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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CARROLL D. WOOD, - - -	Associate Justice
JESSE C. HART, - - - -	Associate Justice
FRANK G. SMITH, - - - -	Associate Justice
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TABLE

OF CASES REPORTED

A

Acree *v.* Patterson 188
Adams *v.* State 202
A. L. Greenberg Iron Co. *v.* Wood 371
Antonio (Turpin *v.*) 377
Arkadelphia Milling Co. (Francis *v.*) 236
Arkansas Central Ry Co. (Fairview Coal Co. *v.*) 295
Arkansas County (Walton *v.*) 285
Arkansas County Courthouse Imp. Dist. (Williams *v.*) 469
Arkansas Road Construction Co. *v.* Evans 142
Augusta Cooperage Co. *v.* Bloch 133

B

Bailey (Ft. Smith Light & Traction Co. *v.*) 574
Baker (Grinnell Co. *v.*) 532
Baker (Wesley *v.*) 529
Bank of Commerce of Earle *v.* Fairbank 56
Bank of Searcy *v.* Baldock 308
Barnett *v.* McClain 325
Barnett *v.* Mays 1
Bell (Vance *v.*) 229
Bennett (Straughan *v.*) 254
Blackshire (White-Jackson Road Imp. Dist. No. 1 *v.*) 581
Bloch (Augusta Cooperage Co. v.) 133
Brackville *v.* Holt 248
Brewer (Grinnell Co., Inc., *v.*) 527
Brodie (Standard Oil Co. of La., *v.*) 114
Brooks (Hodge *v.*) 222
Brooksher (Harper *v.*) 480
Brown *v.* Wilkes 545
Brown & Froley *v.* Monroe County Road Imp. Dist. 606
Brust *v.* State 348

Bryan (Watts *v.*) 313
Bryant (Stewart Oil Co. *v.*) 432

C

Caddo River Lumber Co. *v.* White 93
Carl-Lee *v.* Griffith 74
Caruthers *v.* Davis 200
Childs (Motor Wheel Corporation *v.*) 178
Chipman (Triplett *v.*) 12
Citizens' State Bank (Flannagan *v.*) 216
Clark County (Ross Drainage District *v.*) 175
Clear Creek Oil & Gas Co. (Ft. Smith Spelter Co. *v.*) 170
Clifford *v.* McAlister Fuel Co. 276
Coleman *v.* Utley 233
Conservative Loan Co. (Green *v.*) 219
Conway Cotton Oil Gin Co. (Mitchell *v.*) 594

D

Davis (Caruthers *v.*) 200
Davis *v.* Porter 375
Davis & Worrell *v.* General Motors Acceptance Corporation 626
Desha Road Imp. Dist. No. 2 *v.* Stroud 587
Dickinson & Watkins (Neterer *v.*) 5
Dollar *v.* State 410

E

Echols (McGregor *v.*) 128
Emmerson Mercantile Co. (Farmers' Club Co. *v.*) 614
Evans (Arkansas Road Construction Co. *v.*) 142
Evans *v.* Hoyt 334

F

Fairbank (Bank of Commerce of Earle *v.*) 56
Fairview Coal Co. *v.* Arkansas Cent. Ry. Co. 295
Farmers' Bank & Trust Co. (Wilson-Ward Co. *v.*) 368
Farmers' Club Co. *v.* Emmerson Mercantile Co. 614
Fitzhugh *v.* Norwood 412
Flannagan *v.* Citizens' State Bank 216

Fletcher (Lesser-Goldman Cotton Co. *v.*) 17
Fort Smith *v.* Western Hide & Fur Co. 99
Fort Smith & Van Buren District *v.* Kidd 489
Fort Smith Light & Traction Co. *v.* Bailey 574
Fort Smith Light & Traction Co. (Yaffee *v.*) 416
Fort Smith Spelter Co. *v.* Clear Creek Oil & Gas Co. 170
Francis *v.* Arkadelphia Milling Co. 236
Franklin *v.* State 536

G

Gage *v.* Road Imp. Dist. No. 3 321
Garrett (Rachels *v.*) 343
General Motors Acceptance Corporation (Davis & Worrell *v.*) 626
Glover *v.* Glover 167
Goodman *v.* State 560
Gray (Knapp *v.*) 160
Green *v.* Conservative Loan Co. 219
Griffith (Carl-Lee *v.*) 74
Grinnell Co., Inc., *v.* Baker 532

H

Hale (Maloney *v.*) 462
Handlin (LeFlore *v.*) 421
Harper *v.* Brooksher 480
Harrell *v.* Saline Oil & Gas Co. 104
Hearon (Mosaic Templars of America *v.*) 568
High (Union Marine Ins. Co. *v.*) 156
Hodge *v.* Brooks 222
Holmes *v.* State 339
Holt (Brackville *v.*) 248
Holt (Musgrove *v.*) 355
Hopper (Mitchell *v.*) 515
Hoyt (Evans *v.*) 334
Huddleston *v.* Steuart 270
Humphreys (Vaughan *v.*) 140

J

Johnson (Missouri Pac. Rd. Co. *v.*) 146
Johnson (Smith *v.*) 262

K

Kellogg *v.* State 193
Kennedy (Missouri Pac. Rd. Co. *v.*) 77
Kidd (Fort Smith & Van Buren District *v.*) 489
Knapp *v.* Gray 160

L

LeFlore *v.* Handlin 421
Lesser-Goldman Cotton Co. *v.* Fletcher 17
Logi *v.* State 317
Long Prairie Levee District (Moore *v.*) 85
Lybrand *v.* Watkins Hardware Co. 266

M

McAlester Fuel Co. (Clifford *v.*) 276
McClain (Barnett *v.*) 325
McGregor *v.* Echols 128
McLaughlin (Woodson *v.*) 151
McMath (Ward *v.*) 506
Malone (Missouri Valley Bridge & Iron Co. *v.*) 454
McMurray *v.* McMurray 365
Maloney *v.* Hale 462
Mayo (Norwood *v.*) 620
Mays (Barnett *v.*) 1
Missouri Pac. Rd. Co. *v.* Johnson 146
Missouri Pacific Rd. Co. *v.* Kennedy 77
Missouri Pacific Rd. Co. (Oberste *v.*) 89
Missouri Pacific Rd. Co. (Thomas *v.*) 297
Missouri Valley Bridge & Iron Co. *v.* Malone 454
Mitchell *v.* Conway Cotton Oil Gin Co. 594
Mitchell *v.* Directors School District No. 13 50
Mitchell *v.* Hopper 515
Monroe County Road Imp. District (Brown & Froley *v.*) 606

Moore *v.* Long Prairie Levee Dist. 85
Moreno-Burkham Const. Co. (Wiegel *v.*) 564
Morris (Road Improvement Dist. No. 3 *v.*) 635
Mosaic Templars of America *v.* Hearon 568
Motor Wheel Corporation *v.* Childs 178
Murchison *v.* State 300
Murphy *v.* Province 240
Musgrove *v.* Holt 355

N

Neterer *v.* Dickinson & Watkins 5
Nichols *v.* State 467
Norman *v.* S. L. Joseph Mercantile Co. 127
Norton-Wheeler Stave Co. (Sachs *v.*) 212
Norwood (Fitzhugh *v.*) 412
Norwood *v.* Mayo 620

O

Oberste *v.* Missouri Pac. Rd. Co. 89

P

Patterson (Acree *v.*) 188
Porter (Davis *v.*) 375
Province (Murphy *v.*) 240

R

Rachels *v.* Garrett 343
Red Bud Realty Co. *v.* South 380
Road Improvement Dist. No. 3 (Gage *v.*) 321
Road Improvement Dist. No. 3 *v.* Morris 635
Rose (Walker *v.*) 599
Ross Drainage District (Clark County *v.*) 175

S

Sachs *v.* Norton-Wheeler Stave Co. 212
Saline Oil & Gas Co. (Harrell *v.*) 104
Scott (Wisconsin & Arkansas Lumber Co. *v.*) 65
Shelpman *v.* Shelpman 110

S. L. Joseph Mercantile Co. (Norman *v.*) 127
Smith v. Johnson 262
Smith *v.* State 645
South (Red Bud Realty Co. *v.*) 380
Standard Oil Co. of La. *v.* Brodie 114
State (Adams *v.*) 202
State (Brust *v.*) 348
State (Dollar *v.*) 410
State (Franklin *v.*) 536
State (Goodman *v.*) 560
State (Holmes *v.*) 339
State (Kellogg *v.*) 193
State (Logi *v.*) 317
State (Murchison *v.*) 300
State (Nichols *v.*) 467
State (Smith *v.*) 645
State (Tallman *v.*) 554
State (Turner *v.*) 41
State (Warren *v.*) 497
State (Williams *v.*) 289
Steuart (Huddleston *v.*) 270
Stewart Oil Co. *v.* Bryant 432
Straughan *v.* Bennett 254
Stroud (Desha Road Imp. Dist. No. 2 *v.*) 587

T

Tallman *v.* State 554
Taylor *v.* Taylor 206
Thomas *v.* Missouri Pac. Rd. Co. 297
Triplett *v.* Chipman 12
Turner *v.* State 40
Turpin *v.* Antonio 377

U

Union Marine Ins. Co. *v.* High 156
Utley (Coleman *v.*) 233

V

Vance *v.* Bell 229
Vaughan *v.* Humphreys 140

W

Walker *v.* Rose 599
Walton *v.* Arkansas County 285
Ward *v.* McMath 506
Warren *v.* State 497
Watkins Hardware Co. (Lybrand *v.*) 266
Watts *v.* Bryan 313
Wesley *v.* Baker 529
Western Hide & Fur Co. (Fort Smith *v.*) 99
White (Caddo River Lumber Co. *v.*) 93
White-Jackson Road Imp. Dist. No. 1 *v.* Blackshire 581
Wiegel *v.* Moreno-Burkham Const. Co. 564
Wilkes (Brown *v.*) 545
Williams *v.* Arkansas County Courthouse Imp. Dist. 469
Williams *v.* State 289
Wilson-Ward Co. *v.* Farmers' Bank & Trust Co. 368
Wisconsin & Arkansas Lumber Co. *v.* Scott 65
Wood (A. L. Greenberg Iron Co. *v.*) 371
Woodson *v.* McLaughlin 151

Y

Yaffee *v.* Ft. Smith Light & Traction Co. 416

TABLE OF CASES

CITED BY THE COURT

A

Abbott *v.* Parker, 103 Ark. 429 218
Acree *v.* Patterson, 153 Ark. 188 531
Alexander *v.* Loeb, 230 Ill. 454 31
Allegheny Coal Co. *v.* Bradford Oil Co., 21 Hun 26 109
Allen *v.* Allen, 126 Ark. 164 260
Allen *v.* State, 70 Ark. 337 351
Alter *v.* Kinsworthy, 30 Ark. 756 77
Altheimer *v.* Hunter, 56 Ark. 159 280
Aluminum Co. *v.* Ramsey, 89 Ark. 522 461
Am. Steamboat Co. *v.* Chase, 83 U. S. 522 460
Anderson *v.* Long, 56 Pa. 183 404
Andrews *v.* State, 100 Ark. 184 198
Arendt *v.* Arendt, 80 Ark. 204 361
Arkansas Cent. Rd. Co. *v.* Bennett, 82 Ark. 393 83
Arkansas Ins. Co. *v.* McManus, 86 Ark. 115 142
Arkansas Road Const. Co. *v.* Evans, 153 Ark. 142 325
Armstrong *v.* State, 102 Ark. 356 352
Armstrong *v.* Union Trust Co., 113 Ark. 509 269
Augusta Cooperage Co. *v.* Bloch, 153 Ark. 133 568
Aull *v.* Bowling Green Opera House Co., 130 Ky. 789 31
Austin *v.* Munro, 47 N. Y. 360 281

B

Baker *v.* Mosaic Templars of America, 135 Ark. 65 ..... 571, 574
Baker *v.* State, 44 Ark. 134 122
Baker-McGrew Co. *v.* Union S. & F. Co., 125 Ark. 146 453
Bamberger *v.* Schoolfield, 160 U. S. 149 631
Banks *v.* Goodfellow, L. R. 5 Q. B. 549 428
Barrett *v.* Failing, 111 U. S. 523 209
Barson *v.* Mulligan, 191 N. Y. 306 31
Batesville *v.* Ball, 100 Ark. 496 8
Baxter *v.* Gordon Ironsides, etc., Co., 13 Ont. L. Rep. 598 154
Bayou Meto Drainage Dist. *v.* Chapline, 143 Ark. 446 16
Beasley *v.* Haney, 96 Ark. 568 166
Beavers *v.* State, 60 Ark. 124 54
Bell, *Ex parte*, 14 Ark. 76 16
Belles *v.* Anderson, 38 Ill. App. 128 31

Beneaux *v.* Sparks, 144 Ark. 23 138
Bennett *v.* Johnson, 130 Ark. 507 ..... 479, 592
Blackwood *v.* Eades, 98 Ark. 304 598
Blankenship *v.* State, 55 Ark. 244 198
Blanton *v.* First Nat. Bank, 136 Ark. 441 605
Blevins *v.* State, 85 Ark. 195 49
Board of Directors *v.* Dunbar, 107 Ark. 285 12
Board of Directors of Ross Drainage Dist. *v.* State, 147 Ark. 91 176
Board of Improvement *v.* Moreland, 94 Ark. 380 ..... 461, 494
Board of Improvement *v.* S. W. Gas & Electric Co., 121 Ark. 105 594
Boland *v.* Stanley, 88 Ark. 562 ..... 227, 228
Bomford *v.* Grimes, 17 Ark. 567 280
Booe *v.* Vinson, 104 Ark. 439 ..... 427, 429
Boone County Bank *v.* Byrum, 68 Ark. 71 605
Bourland *v.* McKnight, 79 Ark. 427 266
Bowman *v.* State, 93 Ark. 168 118
Bowman Engineering Co. *v.* Arkansas-Mo. Highway Dist., 151 Ark. 47 ..... 582, 640
Bradley *v.* Harkey, 59 Ark. 178 173
Bramble *v.* Kingsbury, 39 Ark. 131 ..... 447, 451
Brent *v.* Brister Sawmill Co., 60 S. 1018 409
Brown *v.* Guaranty & Trust Co., 128 U. S. 403 396
Brown *v.* Nelms, 86 Ark. 368 430
Brown *v.* State, 134 Ark. 597 351
Brown *v.* Wilson, 58 Okla. 392 109
Browne *v.* Bentonville, 94 Ark. 80 494
Brownfield *v.* Bookout, 147 Ark. 555 ..... 448, 451
Bruder *v.* State, 110 Ark. 402 305
Bryan *v.* Craig, 64 Ark. 438 280
Buck *v.* Ellenbolt, 84 Iowa 394 563
Butt, *Ex parte,* 78 Ark. 262 502

C

Callam *v.* Saginaw, 50 Mich. 7 479
Camden *v.* Bennett, 64 Ark. 155 441
Caraway *v.* State, 143 Ark. 48 483
Carpenter *v.* Gibson, 104 Ark. 32 169
Carpenter *v.* Leatherman, 117 Ark. 531 56
Carr *v.* Hahn, 126 Ark. 609 205
Carr *v.* State, 81 Ark. 589 200
Carroll County *v.* Smith, 111 U. S. 556 316
Carroll County Bank *v.* Rhodes, 69 Ark. 43 605
Carver *v.* Carver, 97 Ind. 497 431
Casteel *v.* State, 151 Ark. 69 341
Central Coal & Coke Co. *v.* Burns, 149 Ark. 533 84
Central of Vt. Rd. *v.* White, 238 U. S. 507 246

Chase *v.* Am. Steamboat Co., 9 R. I. 119 455
Cherokee Const. Co. *v.* Prairie Creek Coal Min. Co., 102 Ark. 428 269
Cherry *v.* Brizzolara, 89 Ark. 668 138
Chicago Cab Co. *v.* Yerkes, 141 Ill. 320 398
Chicago, R. I. & P. R. Co. *v.* Grubbs, 97 Ark. 486 97
Childs *v.* Neal, 138 Ark. 578 598
Church *v.* Mulford, 8 N. J. L. 182 431
Citizens' Bank *v.* Moore, 134 Ark. 554 573
Citizens' Nat. Bank *v.* Kentucky, 218 U. S. 443 125
Claborn *v.* State, 115 Ark. 387 500
Clapp Bros. & Co. *v.* Halliday Bros., 48 Ark. 258 218
Clay County *v.* Brown Lbr. Co., 90 Ark. 413 287
Clear Creek Oil & Gas Co. *v.* Ft. Smith Spelter Co., 148 Ark. 260 172
Clement Nat. Bank *v.* Vermont, 231 U. S. 120 125
Clinton *v.* Modern Woodmen, 125 Ark. 115 573
Coffman & Wilson *v.* Underwood, 83 Ark. 118 603
Collier *v.* Newport Water, etc., Co., 100 Ark. 47 236
Colvin *v.* Glover, 143 Ark. 498 311
Com'rs. of Broadway-Main Street Bridge Dist. *v.* Quapaw Club, 145 Ark. 279 467
Common School District No. 13 *v.* Oak Grove Special School District, 102 Ark. 411 53
Commonwealth *v.* Chapman, 11 Cush. 428 292
Connerly *v.* Dickinson, 81 Ark. 258 625
Cook *v.* St. Louis, I. M. & S. Ry. Co., 103 Ark. 326 453
Cook *v.* Worthington, 116 Ark. 332 427
Cooley *v.* Lovell, 95 Ark. 567 138
Craig *v.* Frauenthal, 145 Ark. 185 380
Craig *v.* Gwin, 53 L. R. A. 715 155
Crane *v.* Siloam Springs, 67 Ark. 30 ..... 472, 474, 476
Crawford County Bank *v.* Baker, 95 Ark. 438 146
Crawley *v.* Neal, 152 Ark. 232 259
Crocker *v.* Hutchinson, 2 D. Chipman 114 399
Cumnock *v.* Alexander, 139 Ark. 153 592

D

Daniel *v.* Garner, 71 Ark. 484 261
Davenport *v.* Davenport, 110 Ark. 222 75
Davie *v.* Davie, 52 Ark. 224 535
Davie *v.* Padgett, 117 Ark. 544 329
Davis *v.* Neal, 100 Ark. 399 451
Davis *v.* Receiver, 117 Ark. 393 296
Davis *v.* Webber, 66 Ark. 190 400
Dean *v.* State, 120 Ark. 302 276
Dewein *v.* State, 120 Ark. 302 556
Dickinson *v.* Hardie, 79 Ark. 364 624
Dickinson *v.* McCoffin, 121 Ark. 414 35

Dickinson *v.* Muse, 135 Ark. 36 ..... 495, 496
Dill *v.* Johnson, 179 Pac. 608 409
Dobbs *v.* Holland, 140 Ark. 398 118
Dodds *v.* Neal, 41 Ark. 70 128
Dougan *v.* Champlin Transp. Co., 56 N. Y. 1 455
Drenner *v.* Brown, 10 Ark. 138 598
Driver *v.* Edrington, 74 Ark. 12 31
Dumpfel *v.* O. & M. R. Co., 110 U. S. 209 396
Dunavant *v.* Fields, 68 Ark. 534 63
Dunleith & D. Bridge Co. *v.* Dubuque County, 55 Iowa 558 563
Dunnington *v.* Frick Co., 60 Ark. 250 173
Duquesne Distributing Co. *v.* Greenbaum, 21 A. & E. Cas. 481 333
Durfey *v.* Thalheimer, 85 Ark. 544 ..... 101, 104

E

Eagle *v.* Oldham, 116 Ark. 565 427
Earl *v.* Malone, 80 Ark. 218 266
Earle Imp. Co. *v.* Chatfield, 81 Ark. 296 626
Earle Road Imp. Dist. No. 6 *v.* Johnson, 145 Ark. 438 641
Eikhoff *v.* Street Imp. Dist., 120 Ark. 212 494
Eilenbecker *v.* Plymouth County, 134 U. S. 31 205
Elder *v.* State, 69 Ark. 648 276
Ellis *v.* Horine's Devises, 8 Ky. 417 432
Ellis *v.* Terrell, 109 Ark. 69 221
Emma Cotton Seed Oil Co. *v.* Hale, 56 Ark. 232 240
E. O. Barnett Bros. v. Porter, 134 Ark. 268 329
E. O. Barnett Bros. *v.* Porter, 138 Ark. 65, 613 329
Epperson *v.* Helbron, 145 Ark. 566 108
Estate of Blake, *Re*, 136 Col. 306 363
Eureka Stone Co. *v.* Roach, 120 Ark. 326 138
Evans *v.* Parrott, 26 Ark. 600 368
Evans *v.* State, 58 Ark. 47 292
Exchange Nat. Bank *v.* Bettis, 3 A. L. R. 1604 281

F

Fancher *v.* Kenner, 110 Ark. 117 252
Fears *v.* Merrill, 9 Ark. 559 131
Fecheimer *v.* Robertson, 53 Ark. 101 550
Ferguson *v.* Ferguson, 148 Ark. 290 284
Few *v.* Mitchell, 80 Ark. 243 266
Fidelity-Phoenix Ins. Co. *v.* Friedman, 117 Ark. 71 579
Finch *v.* Hunter, 148 Ark. 482 428
Fincher *v.* Hanegan, 59 Ark. 151 ..... 197, 198
First Nat. Bank *v.* Chehalis County, 166 U. S. 440 125
First Nat. Bank *v.* Commonwealth, 9 Wall. 353 125
Fletcher *v.* Simpson, 144 Ark. 436 568

Fletcher *v.* State, 97 Ark. 1 197
Ford *v.* Abbott, 35 Ark. 365 448
Fordyce *v.* Hardin, 54 Ark. 554 415
Forster *v.* Bradley, 143 Ark. 320 603
Fort *v.* State, 52 Ark. 180 ..... 46, 98
Fort Smith *v.* Scruggs, 70 Ark. 549 120
Ft. Smith L. & T. Co. *v.* Williams, 149 Ark. 159 492
Fox *v.* Drewry, 62 Ark. 316 ..... 447, 453
Fractional School Dist. No. 3 *v.* Board of Inspectors, 30 N. W. 198 54

G

Gadbury *v.* Gas. Co., 162 Ind. 9 109
Gailey *v.* Ricketts, 123 Ark. 18 214
Gaines *v.* Summers, 50 Ark. 327 218
Gans *v.* State, 132 Ark. 481 205
Garland Power & Development Co. *v.* State Board, 94 Ark. 422 118
Gartland *v.* Dunn, 11 Ark. 720 396
Gentle *v.* Board of School Inspectors, 40 N. W. 928 54
Georgia State Sav. Ass'n *v.* Dearing, 128 Ark. 149 35
Ghio *v.* Byrne, 39 Ark. 280 218
Gibson *v.* Atlantic Coast Lines Rd. Co., 88 S. C. 360 404
Gibson *v.* Buckner, 65 Ark. 84 553
Gibson *v.* Spikes, 143 Ark. 270 ..... 8, 10
Gilbert *v.* Moline Water Power & Mfg. Co., 19 Iowa 319 563
Gill *v.* State, 59 Ark. 422 200
Gish *v.* Scantland, 151 Ark. 594 154
Gist *v.* Pettus, 115 Ark. 400 430
Goodwin *v.* Baker, 129 Ark. 513 269
Gordon *v.* Clark, 149 Ark. 173 252
Gould *v.* Davis, 133 Ark. 90 374
Grand Lodge *v.* Davidson, 127 Ark. 133 573
Graves *v.* Scott, 51 S. E. 821 154
Gregg *v.* Von Pheel, 1 Wall. 274 447
Green *v.* National Adjustment Co., 162 N. W. 1056 409
Green *v.* State, 38 Ark. 304 321
Greenhaw *v.* Cohn, 74 Ark. 336 138
Grider *v.* Apperson, 32 Ark. 332 219
Griffin *v.* Rhoton, 85 Ark. 89 527
Griffin *v.* State, 141 Ark. 43 305
Gulf, C. & S. F. Ry. Co. *v.* McGinnis, 228 U. S. 173 246
Gus Blass Dry Goods Co. *v.* Reinman, 102 Ark. 287 101

H

Hale *v.* Brown, 70 Ark. 471 56
Hall *v.* Bledsoe, 126 Ark. 125 ..... 56, 191
Hall *v.* Bonville, 36 Ark. 491 173

Hall *v.* Cole, 71 Ark. 601 553
Hall & Farley *v.* Ala. Terminal Imp. Co., 56 So. 235 404
Hamby *v.* Pittman, 139 Ark. 341 592
Hamiter *v.* Brown, 88 Ark. 97 311
Hannity *v.* Theatre Co., 19 S. W. 82 398
Hanson *v.* Hodges, 109 Ark. 479 523
Harbour *v.* Harbour, 103 Ark. 273 169
Harnwell *v.* White, 115 Ark. 88 494
Harris *v.* Bush, 129 Ark. 369 598
Harrison *v.* Abington, 140 Ark. 115 10
Hartford Fire Ins. Co. *v.* State, 76 Ark. 303 118
Harvey *v.* Dewoody, 18 Ark. 252 101
Hawes *v.* Oakland, 104 U. S. 450 398
Hawke *v.* Smith, 253 U. S. 221 523
Hayden *v.* Hayden, 105 Ark. 97 76
Head *v.* Cole, 53 Ark. 523 166
Heiseman *v.* Lowenstein, 113 Ark. 404 427
Helena Water Co. *v.* Helena, 140 Ark. 597 493
Hendricks *v.* Block, 132 Ark. 473 138
Hesterburg *v.* Clark, 57 Am. St. 135 364
Hickey *v.* State, 123 Ark. 180 204
Hildreth *v.* Taylor, 117 Ark. 465 ..... 316, 518
Hill *v.* Dade, 68 Ark. 409 396
Hill *v.* Echols, 140 Ark. 474 10
Hill *v.* Jayne, 18 Ark. 396 598
Hingston *v.* Montgomery, 97 S. W. 202 ..... 397, 398
Hinrichson *v.* Hinrichson, 171 Ill. 462 431
Hodges *v.* Cowing, 58 Conn. 12 131
Hodges Bros. *v.* Bank of Cove, 119 Ark. 215 232
Hoffman *v.* Rice-Stix D. G. Co., 111 Ark. 205 138
Hogan *v.* Kyle, 35 Pac. 399 131
Hollenberg *v.* State, 53 Ark. 387 46
Hollingsworth *v.* Virginia, 3 Dall. 378 523
Holmes *v.* Jewett, 134 Pac. 665 396
Holt *v.* State, 131 Ark. 391 352
Home Fire Ins. Co. *v.* Benton, 106 Ark. 552 392
Hooper *v.* California, 155 U. S. 657 118
Horner-Gaylord Co. *v.* Miller & Bennett, 147 Fed. 295 396
Howard *v.* Hunter, 90 Am. St. 121 364
Howard County *v.* Lambright, 72 Ark. 330 178
Hughes *v.* Kelley, 95 Ark. 327 118
Hughes *v.* State, 109 Ark. 403 468
Hunt *v.* Dell, 147 Ark. 94 239
Hunt *v.* State, 114 Ark. 239 46
Hunter *v.* Matthews, 67 Ark. 364 604
Hunter *v.* State, 104 Ark. 245 ..... 291, 293
Hutchinson *v.* Ozark Land Co., 57 Ark. 554 473

I

Imboden *v.* Talley, 150 Ark. 567 451
Iowa *v.* Illinois, 147 U. S. 1 563
Izard *v.* Connecticut Fire Ins. Co., 128 Ark. 433 187
Izard County *v.* Vincennes Bridge Co., 122 Ark. 557 374

J

Jackson *v.* State, 92 Ark. 71 350
Jackson *v.* State, 94 Ark. 169 307
Jacobson *v.* Atkins, 103 Ark. 91 604
Jacoway *v.* Hall, 67 Ark. 340 347
Jennings-Heywood Oil Synd. *v.* Houssiere-Latreille Oil Co., 119 La. 794 109
Jett *v.* Crittenden, 89 Ark. 349 453
Johns *v.* Road Imp. Dist., 142 Ark. 73 592
Johnson *v.* Mo. Pac. Ry. Co., 140 Ark. 587 400
Johnson *v.* Mantooth, 120 Ark. 99 598
Johnson *v.* State, 60 Ark. 45 ..... 307, 541
Johnson *v.* State, 120 Ark. 193 305
Johnson *v.* Westfield, 135 S. W. 425 460
Johnston *v.* Conway, 151 Ark. 398 640
Jones *v.* Grogan, 25 S. E. 590 429
Jones *v.* Sewer Imp. Dist., 119 Ark. 166 494
Jones *v.* Taylor, 136 Ky. 39 31
Jordan *v.* State, 141 Ark. 504 556
J. T. Fargason Co. *v.* Ball, 159 S. W. 221 370

K

Kansas City So. R. Co. *v.* Worthington, 101 Ark. 128 ..... 82, 83
Kapen's Will, *Re*, 98 Am. St. 808 364
Karnopp *v.* Ft. Smith L. & T. Co., 119 Ark. 295 419
Kaufman *v.* Underwood, 83 Ark. 118 266
Kempner *v.* Cohn, 47 Ark. 519 131
King *v.* Stevens, 146 Ark. 443 252
Kirst *v.* Street Imp. Dist., 86 Ark. 1 593
Knight & Jillson Co. *v.* Castle, 27 L. R. A. N. S. 573 144
Krone & Co. *v.* Phelps, 43 Ark. 350 128

L

Lackey *v.* State, 67 Ark. 416 ..... 200, 351
Lamb *v.* State, 135 Ark. 275 505
Lane *v.* Kansas City So. Ry. Co., 78 Ark. 234 377
Larue *v.* See, 14 L. R. A. N. S. 968 364
Latham *v.* First Nat. Bank, 92 Ark. 315 214
Leary *v.* Corvin, 2 A. & E. Am. Cas. 664 441
Lee Wilson Co. *v.* Road Imp. Dist., 127 Ark. 310 593
Lemley *v.* Works, 138 Ark. 426 63

Leonard *v.* State, 95 Ark. 381 118
Lewis *v.* Young, 116 Ark. 291 ..... 54, 192
Linton *v.* Vt. National Life Ins. Co., 104 Fed. 584 401
Little *v.* McGuire, 113 Ark. 497 430
Little Bros. *v.* Brock, 91 S. C. 549 404
Little Rock Ry. & Electric Co. *v.* Dobbins, 78 Ark. 553 495
Little Rock Ry. & El. Co. *v.* McDowell, 101 Ark. 223 35
Little Rock Traction & El. Co. *v.* Walker, 65 Ark. 144 496
Livingston *v.* New England Mtg. Security Co., 77 Ark. 379 212
Lockett *v.* State, 136 Ark. 473 350
Lonoke *v.* Chicago, R. I. & P. Ry. Co., 92 Ark. 546 101
Louisville & N. R. Co. *v.* Johnson, 79 Ala. 436 82
Love *v.* Cahn, 93 Ark. 215 146
Lowry *v.* State, 135 Ark. 159 321
Lyman *v.* Howe, 64 Ark. 436 288
Lynch *v.* Daggett, 62 Ark. 592 233
Lynch *v.* Mackey, 151 Ark. 145 604

M

McAlister *v.* State, 99 Ark. 604 350
McClintock *v.* Skinner Co., 126 Ark. 591 465
McClure *v.* Hill, 36 Ark. 268 322
McDonald *v.* Mallory, 77 N. Y. 546 460
McDonald *v.* St. Louis S. W. Ry. Co., 98 Ark. 334 598
McGraw *v.* Berry, 152 Ark. 452 593
McIlroy *v.* Arkansas Valley Trust Co., 100 Ark. 596 393
McIlvane *v.* Steinson, 85 N. Y. Supp. 889 142
McIntire *v.* State, 151 Ark. 458 47
McIntosh *v.* State, 108 Ark. 418 197
McKnight *v.* Wilmington, 94 Ark. 621 138
McLemore *v.* State, 111 Ark. 457 197
McNamara *v.* Garrity, 106 Ill. 384 441
McVay *v.* State, 104 Ark. 629 353
Madden *v.* Suddarth, 144 Ark. 79 218
Mader *v.* Apple, 80 O. St. 691 363
Magness *v.* State, 67 Ark. 594 276
Mahoney *v.* Boston, 171 Mass. 427 494
Mahoney *v.* Roberts, 86 Ark. 130 579
Martin *v.* Thayer, 16 S. E. 489 429
Marvel *v.* State, 127 Ark. 595 204
Maxey *v.* State, 66 Ark. 523 350
Mechanics' Ins. Co. *v.* Thompson, 57 Ark. 279 158
Merchants & Planters Bank *v.* Meyers, 56 Ark. 473 ..... 371, 605
Merwin *v.* Fussell, 93 Ark. 336 315
Merritt *v.* Hinton, 55 Ark. 12 557
Metropolitan Cas. Ins. Co. *v.* Chambers, 136 Ark. 84 541

Meyers *v.* Vanderbilt, 24 Am. St. 227 364
Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59 246
Miller *v.* Freeman, 40 Ark. 62 441
Miller *v.* Illinois Bankers Life Ass'n, 138 Ark. 442 578
Miller *v.* Kempner, 32 Ark. 573 401
Millington *v.* Hill, Fontaine & Co., 47 Ark. 301 218
Miner *v.* Belle Isle Ice Co., 53 N. W. 218 409
Miners' & Citizens' Bank *v.* Maxine Mining Co., 150 Ark. 653 536
Mississippi & M. R. Co. *v.* Ward, 2 Black 485 563
Missouri & N. A. R. Co. *v.* Van Zandt, 100 Ark. 462 461
Missouri Pac. Rd. Co. *v.* Ault, 256 U. S. 148 .....
Missouri Pac. Rd. Co. *v.* Conway County Bridge Dist., 134 Ark. 292 594
Mitchell *v.* Probst, 52 Okla. 10 109
Mitchell *v.* School Dist. No. 13, 153 Ark. 50 ..... 190, 191, 192, 531
Monk *v.* Little, 122 Ark. 7 513
Monroe County *v.* Brown, 118 Ark. 425 374
Moody *v.* Jonesboro, L. C. & E. R. Co., 83 Ark. 371 296
Mooney *v.* State, 137 Ark. 410 197
Moore *v.* Avery, 146 Ark. 193 428
Moore *v.* Goodbar, 66 Ark. 161 591
Moore *v.* Long Prairie Lev. Dist., 98 Ark. 113 .....
Moore *v.* Paving Dist. No. 20, 122 Ark. 326 431
Moore *v.* Willey, 77 Ark. 317 205
Moore & Co. *v.* Emerick, 38 Ark. 203 219
Moro, *In re*, 10 A. L. R. 422 363
Morris *v.* State, 142 Ark. 297 290
Moss *v.* Sandefur, 15 Ark. 381 252
Mosser *v.* Mosser, 32 Ala. 551 429
Mueller *v.* Coffman, 132 Ark. 45 598
Muenchow *v.* Roberts, 77 Wis. 520 131
Munrow *v.* Huddard, 14 L. R. A. N. S. 259 364
Murchison *v.* State, 153 Ark. 300 341
Murphy *v.* Citizens' Bank, 82 Ark. 131 553
Murphy *v.* Murphy, 144 Ark. 429 362
Murphy *v.* Myar, 95 Ark. 32 146
Murphy *v.* State, 130 Ark. 353 468
Murray *v.* Galbraith, 95 Ark. 199 ..... 275, 331
Mutual Life Ins. Co. *v.* Owen, 111 Ark. 554 142

N

Nakdimen *v.* Ft. Smith & V. B. Bridge Dist., 115 Ark. 194 592
Nathan *v.* Tompkins, 82 Ala. 437 398
National Life Ins. Co. *v.* Hale, 154 Pac. 536 401
National Safety Deposit Co. *v.* Stead, 232 U. S. 58 125

National Surety Co. *v.* Hall-Miller Decorating Co., 46 L. R. A. N. S. 325
Natural Gas Co. *v.* Wolcott, 98 Atl. 955 109
Nevada County Bank *v.* Gee, 130 Ark. 312 257
Newsum *v.* Hoffman, 137 S. W. 490 ..... 370, 371
New York *v.* Purdy, 231 U. S. 373 125
Noble *v.* White, 77 S. W. 678 54
Noe *v.* Layton, 69 Ark. 551 604
North *v.* Broadway, 9 Minn. 183 396
North *v.* Union Sav. Ass., 59 Ore. 483 398
Norton *v.* Lakeside Special School District, 97 Ark. 71 .....

O

Odell & Kleiner *v.* Heinrich, 143 Ark. 435 380
Old Colony Rd. Corp. *v.* Evans, 6 Gray (Mass.) 25 131
Old Society *v.* Crocker, 119 Mass. 1 513
Oliver Construction Co. *v.* Williams, 152 Ark. 414 ..... 144, 325
Owens *v.* Douglas, 121 Ark. 448 363
Ozan Lumber Co. *v.* Biddie, 87 Ark. 587 461
Ozan Lumber Co. *v.* Union County Nat. Bank, 207 U. S. 251 124

P

Pankey *v.* Little Rock Ry. & El. Co., 117 Ark. 337 419
Parker *v.* State, 98 Ark. 575 49
Parsel *v.* Barnes & Bro., 25 Ark. 265 373
Partridge v. State, 88 Ark. 267 304
Pate *v.* Modern Woodmen, 129 Ark. 159 573
Payne *v.* Rittman, 66 Ark. 201 204
Payne *v.* Stockton, 147 Ark. 598 149
Pennington *v.* Yell, 11 Ark. 212 399
People *v.* Hastings, 29 Calif. 451 288
Peoples *v.* Str. America, 34 Cal. 679 460
Perryman *v.* Bethune, 1 S. W. 231 54
Phelps *v.* Wyler, 67 Ark. 97 551
Pickett *v.* State, 91 Ark. 570 276
Pine Bluff Co. *v.* Webb, 139 Ark. 251 419
Pleasant *v.* State, 15 Ark. 624 350
Polk *v.* Brown, 117 Ark. 321 257
Polk *v.* Stephens, 126 Ark. 159 557
Porter *v.* Travis, 40 Ind. 556 131
Portis *v.* Merrill, 33 Ark. 416 401
Powell *v.* State, 149 Ark. 311 ..... 46, 350
Prewitt *v.* State, 150 Ark. 279 46
Price *v.* Notrebe's Heir, 17 Ark. 45 368
Pritchard *v.* Mulhall, 4 Am. Cas. 789 131

Pryor *v.* Murphy, 80 Ark. 150 118
Pryor *v.* Pryor, 88 Ark. 302 113
Puckett *v.* State, 71 Ark. 62 541

R

Railroad Co. *v.* Adcock, 52 Ark. 406 82
Railway Ice Co. *v.* Howell, 117 Ark. 198 543
Red Bud Realty Co. *v.* South, 96 Ark. 281 397
Redfield *v.* Parks, 132 U. S. 239 623
Reed *v.* Rogers, 134 Ark. 528 ..... 311, 541
Reitzammer *v.* Desha Road Imp. Dist. No. 2, 139 Ark. 169 592
Reynolds *v.* Canal & Banking Co., 30 Ark. 520 16
Rhodes *v.* Cissel, 82 Ark. 367 453
Rice *v.* Palmer, 78 Ark. 432 315
Richmond *v.* Mississippi Mills, 52 Ark. 30 550
Riley *v.* State, 120 Ark. 450 47
Road Imp. Dist. *v.* Crary, 151 Ark. 484 592
Roberts *v.* Bodman-Pettit Lbr. Co., 84 Ark. 227 465
Roberts *v.* Fullerton, 117 Wis. 222 562
Robinson *v.* State, 38 Ark. 641 304
Ross *v.* Hine, 48 Ark. 304 77
Ross *v.* Royal, 77 Ark. 324 623
Rothwell *v.* Robinson, 39 Minn. 1 398
Rowe *v.* Allison, 87 Ark. 206 568
Rural Special School Dist. No. 17 *v.* Special School Dist. No. 56, 123 Ark. 571 56
Russell *v.* Haltom, 76 Ark. 506 232
Ryan *v.* Lenon, 7 Ark. 78 76

S

Sadler *v.* McMurtrey, 152 Ark. 621 10
Sain *v.* Bogle, 122 Ark. 14 347
St. Louis, I. M. & S. Ry. Co. *v.* Blaylock, 117 Ark. 504 400
St. Louis, I. M. & S. Ry. Co. *v.* Camden Bank, 47 Ark. 541 146
St. Louis, I. M. & S. Ry. Co. *v.* Carter, 111 Ark. 272 ..... 307, 541
St. Louis, I. M. & S. Ry. Co. *v.* Glossup, 88 Ark. 225 83
St. Louis, I. M. & S. Ry. Co. *v.* Hesterly, 98 Ark. 240 244
St. Louis, I. M. & S. Ry. Co. *v.* Ingram, 118 Ark. 377 245
St. Louis, I. M. & S. Ry. Co. *v.* Landers, 67 Ark. 514 377
St. Louis, I. M. & S. Ry. Co. *v.* Rush, 86 Ark. 325 83
St. Louis, I. M. & S. Ry. Co. *v.* State, 86 Ark. 518 124
St. Louis, I. M. & S. Ry. Co. *v.* Waters, 105 Ark. 619 495
St. Louis, I. M. & S. Ry. Co. *v.* Wiseman, 119 Ark. 477 245
St. Louis-S. W. Ry. Co. *v.* Board of Directors, 81 Ark. 562 11
St. Louis-S. W. Ry. Co. *v.* Compton, 135 Ark. 563 239
Sallee *v.* Bank of Corning, 122 Ark. 502 332

Sallee *v.* Dalton, 138 Ark. 549 472
Salmon *v.* Long Prairie Lev. Dist., 100 Ark. 366 366
Sands *v.* Greeley & Co., 83 Fed. 772 403
Sarllo *v.* United States, 152 U. S. 570 320
S. A. Robertson & Co. *v.* Lewis Rich Const. Co., 151 Ark. 557 325
Satchfield *v.* Laconia Levee Dist., 74 Ark. 270 380
Schaap *v.* First Nat. Bank, 137 Ark. 251 325
Scharff Distilling Co. *v.* Dennis, 113 Ark. 221 236
Schmidt *v.* Griffith, 144 Ark. 8 35
School District of Hartford *v.* West Hartford Special District, 102 Ark. 261 53
School District No. 44 *v.* School District No. 10, 128 Ark. 383 192
School District No. 45 *v.* School Dist. No. 8, 119 Ark. 149 56
Schoolfield (Bamberger *v.*), 160 U. S. 149 631
Scott *v.* Mills, 49 Ark. 266 625
Scott *v.* Wisconsin & Ark. Lumber Co., 148 Ark. 66 ..... 66, 239
Sears *v.* Sears, 17 L. R. A. N. S. 353 363
Seitz *v.* Meriwether, 114 Ark. 289 535
Shane *v.* Dickson, 111 Ark. 353 252
Sharp *v.* Fitzhugh, 75 Ark. 562 466
Shaul *v.* Harrington, 54 Ark. 305 233
Shibley *v.* Ft. Smith & V. B. Bridge Dist., 96 Ark. 410 ..... 472, 477, 492
Shinn *v.* State, 150 Ark. 215 354
Simmons *v.* Lusk, 128 Ark. 336 82
Simpson *v.* Biffle 63 Ark. 289 447
Skeehill *v.* Abbott, 184 Mass. 154 441
Smith *v.* Bell, 31 U. S. 68 427
Smith *v.* Okla. Supply Co., 149 Pac. 879 396
Smith *v.* State, 59 Ark. 132 276
Smith *v.* State, 91 Ark. 200 647
Snowden *v.* Thompson, 106 Ark. 517 118
Solomon *v.* Wharf Imp. Dist., 145 Ark. 126 ..... 413, 472
Southern Ins. Co. *v.* White, 58 Ark. 277 159
Southwestern Tel. & Tel. Co. *v.* Abeles, 94 Ark. 254 342
Sovereign Camp W. O. W. *v.* Newsom, 142 Ark. 132 573
Sovereign Camp W. O. W. *v.* Peaugh, 150 Ark. 176 573
Spadra Creek Coal Co. *v.* Callahan, 129 Ark. 448 598
Spadra Creek Coal Co. *v.* Harger, 130 Ark. 374 598
Spear Mining Co. *v.* Shink, 13 Ark. 346 146
Star Lime & Zinc Mining Co. *v.* Arkansas Nat. Bank, 146 Ark. 246 218
State *v.* Bach Liquor Co., 67 Ark. 163 502
State *v.* Dahl, 34 L. R. A. 97 524
State *v.* Devers, 34 Ark. 188 204
State *v.* Dupuy, 52 Ark. 48 550
State *v.* Embrey, 135 Ark. 262 120

State *v.* Greenville Stone & Gravel Co., 122 Ark. 151 296
State *v.* Hawdlin, 100 Ark. 175 118
State *v.* Jones, 91 Ark. 5 118
State *v.* Kansas City & Memphis Ry. & Bridge Co., 117 Ark. 606 124
State *v.* Kirk, 10 Ore. 505 292
State *v.* Payton, 90 Mo. 220 292
State *v.* Roberts, 148 Ark. 328 ..... 501, 503
State *v.* Scroggins, 85 Ark. 43 49
State *v.* Sorrels, 15 Ark. 675 528
State *v.* Supervisors of Clifton, 88 N. W. 1019 54
State *v.* Trulock, 109 Ark. 556 118
State Bank *v.* Walker, 14 Ark. 234 76
State *ex rel* Lbr. Co. *v.* Knife Falls Boom Corp., 104 N. W. 817 396
State Mut. Fire Ins. Ass'n *v.* Brinkley Stave & Heading Co., 61 Ark. 1 631
State Nat. Bank *v.* Wheeler-Motler Merc. Co., 104 Ark. 222 551
Stephens *v.* Leach, 7 Harris 262 626
Stephens *v.* School Dist. No. 85, 104 Ark. 145 56
Stewart *v.* Smith, 91 Pa. 667 396
Sublett *v.* Sublett, 133 Ark. 196 543
Sumpter *v.* Duffie, 80 Ark. 369 528
Sunny South Lbr. Co. *v.* Neimeyer Lbr. Co., 63 Ark. 268 218
Swinfen *v.* Bacon, 6 H. & N. 846 31

T

Talley *v.* Davis, 136 Ark. 604 465
Tallman *v.* State, 151 Ark. 438 555
Tapp *v.* Williams, 83 Ark. 182 551
Taylor *v.* Gumpert, 96 Ark. 354 ..... 275, 331
Taylor *v.* King, 135 Ark. 43 212
Taylor *v.* McClintock, 87 Ark. 243 428
Taylor *v.* Taylor, 232 U. S. 362 ..... 244, 246
Tedford Auto Co. *v.* Thomas, 108 Ark. 503 138
Temple *v.* State, 126 Ark. 290 351
Thielman *v.* Reinsch, 103 Ark. 307 542
Thomas *v.* Jackson, 105 Ark. 353 542
Thomas Mfg. Co. *v.* Prather, 65 Ark. 27 34
Tomlinson's Estate, *In re,* 19 Am. St. 637 364
Townsend *v.* Goodfellow, 41 N. W. 1056 132
Townsley *v.* Yeutsch, 98 Ark. 313 275
Tucker *v.* Grace, 61 Ark. 410 280
Turner *v.* State, 130 Ark. 48 198
Turner *v.* State, 135 Ark. 381 541
Turner *v.* Watkins, 31 Ark. 429 550

U

Union & Merc. Trust Co. *v.* Hudson, 143 Ark. 519 428
United States *v.* Anthony Ry. Co., 192 U. S. 524 139
United States *v.* Flint Lbr. Co., 87 Ark. 80 139
United States Gypsum Co. *v.* Gleason, 17 L. R. A. (N. S.) 906 144
Usselton *v.* People, 149 Ill. 612 292

V

Vahlberg *v.* Keaton, 51 Ark. 534 .....
Vance *v.* Austell, 45 Ark. 400 315
Vance *v.* State, 70 Ark. 272 46
VanHook *v.* Wallace, 143 Ark. 203 592
Varner *v.* Turner, 83 Ark. 131 138
Veile *v.* Hudson, 82 N. Y. 32 447
Venner *v.* Gt. Northern Ry. Co. 136 N. W. 271 396
Vestal *v.* Knight, 54 Ark. 97 311
Vick *v.* Shinn, 49 Ark. 70 380
Virginia, etc., Co. *v.* Fisher, 104 Vt. 121 398
Von Arnim *v.* Am. Tube Works, 188 Mass. 515 398
Vrooman *v.* Turner, 69 Ark. 280 34

W

Waddell *v.* Bowdre, 151 Ark. 474 138
Waits *v.* Moore, 89 Ark. 19 ..... 447, 451
Wales-Riggs Plantation *v.* Banks, 101 Ark. 461 138
Walker *v.* Byers, 14 Ark. 246 ..... 337, 338
Walter *v.* Kierstead, 74 Ga. 18 460
Ware *v.* State, 91 Ark. 555 46
Warfield *v.* Vandiever, 101 Md. 78 ..... 525, 528
Warner *v.* Bonds, 111 Ark. 238 409
Washington *v.* State, 13 Ark. 752 122
Waters *v.* Winn, L. R. A. 1915a 601 154
Waters-Pierce Oil Co. *v.* Bridwell, 103 Ark. 345 332
Watson *v.* Billings, 38 Ark. 278 259
Weaver-Dowdy Co. *v.* Brewer, 127 Ark. 462 312
Webb *v.* Webb, 111 Ark. 54 429
Wedding *v.* Meyler, 192 U. S. 573 ..... 561, 564
Welch *v.* Welch, 132 Ark. 227 138
Wells *v.* State, 102 Ark. 627 197
Western Union Tel. Co. *v.* Pac. Ry. Co., 120 Fed. 362 30
Westmoreland *v.* Plant, 89 Ark. 147 451
White *v.* Holman, 32 Ark. 753 ..... 367, 368
White *v.* McCracken, 60 Ark. 613 233
White River Lbr. Co. *v.* Elliott, 146 Ark. 551 286
White River Lbr. Co. *v.* S. W. Imp. Ass'n. 55 Ark. 625 631
Whitesides *v.* Kershaw, 44 Ark. 377 204

Whittemore *v.* Terral, 140 Ark. 493 525
Wilder *v.* Little Rock, 150 Ark. 439 104
Wilhelm *v.* Collison, 133 Ark. 166 598
Wilkerson *v.* Eads, 97 Ark. 296 76
Williams *v.* Erie Mt. Consol. Mining Co., 91 Pa. 1091 398
Williams *v.* Gooch, 3 Met. (Ky.) 486 208
Williams *v.* State, 85 Ark. 464 124
Williamson *v.* Grider, 97 Ark. 588 427
Willis *v.* Sharp, 113 N. Y. 586 281
Williams *v.* Bordwell, 73 Ark. 418 557
Wiser, *v.* Lawler, 189 U. S. 260 ..... 447, 451
Wisner *v.* Richards, 24 Am. Cas. 1912D, 162 30
Wood *v.* Drainage Dist., 110 Ark. 416 494
Wood *v.* Holland, 64 Ark. 104 262
Wood *v.* Wood, 59 Ark. 441 210

Y

Yarbrough *v.* Ward, 34 Ark. 204 280

Z

Zearing *v.* Crawford, McGregor & Camby Co., 102 Ark. 575 269

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

BARNETT *v.* MAYS.

Opinion delivered April 3, 1922.

1. MUNICIPAL CORPORATIONS—PASSAGE OF ORDINANCES—PUBLICATION.—Crawford & Moses' Dig., § 7502, requiring that "ordinances of a general or permanent nature" be read on three different days before passage, and § 7499, requiring that such ordinances be published, have no application to an ordinance entering into a special contract, such as an electric light franchise.
2. GOOD WILL—AGREEMENT NOT TO FURNISH ELECTRICITY.—A vendor of an electric light plant who agreed not to re-enter the business of furnishing electricity or to interfere with the operation of the plant by the vendee, may generate electricity for his own use and transmit it over the premises of others by permission, but cannot furnish electricity to others nor interfere with the vendee's operation of the plant, even by the erection of poles over the premises of owners who may be willing to grant him the privilege.
3. ELECTRICITY—USE OF STREETS AND ALLEYS FOR TRANSMISSION.—One generating electricity for his own purpose cannot, without permission of the city, transmit it across streets and alleys to another plant owned by him.
4. ELECTRICITY—RIGHT TO USE STREETS FOR TRANSMISSION.—The fact that certain streets and alleys in a city used by the owners of an electric generating plant for transmission of electricity to another plant owned by him were closed and used as storage places by private interests was no defense to an action by the city to enjoin such use, as the city could open them at any time.

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

S. W. Woods, for appellants.

The contract entered into between Barnett and the city of Leslie was valid and binding. 100 Ark. 496; 20 L. R. A. 821; 9 R. C. L. 1186; 118 Ark. 166; 80 Ark. 108.

W. F. Reeves, for appellee.

The ordinance granting the franchise to Barnett was not legally passed. C. & M. Digest, § 7502.

McCULLOCH, C. J. Appellee, Ed Mays, doing business individually under the style of Mays Manufacturing Company, owned an electric light plant in the city of Leslie and operated the same under a franchise granted by the city council for the purpose of furnishing electric light to the inhabitants of the city. In the operation of the plant he generated electricity by machinery used in a mill plant which he owned. Appellee sold the electric light plant to appellant, A. L. Barnett, by bill of sale executed July 23, 1920, but this sale did not include the dynamo and other machinery in the mill plant where the electricity was generated. In fact, appellee did not at that time own the dynamo in use.

According to the testimony adduced in the present litigation, it is clear that the terms of the sale by appellee to appellant Barnett contemplated that appellee would not re-enter the business of furnishing electric lights or interfering in any way with the operation of the plant sold to Barnett. At the time this sale was consummated, appellee had surrendered his franchise to the Corporation Commission, and appellant Barnett had obtained from the city council a new franchise. Barnett had likewise obtained a permit from the Corporation Commission. Barnett proceeded to perfect his plant by installing the necessary machinery and making other preparations.

This action was instituted by appellant Barnett, the city of Leslie joining therein, to restrain appellee from attempting to furnish electricity to inhabitants of the city and from using the streets and alleys over and along which to string wires, and from otherwise interfering with Barnett's operation of the electric light plant under the new franchise granted to him.

Appellee, in his answer, denied all the allegations with respect to his attempt to furnish electricity to other

parties, or the use of the streets and alleys of the city, but alleged that he owned two mill plants, one inside the corporate limits of the city and the other just outside, and that all he was doing was to generate electricity at one of the plants for use in his business at both plants and to transmit the same over wires erected along the right-of-way of the railroad.

The issues were tried before the court, and there was a decree dismissing the complaint for want of equity.

It is, as before stated, clear that appellee should not engage in furnishing electric light to the public. There is no contention in the brief here on the part of appellee that he reserved the right to continue in the business of furnishing electricity. On the contrary, he claims that he has made no such attempt, and is only engaged in generating electricity for his own use in the manufacturing plants which he operates, and that he has not used the streets and alleys, but is merely operating a wire erected along the right-of-way of the railroad, having obtained a permit from the railroad company to do so. Appellee does, however, dispute the right of appellants to maintain this action on the ground that the franchise granted by the city to Barnett is void because the ordinance granting same was not enacted in the mode prescribed by statute in that it was not read on three different days as required by statute. Crawford & Moses' Digest, § 7502. The statute referred to only requires that the procedure mentioned must be observed in the passage of "by-laws and ordinances of a general or permanent nature," and does not apply to an ordinance or resolution entering into a special contract. *Batesville* v. *Ball,* 100 Ark. 496.

It is also contended that the ordinance is void because it was not published, but the statute in regard to publication of municipal ordinances is limited in its application to ordinances of a general and permanent nature. Crawford & Moses' Digest, § 7499.

We need not pursue any inquiry at this time whether the authority to grant such a franchise was taken away

from the city council and conferred upon the Corporation Commission by the act creating the latter Commission (Crawford & Moses' Digest § 1653), for appellant Barnett held a franchise, not only from the city council, but from the Corporation Commission itself.

The only remaining question is whether or not appellee was violating his contract of sale to Barnett, or was attempting, without authority, to use the streets and alleys of the city for the purpose of transmitting electric current from one of his plants where it was generated to the other plant which he was operating.

The evidence not only establishes the fact that appellee was operating his wires over and across the streets, but there is also evidence tending to show that he was furnishing electric lights to others.

Appellee had the right, of course, to generate electricity for his own use and to transmit it from one place to another over his own premises, or over the premises of others from whom he might obtain a permit, for his own use at such other place. He has no right, however, to cross the streets and alleys of the city, nor to furnish electricity to other persons by transmitting it even over his own premises. He had no authority to use the streets and alleys for such purposes, and he is barred by his contract of sale to Barnett from furnishing electricity to other persons, regardless of how and under what circumstances it may be transmitted.

There is evidence also tending to show that appellee's erection of new lines along the right-of-way constitutes an interference with appellant in the operation of his lines, and this appellee is barred from doing by his contract. He cannot in any way interfere with the operation by appellant of the electric light plant, even by the erection of poles over the premises of owners who may be willing to grant him the privilege. Even though he can obtain the privilege of erecting the wires from the railroad company or private owners, he cannot use such privilege, if it constitutes an interference with appellant's operation of his plant.

Appellee attempts to escape the charge of using the streets and alleys by showing that some of the streets alleged to be used have been closed up and used as storage places by appellant Barnett and certain other manufacturing interests. The fact that the streets are temporarily closed does not deprive the city of authority over them, for the city has a right to open them at any time, and appellee has no right to use the streets over which to carry his electric light wires, even though the streets are temporarily closed.

We are of the opinion, therefore, that the court erred in dismissing the complaint, for the proof shows that appellants were entitled to relief.

The decree is therefore reversed, and the cause remanded with directions to enter a decree enjoining appellee from using the streets and alleys of the city for the purpose of stringing wires and from interfering in any way with appellant Barnett in the operation of his electric light plant, and also enjoining appellee from furnishing electricity to any other consumer.

NETERER v. DICKINSON & WATKINS.

Opinion delivered April 3, 1922.

1. HIGHWAYS—ROAD IMPROVEMENT DISTRICT—EXCLUSION OF LANDS.—No. 426 Road Acts 1919, creating a road improvement district, was not rendered invalid by exclusion from the district of certain tracts which jut into the area included, but which do not necessarily intervene between included tract and the improved roads, especially where the statute authorized the taxation of omitted lands, if subsequently found to be benefited.
2. HIGHWAYS—ROAD DISTRICT—ABANDONMENT—LEVY OF EXPENSES.—In a suit against a road district, upon abandonment of the improvement, to establish and enforce claims for services performed by plaintiffs, where the act under which the district was created (Road Acts 1919, No. 426, § 30) provided that the amount necessary to pay for the preliminary work should be levied on the real property of the district in proportion to the county assessment, it was error to direct that the claims should be paid out of funds raised by taxation of benefits assessed.

3. HIGHWAYS—ABANDONED ROAD DISTRICT—EXPENSES.—Authority to impose taxes to pay the preliminary expenses of an abandoned road improvement district must be found in the statute creating the district.

4. HIGHWAYS—ABANDONED ROAD IMPROVEMENT DISTRICT—ASSESSMENT OF EXPENSES.—Road Acts 1919, No. 426, § 30, providing that, if the road improvement therein authorized shall not be made, the preliminary expenses shall be paid by a tax on the real property in the district in proportion to the county assessment, is valid as a legislative determination that there are anticipated benefits to the extent of the preliminary expenses appointed according to assessments for county purposes.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor; reversed in part.

W. A. Cunningham, for appellant.

The act creating the district was void because the boundaries were arbitrarily formed, without regard to any benefits to be derived. 130 Ark. 170; 139 Ark. 574; 145 Ark. 49. Hence no liability could be based upon its attempted formation.

The assessment of betterments and the attempted confirmation by the Legislature is void because arbitrary and confiscatory. 48 Ark. 370.

Section 30 of the special act providing for the payment of preliminary expenses upon an *ad valorem* basis is unconstitutional and void. The only basis for such an assessment is the benefit derived, or which would have been derived had the improvement been made. 50 Ark. 129; 89 Ark. 573; 96 Ark. 416; 98 Ark. 549; 118 Ark. 303. If, however, an assessment for preliminary expenses is authorized, the statute must be strictly construed (59 Ark. 356; 71 Ark. 561; 79 Ark. 521); and the basis adopted by the court was wrong.

A. S. Irby, for appellee.

The district was in all respects valid, and so held in 143 Ark. 270.

A legislative determination of the boundaries of a district will not be overturned unless shown to be arbi-

trary and unreasonable (147 Ark. 449; 147 Ark. 312; 139 Ark. 524), and may even include lands which had therefore been excluded by the county court on the ground that they received no benefits. 216 S. W. 1047; 217 S. W. 258; 130 Ark. 70; 139 S. W. 574.

The action of the court in making the levy on the assessment of benefits which had been confirmed, rather than on the *ad valorem* basis contended for by appellant, was correct. 143 Ark. 270; 113 Ark. 364; 107 Ark. 285; 166 S. W. 170; 112 Ark. 357; 83 Ark. 54; 97 Ark. 322; 86 Ark. 1.

The assessment of benefits is not now subject to attack. 143 Ark. 270; 145 Ark. 382. The district was not rendered invalid by the exclusion of certain lands said to be benefited, as these lands can still be made to bear their proportion of the tax. 215 S. W. 882.

McCULLOCH, C. J. The Walnut Ridge-Alicia Road Improvement District in Lawrence County was created by a special statute enacted by the General Assembly. Road Act No. 43, regular session, 1919. The statute authorized the improvement of a public road running between Walnut Ridge and Alicia, and authorized the appraisal and taxation of the benefits for the purpose of paying the cost of the improvement. The section of the statute pertinent to the controversy now before us reads as follows:

"Section 30. If, for any reason, the improvement herein authorized and directed shall not be made, all expenses and costs accrued to that time shall be charged against the real property of the district, and the amount necessary to discharge all such indebtedness shall be levied by the chancery court of Lawrence County upon real property in proportion to the county assessment, and collected by a receiver to be appointed by said court."

There was an assessment of benefits by the assessors of the district appointed in accordance with the provisions of the statute, and subsequently another special statute was enacted approving those assessments. Unpublished statute, approved Feb. 4, 1920.

The last statute just referred to also made slight changes in the boundaries of the district.

The validity of the statute confirming the assessment of benefits was upheld by this court in the case of *Gibson* v. *Spikes,* 143 Ark. 270. Later there was an abandonment of the whole project, it being ascertained that the cost of the improvement would be so much, in comparison with the benefits to be derived, that it was impracticable to attempt to make the improvement.

In an action instituted by certain owners of property in the district against the board of commissioners in the Federal court of this district, there was a decree enjoining further proceedings toward the improvement of the road, but the decree contained a recital that it was "without prejudice to the right of the chancery court of Lawrence County to proceed to pay the debts of said Walnut Ridge-Alicia Road Improvement District as provided in section 30 of the act whereby said district is created, and to enforce collection of said taxes in the manner herein provided."

Thereupon appellees, who had performed services in the preliminary work, instituted the present action in the chancery court of Lawrence County (Eastern District) against the improvement district and the commissioners thereof, in which it was sought to establish the claims of the creditors of the district and to enforce the collection thereof in accordance with the terms of the section of the statute quoted above. Appellants are owners of lands in the district, and they intervened in the action to contest the claims against the district.

Appellants attack the validity of the district on the ground that certain tracts of land which would have been benefited were omitted from the district and thus exempted from taxation. There is also an attack on the assessment of benefits made by the assessors, and confirmed by the Legislature, as being arbitrary, discriminatory and confiscatory. There was also an attack on sec-

tion 30 of the original statute on the ground that it authorizes the collection of an *ad valorem* tax instead of a tax on benefits.

The court made a finding as to the correctness of the claims against the district and decreed payment thereof out of funds to be raised by taxation of benefits according to the assessments made by the assessors and confirmed by the Legislature.

There is no question raised as to the correctness of the claims of appellees as creditors of the district. It is therefore unnecessary to state those claims in detail or to refer to the amounts allowed to the respective creditors for services performed.

The attack on the validity of the statute creating the district is based upon the omission of certain lands. It is claimed that a portion of the SE¼ of sec. 27, twp. 17 N, range 1 E, which was contiguous to the northern end of the road to be improved in the corporate limits of Walnut Ridge, and which is excluded from the boundaries of the district, lies in between the NW¼ of said section and the end of the road, and that the only way of approach from the latter tract is completely around the former tract, along the road that crosses the bridge at the end of the road to be improved.

According to the plats exhibited, there is a creek near the city limits of Walnut Ridge, which forms the boundary of the road district at that point. There is a conflict in the testimony as to where the bridge is situated, there being testimony that the bridge which constitutes the end of the road to be improved lies in section 34, which is south of section 27. If this is true, the excluded portion of section 27 does not in any sense intervene between the portion of section 27 which is included in the district and lies further west.

It is also contended that there is an arbitrary exclusion from the district of the north half of section 2, which lies near the town of Minturn, and the inclusion of the south half of said section 2, it being alleged that the

only means of access to the road to be improved is from the south half over the north half of section 2. There is also a conflict in the testimony in that regard.

In neither of these instances is there such an intervention of excluded tracts between included tracts as to demonstrate that one tract is necessarily benefited because the other was included, so as to make the action of the lawmakers arbitrary and discriminatory. It is just a case of excluded lands which jut into the area included in the district, but which do not necessarily intervene between included tracts and the improved roads. The case in this respect is ruled by the recent decision in *Sadler* v. *McMurtrey,* 152 Ark. 621. Moreover, there is a provision in the statute creating this district authorizing the taxation of omitted lands which may be subsequently found to be benefited by the improvement. This provision eliminates any discriminatory effect of mistake of the lawmakers in omitting benefited tracts from the district, for this provision of the statute constitutes authority to put them in the district and assess them if subsequently found to be benefited. *Hill* v. *Echols,* 140 Ark. 474.

This is not a case of absolute exclusion from the district, as was the case in *Harrison* v. *Abington,* 140 Ark. 115, for the reason, as above stated, that the other provisions authorized the taxation of any lands found to be benefited, whether expressly included in the district or not.

The question of invalidity of the special statute confirming the assessment was decided against the contention of appellants in the case of *Gibson* v. *Spikes, supra.* But we are of the opinion that the chancery court erred in ordering the tax levied upon the benefits as assessed, rather than upon the values shown on the tax books for county purposes, in accordance with the provisions of section 30 of the original statute; therefore it is unnecessary to discuss the question of benefits.

The courts must find authority in the statute itself to impose taxes to pay the preliminary expenses of an

abandoned improvement district. The statute itself in this instance contains an express provision as to how the preliminary expenses shall be paid in the event that the authorized improvement shall not be made. It further provides that "the amount necessary to discharge all such indebtedness shall be levied by the chancery court of Lawrence County upon real property in proportion to the county assessment."

Appellants also attack the validity of the statute in this respect, their contention being that the taxation must be upon anticipated benefits and not upon value. We have often upheld taxation upon valuation as appraised by the county assessors for general purposes, on the theory that it constitutes a legislative determination that benefits will accrue in proportion to value. *St. L. S. W. Ry. Co.* v. *Board of Directors,* 81 Ark. 562.

Even if it be held that the presumption of the legislative determination that benefits will accrue in that proportion is excluded by the further provision in the statute for an actual assessment of benefits, it does not render invalid the provision for payment of preliminary expenses by taxation in proportion to the assessment for county purposes. The two methods of assessment are for wholly different purposes. One is for the payment of the cost of the completed improvement, which must be by taxation based upon and apportioned on benefits to accrue. The other is a mere provision for the payment of preliminary expenses where the improvement is not undertaken at all. This provision necessarily implies a determination by the Legislature that there are anticipated benefits, at least to the extent of the cost of the preliminary expenses, apportioned according to assessments for county purposes, but it is neither unfair nor violative of any right of landowners to provide that, in the event the contemplated improvement is not undertaken, the preliminary expenses shall be paid according to value, and not according to anticipated benefits. The distinction lies between the payment of preliminary expenses and payment of the actual cost of the improvement.

Where the attempt to construct the improvement proves abortive and has to be abandoned, it is fair to exact contributions from all of the lands according to value, provided the taxation does not exceed the anticipated benefits, and, as before stated, this feature of the statute must be treated as a determination that a proportionate assessment of taxation for the payment of preliminary expenses will not exceed the anticipated benefits. It is not even shown in the present instance that the assessments apportioned according to assessed value will exceed, as to any tract of land, the assessed benefits. *Board of Directors* v. *Dunbar,* 107 Ark. 285.

Our conclusion is therefore that the chancery court erred in adopting the method of taxation on assessed benefits, rather than the method prescribed by statute, of taxing the land according to value as assessed for county purposes. That part of the decree which relates to the method of assessment will be reversed and remanded, with directions for further proceedings in accordance with this opinion; in all other respects the decree is affirmed.

TRIPLETT *v.* CHIPMAN.

Opinion delivered April 3, 1922.

1. EXECUTORS AND ADMINISTRATORS—COMPENSATION OF ADMINISTRATOR.—It was within the discretion of the probate court to allow the maximum compensation under Crawford & Moses' Dig., § 183, for services as administrator, and such discretion will not be controlled unless abused.
2. EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF ATTORNEY'S FEE.—An allowance of $300 to an administrator for attorney's services in defending through the courts a claim on a note for $1,446.21, on the ground that it had been paid, *held* an abuse of discretion where no intricate questions of law were involved; $150 being ample compensation.
3. EXECUTORS AND ADMINISTRATORS—LIABILITY FOR INTEREST.—An administrator is not personally chargeable with interest on funds in his hands as such.

Appeal form Union Circuit Court; *C. W. Smith,* Judge; affirmed with modification.

Caldwell & Triplett, for appellant.

Appellee had no meritorious defense to this suit, but by his unnecessary delays and appeals has succeeded in piling up court costs, attorney's fees, and in procuring for himself a larger allowance than was necessary, all of which the court should disallow. 84 N. Y. Supp. 46; 41 Misc. Rep. 278; 182 N. W. 32, 87 Neb. 700; 31 L. R. A. (N. S.) 350. See also 67 Ark. 340; 53 Ark. 224; 66 Ark. 7; 96 Me. 380.

Where an administrator improperly keeps administration open, subsequent costs and commissions should be charged to him personally and not to the estate, but we only ask that the costs of the appeal to this court be charged against him. The allowance of attorney's fees was excessive, neither do we think that the highest amount allowable under statute should have been given appellee, because of his conduct in prolonging the litigation and having to be twice cited to file a settlement.

Flenniken, Sellers & Cohn, for appellee.

The allowance of commission to appellee was according to law, and a matter within the discretion of the probate court, which will not now be disturbed. 14 Ark. 76; 30 Ark. 520; 74 Ark. 168; § 134, Kirby's Digest.

Appellee was not properly chargeable with interest on the funds in his hands.

The allowance of attorney's fees was just and fair and properly made. Acts 1921, act 118; 30 Ark. 312; 18 Cyc. 444; 67 Ark. 345; 168 U. S. 311; 141 U. S. 411.

WOOD, J. In 1914 J. J. W. Smith, who resided in Little Rock, Arkansas, died while on a visit to Texas. He died intestate. His estate consisted of three life insurance policies of $1,000 each and a small deposit of money in the Cotton Belt Savings & Trust Company at Pine Bluff. T. N. Chipman was appointed administrator of his estate on December 14, 1914. He immediately

employed Aylmer Flenniken, an attorney at El Dorado, to represent him. Smith had borrowed money on the life insurance policies, so that when these amounts were taken out of the policies the entire assets of the estate amounted to the sum of $2,435.65, as shown in the first annual settlement of the administrator. Aylmer Flenniken assisted the administrator in collecting the balance due on the insurance policies. There was no litigation over these policies. The work of the attorney consisted in making proofs of death, which was done by correspondence with the doctors and undertakers at the place near the Mexican border where Smith died, and through one Thompson, who saw the undertakers and doctors and got the proofs of death. The attorney did not pay Thompson anything for his services in this matter. He did not have to make any trips to Texas. He was allowed the sum of $150 for his services.

On the 28th of October, 1915, Alex Perdue presented a claim against the estate for the sum of $1,446.21, evidenced by Smith's promissory note for that amount. The administrator, acting upon the advice of his attorney, refused to allow the claim. The claim was presented to the probate court and the probate court allowed the same, and the administrator, acting upon the advice of his attorney, appealed to the circuit court. On the 21st of November, 1917, the circuit court affirmed the judgment of the probate court allowing the claim, with interest from the date of the judgment, and the administrator, upon the advice of his attorney, appealed to the Supreme Court. The Supreme Court affirmed the judgment of the circuit court holding that the allowance should be made. The mandate of the Supreme Court was filed in the circuit court by the attorneys of Perdue on the 19th of April, 1919. In the second annual settlement the administrator showed that he had allowed the claim of Perdue with interest thereon from November 21, 1917, which amounted to the sum of $1,687.21. In this settlement the administrator showed that he had allowed himself the sum of $171.75 as commission for his services

and had allowed his attorney the sum of $300, and that he had allowed other sums in the way of court costs and expenses incident to the resistance of the claim of Perdue in the aggregate sum of $90.20. Exceptions were duly filed by Perdue's attorneys to this account of the administrator, which were overruled and the settlement approved. On appeal to the circuit court, upon a trial of the exceptions to the settlement as above indicated, the circuit court found that the administrator had expended the sum of $71.95 in court costs in the circuit and Supreme Courts in resisting the Perdue claim, and also the sum of $300 for attorney's fee; that the administrator was allowed commission for his services in the sum of $171.75. The court found that interest should be allowed on the note of Perdue from October 28, 1915, the date of its presentation to the administrator, and that the administrator should be charged with the interest on the funds in his hands from January 1, 1917, to October 15, 1920, in the sum of $466.95, and that he should be charged with the balance of funds in his hands as administrator in the sum of $1,925.90 instead of $1,458.95 as stated in his settlement and approved by the probate court. The court entered a judgment according to its findings, from which judgment is this appeal.

The statute allows the administrator as compensation for his services an amount not exceeding ten per centum on all sums less than $1,000, and on all sums over $1,000 and less than $5,000 five per centum. C. & M. Digest, § 183. The appellee was allowed the maximum amount for his services under the above statute.

It is unnecessary to discuss the facts pertaining to the services of the appellee in connection with the administration of the estate of the decedent, Smith. We cannot say there was an abuse of the discretion on the part of the probate court and of the trial court in allowing the appellee the maximum sum specified by the statute. It was within the sound discretion of the probate court to allow the maximum or a lesser amount, which discre-

tion will not be controlled unless abused. *Ex parte Bell,* 14 Ark. 76; *Reynolds* v. *Canal & Banking Co.,* 30 Ark. 520.

It could serve no useful purpose likewise to discuss the facts in connection with the litigation over the claim of Perdue. We do not find anything in the testimony to justify the conclusion that the administrator was not acting in good faith in resisting the payment of this claim. He followed the advice of his attorney, and there is nothing to warrant the inference that the attorney was actuated by any other than a *bona fide* purpose to protect the estate against a claim which he and the administrator believed had been paid. So believing, they could not have discharged their duty to the estate without resisting the payment of this claim until the matter had been finally adjudicated by the courts and determined to be a just demand. In this connection, however, we are constrained to hold that the probate court and the trial court abused their discretion in allowing the administrator the sum of $300, the amount paid by him for the services of an attorney. The sum allowed the attorney in connection with the litigation over the claim of Perdue was a little over 20 per cent. of the entire amount of that claim. The character of the litigation, with which the judges of this court are familiar, was not such as to justify the administrator in paying his attorney the sum of $300 to have the litigation conducted to its final conclusion.

While the issues involved were important, they were not difficult and complicated. Meritorious and efficient as were the services of the attorney, nevertheless, it occurs to us that the sum of $150 was ample compensation for such services. The court abused its discretion and therefore erred in allowing the administrator a greater amount as compensation for the services of his attorney.

In the case of *Bayou Meto Drainage District* v. *Chapline,* 143 Ark. 446-455, we held that the judges of this court should not divorce themselves from their general knowledge, observations and experience of such matters

and renounce entirely their own judgment as to what would be a reasonable compensation for the attorney, after taking into consideration the character of the services rendered, the labor, time and trouble involved, and the nature and importance of the litigation, etc. See other cases there cited.

The claim of Perdue against the estate was for $1,446.21, as evidenced by a promissory note of the decedent, and the defense of the administrator was that the note had been paid. Therefore, there were no delicate and intricate questions of law to be settled, and the issue of fact was exceedingly simple. We are convinced that the probate court and the trial court abused their discretion in sanctioning the payment by the administrator of attorney's fee in an unreasonable amount as compensation for his services.

There was no error in the ruling of the court in refusing to charge appellee personally with interest on the funds in his hands as administrator. The judgment of the circuit court will be modified by reducing the allowance of the administrator for attorney's fee from $300, as allowed in the second annual settlement, to the sum of $150, and, as thus modified, the judgment is affirmed.

LESSER-GOLDMAN COTTON COMPANY v. FLETCHER.

Opinion delivered April 3, 1922.

1. LANDLORD AND TENANT—CANCELLATION OF LEASE—REVOCATION.—Notice of cancellation of a lease did not terminate the lease where such notice was revoked before being acted upon by the other party.
2. LANDLORD AND TENANT—DOUBLE RENTS FOR HOLDING OVER.—To entitle a landlord or lessor to double rents after termination of the lease, under Crawford & Moses' Dig., § 6557, the holding over by the tenant must be done wilfully.
3. LANDLORD AND TENANT—TENANT HOLDING OVER—DOUBLE RENTS.—Crawford & Moses' Dig., § 6557, providing that a landlord shall be entitled to recover double rents from a tenant "wilfully"

holding over after term of his lease and thirty days' notice in writing requiring possession, being a penal statute, must be strictly construed and cannot be extended by intendment beyond its express terms.

4. LANDLORD AND TENANT—WILFUL HOLDING OVER.—A holding over by the tenant under a *bona fide* belief that he has a right to do so, even though he is mistaken, is not a "wilful" holding over under Crawford & Moses', § 6557, entitling the landlord to double rents upon a "wilful" holding over.

5. LANDLORD AND TENANT—LIABILITY OF ASSIGNEE.—Where a lease required the lessee or his assigns to replace improvements in as good condition as at time of execution of the lease, and a contract between the United States as assignee of such lease and a purchaser of the improvements made upon the land by the United States provided that such sale should be subject to the terms of the lease, and made the lease a part of the contract, and provided that the purchaser would hold the United States harmless from the claims of landowners for damages to the improvements which were on the property at the time of the execution of the lease, the purchaser was liable to the landowners for damages caused by destruction of improvements or failure to restore them to as good condition as they were in at the time the lease was executed.

6. ESTOPPEL—REPRESENTATION.—Written statements, signed by landowners, in which they agreed to release the United States from liability for damages to improvements on lands leased to the United States, were binding in favor of purchasers of improvements on the lands who had agreed as a condition of purchase to assume the government's liability to the owners.

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

Moore, Smith, Moore & Trieber, for appellants.

1. The lease of the Fletcher-Goodrum lands was not terminated by cancellation. Where a lease authorizes the lessee to terminate the tenancy at a certain time, he cannot terminate it at some other time. 1 Tiffany, Landlord & Tenant, 86; 16 R. C. L. par. 628. A notice to quit, given by landlord or tenant, may be revoked or withdrawn before it has been acted on. Ann. Cas. 1912-D, p. 682, and authorities cited. Even if that lease is deemed to have been canceled, Fletcher and Goodrum are not

entitled to double damages. The statute, C. & M. Digest, § 6557, is highly penal, and must be strictly construed. 20 Ill. 120; 3 Camp 453; 211 S. W. 908; 82 N. J. Law, 645; 82 Atl. 892; 118 Ga. 906; 45 S. E. 794; 197 Ala. 625; 73 So. 328. The statute does not apply unless the holding over is wilful. A holding over which is not contumacious, but is under a reasonable mistake as to the tenant's rights, is not wilful. 38 Ill. App. 128; 230 Ill. 454; 82 N. E. 833; 130 Ky. 789; 114 S. W. 284; 136 Ky. 39; 123 S. W. 326; 6 H. & N. 846; 191 N. Y. 306; 84 N. E. 75.

2. There was no liability on the part of the United States to the landowners for damages. Such being the case, an alleged oral agreement on the part of Lesser-Goldman Cotton Company for the benefit of the landowners, independent of its contract to assume the liability of the United States, assuming to pay their claims regardless of liability of the United States, is not enforceable by them for lack of consideration. 65 Ark. 27; 101 *Id.* 223; 110 *Id.* 578; 121 *Id.* 414; 128 *Id.* 149; 144 *Id.* 8. See also 6 R. C. L., Contracts, par. 270-277.

The alleged oral contract, before it was acted upon by either the landowners or the road district, was merged into the written contract between the United States and Lesser-Goldman Cotton Company, and that contract exclusively defines the rights of any of the parties to this suit to hold the latter for their damages. 2 Elliott on Contracts, § 1415; 33 R. I. 464, 82 Atl. 225; 56 Iowa 349; 9 N. W. 293; 172 Ill. 563; 50 N. E. 219; 95 N. Y. 423; 38 Ohio St. 543; 80 Ky. 409; 27 N. J. Eq. 650; 6 N. D. 438; 71 N. W. 125; 153 Ind. 393; 53 N. E. 769. At most, the landowners and road district cannot recover greater damages than they respectively agreed to accept at the sale, with interest.

W. P. Beard and *Mehaffy, Donham & Mehaffy,* for Fletcher and Goodrum.

1. Adopt briefs and arguments filed on behalf of appellees Williams and Williams & Pierson, and in addition urge that appellant cotton company by its answer not

only admitted liability, but also that payment to these landowners was a part of the purchase price at the sale—constituted one of the terms thereof. 134 Fed. 241.

2. The lease on the Fletcher-Goodrum lands was terminated by cancellation. Notice was given, and Fletcher gave express consent to the termination. The notice required by a lease may be waived. 29 L. R. A. (N. S.) 177; 147 Ill. App. 18; 126 Ark. 38; 70 *Id.* 406; 120 *Id.* 268; 88 *Id.* 138; 32 Atl. 64; 24 Cyc. 1334-1339.

3. Fletcher and Goodrum were entitled under the statute, C. & M. Dig., § 6557, to double damages. 74 Ark. 12.

J. H. Carmichael and *Coleman, Robinson & House,* for appellee W. A. Williams.

1. As to the appellee Williams, appellants raise only the question as to whether or not the instruction numbered 1 is a correct declaration of law, admitting that there was evidence on which to base the instruction, but contending that the facts do not make out a case of liability. This suit is not based on the leases, but on a special contract made between the three parties to the sale itself, whereby the appellant promised to pay Williams the $1,000 which he had agreed to take, and the facts bring the case squarely within the doctrine that "when a promise is made to one upon a sufficient consideration, for the benefit of another, the beneficiary may sue the promissor for a breach of his promise." 65 Ark. 27. That is the first prerequisite to appellee's right to recover in this case. The second existed also, viz: privity between the promisee and Williams, and the obligation on the part of the promisee toward him. *Id.* Williams was not a stranger to the contract. A consideration moved from him, and there was a duty or obligation on the part of the Government to him. He was an actual party to the contract itself. 93 U. S. 148; 93 Ark. 346; 46 *Id.* 132; 91 *Id.* 367; 31 *Id.* 155; 119 *Id.* 64.

2. In response to appellant's contention that the Government and appellant afterwards changed the terms

of the contract in such way as to release appellant from liability to Williams, and that they had the right to change it at any time before acceptance by Williams: the evidence conclusively shows an acceptance by him. Moreover, an acceptance on his part will be presumed. 2 Elliott on Contracts, § 1414; *Id.* 1415; 8 Pac. 280; 50 *Id.* 597; 93 N. W. 440; 58 Mo. 586.

Coleman, Robinson & House, and *Carmichael & Brooks,* for cross-appellants, W. A. Williams and R. Pierson.

James B. Reed and *Thos. C. Trimble, Jr.,* for Lonoke Chamber of Commerce.

Chas. A. Walls, for Road Improvement District No. 4.

WOOD, J. On August 1, 1917, George B. Fletcher and Ella Mae Goodrum (hereafter for convenience called Fletcher-Goodrum) executed an assignable lease to W. W. McCreary to 160 acres of land, and on the same day W. A. Williams executed a similar lease to McCreary to 720 acres of land, all in Lonoke County, Arkansas. The consideration for the Fletcher-Goodrum lease was an annual rental of $720, and of the Williams lease for the annual rental of $5,500, both payable in advance. The leases gave the lessee an option to purchase at sums named therein at any time during the period of the leases. The Fletcher-Goodrum lease ran until December 31, 1920, and the Williams lease until December 31, 1921. The lessee, or his assigns, were given the right of cancellation upon written notice to the lessors on or before October 1st in any year, the possession of the premises to be surrendered on or before the end of the year in which notice was given.

Among other provisions the leases contained the following: "In case of the removal or destruction of irrigation plant machinery, houses or fences, the lessee or its assigns shall replace such improvements in as good condition as the same were at the date of this lease contract, at the conclusion of the lease. * * * * The undersigned (landowner) further agrees * * * * to permit the

removal of buildings and improvements which may be erected by the lessee or his assigns, at the expiration of the lease." * * * * "He (lessee) shall have the right to assign or sublease the same to the United States Government, its officers, agents, or attorneys."

On the 26th of October, 1917, McCrary executed the following assignments of the leases: "For and in consideration of the sum of $1 and other valuable considerations, I, W. W. McCrary, do hereby transfer, assign and sublease the foregoing contract with all rights thereto to Charles A. Walls, president of the Lonoke Chamber of Commerce, for the use and benefit of the United States Government."

The contract between the Chamber of Commerce, the lessor, and the lessee, the United States, contained among others the following provisions: "That said lessor agrees that the lessee, without expense, may demolish or destroy any and all buildings, and any crops now growing on said land, in so far as they interfere with the use of the site for aeronautical purposes." "That the said lessor shall close all roads on the property hereby leased, seeking such legal proceedings as may be necessary to effectuate the same." "The lessor agrees that, at the expiration of this lease and any renewal thereof, the lessee may within a reasonable time remove any and all buildings, structures and other improvements, or part of buildings, structures, or other improvements, placed or erected on said premises, during the term thereof, or any renewal thereof, all expenses connected with such removal to be borne by the lessee." "That it (United States) will commit no waste and will not suffer the same to be committed, and will not misuse or injure the said premises, except in so far as is consistent with the use of this tract for aeronautical purposes." "That the lessee reserves the right to quit, relinquish and give up the said premises at any time within the period for which this lease is made or may be renewed, by giving to the said lessor or agents thirty days' notice in writing."

The landowners for "valuable consideration" executed a writing ratifying and confirming the action of the chamber of commerce in the execution of the leases and option, and agreed on their part "to perform and carry out all of the terms of said lease."

On December 10, 1919, the United States sold its improvements on the leased lands at public auction. The officer conducting the sale for the government passed out to the bidders a printed announcement containing the conditions of the sale, which, among other things, provided: "* * * * the successful bidder to release the government from all claims of property damage from the owners of the land, and any or all claims for replacement of improvements which the United States is obligated to replace for the property owners, under provisions of lease by which this land is held. * * * * It is agreed and understood by the successful bidder that all improvements must be removed and releases as specified, in this announcement, for the United States, must be furnished its representative, the chief of construction division, War Department, Washington, D. C., on or before June 30, 1920. A surety bond of $20,000 will be required when this deal is closed to insure the carrying out of the provisions of this announcement."

Before the sale was announced and bidding began, Burt Brooks, an attorney representing one Pierson, announced that Pierson had purchased from Williams and had a claim for damages to the Williams lands, in the sum of $70,000 against the United States, and that the purchaser of the property would have a lawsuit on his hands. Thereupon the sale was adjourned until the afternoon. When the sale was resumed, the officer in charge read out written statements of damage claims signed by Fletcher and Goodrum, Williams, and the county judge of Lonoke County and the commissioners of Road District No. 4. Fletcher and Goodrum agreed to release the United States and the chamber of commerce from all damages to their lands for the sum of $6,561. Williams signed a similar agreement to release all damages to his lands for

the sum of $10,000, and the road district agreed to release all damages to the road for the sum of $2,000. At the same time the officer in charge of the sale read the report of a board of officers appointed by him to estimate the damages. This report stated that the Williams land could be restored to its original condition for $12,850, the Fletcher-Goodrum land for $6,000, and the road to its original condition for the sum of $2,000. This board pronounced the Pierson claim a hold-up, and also stated that a $20,000 bond from the purchaser would be ample to protect the United States against all claims. The officer further stated that the government did not guarantee that $20,000 was the limit of what might have to be paid; that it might be more and might be less.

According to the version of some who were present at the sale, the officer made the further announcement that the bidders would have to take the printed announcement of the conditions of the sale just as it was read, and that the successful bidder would have to indemnify the United States against all claims of the landowners. According to another witness, the officer announced that the purchaser would be required to give a bond in the sum of $20,000 for the restoration of the field when the plant had been dismantled to its former condition.

The Lesser-Goldman Cotton Company (hereafter called company) bid $30,000 for the property of the government, and on December 15, 1920, entered into a contract with the United States which had attached thereto, and made a part thereof, copies of the leases from the landowners to McCrary, the assignments by him to the chamber of commerce, a copy of the lease from the chamber of commerce to the United States, and a copy of the printed announcement of the conditions of the sale of the government property. The contract acknowledged a consideration of $30,000 cash paid by the company and its undertaking as to the extent set forth in the contract "to save and protect and hold harmless" the United States "from any and all claims on the part of the owners of the lands (describing them) for and on

account of all property damages to said lands, and all replacements or improvements thereon, and all removals of structures therefrom which" the United States "may be under obligations to pay and replace and remove pursuant to the provisions of the leases which were taken from the said owners of said lands by W. W. McCrary, and by the latter assigned to the Lonoke Chamber of Commerce, and of the lease which was taken by" the United States "from the said Lonoke Chamber of Commerce with ratifications thereof by the respective said landowners." For the considerations mentioned, the United States sold and delivered to the company the improvements "as set forth in the announcement of terms and conditions of sale of government-owned improvements at Eberts Field, dated December 10, 1919."

It was provided in the contract that the company "agrees that it will, at an expense to itself not exceeding the penal sum of the bond hereinafter described, protect and save and hold harmless" the United States "from any and all claims of the owners of any of said lands for and on account of all property damages thereto done or suffered by" the United States, "and to make replacements of improvements on said lands, and for and on account of any obligation of" the United States "to remove any buildings, improvements, roads, foundations or other structures placed on said lands by" the United States, "which said claims for property damages or replacements or removals arise out of the provisions of said leases and ratifications."

Under the terms of the contract performance by the company was to be evidenced by its procuring for the United States valid and complete releases from the owners of the lands of all their claims or by satisfying all judgments recovered by the landowners in suits or other proceedings against the United States or the company in respect to any of the claims. The company agreed to defend such suits or proceedings at its own expense. It was contemplated that the company would dispose of all

claims by June 30, 1920, but the United States agreed that the company should have whatever additional time might be required after the expiration of the government's lease that the United States itself was entitled to under the lease and ratifications thereof by the landowners. It was further expressed in the contract that the intent was "to create and extend to the said landowners a direct cause of action by them against" the Lesser-Goldman Company "for and on account of said claims in any court of competent jurisdiction. * * * * ."

The bond provided that the company would faithfully and fully perform the obligations resting on it as set out in the contract, in the penal sum of $20,000, which sum was stipulated to be the limit of liability both of the company and the surety on the bond for and on account of any and all of the obligations of the company under the provisions of the contract.

On January 15, 1920, Fletcher-Goodrum, in a letter to the company, demanded an immediate settlement of the damages due them and warned it that the damages would be enhanced if the 1920 crop was lost through failure to secure such settlement. On September 27, 1920, the company released possession of the land and so notified the United States.

On May 19, Fletcher-Goodrum instituted this action in the Lonoke Circuit Court against the company and Lynch Creekmore and H. M. Bennett, agents of the company, and the Lonoke Chamber of Commerce, to recover damages to improvements on their lands in the sum of $10,000, and the sum of $20,000 rent for the year 1920, which they alleged grew out of their contract of lease to McCrary and the several contracts above mentioned.

The company set up that the defendants Creekmore and Bennett were its agents, and that it assumed full responsibility for all their acts. It denied liability, but set up that, if liable at all, the limit of its liability under the contract was $20,000 to all of the landowners. The answer contained a motion that Williams, Pierson and

the road district be made parties plaintiff and required to set up their respective claims. The answer also contained a motion to transfer to the equity court. It also set up that, if liable at all, the company would be entitled to judgment in the same amounts against the chamber of commerce. It prayed that it be dismissed without cost, and, in the alternative, if any judgments were recovered against it by the plaintiffs, it be allowed to recover in the amount of plaintiffs' judgments against the chamber of commerce.

The court directed that Williams, Pierson, and the Road District No. 4 be made parties plaintiff, which was done. The court overruled the motion to transfer to equity. There was evidence adduced at the trial by which it was estimated that the damage by the United States to Fletcher-Goodrum lands was $24,176.40; to the Williams lands in the sum of $60,130, and to the road district in the sum of $6,000. It was conceded that all the damage done by the United States and the improvements made were necessary in the use of the field for aeronautical purposes. The court instructed the jury that if they found for the plaintiffs, Fletcher-Goodrum, the amount they would be entitled to recover as damages to the lands could not exceed the sum of $6,561, the amount they specified at the auction sale, with interest from the date of such sale; and that if they found in favor of Williams and Pierson, the amount of their damages would be the sum of $10,000, the amount specified by them on the day of sale, with interest from that date. (No separate damages were claimed for Pierson). The court instructed the jury that if they found in favor of the road district they could return damages in the sum of $6,000. It was agreed that, if the company were liable, the testimony would show that the road district had sustained damages in the sum of $6,000.

At the request of the plaintiffs, except the road district, the court in substance instructed the jury that if, in the printed announcement of sale, it was stated that the successful bidder would be required to release the

government from all claims for damages from owners of the land and from all claims for replacement of improvements which the United States was obligated to replace under the provisions of the lease under which it held the land, and that if at the sale some question was raised by the bidders as to the respective amounts of the claims of the landowners, and the officer of the government conducting the sale adjourned the sale until the afternoon in order that such amounts be ascertained, and that such amounts were ascertained and agreed upon by the plaintiffs and were announced to prospective bidders when the sale was resumed in the afternoon, and that if it was further announced that the successful bidder would have to pay the amounts of these claims in addition to the amount bid by him, then the company would be liable for the amounts of these claims.

The court also instructed the jury that the road district was not bound by the representation as to the amount of its damages made by the county judge and the road commissioners when the sale was made. The court refused to instruct the jury at the request of the plaintiffs, Williams and Pierson, as follows: "You are instructed that, in the lease from Williams to W. W. McCrary, the lessee, or his assignee, was bound to replace all improvements in as good condition as they were on August 1, 1917, and that the terms of said lease were not abrogated by the lease from the chamber of commerce to the United States Government, nor by the alleged ratification by said Williams, nor was this duty or liability fixed or limited by the contract of December 15, 1919, between the Lesser-Goldman Cotton Company and the United States Government, and you will find for the plaintiff Williams in such an amount as you may find it would cost Williams to put the place named in the lease to McCrary in the condition it was in on August 1, 1917."

The company prayed the court for instructions telling the jury in effect that the rights of the plaintiffs to damages depended upon the written contract of December 15, 1919, between it and the United States, which was

one merely of indemnity as to the claims of the landowners and which imposed no duty at all as to the claim of the road district. The company also asked the court to instruct the jury to return a verdict in its favor against all of the parties seeking a judgment against it. The court refused these instructions. Exceptions were saved by the respective parties to the ruling of the court in giving and refusing instructions which were contrary to their respective contentions.

The jury returned a verdict in favor of Fletcher-Goodrum against the company and Lynch Creekmore in the sum of $1,000 for rent of their lands, and against the company in the sum of $6,561 with interest as damages to their lands; in favor of Williams on account of damages to his lands in the sum of $10,816.66, with interest, and in favor of the road district in the sum of $6,000, with interest. The jury returned verdicts in favor of the defendants, Lynch Creekmore and H. M. Bennett, agents, and also in favor of the Lonoke Chamber of Commerce as against all the plaintiffs.

Judgments were rendered against the company and Lynch Creekmore in favor of Fletcher and Goodrum for rent in the sum of $2,000, the same being double the amount of the verdict returned by the jury; against the company in favor of Fletcher and Goodrum in the sum of $6,561 with interest thereon from date of the sale; and against the company in favor of Williams in the sum of $10,816.66; and against the company in favor of the road district in the sum of $6,000, from which judgments the appellants duly prosecute this appeal, and all of the appellees except the chamber of commerce prosecute a cross-appeal. Any other necessary facts will be stated as we proceed.

1. The lease of the Fletcher-Goodrum lands was not terminated by cancellation either under the terms of the lease of such lands to McCrary or the lease of the chamber of commerce to the United States which Fletcher-Goodrum ratified. The notice was by telegram dated

November 29, 1919, from the Director of Air Service to the Lonoke Chamber of Commerce, notifying the latter of the cancellation of the lease to take effect December 31, 1919. This telegram was followed by letter of December 1, 1919, confirming the telegram and including notice of the cancellation, with the request that admission of the service of such notice be signed by the chamber of commerce and returned as promptly as convenient. Upon receipt of the telegram the president of the chamber of commerce immediately notified the landowners. The landowners verbally acquiesced. On December 3, the Director of Air Service telegraphed the chamber of commerce to disregard the notice of cancellation by previous telegram and letter. The president of the chamber of commerce also notified the landowners of the last telegram, and it does not appear that, intervening the first telegram and letter and the receipt of the last telegram, the chamber of commerce had by letter or otherwise notified the Director of Air Service that the notice had been served, nor does it appear that the landowners had acted upon the telegram and letter giving notice of cancellation. The rights of the parties therefore had not been in any manner affected by the notice of cancellation before the same was revoked.

A notice of cancellation of a lease to take effect in the future may be revoked or withdrawn before it has been acted on by the other party to the contract, and in such case the rights of the parties under the contract are the same thereafter as if the notice of cancellation had not been given. This doctrine is supported by the decided preponderance of the authorities in this country. See *Wisner* v. *Richards,* 24 Ann. Cas. 1912-D, p. 162, and cases there cited. We are aware that there are respectable authorities which hold that when a valid notice to quit is given by the landlord or tenant, the party to whom it is given is entitled to count upon it, and it cannot be withdrawn without the consent of both parties. See *Western Union Tel. Co.* v. *Pac. Ry. Co.* 120 Fed. 362. But,

even if we are mistaken in holding that the lease was not terminated by cancellation, still Fletcher-Goodrum would not be entitled to recover double damages for the retention of the lands under § 6557 Crawford & Moses' Digest. For, under the statute, to entitle the landlord or lessor to double rents after the termination of the lease term, the holding over by the tenant must be done wilfully. The statute is highly penal, must be strictly construed, and cannot be extended by intendment beyond its express terms. A holding over by the tenant under the *bona fide* belief that he has the right to do so, even though he were mistaken, is not a wilful or contumacious holding under the statute, where the undisputed facts show, as they do here, that there were reasonable grounds for such belief. *Belles* v. *Anderson,* 38 Ill. App. 128; *Alexander* v. *Loeb,* 230 Ill. 454, 82 N. E. 833; *Aull* v. *Bowling Green Opera House Co.,* 130 Ky. 789, 114 S. W. 284; *Jones* v. *Taylor,* 136 Ky. 39, 123 S. W. 326; *Swinfen* v. *Bacon,* 6 H. & N. 846; *Barson* v. *Mulligan,* 191 N. Y. 306, 84 N. E. 75.

The case of *Driver* v. *Edrington,* 74 Ark. 12, does not contravene the above doctrine, for in that case there was a holding over by the tenant, after he knew that his term had expired and after he had lawful notice to vacate, simply because it was inconvenient and injurious to his business. The holding over by the tenant in that case was not grounded upon facts which justified an honest belief that he had the right to do so.

2. It will be observed that the original leases from Fletcher-Goodrum and from Williams to McCrary contained this provision: "In case of the removal or destruction of irrigation plant, houses, or fences, the lessee or its assigns shall replace such improvements in as good condition as the same was at the date of this lease contract." The contract between the appellant and the United States by which the latter sold to the former the "government-owned improvements" expressly makes these leases to McCrary "with all the terms, provisions, conditions and covenants thereof" a part of that con-

tract. The announcement of the terms and conditions of the sale of the government-owned improvements, in pursuance of which the sale was made and the written contract of sale between the appellant and the United States entered into, contains a provision to the effect that the "successful bidder shall release the government from all claims of property damage from owners of the land and any or all claims for replacement of all improvements which the United States is obliged to replace for the property owners under the provisions of the lease by which this land is held." This written announcement of the terms and conditions of the sale is also expressly made a part of the contract of sale between the appellant and the United States. The contract of sale between the appellant and the United States likewise makes the lease of the chamber of commerce to the United States and the ratifications thereof by the landowners a part of the contract of sale. The transfer or assignment of the lease from McCrary to the Lonoke Chamber of Commerce shows that it was done "for the use and benefit of the United States Government."

Now, the manifest intention of the parties to the contract of sale in making all of the above instruments with all of their terms, conditions, provisions and covenants a part of the contract of sale, was to preserve the rights of the landowners as against the United States Government for and on account of all property damages to their lands and all replacements of improvements thereon which the United States Government "may be under obligation to pay and replace and remove pursuant to the provisions of the leases which were taken from the said landowners of said lands by W. W. McCrary." The purpose of the contract, as clearly expressed therein, was that the appellant should "save and protect and hold harmless" the United States from the claims of the landowners. In other words, as we construe the contract of sale, it bound the appellant to pay any and all claims of

the landowners for damages that the United States would have to pay them under the leases. The language of the contract of sale shows that the parties to it at the time of its execution recognized that the landowners had claims for damages against the United States, which the latter would have to pay as a part of the consideration of the sale of the government-owned improvements. Under the original leases to McCrary, he and his assigns were liable to the landowners for all damages to their lands caused by the destruction of improvements or by failure to restore the same in as good condition as they were at the time the leases were executed. Taking the provisions of the contract as a whole, it cannot be construed as one intending merely to indemnify the government against the claims of the landowners, but a contract by which the appellant assumed payment of these claims. The contract in terms says that the intent of the provisions "is to create and extend to the landowners a direct cause of action against the said party of the second part" (appellant). If the contract had intended to indemnify the government merely, the above language would not have been used.

While there was no direct assignment of the leases from McCrary to the United States Government, the undisputed testimony shows that the assignment by him to the chamber of commerce was, as we have stated, for the use and benefit of the United States Government, and, so far as the landowners were concerned, the independent leases executed by the chamber of commerce operated as a transfer or assignment of their title to the United States Government. The undisputed facts show that the taking of the leases, their assignment to the chamber of commerce, the execution of the leases by the chamber of commerce to the United States Government, and the ratification of these leases by the landowners was all done for the purpose of putting the lease title in the United States, the United States assuming all the obligations of the lessee under the original leases. This was certainly

the interpretation which the officers of the United States Government, entrusted with the duty of executing and carrying out the obligations of the United States under these leases, gave the original leases and the leases of the chamber of commerce and the ratification thereof at the time of the sale of the government-owned property. It was also the interpretation of the landowners at that time. And we believe it was likewise the interpretation of the appellant, as shown by the express provisions of the contract itself, in making all the instruments evidencing any rights growing out of the leases a part of the contract of sale. In the light of all the written instruments and the contract thereunder of the parties thereto, as shown by the undisputed testimony, we are convinced that the appellees were not strangers to the contract of sale and to the consideration thereof, as contended by learned counsel for appellant. But, on the contrary, the undisputed facts of this record show that by the express terms of the contract the appellees were privies to the extent of their interest with the United States Government. A consideration had moved from the landowners to the United States under the lease contracts, and by the terms of these contracts the United States was liable to them for all damages they had sustained. The United States, by its contract with the appellant, provided that the latter should pay these damages.

The uncontroverted facts of this record bring the case squarely within the doctrine announced by this court in *Thomas Mfg. Co.* v. *Prather,* 65 Ark. 27-29, as follows: "Where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promissor for a breach of his promise." As prerequisites of the application of the doctrine, we further said, quoting from the N. Y. Court of Appeals in *Vrooman* v. *Turner,* 69 N. Y. 280, "There must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two—the promisee and the party to be benefited—and some ob-

ligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise." See also *Little Rock Ry. & Elec. Co.* v. *McDowell,* 101 Ark. 223-26; *Dickinson* v. *McCoppin,* 121 Ark. 414-18; *Ga. State Sav. Assn.* v. *Dearing,* 128 Ark. 149-54; *Schmidt* v. *Griffith,* 144 Ark. 8.

3. This brings us to the question of the amounts of damages which the appellees were entitled to recover. The written instruments signed by the respective landowners and those representing Road District No. 4, in which they agreed to release the United States Government and the chamber of commerce in consideration of the amounts set forth in their respective statements, are binding upon them as against the United States, and the appellant, who, under the contract of sale, as we have seen, assumed the liabilities of the United States Government for the damages that the landowners sustained under their respective leases. The United States, the party making the sale, and the appellant, the party purchasing, had the right to rely upon these statements as fixing the amounts of "all damages whatsoever" resulting to the appellees by reason of the occupancy of their lands as an aviation field by the United States Government under the terms of the lease contract. The appellees are estopped by their conduct, in executing these agreements and permitting them to be read at the sale before the bidding commenced, from afterward asserting that they sustained greater damages than the sums set forth in these agreements. As the undisputed testimony shows, these agreements were especially executed for the purpose of declaring an amount which would fix the limit of damages beyond which the United States and the purchaser at the sale would not be liable. The county judge and the commissioners were the duly authorized agents representing the road district and had the power to fix the amount of the damages that the district had sustained at the hands of the United States Government in its appropriation of the road of the district. It was agreed that, if the appellant were liable,

the testimony would show that the district had sustained damages in the sum of $6,000. But the appellant contended that, if liable, the district should not be allowed to recover in a sum exceeding $2,000, the amount set forth in the written statement of the road district signed by the county judge and the road commissioners and read on the day of sale. The appellant is correct in this contention. The district is estopped by the conduct of its duly authorized agents from claiming a greater amount than was set up in the written statement as the amount of the damages to the district. The court therefore erred in its instruction telling the jury that the district was entitled to recover in the sum of $6,000.

4. It follows from our construction of the contract of sale between the appellant and the United States, that the appellant was liable to the appellees, except the chamber of commerce, for all damages caused by the United States in its occupancy of their lands. The court therefore ruled correctly in instructing the jury to return a verdict in favor of the chamber of commerce, except as to the rent due Fletcher-Goodrum for the year 1920. (The sum of $720 rent was tendered them by the chamber of commerce and refused). The instructions of the court were correct except in the particulars indicated.

The judgment of the court in favor of Fletcher-Goodrum against appellant for rents will be reversed, and judgment will be entered here in their favor against the chamber of commerce for the sum of $720, with interest from date. The judgment in favor of the road district will be modified by reducing the same to the sum of $2,000, with interest. In all other respects the judgment is correct, and, after being modified as above indicated, it is affirmed.

McCULLOCH, C. J., (dissenting). The opinion of the majority contains a recital of the clauses in the lease-contract between the United States Government and the Lonoke Chamber of Commerce giving the lessee authority

to destroy buildings and crops which would interfere with the use of the premises for aeronautical purposes, and to commit waste and to injure the premises for such purposes; but in the discussion of the facts and the principles of law applicable thereto, which control the decision of the case, those features of the contract are completely ignored.

The clauses to which I refer read as follows: "That said lessor (chamber of commerce) agrees that the lessee (United States), without expense, may demolish or destroy any and all buildings, and any crops now growing on said land, in so far as they interfere with the use of the site for aeronautical purposes. That it (United States) will commit no waste and will not suffer the same to be committed and will not misuse or injure the said premises, except in so far as is consistent with the use of this tract for aeronautical purposes."

The original lessors, the landowners, entered into an additional contract with the United States Government ratifying the lease made with the chamber of commerce.

It is undisputed, and the record contains an express concession, that all the damages done and changes made by the United States Government were necessary for the use of the premises for aeronautical purposes. This being true, there is no liability, under the contract, on the part of the Government to the landowners.

Learned counsel for one of the appellants argue that the above-quoted clause of the contract gives permission to demolish the buildings and crops, but that it does not mean that it could be done without compensation to the landowners. In other words, they argue that the words "without expense" only mean that it should be without expense to the government's lessor, the Lonoke Chamber of Commerce. This is not, in my opinion, a proper interpretation of the contract.

Under the language used, permission was expressly granted to the government to demolish the buildings and

crops so far as necessary for the use of the premises for aeronautical purposes, and, unless the contract itself provided for compensation, there is no liability imposed on the government for the damage done.

Where a contract authorizes a thing to be done, it is necessarily implied that it will be permitted without liability for compensation, unless provided for in the contract.

It would seem from the way in which the words "without expense" are used that it was meant that the government should be without expense or liability; but, even if it does not mean that, the use of that term would have no other bearing on the question of liability of the government unless it can be construed to mean that the government shall pay the damages done by the destruction. I can scarcely conceive that the words "without expense" can be construed to mean that the government shall pay damages or become liable for damages incurred in that way.

It seems to me, therefore, that it necessarily results from a fair interpretation of this clause of the contract that there is no liability on the part of the government, and, that being true, there can be none on the part of appellant under its contract with the government. Conceding that the contract between appellant and the government is all that appellees claim it to be with respect to the assumption of the obligation of the government, there is no liability for the simple reason that the government itself is not responsible, and there is no liability, therefore, to be assumed by appellant.

The trial court gave instructions permitting recovery under the alleged oral agreement at the auction sale to assume the obligation of the claimants, and the verdict of the jury was based upon a finding upon that issue. There was a conflict in the testimony, but there was enough testimony to sustain the contention of appellees with respect to what occurred at the sale. This court has, however, affirmed the judgment of recovery in favor of

appellees on the theory that the undisputed evidence, that is to say, the contract which was entered into later between appelllant and the government, established liability for the claims.

I think the rights of the parties must be determined by the terms of the written contract entered into between the government and appellant subsequent to the sale, for the claims asserted by appellees, so far as concerns liability of appellant, derive their existence from the contract between the principal contractors—the government and appellant.

Until a binding contract was entered into between the parties, no liability could arise in favor of appellees. The terms of the contract as finally reduced to writing after the sale must therefore control in determining the liability of appellant. The incidents of the sale itself can not be considered for the purpose of construing the contract, for they were only antecedent transactions, which became merged into the contract itself when reduced to writing and signed by the parties as evidence of their several undertakings.

I agree with counsel for appellant that the doctrine of liability of one person upon a contract made for his benefit by another cannot be extended to contracts for indemnity. None of our cases go to that extent, and I do not believe that any cases can be found where the doctrine is thus extended. Any other rule would be contrary to the reasoning upon which such liability is based, which is that a promise made for another's benefit creates a right of action in his favor. Now, a contract merely for indemnity is not made for the benefit of any one except the party to the contract who is to be indemnified thereby, and no rights accrue thereunder to a person against whose claim indemnity is given under the contract.

But it seems to me that this contract, when considered as a whole, is not one merely of indemnity, but that it amounts to a contract on the part of the appellant

to assume the obligation of the government to the landowners—the original lessors. It is true that in the contract the word "indemnity" is used, but the contract contains an express stipulation that appellant should not only "save and hold harmless the party of the first part from all claims of the owners of any of said lands," etc., but it goes further and states that the performance of such undertaking should be evidenced "by said party of the second part procuring for and delivering to the said party of the first part either valid and complete releases from the owner of said lands of all the claims of the latter as aforesaid, or satisfactions in full of all judgments." And it is also declared in the contract that a cause of action in favor of the landowners is created against appellant under its contract of indemnity.

Of course, the parties had no right to declare a right of action where none could exist under the law, but the last-mentioned feature of the contract demonstrates an intention that appellant should assume and pay the obligation of the government to the landowners.

Taking the contract as a whole, while it uses language which makes it a contract of indemnity, it is more than that, for it, in effect, constitutes an obligation to assume and discharge the liability to the landowners.

My view is that there is no liability in this case to the road district for any sum. The district was not a landowner nor a lessor, and there was no obligation on the part of appellant in its contract with the government to assume any other obligation except that to the landowners.

TURNER v. STATE.

Opinion delivered April 3, 1922.

1. GAMING—SUFFICIENCY OF EVIDENCE.—Evidence held to sustain a conviction for running a gambling house.
2. CRIMINAL LAW—OPINION EVIDENCE.—In a prosecution for running a gambling house, statements of witnesses that they under-

stood that it was accused's place and that he seemed to be in charge was not opinion evidence but conclusions drawn from appearances, and was admissible.

3. WITNESSES—CROSS-EXAMINATION OF ACCUSED.—Where the defendant in a criminal case takes the stand, he is subject to cross-examination as any other witness, and to test his credibility as a witness it is proper to ask him on cross-examination whether or not he had been convicted and sent to the penitentiary.

4. GAMING—SUFFICIENCY OF INDICTMENT.—An indictment for running a gambling house which alleges that defendant did "run, maintain and operate" and suffer and permit gaming tables to be maintained and gambling to be carried on and exhibited in a certain house or building then and there owned, used and controlled by him, though not in the exact words of the statute, is sufficient when questioned for the first time on appeal.

5. GAMING—REPEAL OF STATUTES.—Crawford & Moses' Dig., §§ 2630, 2631, and 2635 are not repealed by § 2632, *Id.*

6. GAMING—OWNERSHIP OF GAMBLING HOUSE.—The offense of "keeping, conducting and operating a gambling house or being interested therein, under Crawford & Moses' Dig., § 2632, is complete, whether the accused owns the house or not, if he keeps, conducts or operates it as a gambling house.

7. GAMING—PERMITTING GAMBLING.—Under Crawford & Moses' Dig., § 2632, one would be guilty of running a gambling house if he permitted gaming tables to be exhibited and gambling to be carried on in a house controlled by him, whether he engaged in gambling or maintained and exhibited such tables and other gambling devices or not.

Appeal from Union Circuit Court; *Charles W. Smith,* Judge; affirmed.

Mahoney & Yocum and *Powell & Smead,* for appellant.

There is no direct testimony to the effect that that part of the house where the gambling was done was owned, used or controlled by the defendant.

Evidence of conviction for selling whiskey was improperly admitted.

The indictment does not charge the defendant with running a gambling house.

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

The verdict of the jury was amply supported by the evidence. *Cain* v. *State,* 149 Ark. 616.

The testimony of B. A. Hancock was not hearsay, and was properly admitted. When proof of a statement is introduced for the purpose of establishing the fact that a party relied and acted thereon, it is not objectionable on the ground that it is hearsay. 10 R. C. L. sec. 133, p. 959; 83 Ga. 703; 112 Pac. 617.

It was not error for the court to permit witness Turner to testify as to the acts and conduct of defendant at the time the raids were made. 52 Ark. 180; 117 Mass. 122; 41 Iowa 219; 1 Thompson on Trials, 379; 88 Ark. 62.

There was no error in permitting the State to prove by the defendant, on cross examination, that he had been convicted of a felony. 114 Ark. 239; 53 Ark. 387; 72 Ark. 284; 70 Ark. 272; 91 Ark. 555; *Powell* v. *State,* 149 Ark. 311.

The indictment herein sufficiently charges the offense of keeping, conducting or operating a gambling house or place where gambling is carried on, by setting up, keeping and exhibiting and being interested in gambling devices, etc. Joyce on Indictments, § 413; 20 Ark. 67; Snad. Ency. of Pro. vol. 12, p. 522.

WOOD, J. The appellant appealed from a judgment of conviction on an indictment which, omitting formal parts, reads as follows:

"The grand jury of Union County, in the name and by the authority of the State of Arkansas, on oath accuse the defendant, C. O. Turner, of the crime of running a gambling house, committed as follows, to-wit: The said defendant, on the 7th day of November, 1921, in Union County, Arkansas, did unlawfully and feloniously run, maintain and operate and suffer and permitted gaming tables to be maintained and gambling to be carried on and exhibited in a certain house or building then and

there owned, used and controlled by him, the said C. O. Turner, said building then and there being situated on a lot on South Washington Street in the city of El Dorado, and commonly known as the Willis Jones place, against the peace and dignity of the State of Arkansas."

At the trial the sheriff of the county testified that when the building known as the Willis Jones place was raided by him for gambling and parties were arrested for that offense, the appellant generally put up bonds for them, and when they were short of money appellant would put up additional amounts necessary "to get up for the men who were gambling in that place." This occurred in Union County, Arkansas, since the first of the year 1921. The appellant had rooms in the house, and he rented rooms to others. The gambling was carried on in the shed back of the house. There was a dwelling house, a barn and stable and a little shed. The shed was used for gaming. The back yard was surrounded by a high board fence. In going into the Willis Jones residence from the street there is a continuous floor space all the way back where there is a poolroom and gaming going on all the time. The witness, with others, made a number of raids on the place. The parties who were arrested for gambling in that place when the raids were made never put up their money for their fines. They didn't want to go to jail, and sometimes they would request the appellant to put up the money and stand good for them. When Willis Jones left the place, the appellant moved into the property vacated by Jones, and then the gambling started. In the various raids made by witness on the place he found a great amount of paraphernalia such as is used in gambling houses.

There was other testimony corroborating the testimony of the above witness to the effect that the premises known as the Willis Jones place, while under the control of appellant, was being maintained as a gambling house. One witness testified that he went there on one occasion after complaint was made to him that it was being run as a gambling house, and found two hundred

men in there. Some man invited the witness to come in, and witness replied that he did not have any money. Whereupon the party said that witness' check would be good. Witness handed his check to a certain party, who took it up to appellant in the front part of the house and brought back the money. A few days later witness went to the bank and got the check, and it was indorsed C. Turner. Witness did not know whether it was C. O. Turner, the appellant's signature, or not. The place where the gaming was going on was a shed 100 feet or more from the house. He entered the house from the street—went into a hallway a little north of the room where he saw appellant standing.

Another witness testified that he went down to the Willis Jones place and saw gambling going on. He didn't know who owned the place—saw appellant there, working there—saw him in the office. At the time gambling was going on in the house and in the livery stable. Witness never saw appellant exercising any authority. He saw him in the office in the front, and they said it was his place.

Another witness stated that he was present at the Willis Jones place on a certain occasion when some deputy sheriff raided same; as they started to the back, some one ran up and pushed a little signal button that runs to the gambling room and they began to pour out. Witness didn't remember seeing the appellant. Witness had been deputized as constable and was asked by the prosecuting attorney to go down there. When witness arrived at the place there was no gambling going on. Witness walked on back and found whiskey and chock beer in a suitcase. Appellant was in there and assumed charge of the place. The appellant objected to the witness stating that appellant assumed charge of the place. Appellant told witness on that occasion that he did not allow whiskey in the building and did not know how it got there. In the trial about the whiskey, appellant admitted that he had charge of the place, but was turning it back to Willis Jones, as he didn't want to get Jones

into trouble. When witness went there and found the whiskey, appellant said he was in control, and didn't know how the whiskey got there; that some one had slipped it in and left it. Witness did not find any gambling devices there. The appellant stated that all the gaming devices had been moved out. Appellant made the statement that he was in charge of the place. He assumed charge and directed witness to the different places —seemed to have charge of the whole building. It was shown that the appellant was renting the building from Willis Jones.

The appellant testified in his own behalf that he rented some rooms from Willis Jones on a lot on South Washington Street known as the Willis Jones place. He had four rooms in the building in the front yard of that house. He had nothing to do with any other part of the building. He didn't participate in the games in the place known as the gambling house—had no interest in it. He stated that he did not run any of the games and did not gamble. After the raids were made he made bonds three times for parties who called on him—that is, put up the money. The people who were in the games for whom he made bonds were playing poker. There was no gambling carried on in the rooms rented by appellant. Appellant rented out these rooms.

On cross-examination, over the objection of appellant, the court permitted the attorney for the State to ask the witness if he had not been convicted of a felony and sent to the penitentiary, to which question witness replied that he was convicted in 1909 for selling whiskey and sent to the Federal prison at Atlanta, Georgia, for eighteen months.

1. The appellant contends that the testimony was not sufficient to sustain the verdict. The testimony speaks for itself. It was sufficient to sustain the verdict. It tended to prove the allegation of the indictment charging the appellant with running, maintaining and operating a gambling house.

2. The appellant contends that there was no direct evidence to show that he was running a gambling house and it was therefore error for the court to allow witnesses to say that they understood it was appellant's place and that he seemed to be in charge. There was no error in the ruling of the court. The above statements were not strictly opinion evidence. The witnesses were rather stating a conclusion of fact drawn from appearances which they detailed. As was said by Chief Justice COCKRILL of similar testimony in the case of *Fort* v. *State,* 52 Ark. 180-87, "This, however, was only a conclusion of fact drawn from appearances. It was with reference to an ordinary transaction which any man of common understanding was capable of comprehending, but which could not be reproduced or described to the jury precisely as it appeared to the witness; and while it may not be the right of a party to demand an expression of opinion of a witness under such circumstances, it is not reversible error to permit it." See other cases there cited. *Prewitt* v. *State,* 150 Ark. 279.

3. The court did not err in permitting the prosecuting attorney to ask the appellant on cross-examination if he had not been convicted of a felony and sent to the penitentiary. When appellant took the witness stand, he was subject to the same rules of cross-examination as any other witness, and to test his credibility as a witness it was proper to ask him on cross-examination whether or not he had been convicted and sent to the penitentiary. *Hollenberg* v. *State,* 53 Ark. 387; *Vance* v. *State,* 70 Ark. 272; *Ware* v. *State,* 91 Ark. 555; *Hunt* v. *State,* 114 Ark. 239; *Powell* v. *State,* 149 Ark. 311.

4. It is next contended that the indictment does not charge the appellant with running a gambling house. Section 2632, Crawford & Moses' Digest reads as follows: "Every person who shall keep, conduct or operate, or who shall be interested, directly or indirectly, in keeping, conducting or operating any gambling house or place, or place where gambling is carried on, or who shall set up, keep or exhibit, or cause to be set up, kept or

exhibited, or assist in setting up, keeping or exhibiting any gambling device, or who shall be interested, directly or indirectly, in running any gambling house, or in setting up and exhibiting any gambling device, or devices, either by furnishing money or other articles for the purpose of carrying on any gambling house, shall be deemed guilty of a felony, and, on conviction thereof, shall be confined in the State penitentiary for not less than one year nor more than three years."

The charging part of the indictment set out above, while not phrased in the precise terms of the statute, was nevertheless sufficient to charge the offense under the statute of "keeping, conducting or operating a gambling house, or place where gambling is carried on." To "run, maintain and operate" and suffer and permit gaming tables to be exhibited and gambling to be carried on in a house or building by a person who owns or controls such house or building for gambling purposes, and who knowingly permits it to be used for the purpose of exhibiting gaming tables and for gambling to be carried on, is but to "keep, conduct or operate a gambling house" within the purview of the above statute. The appellant is accused in the indictment of the crime of "running a gambling house." While this designation of the offense is not controlling, yet, taken in connection with the facts set forth in the charging clause, it advises the appellant that he is charged with the offense of "running a gambling house" by permitting gaming tables to be exhibited and gambling to be carried on in a certain house or building owned and controlled by him for gambling purposes. The appellant did not demur, or challenge the sufficiency of the indictment by motion in arrest of judgment. The indictment as a whole does not omit any essential allegation of fact necessary to constitute the crime designated therein. Therefore, although clumsily drawn, the indictment cannot be questioned here for the first time. *McIntire* v. *State,* 151 Ark. 458. On the sufficiency of the indictment, see also *Riley* v. *State*. 120 Ark. 450, and cases there cited.

This statute is leveled at the specific offense of "keeping, conducting or operating a house or place" for the purpose of allowing gambling to be carried on therein, or any gambling device or devices to be set up and exhibited therein. The gravamen of the offense is the maintaining of a house or place where those who desire to engage in gambling or to exhibit any gambling device or devices, may resort and find shelter, so to speak, while indulging in their gambling practices. The gist of the offense is the keeping of the house or place for the purposes named therein.

There is no conflict between this section of the statute and sections 2630 and 2631, Crawford & Moses' Digest, as the Attorney General suggests, nor between this section and section 2635, as contended by counsel for the appellant. Sections 2630-31 and 35, *supra*, constitute the offenses named in those respective sections misdemeanors; whereas, the offense under section 2632 is a felony. The offenses designated in the other sections do not have reference to the keeping, conducting or operating a house or place set apart and devoted to gambling purposes, whereas sec. 2632 has reference to just such house or place. Sections 2630-31 and 35, *supra*, are provisions of the Revised Statutes. Section 2632 is the first section of act 152, page 613, Acts of 1913. There is no repealing clause to the act of 1913, and unless there is an irreconcilable conflict between sec. 2632 and the other sections mentioned, the latter are not repealed by the former. We find no such conflict.

5. The court instructed the jury at the request of the State as follows: "If the jury believes from the evidence, beyond a reasonable doubt, that the defendant is guilty of knowingly suffering and permitting a gaming table to be maintained and gambling to be carried on and exhibited in a certain house used and controlled by said defendant, as set out in the indictment, then it will be your duty to find him guilty and assess his punishment at some period in the penitentiary not less than one year nor more than three years."

The appellant objected to the above instruction on the ground that it omits the word "owned" used in the indictment. The word "owned" was not an essential description of the offense. The offense consists in "keeping, conducting or operating" a gambling house, or being interested therein, and is complete, whether the accused owned the house or not, if he keeps, conducts and operates it as a gambling house. The word "owned" as employed in the indictment obviously was not intended to designate legal title to the property, but only to indicate that the appellant had control over the house or building—that is, that he was keeping, conducting and operating the same as a gambling house. It was not essential to the validity of the indictment that the pleader use the precise terms of the statute. It is sufficient, although different words are employed, if they have the same import as those used in the statute to define the offense. *State* v. *Scroggins,* 85 Ark. 43; *Blevins* v. *State,* 85 Ark. 195; *Parker* v. *State,* 98 Ark. 575.

The appellant complains because the court refused to grant his prayer for instruction as follows: "You are instructed that it is not sufficient, under this indictment, to find that defendant suffered and permitted gambling tables to be maintained, and gambling to be carried on and exhibited in the house therein referred to, but you must also, before you will be warranted in finding the defendant guilty, find from the evidence beyond a reasonable doubt that the defendant himself ran, maintained and operated said gaming tables."

There was no error in refusing this prayer. As we have shown, under sec. 2632, *supra,* the section under which appellant was indicted, the appellant would be guilty if he suffered and permitted gaming tables to be exhibited and gambling to be carried on in a house which he controlled and kept and conducted for gambling purposes, whether he himself engaged in gambling or maintained and exhibited gaming tables and other gambling devices or not. He would also be guilty if he kept and conducted a house for gambling purposes and he

himself engaged in gambling or operated and exhibited gaming devices therein. As we have seen, the indictment charges the offense of keeping a gambling house set forth in sec. 2632, *supra*. The jury returned a verdict of guilty of the crime charged. We are not, therefore, called upon to determine whether or not lesser crimes—misdemeanors—of the same generic class are embraced in the indictment.

6. The undisputed evidence proved that the house or building which it is alleged that the appellant kept as a gambling house was situated on Washington Street.

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

MITCHELL v. DIRECTORS OF SCHOOL DISTRICT No. 13.

Opinion delivered April 3, 1922.

1. SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF ACTS CREATING COUNTY BOARDS.—Act March 11, 1919 (Acts 1919, No. 234) creating county boards of education and conferring upon them power to form new school districts or to alter the boundary lines of existing ones, is valid and not in conflict with Const. art. 7, § 28, providing that county courts shall have exclusive original jurisdiction over local concerns of their respective counties.
2. SCHOOLS AND SCHOOL DISTRICTS—NOTICE OF PROCEEDINGS TO CHANGE BOUNDARIES.—Acts 1919, No. 234, creating county boards of education and conferring on them power to form new districts or alter the boundary lines of existing ones, merely changed the tribunal which was authorized to act, but not the method of procedure, and did not repeal Crawford & Moses' Dig., § 8821, requiring notice of the change before the petition is presented to the county board, and such notice in a proceeding before the board is jurisdictional.
3. SCHOOLS AND SCHOOL DISTRICTS—REVIEW OF PROCEEDINGS BEFORE COUNTY BOARD.—The acts of a county board of education in respect to changing boundary lines of school districts are *quasi* judicial, and certiorari lies to review such proceedings.

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

STATEMENT OF FACTS.

This proceeding was instituted in the circuit court by certiorari by appellants against appellees to review the action of the county board of education of Jefferson County, Ark., in taking from common school district No. 6 four sections of land and adding the same to common school district No. 15.

On the 21st day of May, 1921, the directors of school district No. 15 presented a petition to the county board of education of Jefferson County, Ark., asking that the boundary lines between school district No. 6 and school district No. 15 be changed so as to take four sections of land from school district No. 6 and add the same to school district No. 15. The petition was granted by said board.

The directors of school district No. 6 allege that said petition did not contain a majority of the electors of either district No. 6 or district No. 15, or of both districts combined. They also allege that proper notice was not given as required by law prior to the filing of said petition with the board of education of Jefferson County, Arkansas.

The prayer of the petition is that the order of said board changing the boundaries between said districts as aforesaid be set aside and held for naught.

The circuit court sustained a demurrer to the petition, and the plaintiffs, who are appellants here, electing to stand upon their demurrer, their complaint was dismissed and judgment was rendered in favor of the defendants, who are appellees in this court. To reverse that judgment appellants have duly prosecuted this appeal.

Brockman & Lucas, for appellant.

Act 234 of the Acts of 1919 merely transferred certain powers of the county judge to the county board of education, but the manner of procedure to effectuate this purpose was not changed. Therefore notice, as provided in sec. 8821, C. & M. Digest, should have been given.

105 Ark. 7; 116 Ark. 291. It is a prerequisite to the filing of the petition and the exercise of jurisdiction by the board.

The petition is jurisdictional. 104 Ark. 145; 119 Ark. 149; 119 Ark. 492.

No appeal was authorized by the act, and the only remedy is by certiorari. Certiorari will lie where the inferior tribunal has exceeded its jurisdiction; or where it has proceeded illegally and no appeal will lie, but that the right has been unavoidably lost. 52 Ark. 213; 131 Ark. 211; C. & M. Dig., §§ 2237-9. The county board acts in a quasi-judicial manner, and its actions is subject to review on certiorari. 109 Ark. 100; 11 C. J., § 27, p. 102; 126 Ark. 125.

Caldwell, Triplett & Ross, for appellee.

The Legislature in passing act 234 took away from the county court and vested in the county board of education the authority to change the boundaries of school districts, and the act repealed all others in conflict therewith, which necessarily repealed sec. 8823, C. & M. Digest. The Legislature has complete control in such matters (111 Ark. 379; 119 Ark. 592), and it can delegate its authority to a board created for the purpose. 96 Ark. 410; 106 Ark. 151; 109 Ark. 433. No petition for changing the boundaries of districts was provided for in the above act.

Certiorari will not lie to review the action of the board. 106 Ark. 151; 96 Ark. 410.

HART, J. (after stating facts). The Legislature of 1919, by act 234, approved March 11, 1919, creates county boards of education, and section four of the act gives to said boards the direction and supervision of the public schools of their respective counties, and also provides that said board, among other powers granted, shall have the power to change the boundary lines between school districts. Section 4 of said act is § 8876 of Crawford & Moses' Digest.

Prior to the passage of the act of 1919 conferring jurisdiction upon the county board of education to change the boundary line between school districts, that power was granted to the county court. Section 7544 of Kirby's Digest. Section 8823 of Crawford & Moses' Digest simply substitutes the county board of education for the county court, in conformity with the transfer of the jurisdiction from the county court to the board of education in forming new school districts and changing the boundaries of the old ones.

It is suggested that the Legislature was without power to make this change. This proposition has already been decided adversely to that contention by this court. This court has expressly held that the Legislature has the power to establish new school districts and to change the boundaries of those established for any reason that may be satisfactory to it. The court expressly said that whatever power the Legislature has lawfully conferred upon county courts in these respects, it may take away and confer upon other agencies or tribunals. *School District of Hartford* v. *W. Hartford Sp. Dist.* 102 Ark. 261; *Common School District No. 13* v. *Oak Grove Special School District,* 102 Ark. 411, and *Norton* v. *Lakeside Special School District,* 97 Ark. 71.

It is true that in none of these cases did the court discuss in its opinion the effect of article 7, § 28, of the Constitution of 1874, providing, among other things, that county courts shall have exclusive original jurisdiction over the internal improvements and local concerns of their respective counties. The effect of all our previous decisions, however, bearing on the subject, show that the court did not consider the jurisdiction to form school districts or to change the boundaries was conferred upon county courts under the provisions of the Constitution referred to, but that it has always been considered a purely statutory power.

In each of the cases cited above the court expressly held that a school district is a creature of the Legislature

or some governmental agency named in the Legislature, and that the Legislature may create, alter, or abolish school districts at will. Under the statute single school districts may be formed by incorporated towns in the manner provided by the statute without the intervention of the county court. *Beavers* v. *State,* 60 Ark. 124. This could not be done if the section of the Constitution above referred to placed exclusive jurisdiction in the county court.

Therefore, we are of the opinion that the act of the Legislature of 1919 conferring upon county boards of education the power to form new school districts or to alter the boundary lines of existing ones is valid and constitutional.

It is the contention of counsel for appellants that the action of the county board in transferring the four sections of land from school district No. 6 to school district No. 15 is invalid because the notice required by § 8821 of Crawford & Moses' Digest was not given. That section provides, in substance, that notice of the proposed change shall be given in the form provided by the statute by posting the same thirty days before the convening of the court at which the petition shall be presented.

In *Lewis* v. *Young,* 116 Ark. 291, this court held that the giving notice of change as prescribed by the statute was a prerequisite to the exercise of jurisdiction in the premises by the county court. Other courts have held that similar statutory requirements are jurisdictional, and that a failure to comply with them invalidates the organization of the school district and all taxation resulting therefrom. *Perryman* v. *Bethune,* (Mo.) 1 S. W. 231; *Noble* v. *White,* (Ky.) 77 S. W. 678; *Gentle* v. *Board of School Inspectors,* (Mich.) 40 N. W. 928; *Fractional School Dist. No. 3, etc.* v. *Board of Inspectors, etc.* (Mich.) 30 N. W. 198; *State* v. *Supervisors of Town of Clifton,* (Wis.) 88 N. W. 1019.

But it is contended by counsel for appellee that § 8821 of Crawford & Moses' Digest is no longer in force.

They contend that the court took up the whole subject anew in the act of 1919 above referred to, and that this had the effect of repealing the section requiring notice of the change before the petition therefor was presented to the county court.

We do not agree with counsel for appellees in this contention. The act of 1919 only had the effect to transfer the power to make the change from the county court to the county board of education, and it in no wise affected the mode of procedure.

Section 8877 of Crawford & Moses' Digest provides that the county board of education shall meet at least four times each year and prescribes the time of holding the regular meetings of said board and that three members thereof shall constitute a quorum. The object of the notice required by the statute was to enable parties whose interests might be affected to be heard before any action is taken, and there would be just as much need for requiring the notice in a proceeding before the county board of education as in a proceeding before the county court. It is evident from reading the act of 1919 that its purpose was merely to change the tribunal which had power to act and not to change the method of procedure in the premises.

As we have already seen, the notice required by the statute is jurisdictional, and there is nothing in the act of 1919 which shows that the Legislature intended to dispense with this requirement.

Again, it is sought to uphold the judgment of the circuit court on the ground that, under the statute, the action of the county board of education is purely administrative, and that a writ of certiorari will not lie to review its proceedings.

As we have already seen, the statute merely changes the power to act in the premises from one tribunal to another. We have held in several cases that the county court exercised discretion with respect to the power conferred upon it in the change of boundaries of common school

districts. *Hale* v. *Brown,* 70 Ark. 471; *Stephens* v. *School District No. 85,* 104 Ark. 145; *Carpenter* v. *Leatherman,* 117 Ark. 531; *School Dist. No. 45* v. *School District No. 8,* 119 Ark. 149, and *Rural Special School District 17* v. *Special School District No. 56,* 123 Ark. 571. The same reason would apply for holding that the county board of education has discretion under the statute. As we have just seen, the statute only changes the jurisdiction to act from one tribunal to another, and we are of the opinion that the county board of education acts in a *quasi* judicial manner in the premises. No appeal from the order of the board of education is given by the statute. It follows that a writ of certiorari will lie to review the proceedings of the board. *Hall* v. *Bledsoe,* 126 Ark. 125.

As we have already seen, the petition of appellants show that the statutory requirement as to notice was not given, and the circuit court should have issued the writ of certiorari and granted the prayer of appellants' petition.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with directions to overrule the demurrer to appellants' petition and for further proceedings according to law.

BANK OF COMMERCE OF EARLE *v.* FAIRBANK.

Opinion delivered April 3, 1922.

1. MORTGAGES—ABSOLUTE DEED AS SECURITY.—The chancellor's finding that a deed absolute on its face was intended as a mortgage *held* sustained by the evidence.
2. INTEREST—ALLOWANCE OF COMPOUND INTEREST.—Where a loan was made in a foreign country in which it was customary to compound interest, it was not error to charge the borrower compound interest in ascertaining the indebtedness due to the lender.
3. ACCOUNT STATED—FAILURE TO MAKE OBJECTION.—An account rendered, after lapse of a reasonable time, without objection by the debtor, becomes an account stated.

4. TENANCY IN COMMON—LIABILITY FOR IMPROVEMENTS.—A tenant in common is not required to contribute to permanent improvements made by his cotenant without his knowledge or consent.
5. MORTGAGES—BAD FAITH OF TRUSTEE.—EVIDENCE.—Evidence held insufficient to prove that a trustee who held land for purpose of sale acted in bad faith in selling it for less than the market price.
6. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Findings of fact made by a chancellor will not be disturbed on appeal unless against the preponderance of the evidence.

Appeal from Crittenden Chancery Court; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to recover judgment on certain notes executed to appellant by William English, and to have a deed, absolute on its face, executed to Isaac Greenizen by the other appellees declared to be a deed of trust. and for an accounting between the parties.

Appellant states that it has a second mortgage on said lands to secure it in a large indebtedness owed it by English, and asks that an attachment be levied on said lands.

Appellees defended on the ground that the conveyance of the lands to Greenizen by the other appellees was an absolute conveyance, and that, if such conveyance be declared a deed of trust, the property embraced therein is not sufficient to pay the indebtedness mentioned therein.

It appears from the record that in 1907, J. H. Fairbank and William English of Petrolea, Ontario, Canada, purchased something like 4,300 acres of land in Crittenden and Cross Counties, Ark. Fairbank conducted a banking business in the town of Petrolea and furnished the money with which to purchase the lands. The title was taken in the name of English, but it was agreed between the parties that Fairbank should have a fourth interest and English a three-fourths interest in the lands. The lands were principally timber lands, and they operated a sawmill on them for about six years. English

came to Arkansas and had personal charge of the mill. Fairbank furnished the money with which they operated it. English put about three hundred acres of the lands in cultivation. Their lumber business was not profitable, and on July 31, 1913, English owed Fairbank $43,005.25. On that date English conveyed all of said lands to Fairbank, and on the same date Fairbank reconveyed to English an undivided three-fourths interest in said land, reserving a lien thereon to secure said debt of $43,005.25. After this time English operated on his own account and cleared and cultivated a part of the lands, using them for his own benefit. Fairbank, however, made English additional loans of money. Fairbank died testate on February 24, 1914, leaving surviving him a son, C. O. Fairbank, and a daughter, Mary Edna Rock, as his sole heirs at law and the devisees under his will. The children of J. H. Fairbank, deceased, became his executors and as such made further advances to English until his indebtedness to the Fairbank estate amounted to something like $140,000 on November 22, 1916. On this date, William English and his wife and C. O. Fairbank and Mary Edna Rock individually, and as executors of the estate of J. H. Fairbank, deceased, united in a conveyance of all said Arkansas lands to Isaac Greenizen, a solicitor and barrister of Petrolea, Ontario, and the representative of the Fairbank estate.

According to the testimony of Greenizen, this conveyance on the part of English was absolute, and Greenizen held the title as trustee for the Fairbank estate in order to facilitate future sales and conveyances of the lands.

According to the testimony of English, the instrument was intended as a deed of trust to secure the indebtedness that English owed the Fairbank estate. On November 23, 1916, Greenizen leased to English for the years 1917, 1918 and 1919 about 600 acres of said lands which had been cleared, at an annual rental of $6,000. English did not pay the rent for 1917, and in May, 1917, Green-

izen obtained judgment against him for $6,000, with interest from November 15, 1917.

Subsequent to the execution of the deed to Greenizen and after it was filed for record, English, on February 19, 1917, executed to appellant and another bank in Memphis, Tenn., a mortgage on said lands for $30,000, which is now due and unpaid. The Memphis bank duly transferred its mortgage and the debt it was given to secure to appellant. At the time of the conveyance to him by English and Charles O. Fairbank, and Mary Edna Rock, Greenizen was given the power to sell said lands after paying off the mortgage indebtedness of English to account to him for his share of the proceeds according to his interest in the lands. In May, 1917, and in April, 1918, when making title to certain of said lands to certain purchasers, Greenizen discovered other encumbrances which English had placed on the lands before the deed to Greenizen was executed, and paid off same. The amount of one of these incumbrances was $5,650.60, and the other amounted to $7,552.30. Greenizen made sales of all of said lands except two tracts, and had made executory contracts for the sale of these two tracts at the time this controversy arose. After paying the proceeds of English's three-fourths interest in the lands towards the satisfaction of his mortgage indebtedness to the Fairbank estate, English was still in debt to that estate in the sum of $20,582.42 on December 31, 1918.

Other facts will be stated in the opinion.

The chancellor made a special and general finding of fact in favor of Isaac Greenizen and C. O. Fairbank and Mary Edna Rock individually and as executors of the estate of J. H. Fairbank, deceased, and it was decreed that the complaint of appellant be dismissed as to it for want of equity. The appellant was given judgment against William English in the sum of $30,000.

To reverse that part of the decree which was against it, appellant has duly prosecuted an appeal to this court.

Ewing, King & King and *Hub Blair,* for appellants.

Hughes & Hughes, for appellees.

HART, J. (after stating the facts). We are of the opinion that the chancellor was right in holding that the conveyance of the Arkansas lands by William English and C. O. Fairbank and Mary Edna Rock to Isaac Greenizen, although absolute on its face, was intended as a deed of trust to secure the Fairbank estate in the amount owed it by English, and that the title was placed in Greenizen to enable him to sell the lands and to account to the parties for their respective interests after the mortgage indebtedness was taken out of the share of the lands owned by William English. This was the construction put upon the instrument by the parties themselves. Greenizen was allowed to take charge of the lands and to begin to sell the same, and to account to the parties for the proceeds according to their respective interests, and to apply the proceeds from the sale of the interest of English towards the satisfaction of his mortgage indebtedness to the Fairbank estate. There is no dispute between the parties as to their respective interests in the lands, or to the principal of the mortgage indebtedness of English to the Fairbank estate.

Counsel for appellant, however, contend that there is an error against English in a large amount on account of interest charges. In other words, it is claimed that the court erred in allowing interest in favor of the Fairbank estate against English calculated at the rate of 6% per annum on monthly or quarterly balances.

According to the testimony of English, J. H. Fairbank, in his life time, promised to adjust the interest account between them on an equitable basis.

A. M. McQueen, under power of attorney from the executor, was in full control of the estate of J. H. Fairbank, deceased, until May, 1916. He had also been in charge of the Fairbank estate from 1892 to the time of the death of J. H. Fairbank. According to his testimony, accounts were rendered by the bank to English at stated

intervals. These accounts showed that 6 per cent. per annum was charged English. This was the lowest and the customary bank rate. It was the general banking custom in Ontario to compound interest monthly on overdrafts, but, where notes were given to cover overdrafts, the custom was to compound the interest quarterly. English's bank pass book and the statement of his accounts was submitted to him periodically, perhaps monthly, and the accounts so submitted to English included the interest charges; and at no time while McQueen was bank manager did English in person, or through another, make any complaint about the interest charges.

Greenizen testified that English never made any complaint to him that the interest charged on his accounts was excessive, but, on the contrary, admitted the correctness of his accounts on more than one occasion.

C. O. Fairbanks testified that he made no agreement with English relative to any matter in the case. It was shown that these bank statements were regularly submitted to English's agent in Canada while English was in Arkansas.

It also appears from the record that English made periodical trips back to Ontario. It does not appear that McQueen has any interest whatever in this case. If his statement about the submission of the accounts to English's agent in Ontario is not correct, that fact could have been easily established by such agent. It was the duty of English to have examined his accounts when they were delivered to him by the bank and to have notified the bank in a reasonable time that the charges were improper, if he deemed them to be so. It will be remembered that the bank belonged to J. H. Fairbank, and the account it rendered to the agent of English of the state of the accounts between English and J. H. Fairbank became a stated account when English failed to object to the same within a reasonable time after they were delivered to him. *Citizens' B. & T. Co.* v. *Hinkle,* 126 Ark. 266.

Appellant could have no greater rights in the premises than English. Therefore, the chancery court did not err in holding against appellant on the item of interest charges.

In connection with the interest charge, the contention is made that it was unlawful to charge compound interest. Isaac Greenizen was a practicing barrister and solicitor of Petrolea, Ontario, and as such has been engaged in the practice of the law there for many years. He had represented J. H. Fairbank as attorney for many years prior to his death in 1914, and since that time has represented the estate. Greenizen stated further that he had been familiar with banking transactions in that country for over thirty years, and knew that it was the custom of banks in Ontario to charge interest at the rate of 6 per cent. on loans of money and to compound the interest quarterly, and that such compounding of interest was legal in Ontario.

As we have already seen, McQueen, who had charge of the bank until in 1916, testified to the same fact. Hence the transaction was not an illegal one, and, as above stated, the accounts became accounts stated after the lapse of a reasonable time after their delivery to English.

It may also be stated that counsel for appellant claim that the court erred in not allowing English for the amounts expended by him in clearing some of the lands. We do not agree with counsel in this contention. It will be observed that Fairbank and English were tenants in common in the lands, and that English owned a three-fourths interest therein. The lands were principally timber lands, and it was expected that their chief profit would be derived from the sale of the timber. Fairbank furnished English with money with which to cut and remove the timber. English, after cutting the timber off of the lands and disposing of it, cleared and cultivated a part of them. The lands were situated in Arkansas, and English acted for his own benefit in clearing and cultivating them. Fairbank remained in Ontario, and

it does not appear that he knew anything about English clearing the lands and cultivating the same. English collected the rents and used them. Under these circumstances Fairbank would not be required to contribute to the permanent improvement of the lands made without his knowledge or consent. *Dunavant* v. *Fields*, 68 Ark. 534, and *Lemly* v. *Works*, 138 Ark. 426.

It is next contended that Greenizen committed a breach of trust in his disposition of the lands. It will be remembered that when the deed to Greenizen to the lands was executed by William English and C. O. Fairbank, and Mary Edna Rock, on November 22, 1916, it was contemplated that Greenizen should sell the lands and distribute the proceeds between the parties according to their respective interests, after satisfying the mortgage indebtedness of English out of his interest. English had a three-fourths interest in the lands, and the Fairbank estate a fourth interest in the lands. Greenizen had sold all of the lands except two tracts and had applied English's share towards the satisfaction of the mortgage indebtedness before the present controversy. It is not contended by counsel for appellant that Greenizen was guilty of any breach of trust with regard to these sales, but it is contended that Greenizen was guilty of a breach of trust with regard to the remaining tracts which he had made an executory contract to sell at the time the present controversy arose.

It is contended by counsel for appellant that Greenizen had contracted to sell these lands for $40 per acre and less, when in fact they were worth and he could have sold them for $60 to $65 per acre. Witnesses for appellant testified that the lands in question were worth $65 per acre and upwards and that Greenizen sold them for $40 per acre, and that he had sold one of the tracts to his own agent for something less than $40 per acre.

On the other hand, witnesses for appellees stated that Greenizen acted in perfect good faith in the matter and sold the lands for all that he could get for them. He employed local agents to sell the lands with direc-

tions to sell them for the best price obtainable. The local agents bargained to sell both of these tracts for the best price obtainable, but the sale was prevented on account of the present controversy. Subsequently one of the local agents told Greenizen that he would take the lands at the price he had sold them for, if Greenizen would deduct his commission from the purchase price. Greenizen agreed to do this. This act resulted in no loss to the estate. For, if the sale to the third party by the agent had been carried out, the local agent making the sale would have been entitled to his commission and the purchase price would have been reduced by that amount. The local agent and other witnesses for appellees testified that the lands were sold for the best price obtainable and that the price which they sold for was a fair one.

One of the witnesses for appellees testified that other lands had been sold in the same neighborhood for a somewhat less price. Three witnesses on each side testified with regard to the price for which the lands were sold. Those for appellant maintained that the lands were sold too low, and those for appellees being equally positive that the lands sold for all they could have been sold for, and for all they were worth.

Greenizen rendered a full account of all his acts as trustee, and there is nothing in the record which tends to reflect upon his conduct. At any rate, the chancellor found the issues with regard to his alleged breach of faith in the sale of the lands in his favor, and it cannot be said that his finding is against the weight of the evidence and on that account should be reversed.

It may be here noted that, under the settled and familiar rules of practice, the findings of fact made by a chancellor will not be disturbed on appeal unless they are against the preponderance of the evidence.

Complaint is made against the trustee with regard to other items of his account. But the chancellor found the issues in his favor, and we cannot say that his finding is against the preponderance of the evidence. We

do not deem it necessary to discuss these matters in detail, for the reason that, even if it should be said that the finding of the chancellor as to them is against the weight of the evidence, no error prejudicial to the rights of appellant would be committed. The reason is that the aggregate amount of these omitted items would not total by a good deal the amount of the balance of the mortgage indebtedness of English to the Fairbank estate. English has not appealed.

It follows that the decree will be affirmed.

WISCONSIN & ARKANSAS LUMBER COMPANY v. SCOTT.

Opinion delivered April 3, 1922.

1. NEGLIGENCE—PROXIMATE CAUSE.—To be actionable, negligence must be the proximate cause of the injury complained of; "proximate cause" being a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue.
2. MASTER AND SERVANT—PROXIMATE CAUSE OF INJURY—INSTRUCTION.—Where a workman, engaged in unclogging a conveyor trough which had become clogged by reason of its defective condition, fell and caught his clothing on a set screw of a revolving line shaft, and was killed, while it was proper to submit to the jury whether the master was negligent in failing to cover the set screw as the proximate cause of the injury, an instruction which permitted the jury to find negligence in allowing the conveyor chain to become clogged by reason of the defective condition of the trough was erroneous, as such negligence, if proved, could not have been the proximate cause of the injury.
3. MASTER AND SERVANT—QUESTIONS FOR JURY.—In an action for the death of an employee, caught on a set screw of a revolving line shaft, while obeying his superior's command to unchoke a conveyor chain, *held* that the question of contributory negligence and assumed risk were for the jury.

Appeal from Howard Circuit Court; *A. P. Steel*, special Judge; reversed.

STATEMENT OF FACTS.

This is an action by the administrator to recover damages for the death of his decedent, and damages were awarded by the jury under the instructions of the court.

The case is here for the second time. On the former appeal it was held that the trial court erred in telling the jury as a matter of law that his decedent assumed the risk. It was held further that the question of the negligence of the defendant and the question of contributory negligence on the part of the decedent and his assumption of risk under the surrounding circumstances should be left to the jury. *Scott* v. *Wisconsin & Arkansas Lumber Co.,* 148 Ark. 66.

On the first trial of the case the circuit court was of the opinion that the plaintiff, on account of his position and familiarity with the machinery of the defendant, assumed the risk, and the most part of the opinion of this court was directed to a discussion of that phase of the case and in setting forth the reasons why, under the peculiar circumstances of the case, it should not be said as a matter of law that Scott assumed the risk. After concluding a lengthy discussion of this branch of the case the court said:

"Therefore, if the appellee was negligent in having a projecting set-screw at the place where the same was located, and if the deceased had no knowledge of such defective condition and did not appreciate the danger thereof, and if the defect and danger were not so open and obvious that, in the exercise of ordinary care in the performance of his duties, he should have discovered same and have known and appreciated the danger, then he did not assume the risk if he was discharging his duty of unclogging the sprocket wheel and conveyor chain in the customary way acquiesced in by the appellee."

Continuing, the court discussed the feature of the case bearing upon the liability of the defendant result-

ing from Scott carrying out the orders of his superior in keeping the machine running, and his consequent injury while so employed.

It appears from the record that Roy Scott had been lath foreman for about two and a half years before he was killed. It was his duty to keep the conveyor chain going, but he had nothing to do with making repairs on it. On the ground floor there was a machine called a hog, that cut slabs into pieces from a half inch to four inches long. These particles were carried away by conveyor chains to the fuel house and supplied the boilers with fuel. The fuel was carried from the hog on a conveyor chain about twelve or fourteen feet long, and was then poured into a second conveyor trough, which carried it up an incline about 100 feet long to a height of about 15 or 18 feet from the floor. This conveyor chain ran over a sprocket wheel at its upper end, and was endless. The fuel passed over the sprocket wheel and was poured into another conveyor trough at right angles, which carried it to the fuel room next to the boilers. The bottom of the second or long conveyor trough was lined with tin or sheet iron and was worn in holes in places. Close to the top of it was the worst place. These defects in the lining caused particles of fuel to catch in the defective places and accumulate and eventually to clog the chain. Sometimes a long plank would fall down from the floor above and catch on the conveyor chain and be carried along it and then become entangled in the sprocket wheel, and thereby cause the chain to be lifted off of the sprocket wheel. This condition was discovered to exist after the accident in question. When in such condition the sprocket wheel would revolve but it would not catch the chain and carry it around. This condition would cause the chain to become choked or clogged. There was a plank walk-way to the left of the conveyor trough which was used for the purpose of going up there to unchoke the conveyor chain. It was customary to go up there on this plank run-way and unchoke the chain before the machinery stopped.

On the morning of the injury, Scott's superior told him that they were short of fuel and to shove along all the fuel possible. Scott told his superior about the defects in the conveyor trough and said that he did not know whether he could do as required until the defects were repaired. His superior said, "Watch it close today, we have to have fuel today, and keep it going and I will have it fixed tomorrow." Scott told him that he would do his best. Early in the afternoon Scott was informed that the conveyor trough had become choked with accumulated fuel, and he went up the walk-way to see about it. It is fairly inferable from the evidence that he went to the end of the walk-way, which was about two feet from the sprocket wheel, and found that a plank three or four feet long had in some way been carried up the conveyor chain and fastened itself into the sprocket wheel, pushing the conveyor chain off of it so that it did not revolve and thereby allowed particles of fuel to accumulate. While endeavoring to unchoke the conveyor chain, Scott had evidently slipped or fallen to one side, and his clothes became entangled in a set screw which was attached to the collar on a revolving line shaft near by. In any event, when his body was found, his clothes were attached to the set screw and had become wrapped around the revolving line shaft, thereby causing his death. The set screw was attached to a collar on the revolving line shaft to the left of and near to the sprocket wheel to which the conveyor chain was attached and around which it revolved. No one was present when Scott was killed, but it is fairly inferable that he slipped and fell while unchoking the sprocket wheel, and in falling his clothes became fastened to the set screw and wrapped around the revolving line shaft.

From the judgment rendered against it the defendant has duly prosecuted this appeal.

T. D. Wynne, W. P. Feazel and *W. R. Donham,* for appellant.

1. The appellant's request for peremptory instruction should have been given. The court's conclusion on

former appeal that the issues of alleged negligence of the appellee and the assumption of risk and contributory negligence on the part of the deceased should have been sent to the jury under appropriate instructions, is not the law of the case on this appeal, because the facts are different. 138 Ark. 267. If either of these questions ceases, under the present record, to be jury questions, then a verdict should have been directed by the defendant.

On the question of assumed risk, see 56 Ark. 216; 57 *Id.* 76; 58 *Id.* 125; 65 *Id.* 98; 68 *Id.* 316; 77 *Id.* 367; 81 *Id.* 343; 85 *Id.* 600; 87 *Id.* 44; 89 *Id.* 50; 90 *Id.* 387; 92 *Id.* 102; 93 *Id.* 140; 95 *Id.* 560; *Id.* 136; 98 *Id.* 202; 99 *Id.* 377; 100 *Id.* 462; *Id.* 156; 101 *Id.* 537; *Id.* 197; 104 *Id.* 489; 105 *Id.* 434; 107 *Id.* 528; *Id.* 341; 108 *Id.* 483; 113 *Id.* 359; 115 *Id.* 350; 116 *Id.* 56; 118 *Id.* 304; 119 *Id.* 477; 112 *Id.* 552; *Id.* 272; 133 *Id.* 336; 140 *Id.* 135; 141 *Id.* 438; 143 *Id.* 390; 147 *Id.* 95; 232 S. W. (Ark.) 8.

2. The court erred in submitting to the jury, in plaintiff's instruction No. 1, a double issue of negligence *i. e.*, negligence of the defendant and negligence of defendant's servants, whereas, the testimony justified the submission of only one issue of negligence. 148 Ark. 500.

3. When, as in this case, the servant is required to make his own place of work safe, the rule as to the duty of the master to exercise ordinary care to furnish a reasonably safe place to work is not applicable, and the court erred in submitting that question to the jury. Every danger about this place of work was open and obvious, and deceased contracted with reference thereto. It is the duty of the master to exercise ordinary care to discover and repair latent defects only.

The court's instruction on this subject in effect assumes that the defects and dangers were latent. This was erroneous. 14 Ark. 286; 93 *Id.* 29; 14 R. C. L. 738.

4. The defects in the lining of the conveyor trough did not cause or contribute to the injury. It was error therefore to base an instruction on such defects,—upon a

promise to repair such defects. 101 Ark. 537; 141 *Id.* 438. See also 77 Ark. 367; 136 *Id.* 602.

D. D. Glover and *Andrew I. Roland,* for appellees.

The law of the case was announced on the former appeal. There is no material difference in the facts developed in the last trial from those developed and in the record on former appeal, and the case was sent to the jury under proper instructions.

This court has said that the servant has a right to rely upon the superior knowledge of the master and to proceed upon the assurance that it is safe to do so, and that the defects will be repaired. 84 Ark. 78. For correct rule, as we view it, see 1 Shearman & Redfield on Negligence, § 215. See also 88 Ark. 34.

Even though a servant knows of a particular risk, if he makes complaint thereof to his foreman, as was done in this case, who promised to repair the defect, and the servant, relying on that promise, continues his work, it is a question for the jury to say whether he assumed the risk, unless the danger was so obvious and imminent that a person of ordinary prudence would not have continued in the work. 86 Ark. 508; 97 *Id.* 347; 102 *Id.* 646; 105 *Id.* 353.

Deceased at the time of his death was occupying the only position he could have occupied to obey the commands of his master; still, if he adopted a less safe of two ways to do the work, the court would not be justified in declaring as a matter of law that he was negligent or assumed the risk, in adopting the less safe way, unless it was so dangerous that a person of ordinary prudence would not have undertaken it. 111 Ark. 9. See also 123 Ark. 119; 90 *Id.* 226; 1 Labatt, Master & Servant, §§ 7-14; 91 Ark. 389; 87 *Id.* 321; 92 *Id.* 502; 88 *Id.* 549; *Id.* 29; 91 *Id.* 102; 92 *Id.* 554; 95 *Id.* 291.

Where the facts are such with respect to the negligence of the parties that reasonable minds might differ, the case should go to the jury. 79 Ark. 53; 86 *Id.* 244; 87 *Id.* 321.

The set screw could not be seen when the line shaft was running. It was a question for the jury whether deceased knew and appreciated the danger. 124 Ark. 58; 132 *Id.* 385; 134 *Id.* 136, 139; 77 *Id.* 458; 86 *Id.* 325.

There was no duty of inspection resting on the deceased, neither is it shown by uncontradicted evidence that he had actual knowledge of the set screw. 90 Ark. 564; 141 *Id.* 386.

HART, J. (after stating the facts). The effect of our opinion on the former appeal was to hold that the use of an uncovered set screw upon the collar on an elevated line shaft was not negligence, as a matter of law, under the conditions set out in the statement of facts, but that the question of negligence in this respect was for the jury. Although the use of set screws and projecting bolts upon line shafts is generally held not to be negligence as a matter of law, it does not follow that it would not be negligence to use them without being guarded or covered where, by their proximity to the floor and other places of work, workmen would be subjected to unusual danger. If the accident happened as claimed by counsel for the plaintiff—that is, if in trying to pull out a plank from the cog wheel, or from unclogging the conveyor chain while standing near the uncovered or unprotected set screw, Scott slipped or lost his balance, and while falling his clothing caught in the set screw and wound around the line shaft and thereby killed him, the case falls within that line of cases in which it has generally been held that, where an employee is injured by unguarded machinery with which he comes in contact by reason of some such cause as leaning over, slipping or losing his balance, he cannot be held to have assumed the risk as a matter of law. The defective condition of the conveyor trough and the consequent clogging of the conveyor chain is only important as accounting for Scott's fall. It may be stated in this connection that, notwithstanding Scott was a mill foreman, he was doing the work of another under the command of his su-

perior at the time he was killed, and his rights were practically the same as those of any other workman who possessed the same knowledge and skill in the premises as he did.

To constitute actionable negligence, there must be negligence and injury resulting as the proximate cause of it. Proximate cause has been defined as a cause from which a person of ordinary experience and sagacity could foresee that the result might probably ensue.

It is true that, according to the theory of the plaintiff and the evidence introduced to support it, Scott was injured by falling from the walk-way while engaged in unclogging the conveyor chain which had become clogged on account of the accumulation of particles of wood by reason of the defect in the lining of the conveyor trough, nevertheless it is conceded, or in any event it may be fairly assumed from the evidence, that the set screw caught his clothes and caused them to be wound around the revolving shaft, and thereby killed him. It does not follow that which caused Scott to fall was the proximate cause of his injury. The set screw would have caused the injury whether or not the defendant had been guilty of negligence with reference to the defective condition of the conveyor trough. This alleged defect was only a condition, and was not the proximate cause of the accident which resulted in Scott's death. The set screw would have produced the same injury if Scott had fallen because of the slippery condition of the walk-way or as the result of his own carelessness while going along the walk-way to see if the conveyor trough had become clogged. Hence it is apparent that if the set screw had been covered Scott might not have been killed, and that if it was left uncovered he would be injured if he fell against it while the line shaft was revolving. Hence the negligence of the defendant in failing to cover the set screw, if the jury should find that it was negligent in this respect, was the direct and proximate cause of the injury, and the clogging of the conveyor chain was only a condition, and as such was not the efficient cause of the injury.

Of course the opinion on the former appeal is the law of the case and must govern here. We have stated, however, the effect of that opinion as we understand it from the language used, without quoting at length from it. Therefore, we are of the opinion that the instructions of the court at the instance of the plaintiff are erroneous. The instruction of the court should have only submitted to the jury the negligence of the defendant in leaving an exposed set screw under the surrounding conditions, and should not have left to the jury the question of negligence of the defendant in allowing blocks or particles of wood to have accumulated on the conveyor chain and thereby clogging it by reason of the defective condition of the lining in the conveyor trough. If the alleged defect in this respect was not the direct and proximate cause of the injury, it necessarily follows that the court erred in submitting it to the jury as a question of negligence on account of which the plaintiff might recover.

In instruction No. 1 as well as other instructions given at the request of the plaintiff, the court submitted to the jury, in general terms, the negligence of the defendant on all the grounds alleged in his complaint. The allegations of negligence with regard to the defective condition of the lining of the conveyor trough was one of the allegations of negligence set out in the complaint. Then, too, in instruction No. 15 this allegation of negligence was expressly submitted to the jury, and the jury was told that, if such negligence contributed to the decedent's death, it should take this into consideration in arriving at its verdict.

On the question of negligence, as we have already seen, the trial court could only submit that which was the direct and proximate cause of the accident, and it was error to submit other alleged grounds as a basis for the jury to find for the plaintiff. The instruction should have limited the jury upon the subject of negligence to that which was the direct and proximate cause of the

injury, and, not having done so, the trial court committed prejudicial error, which calls for a reversal of the judgment.

It is insisted by counsel for the defendant that the undisputed evidence on the present appeal shows that Scott had helped to repair the collar in which the set screw in question was placed, and that he necessarily knew of its existence. Hence they claim that the case should not be remanded for a new trial, but that the cause of action should be dismissed. We do not agree with counsel in this contention. As we have already seen, the question of whether the use of the uncovered set screw, under the facts and circumstances in the case, constituted negligence on the part of the defendant was one for the jury, and this would not be changed by the fact that Scott knew that the set screw was there. That fact would be for the jury to consider on the question of the assumption of risks, which should be still left to the jury.

Therefore, we are of the opinion that the judgment must be reversed, and that the cause should be remanded for a new trial. It is so ordered.

CARL-LEE v. GRIFFITH.

Opinion delivered April 3, 1922.

1. EXECUTORS AND ADMINISTRATORS—AUTHENTICATING AFFIDAVIT—PLEADING.—A complaint against an executrix which fails to allege the making of an affidavit of the justness of the demand is not fatally defective; the statute merely requiring the production of the affidavit at the trial.
2. APPEAL AND ERROR—PRESUMPTION FROM ABSENCE OF BILL OF EXCEPTIONS.—In a controverted suit against an executrix for cancellation of a deed given by a deceased person, it will be conclusively presumed on appeal, in the absence of a bill of exceptions, that the court found that the required authenticating affidavit had been made.

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

E. M. Carl-Lee, for appellant.

There was no verification of the complaint. This is imperative. 66 Ark. 327; 65 Ark. 1; 48 Ark. 360; *Id.* 304. It is a jurisdictional requirement. 105 Ark. 97; 110 Ark. 225; 14 Ark. 234; 7 Ark. 78. It is a condition precedent to the right of action, and cannot be waived. 30 Ark. 578.

Harry M. Woods and *Brundidge & Neelly,* for appellee.

All claims not presented within one year after the grant of letters of administration are barred. C. & M. Digest, sec. 97.

Want of verification must be pleaded before judgment is entered. C. & M. Digest, sec. 1246; 71 Ark. 609; 88 Ark. 433.

SMITH, J. Ed S. Carl-Lee and wife executed to G. C. Griffith a warranty deed to a certain tract of land. This deed was later assailed and canceled, the suit for that purpose having been brought after the death of Carl-Lee, but notice of the pendency of the suit was given to his widow, who was his executrix. Later the present suit was brought by Griffith against the estate of Carl-Lee to recover the price paid for the land with the interest thereon and the cost of the litigation, and there was a trial and verdict and judgment for the amount sued for, and this appeal is from that judgment.

We have before us no bill of exceptions preserving the evidence of the proceedings at the trial from which this appeal comes; but the insistence is that error appears upon the face of the record proper, in this, that the complaint does not allege that an affidavit was made showing the justness of the demand.

In the case of *Davenport* v. *Davenport,* 110 Ark. 222, we said: "It has been frequently decided by this court that in suits against estates, either by ordinary action or before the probate court, it is necessary to produce at the trial an affidavit of the justice of the claim and of its nonpayment, made before the commencement of the action, or the claimant will be nonsuited. *Hayden* v.

Hayden, 105 Ark. 97; *Ryan* v. *Lenon,* 7 Ark. 78; *State Bank* v. *Walker,* 14 Ark. 234." We there also said: "The essential thing, the jurisdictional requirement, is the making of the affidavit, and a nonsuit must be suffered when it is not made within the proper time, and the statute prescribes its form. But it is held that a substantial compliance in the matter of the form of the affidavit is sufficient. *Hayden* v. *Hayden, supra; Eddy* v. *Lloyd,* 90 Ark. 340; *Wilkerson* v. *Eads,* 97 Ark. 296."

The statute construed in those cases is section 106 C. & M. Digest, which reads as follows: "If the affidavit required for authenticating claims against deceased persons be not produced in an action against an executor or administrator for debt against the deceased, the court shall, on motion, enter a judgment of nonsuit against the plaintiff; and the affidavit must appear to have been made prior to the commencement of the action."

The making of the affidavit is said to be the essential thing; but the statute does not make it a condition precedent to the institution of the suit. It is not provided that suits shall not be brought unless an affidavit be made and presented to the administrator or executor. Upon the contrary, the provision of the statute is that, if the affidavit is not produced in an action against an executor or administrator, the court shall, on motion, enter a judgment of nonsuit against the plaintiffs. The making of the affidavit must be proved. It is evidentiary of the validity of the demand sued on—made so by statute—but it is part of the evidence in the case. The affidavit must be produced at the trial, but, not being made a condition precedent to the right to sue, a complaint is not fatally defective which fails to allege the making of the affidavit.

In the case of *Wilkerson* v. *Eads,* 97 Ark. 296, it was said: "The affidavit is a prerequisite to the right of action, but not an exhibition to the administrator, though, if not exhibited and the suit is not controverted, the claimant cannot recover costs."

In the case of *Ross* v. *Hine,* 48 Ark. 304, it was said: "The appellee sued an executor without first making the affidavit authenticating his claim against the estate as required by statute. The executor moved to dismiss the action upon this ground. No affidavit was produced except the ordinary form of verification to the complaint, but neither this nor the allegations of the complaint conformed with any degree of substantiality to the statute authenticating claims against estates. Mansf. Dig., sec. 102. The statute is peremptory in its terms, directing a nonsuit if the authentication is not made, (*Ib.,* sec. 107), and this court has universally given effect to it. *Alter* v. *Kinsworthy,* 30 Ark. 756, and cases cited."

These cases, as well as others both earlier and later, recognize the affidavit as the basis of the suit. It must be produced at the trial if the suit is controverted, or if the existence of the affidavit is controverted, or a nonsuit will be ordered.

But, in the absence of a bill of exceptions in this case, it will be conclusively presumed that the court found the fact to be that the essential affidavit had been made.

Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. KENNEDY.

Opinion delivered April 3, 1922.

1. CARRIERS—RIGHT OF PASSENGER TO RELY ON BRAKEMAN'S STATEMENT.—A passenger, temporarily alighting from a railroad train at an intermediate station, was entitled to rely upon information as to prospective movements of the train given him by the brakeman based on the custom of such train.
2. CARRIERS—RELATION OF PASSENGER—TERMINATION.—A passenger, by leaving a railroad train temporarily for a purpose not connected with his trip, does not lose his character as such passenger.
3. CARRIERS—BOARDING TRAIN IN MOTION—CONTRIBUTORY NEGLIGENCE.—A passenger who has temporarily left his train at an

intermediate station is not guilty of contributory negligence as matter of law in attempting to board the train while it is moving slowly.

4. TRIAL—SEPARATE INSTRUCTIONS.—In a personal injury action, it is not error to instruct the jury separately as to the elements of damage and the effect of contributory negligence, provided the instructions, when read together, properly state the law, but the better practice is to include both in a single instruction.

5. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.—In an action by a passenger against a railroad company for personal injuries resulting from the operation of one of its trains, contributory negligence of such passenger does not defeat recovery but merely reduces damages unless such contributory negligence is equal to or greater than the negligence of the company or its employees.

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

E. B. Kinsworthy, B. S. Kinsworthy, for appellant.

Appellee had no primary right to board the moving train and was guilty of contributory negligence in doing so. 179 S. W. 417, L. R. A. 1916-B, 830; 116 Iowa 279, 90 N. W. 59; 86 Ark. 325. The failure to stop a train at the usual place will not justify a person in trying to board it while in motion. 118 Ga. 259, 45 S. E. 268; 67 Miss. 601, 7 Sou. 401; 108 N. C. 34, 12 S. E. 958; 51 Tex. 189; 10 C. J. p. 1104-5, p. 1488; White, Pers. Inj. on Railroads, § 783, p. 1176. There was no invitation on the part of any servant of the company for appellee to board the moving train, which might in some measure tend to relieve him from negligence. 45 Ark. 256; 10 C. J. p. 1105, par. 1488; 86 Ark. 325; 99 Ark. 248; 108 Ark. 292; 122 Ark. 429.

Appellant's instruction No. 14 declared the law with reference to a person boarding a moving train without invitation to do so by a servant of the company, and should have been given. 84 App. Div. 414, 82 N. Y. S. 307; 36 Fed. 879; 133 Ill. A. 503; 77 Ill. A. 66; 210 Pa. 363, 2 Ann. Cas. 938, note.

Persons who voluntarily put themselves in places of danger assume the risk. 86 Ark. 325; 99 Ark. 248; 129 Ark. 257; 128 Fed. 540; 90 Ill. 586; 87 N. J. L. 284; 141 N. W. 353; 31 S. D. 512. Appellant's instruction No. 4, refused, covered this question.

Appellant's refused instruction No. 11 would have told the jury to find for appellant if the employees of defendant did not see appellee in a dangerous position, or know that he intended to board the moving train. This is the law. 179 S. W. 417; L. R. A. 1916-B 830; 59 Ill. App. 620; 139 Mass. 238; 31 K. L. Rep. 679.

Appellant's instruction No. 8 on the question of negligence should have been given. 210 Pa. St. 263.

It was error to give instruction No. C asked by appellee on the question of custom of stopping the caboose at the station, since no custom was established by the evidence. 112 Ark. 446. Appellant's requested instruction No. 5 as to the obligation of the company to stop at a designated place, in the absence of passengers, should have been given. 143 Ark. 135.

Compere & Compere, for appellee.

Lundell was a regular station, and from information and presumption appellee thought the train would stop there. 66 Ark. 543; 135 Ark. 546.

Instructions B and E, taken together, properly stated the measure of damages. 233 S. W. 683.

Appellee did not lose his rights as a passenger when he got off the train. 82 Ark. 393; 88 Ark. 225; 10 C. J. 628, sec. 1051.

It is not negligence *per se* to board a moving train. 86 Ark. 325; 101 Ark. 128.

SMITH, J. Appellee became a passenger on one of appellant's local freight trains at the town of Ferguson, with a ticket to the town of Mellwood. When the train arrived at the intervening station of Lundell, it stopped with the caboose some distance from the station platform. Lundell was a small station at which no depot

was maintained, but tickets were sold there, and a passenger train each way each day stopped there regularly. Another passenger train stopped there when flagged. Appellee left the train at Lundell and went to a store of a customer, to whom he sold goods. This store was near the railroad and just off the right-of-way. Before leaving the train, appellee asked the brakeman if the train would stop a second time with the caboose at the station platform, and the brakeman answered that it would. There was also testimony that it was the custom to stop the train with the caboose opposite the platform before the train pulled out of the station. The members of the train crew testified, however, that there was no such custom except when there were passengers to be received or discharged, and that on the occasion in question there was no passenger to or from Lundell, and the conductor testified that, before giving the signal for the train to pull out of Lundell, he looked and saw that there was no one standing at the platform to take passage on the train. Appellee admits that he was not standing at the platform when the train was set in motion, but he reached the platform before the caboose passed that point, and the train did not stop as appellee had been told it would do. Appellee had some grips and other baggage in the caboose, and when it came by him he undertook to swing on at the rear steps of the caboose, but his hand slipped and he fell and broke his arm and sustained other injuries, to compensate which he brought this suit and was awarded damages in the sum of $500, from which is this appeal.

Appellee was a commercial traveler, and testified that Lundell was in his territory, and that for a period of six years and a half he had been making that point, and that he generally used this local freight train in doing so, and that it had always been the custom for the train to stop at the platform. There was testimony corroborating appellee, although, as has been said, the testimony on the question of this custom was not undis-

puted, and the brakeman denied having told appellee that the train would stop a second time, and there was testimony also on the part of the railroad company that the brakeman had no authority to make statements in regard to the movement of the train.

Several instructions requested by the railroad company were refused, among which was one for a directed verdict in its favor. Other instructions were given, however, at the request of both appellee and the railroad company. We do not set out or discuss all these requested instructions, as we find it unnecessary to do so to announce the law applicable to the issues joined.

The theory on which the cause was submitted clearly appears from an instruction numbered 10 requested by the railroad, and which we do set out. As requested, this instruction reads as follows: "The court instructs you that the uncontradicted evidence in this case shows that the conductor was in charge of the train upon which plaintiff was riding; that he alone had authority to govern the movement of said train, and that the brakeman would not and could not know, without being advised by the conductor, what would be the movement of the train. So the court tells you that the brakeman had no authority to make any statement as to whether the train would or would not stop at Lundell the second time, and that the defendant would not be bound by any statement made by the brakeman, as his statement would simply be a matter of opinion as given by any outsider, and the plaintiff had no right to rely upon any statement made by said brakeman." The court struck out the last clause of the instruction reading as follows: "as his statement would simply be a matter of opinion as given by any outsider, and the plaintiff had no right to rely upon any statement made by said brakeman," and, in lieu thereof, added the following: "unless the statement of the brakeman was in accord with the custom, if any, of the defendant in stopping their trains at Lundell."

It thus appears that the court accepted the view of appellant that appellee had no right to rely on the state-

ment made by the brakeman in regard to the movement of the train unless his statement conformed to the customs of the railroad.

We think no error was committed in modifying the instruction in the manner indicated. Indeed, after its modification, it was still more favorable than appellant was entitled to have it. It is true the brakeman was shown to have no authority to direct the movement of the train except as he received orders to that effect from the conductor. But the brakeman's statement to appellee did not relate to any order in regard to the movement of the train which he (the brakeman) had agreed to give. He merely stated to appellee what the custom was in regard to stopping the train and what would be done that day. The brakeman would have no authority to agree what movement the train would make, but we do not have that question before us. If the brakeman knew under what orders the train would move, or what the custom in regard to its movement was, we see no reason why, when he had imparted this information to a passenger, the passenger might not rely on it. *Simmons* v. *Lusk,* 128 Ark. 336; *Railroad Co.* v. *Adcock,* 52 Ark. 406.

Under the instructions given the jury was required to find that the statement made by the brakeman in regard to the movement of the train accorded with the custom of stopping trains at Lundell, and, as we have said, the railroad company had no right to complain of the law as thus declared. *K. C. S. R. Co.* v. *Worthington,* 101 Ark. 128; *L. & N. R. R. Co.* v. *Johnson,* 79 Ala. 436; 3 Hutchinson on Carriers, p. 1392; 2 White's Personal Injuries on Railroads, § 686; 2 Rorer on Railroads, p. 1097.

Appellant requested an instruction to the effect that, if appellee left the train for any purpose not connected with his trip, and attempted to board the train after it was set in motion without any invitation so to do from a member of the train crew, the railroad would not be liable. This and other instructions to the same effect were asked, and were properly refused as asked, but they

were so modified as to permit the jury to take into account the alleged custom to stop the caboose at the platform in determining whether appellee had lost his character as a passenger.

We think no error was committed in thus modifying the instructions. It is true appellee was not a passenger for Lundell, but we do not think that the jury should, on that account, have been told that, as a matter of law, appellee had lost his character as a passenger if he got off the train there for any purpose not connected with his trip. We have held that a passenger is not compelled to continuously remain aboard a train until he reaches his destination, and that he may, at regular stopping places, leave the train for refreshments, exercise, or other matters of convenience or necessity, provided he exercise proper care in doing so. *St. L., I. M. & S. R. Co.* v. *Glossup,* 88 Ark. 225; *Ark. Cent. Rd. Co.* v. *Bennett,* 82 Ark. 393; 3 Michie on Carriers, § 2739.

The testimony shows that the train was moving very slowly as it passed the platform where appellee was standing, and the court refused to declare, as a matter of law, that appellee was guilty of contributory negligence in attempting to board the train while it was in motion, but submitted that question to the jury. No error was committed in this respect, as we have repeatedly held that it could not be declared negligence as a matter of law for one to board a train, or to alight from it, while it was passing the place where it should stop, to permit him to board it or alight from it, unless the attending circumstances show so clearly that he acted imprudently that reasonable minds could fairly arrive at no other conclusion, and that otherwise it is a question for a jury to determine whether the attempt to board or leave a train while in motion is one of negligence. *K. C. S. R. Co.* v. *Worthington,* 101 Ark. 128; *St. L., I. M. & S. R. Co.* v. *Rush,* 86 Ark. 325.

At appellant's request the court charged the jury that, if appellant was negligent and appellee was equally negligent, to find for the railroad company. In addi-

tion, the court told the jury that the contributory negligence of a person injured by the operation of a train would not defeat a recovery where the negligence of the person injured was of less degree than that of the employees of the railroad causing the injury complained of, but that in such event the amount of recovery should be diminished in proportion to the contributory negligence. This was instruction "B." But the court gave another instruction designated as "E" and reading as follows: "If the jury find for the plaintiff, they should assess his damages at a sum that will, in their judgment, be a just and fair compensation for the mental and physical pain caused by the injury, and in addition any expense he may have incurred in attempting to effect a cure, as well as any losses sustained by reason of loss of earning capacity on account of said injuries." Objection was made to this instruction upon the ground that it was in conflict with instruction "B" and permitted a recovery to compensate all the damage sustained by appellee, although his own negligence may have contributed to his injury. We think the instructions are not open to this objection when they are read together, as all instructions should be. Instruction "E" told the jury what the elements of damage were, and instruction "B" dealt with the diminution of those damages if there was a finding of contributory negligence, and, when read together, they correctly declare the law. *Central Coal & Coke Co.* v. *Burns,* 149 Ark. 533.

We take occasion, however, to say that a better practice would be to include both directions in a single instruction, to first tell the jury what the elements of damage are, and then to state the effect of contributory negligence if the testimony establishes it.

No prejudicial error appearing, the judgment is affirmed.

MOORE v. LONG PRAIRIE LEVEE DISTRICT.

Opinion delivered April 3, 1922.

1. LEVEES—DELINQUENT TAXES—SUFFICIENCY OF COMPLAINT.—Long Prairie Levee District, under Acts 1921, p. 573, could sue for delinquent levee taxes, though the collector had not filed the delinquent list with the clerk of the chancery court, and though a copy thereof was not made a part of the complaint by the district as required by § 4.
2. PLEADING—GENERAL DEMURRER.—Under Crawford & Moses' Dig., § 1190, a general demurrer not specifying the ground of objection to a complaint must be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action.
3. CONSTITUTIONAL LAW—LEVEE ASSESSMENTS—CONFISCATION.—In an action to recover delinquent levee taxes, an answer alleging that the combined effect of the separate assessments on the land for levee, road and drainage purposes was confiscatory was insufficient, since the assessments were levied in pursuance of statutes affording the landowner opportunity to complain of improper assessments.

Appeal from Lafayette Chancery Court; *J. Y. Stevens,* Chancellor; affirmed.

Henry Moore, Jr., for appellant.

The demurrer should have been sustained. The plaintiff failed to comply with act 534 of Acts 1921.

The assessment of benefits was arbitrary, excessive and confiscatory. 83 Ark. 58; 81 Ark. 562; 100 Ark. 369; 98 Ark. 116; 141 Ark. 253; 147 Ark. 459; 147 Ark. 19.

R. L. Searcy and *R. L. Searcy, Jr.,* for appellee.

The demurrer should have been overruled. 32 Ark. 446; 53 Ark. 476; 43 Ark. 543; 126 Ark. 67.

The Legislature is the sole judge in the matter of creating improvement districts. 98 Ark. 543.

SMITH, J. This suit was brought to enforce the payment of certain delinquent levee taxes for the year 1920. A demurrer to the complaint filed for that purpose was overruled. Appellant, who was the defendant, declined to plead further, and a decree was entered ordering his lands sold, from which is this appeal.

It is first insisted that the demurrer should have been sustained because of the failure of the levee district to comply with the provisions of act No. 534, Acts 1921, p. 573. This is an act entitled, "An act to provide for the filing of a delinquent list of lands, town lots, railroads, and tramroads, in road and drainage districts, and for the collection of delinquent taxes thereon." By the provisions of section 1 the act is made to apply to levee and fencing districts, as well as to road and drainage districts. Section 1 of the act provides that, if the taxes are not paid on or before April 10th of the year in which they are due, the collector shall, on or before the second Monday in June, make out and file with the clerk of the chancery court a list of the property returned delinquent, which he is required to verify.

Section 4 of the act provides that when those authorized by law to file suit for the collection of delinquent taxes desire to commence suit, "they shall obtain a certified copy of said list from the said clerk, which shall be filed with the complaint and taken as a part thereof." A fee for the clerk is fixed for this service, which is to be taxed as costs. The insistence is that the complaint is demurrable because this list was not filed with the complaint and made a part thereof.

We do not agree with the counsel in this contention. Other sections of the act provide for a record of the lands so returned delinquent to be kept by the chancery clerk, and for their redemption from sale, and for a record to be made of the redemption when lands are redeemed. Any landowner may go to this record and ascertain if his lands were returned delinquent, and, if they are returned delinquent, may redeem them and have a record of this redemption then made.

Section 6 of the act under which the taxes were levied provides that, if the board should fail to bring suit within sixty days after the taxes become delinquent, the right is given to the holder of any bond issued by the levee district to bring suit for the collection of such delinquent assessments.

This suit was begun June 7, 1921. The clerk of the chancery court is not required to record this delinquent list before the 1st day of July, which is, of course, more than sixty days after the date (April 10th) on which the taxes are required to be paid; and it is not to be presumed that the Legislature intended to impair the remedy given to enforce the collection of the bonds issued pursuant to the authority of the act creating the levee district.

The appellant does not deny that his lands are delinquent. The demurrer filed by appellant is a general one, and, as it does not specify the grounds of objection to the complaint, it must be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action. Sec. 1190, C. & M. Digest.

We do not think the filing of this delinquent list by the collector and the furnishing of a copy thereof by the clerk is made a condition precedent to the right to sue; and, as it is not denied that the allegations of the complaint are otherwise sufficient to state a cause of action, the demurrer to the complaint was properly overruled.

The real question in this case relates to the sufficiency of the allegations of the answer to constitute a defense, as a demurrer was sustained to the answer.

From the pleadings it is shown that appellee, Long Prairie Levee District, was created by act No. 106, passed at the session of 1905; and by act No. 339, of the Acts of 1917, additional powers were conferred upon the district. By virtue of the latter act the scheme of taxation was changed, and a bond issue of $500,000 was authorized to refund the outstanding bonds, and for raising and strengthening the levee.

The complaint alleges that, pursuant to these acts of 1905 and 1917, the levee district had issued bonds, and had built a levee, and the board of assessors of said district had assessed benefits against all lands within the district accruing by reason of the protection given

said lands against overflow from the waters of Red River, and appellant's lands, among other, were thus assessed.

The answer of appellant contains no denial of these allegations, but its recitals are, in substance, as follows: appellant's lands are so assessed that a benefit of $1.20 per year per acre is levied against his lands up to and including the year 1922, after which the assessment for levee purposes is increased to the sum of $1.60 per acre per year. That, pursuant to the Alexander road law, appellant's lands, with others lying within the levee district, were organized into a road district, and by a special act of the General Assembly passed in 1919 the burdens of the road district were increased. And at the special session of the General Assembly of 1920 an act was passed organizing a drainage district which included appellant's lands here sued on and other lands lying within the levee district. That these three districts have issued, for their respective purposes, bonds which are liens on appellant's lands and together amount to approximately $30 per acre on all of appellant's lands; and that the effect of this action has been to confiscate the lands by destroying their value. It was alleged that in 1913 the lands were worth $10 per acre, and that sum could have been obtained for them, whereas now appellant is unable to sell them at any price, as the total taxes for all three districts amount to $2.70 per acre per annum.

Appellant tendered with the answer a deed to his lands, leaving blank the name of the grantee, which he offered to supply by inserting the name of any one who would pay him $8 per acre for the lands.

It was alleged that the same persons had promoted all three of these districts, and the result of their action in so doing was to destroy the value of appellant's property, in violation of the Constitution of the State and the Fourteenth Amendment of the Constitution of the United States.

There is no allegation that the legislation creating this district is unconstitutional. That question was set-

tled by this court in the case of *Salmon* v. *Long Prairie Levee Dist.*, 100 Ark. 366, and *Moore* v. *Long Prairie Levee Dist.*, 98 Ark. 113.

The constitutionality of the legislation conferring additional powers, rights and duties, is not questioned; nor is it contended that there was a failure to comply with any provision of the statutes as to the time and manner of making the assessments which this suit seeks to enforce.

We cannot review, in this proceeding, the assessments for road and drainage purposes. Our concern is only with those assessments which this suit seeks to enforce, and, as we have said, no showing is made that these assessments were not levied in conformity with a valid statute affording appellant the opportunity to complain if he thought his lands were being improperly assessed. He has heretofore had his day in court for the purpose of questioning his assessments for levee purposes, and as his answer sets up no defense to the suit to enforce the payment of these assessments, the demurrer to his answer was properly sustained.

Decree affirmed.

OBERSTE v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered April 3, 1922.

1. WATERS AND WATER-COURSES—QUESTIONS FOR JURY.—In an action by a landowner against a railroad company for damages for causing a stream to overflow plaintiff's land, whether the overflow was caused by sediment deposited in the stream on plaintiff's land, or because defendant's culvert afforded too small an opening for the stream, *held* under the evidence a question for the jury.
2. WATERS AND WATER-COURSES—DUTY OF LANDOWNER TO KEEP DITCH OPEN—INSTRUCTION.—In an action by a landowner against a railroad company for causing a stream to overflow plaintiff's land an instruction that, if the overflow was caused by the bed of the stream on plaintiff's land being filled by sediment, defendant was not liable, was responsive to the evidence tending to show that the overflow was due to sediment deposited in the bed of the stream

on plaintiff's land, and was correct, even if such deposit was caused by surplus water diverted from its natural course and turned into the stream by defendant.

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

Heartsill Ragon, for appellant.

Pryor & Miles, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the Johnson Circuit Court for damages to his land and improvements south and east of appellee's depot in Hartman in the years 1917, 1918 and 1919, caused by overflow of his land alleged to have occurred on account of the failure of appellee to provide suitable culverts and openings in constructing its roadbed near Hartman, in said county, to carry off water which had been diverted from its natural course and thrown into a ditch across appellant's land which had theretofore been adequate to carry off the natural drainage. Appellee filed an answer denying that the culverts were inadequate to carry off the natural drainage and the additional waters diverted from the Logan branch into the branch across appellant's land. The cause was submitted to a jury upon the pleadings, evidence and instructions, which resulted in a verdict and judgment against appellant, from which is this appeal.

The record reveals that the roadbed and culverts were constructed in 1902. The road ran east and west by the depot. Two culverts were constructed across the roadbed near the depot, one just west and the other about 250 yards east of it. Prior to the construction of the roadbed the lands north and west, as well as south and east, of the depot were drained by a branch over which the two culverts were constructed. The lands as far north as the Logan branch drained into the branch over which the culverts were constructed. The Logan branch itself flowed south through the Gray farm, and did not connect with the first branch. Lands further north were drained by the Logan branch. Both branches

were dry-weather branches, forming the route of drainage when it rained, and were ample, prior to the construction of the roadbed, to carry off the water during hard rains. In constructing the roadbed appellee formed a dam across Logan branch, no culvert being placed at that point, and turned or diverted the water during rains down the north side of the track until it entered the first branch. The first branch, or the one over which the two culverts were constructed, ran across the roadbed toward the south and through appellant's land to a point about 250 yards east of the depot, where it turned and crossed the roadbed again, over which the culvert on the east side was also constructed. The culvert on the east side of the depot was smaller than the one on the west side.

The testimony adduced on the part of the appellant tended to show that the culverts, especially the one on the east side of the depot, were too small to carry the water diverted from Logan branch, in addition to the natural flow, during hard rains or freshets; that the ditch across appellant's land had been partially filled by sediment deposited by the excess flow of water, and this, in connection with the insufficiency of the culvert east of the depot to carry the excess volume of water, caused the water to back over the banks and flood appellant's land in the years mentioned, to his damage in the several sums alleged.

The testimony introduced on behalf of appellee tended to show that, if the ditch or branch across appellant's land was not obstructed by sediment, or otherwise, the culverts were large enough to carry off the natural drainage, as well as the water diverted from the Logan branch into the first branch.

Appellant's first contention for reversal is that the only reliable evidence in the case disclosed that the east culvert was insufficient in size to carry off the natural drainage and the additional water diverted from Logan branch into the branch across his land during hard rains. It is argued that the witnesses introduced by him were

eye-witnesses to the fact that the east culvert did not furnish sufficient outlet during hard rains in the years 1917, 1918 and 1919, and that on this account his land was overflowed and damaged as alleged. It is true that the witnesses introduced by appellant actually observed the conditions in those years and testified that appellant's land overflowed because the waters entering the branch or ditch were not carried off through the east culvert as rapidly as they entered it. It is also true the testimony shows that the land never overflowed at any time before appellee constructed its roadbed and culverts. It does not follow, however, as a matter of course, that the overflow was due to the insufficient size of the culvert east of the depot. There was evidence tending to show that sediment and dirt had been washed down from the lands west and north of the depot and deposited in the branch running across appellant's land, thereby partially filling the ditch and obstructing the free flow of the water. The obstruction caused by this sediment may have caused the overflow. The inference from the testimony is that no overflow occurred between 1902 and 1917, or until the ditch had been partially filled up on account of the sediment. Appellee had no right to enter upon the land of appellant and clean out the branch or ditch running through it. Appellant could not sit idly by and permit this sediment to accumulate, even though it was deposited from surplus water thrown through this branch or ditch by appellee, and then recover damages from appellee on account of an overflow occasioned by this deposit. If the sediment was deposited on account of the unnatural flow of water, diverted from its natural course into the branch in question by appellee, it was appellant's duty to remove same, being upon his own land, and thereby prevent the water from flooding his land, if possible. In addition to the proof tending to show that the sediment caused the overflow of appellant's land, appellee introduced an engineer who testified that he figured the rainfall, the area to be drained, and the size of the culverts, and from these measurements was of the opinion that the

culverts were ample in size to carry off all the water when the branch above appellant's land was in its normal condition. We think the testimony presented a disputed fact determinable solely by the jury.

Appellant also insists that the court erred in giving instructions 4 and 5, which are as follows:

"4. Now there has been some contention that the openings there were not the proximate result of the damages that was done to plaintiff, but that it was a ditch that filled up; so I will give you that theory of it.

"5. You are instructed that, if you believe from the evidence in the case that the ditch which heretofore carried off the water south of Mr. Oberste's gin became filled up by natural wash from nearby land into said ditch, then no duty rested upon the railway company to open said ditch, and it became Mr. Oberste's duty to open said ditch, and for the filling of said ditch the railway company is not liable, and your verdict will be for the defendant."

It is argued that there is no evidence in the record to sustain these instructions. We think the instructions objected to were responsive to the evidence tending to show that the overflow was occasioned by sediment deposited in and partially filling the branch running across appellant's land. Even if this were occasioned by surplus water diverted from its natural course and turned into the branch by appellee, it was appellant's duty to keep the branch cleaned on his own land, as appellee had no right to enter upon appellant's premises and clean the branch.

No error appearing, the judgment is affirmed.

CADDO RIVER LUMBER COMPANY *v.* WHITE.

Opinion delivered April 3, 1922.

1. MASTER AND SERVANT—ASSUMED RISK.—One engaged in unloading a sleek and crooked pole from a flat car assumed the risk incident to handling it, its condition necessarily being patent to any one.

2. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.—Whether injuries to an employee's hand while unloading a pole from a flat car were caused by the negligent handling of the pole by fellow employees, *held* for the jury under the evidence.

3. DAMAGES—OPINION OF PHYSICIAN AS TO PERMANENCY OF INJURY.—In an action for injuries to plaintiff's hand, the court properly permitted a physician to testify that the hand was permanently injured, though there was evidence tending to prove that the condition of his hand resulted from former injuries.

4. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—In an action for injuries to an employee's hand while unloading a pole from a flat car, the court's refusal to allow a fellow servant who was standing between plaintiff and the car to testify that plaintiff could not have got his hand in position to be crushed between the pole and the car was not prejudicial error where he was permitted to testify as to his and plaintiff's positions in such way that the jury could draw a correct conclusion.

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

Tompkins, McRae & Tompkins, for appellant.

The allegations of complaint stated a clear case of assumed risk. 97 Ark. 486.

The court erred in refusing to allow appellant's witness Lawrence to testify that the injury could not have happened in the manner alleged. Even if this be considered opinion evidence, under the circumstances it was admissible. 2 Jones on Ev. § 360; Greenleaf on Ev. (16 Ed.) § 430-G; 94 Ark. 538; 43 Ohio St. 270; 74 Conn. 554; 39 N. Y. Sup. 944; 36 N. Y. 132; 115 Iowa 80; 101 Cal. 585.

Rountree & Coblentz and *W. T. Kidd,* for appellee.

Before it can be said appellee assumed the risk it must be shown that he knew and appreciated the danger. 77 Ark. 458; 97 Ark. 364. He had a right to assume that the master had furnished safe tools or appliances. 67 Ark. 209; 90 Ark. 223; 89 Ark. 427; 90 Ark. 555; 92 Ark. 102; 95 Ark. 291.

The evidence of Lawrence was properly excluded, as he was called upon to state conclusions, which would be

an invasion of the province of the jury. 11 R. C. L. 565; 167 Ind. 402; 24 Ark. 251; 29 Ark. 448; 66 Ark. 416; 66 Ark. 494; 70 Ark. 423; 95 Ark. 157.

HUMPHREYS, J. Appellee instituted suit against appellant, a lumber corporation, in the Pike Circuit Court to recover damages in the sum of $8,000 on account of an alleged injury sustained to his hand while assisting other employees in unloading a long pole which was on one of its flat cars where it had served as a support for a house which appellant was moving. Two grounds of negligence were alleged in the amended complaint as a basis for recovery, the first being that appellant, its agents and servant, negligently furnished appellee with a crooked skid pole, which was slick and unsafe; and the second being that the pole was moved or shoved without notice or warning to appellee when he was assisting in moving the same, which caused it to fall upon and break two bones in his hand and otherwise injure it. Appellant filed an answer, denying the allegations of negligence and injury, and, by way of further defense, pleading assumed risk and contributory negligence on the part of appellee. The cause was submitted to a jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellee in the sum of $2,500, from which an appeal has been duly prosecuted to this court.

The evidence, in substance, reflected that appellant was engaged in moving a house from one point to another on a flat car; that the house being wider than the car, was supported by two skid poles about 16 feet long and 8 or 10 inches in diameter at the butt end, lying across the car; that the skid poles were pine; that after the house was unloaded appellant's foreman directed appellee and others to unload the poles; that the skid pole which appellee testified fell upon and injured his hand was crooked, partially disbarked and slick, due to a rain which fell during the afternoon; that appellee's hand had been twice injured before, once in 1914 when a cross-tie

fell upon it, breaking one bone and leaving a knot on the back part of the hand, and again in 1920, when a large rock fell upon it, causing him to cease work for a time. Appellant testified that in removing the pole he was standing against the car on the left side, and that the man on top gave the pole a sudden jerk, which turned it over and mashed his hand between the pole and the edge of the car; that two of his fingers were broken, which stiffened and rendered them useless; that the injury caused him great pain and suffering; that the injuries received to his hand theretofore did not seriously injure his hand; that the injury received to his hand by the falling pole rendered it useless for purposes of labor.

In the progress of the trial T. F. Alford, a practicing physician, over the objection of appellant, testified that the injury was permanent on account of lack of elasticity in the muscles and tension in the ligaments that supply the broken fingers. Appellant objected to the evidence of the physician concerning the permanency of the injury to the hand, because it might have been produced by the injuries received in 1914 and 1920.

The evidence adduced by appellant tended to show that appellee's hand was not crushed by the pole, but that the condition of his hand was due to the injuries received in 1914 and 1920. Some of appellee's co-employees testified that appellee assisted in removing the pole without making any complaint of injury or exclamation during the time it was being removed; that he continued to work that day and part of the next day without making complaint. Nat Lawrence testified that he assisted in moving the crooked pole, and was standing against the car; that appellee was on his right side, away from the car. At this point appellant offered to prove that, owing to the position of Nat Lawrence, appellee could not have reached the arm of witness and gotten hold of the pole so that it could fall on or mash his hand. This evidence was excluded, over the objection and exception of appellant.

The court sent the cause to the jury on the theory that appellee might recover if the evidence supported either or both allegations of negligence set forth in the complaint. In other words, the court authorized a recovery by appellee if the evidence showed that the pole was crooked and slick. This was error. The slick and crooked condition of the pole was necessarily patent to any one, and appellee therefore assumed the risk incident to handling a slick, crooked pole. This court said, in the case of *Chicago R. I. & P. R. Co.* v. *Grubbs,* 97 Ark. 486: "The plaintiff knew that the effect of creosote upon cross-ties was to make them slick and therefore liable to slip. * * * * Their condition was patent to him. * * * * * It was obvious, therefore, that these ties were liable to slip whenever any force or weight was applied to them. The risk or injury which might result by reason of the ties slipping or moving was obvious, and when plaintiff undertook the service of straightening them out he assumed the risk. * * * * A master is not bound to warn the servant as to dangers which are obvious and patent to him."

There is a dispute in the evidence as to whether appellee was injured through the negligent and careless handling of the pole by appellee's co-employees. The cause, therefore, should have been submitted to the jury upon the sole question of whether the injury resulted to appellee on account of the negligent and careless handling of the pole by appellee's co-employees, without notice that the co-employees were about to move or shove the pole.

Appellant next insists that the court erred in permitting Dr. Alford to testify that the injury to plaintiff's hand was permanent. The appellant's insistence is that the effect of this testimony was to allow appellee to recover for the condition of the hand resulting from the fall of the cross-tie in 1914 and the rock in 1920 upon his hand, as well as the injury inflicted by the pole falling upon it in 1921. We do not think so. There was evidence

tending to show that the first two injuries received were slight and left the hand unimpaired. There was evidence, however, to the contrary. It therefore became a disputed question of fact for the jury to determine which injury stiffened and deformed appellee's hand. The court specifically instructed the jury that the burden was upon the appellee to show the nature and extent of the injury he received on June 23, 1921, and that he could not recover for conditions produced by prior injuries. It was not necessary for Dr. Alford himself to know or testify which injury stiffened and deformed appellee's hand before testifying concerning its condition at the time of the trial. It was perfectly proper to show the stiffened and deformed condition of appellee's hand at the time of the trial by a physician, and to show by other witnesses the cause that produced the condition thereof. The physician himself may not have known the immediate cause of the injury to the hand, but, on account of his expert knowledge, was peculiarly qualified to explain the nature and extent of the injury.

Appellant's last insistence for reversal is that the court erred in refusing to allow Nat Lawrence to testify that appellee did not reach, and could not have reached, under his (Lawrence's) arm and gotten his hand in position to be crushed between the pole and the edge of the car. We do not think any prejudice resulted to appellant on account of the exclusion of this evidence, as Lawrence was permitted to testify concerning the position of appellee and himself with reference to the car and the pole in such way that the jury itself could draw a correct conclusion as to whether appellee was near enough to reach the pole and receive the injury in the manner alleged. It would not perhaps have been error to admit the evidence upon the theory that it was a conclusion of fact drawn from appearances which could not otherwise be clearly produced to the jury. *Fort* v. *State,* 52 Ark. 180.

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

FORT SMITH *v.* WESTERN HIDE & FUR COMPANY.

Opinion delivered April 10, 1922.

1. NUISANCE—DISTINCTION BETWEEN PUBLIC AND PRIVATE NUISANCE.—The distinction between a public and a private nuisance lies merely in the extent of injury or annoyance which results therefrom; if injury results only to a few, the nuisance is private, and the remedy is confined to those who suffer from the effects of the nuisance; but if the injury is sufficient in extent to become common to all persons who may come within its influence, it is of a public nature, and the remedy is by action on the part of the municipality.
2. NUISANCE—REMEDY.—Although a municipality may abate a public nuisance by police interference when so authorized by ordinance, in the absence of such authority the remedy is by suit in equity.
3. NUISANCE—SUFFICIENCY OF EVIDENCE.—In a suit by a city to enjoin a public nuisance, the chancellor's finding that defendant's hide and fur business in a thickly settled portion of the city was not a public nuisance *held* to be contrary to the weight of evidence.
4. NUISANCE—EFFECT OF GROWTH OF CITY UPON BUSINESS.—Though a hide and fur business was not a public nuisance when originally established in a sparsely settled part of the city, it may become such by reason of the city's growth, in which case private rights must yield to the public good.
5. NUISANCE—LICENSED BUSINESS.—The fact that a city had issued a license to defendant to conduct its business of dealing in hides and furs did not authorize defendant to conduct its business in such manner as to constitute a public nuisance nor bar the city from suppressing such nuisance.

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

Cravens, Oglesby & Cravens, for appellant.

The testimony was sufficient to show that the defendant maintained a business that, in its nature, constituted a public nuisance. Joyce on Nuisances, secs. 5, 7, 157, 158; 89 Am. Dec. 616; 29 N. E. 656; 32 Atl. 495; 188 Pac. 772; 141 Fed. 385; 92 Ark. 546.

Jas. B. McDonough, for appellee.

The testimony is sufficient to support the chancellor's finding. 41 Ark. 526; 81 Ark. 117; 64 Ark. 609; 98

Ark. 437; 143 Ark. 48; 138 Ark. 329; 122 Ark. 379; 93 Ark. 362; 29 Cyc. 1153; 92 Ark. 546.

McCULLOCH, C. J. Appellee is engaged in the business of buying and selling hides and furs, the business being operated in its own building situated near the center of the business district in the city of Fort Smith. Appellee has been operating the business at that place for the past ten years.

This is an action in chancery, instituted by the city of Fort Smith against appellee, to restrain the further operation of said business at the place mentioned on the ground, as alleged in the complaint, that the method in which the business is operated constitutes a public nuisance.

It is alleged in the complaint that appellee's place of business is situated in a thickly populated section of the city and is a great annoyance to the people in that neighborhood and to passers-by, for the reason that the storage of hides in the house gives off offensive odors and attracts flies, and affects the comfort and endangers the health of the people of the city living near that locality. The complaint, in other words, states facts relative to the manner in which the business is conducted sufficient to constitute the maintenance of a public nuisance.

Appellee, in the answer, denied the allegation of the complaint with respect to the method in which the business was operated, and denied that offensive odors arose from the place of business, or that flies were attracted there any more than is the case at other places of business during warm weather.

There was a trial of the issues before the court upon oral testimony, reduced to writing and made a part of the record, and the decree dismissed the complaint for want of equity.

The distinction between a public and private nuisance lies merely in the extent of the injury or annoyance which results therefrom. If injury results only to a few, on account of the peculiar circumstances, the nui-

sance is private, and the remedy is confined to those who suffer from the effects of the nuisance. If, on the other hand, the injury or annoyance is sufficient in extent to become common to all persons who may come within its influence, it is of a public nature, and the remedy is by action on the part of the municipality to abate the nuisance, either by police interference under an ordinance, or by suit in equity to restrain the maintenance of the nuisance. *Harvey* v. *Dewoody,* 18 Ark. 252; *Lonoke* v. *C., R. I. & P. Ry. Co.,* 92 Ark. 546; *Gus Blass D. G. Co.* v. *Reinman,* 102 Ark. 287.

In the absence of an ordinance authorizing the abatement of the nuisance by police interference, the remedy must be, on the part of the municipality, by a suit in equity. *Lonoke* v. *C. R. I. & P. Ry. Co., supra.*

In the case of *Durfey* v. *Thalheimer,* 85 Ark. 544, there was involved the question of nuisance in the maintenance of a livery stable, and Judge BATTLE, speaking for the court, after declaring that, while a livery stable operated in a city or town is not necessarily or *prima facie* a nuisance, it may become so by the manner in which it is constructed or conducted, and, in defining what may constitute a nuisance, he said:

"It is the duty of every one to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used as to destroy the comfort of persons owning and occupying adjoining premises, creating an annoyance which renders life uncomfortable; and it may be abated as a nuisance."

In *Lonoke* v. *C. R. I. & P. Ry. Co., supra,* we adopted the following as an appropriate definition of a public nuisance:

"A common or public nuisance has been defined to be 'that which affects the people and is a violation of a public right, either by a direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which it is the duty

of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct, working an obstruction or injury to the public and producing material annoyance, inconvenience, and discomfort founded upon a wrong.' "

It is unnecessary to give any further definition of a public or private nuisance.

There were numerous witnesses in the case for the city and for appellee. The city introduced eight witnesses, all of whom gave testimony which tended to show that the operation of the business by appellee was a nuisance, that noxious odors arose from the building, particularly that part where hides were stored, and that in warm weather there was an accumulation of flies about the place. Most of these witnesses were people who lived in the immediate neighborhood and were engaged in business of various kinds.

One of the witnesses operated a baker shop and lunch room, and he testified that the odors from appellee's place of business were so offensive that it seriously interfered with his business.

Another one of the witnesses was interested in the operation of a barber shop and pool hall, and he testified that the odors were so offensive inside of the shop that waiting customers would not remain in the room, but would stand on the outside so that they could get relief from the odors.

One of the witnesses—Mr. Miller—was a commissioner of the city and a member of the district board of health, and he testified that he visited appellee's place of business several times and found that the odors from the place were very offensive. He testified that he visited the place for the purpose of making an investigation and that he could detect the odors a considerable distance from the house.

Appellee introduced ten or twelve witnesses in addition to the manager and owner, whose testimony tended to some extent to overcome the charge that offensive

odors constantly arose from the building, at least to the extent claimed by witnesses for the city. These witnesses were more or less definite in their statements, but none of them disputed the fact that there were peculiar odors arising more or less from the place of business. Many of the witnesses said that these odors were noticeable but were not offensive. Some of the witnesses stated that the odors arose on account of the disinfectants used and that these were not offensive odors, at least not so to them.

Mr. Davidson, the manager of the business, stated that there were odors going out from the hides, but that such an odor as that was not offensive. He admitted, however, that sometime hides were bought which were partially decomposed and that it was necessary to put them down in salt in order to stop decomposition. He testified that all the fresh hides purchased were salted to prevent decomposition.

A careful consideration of the testimony leaves no escape from the conclusion that the place of business maintained by appellee was offensive to those who came into the immediate neighborhood. There were bad odors which were easily detected, and which were sufficient to constantly annoy those who were engaged in business in the locality or who came there for any purpose.

It is conceded that the operation of a hide and fur business is not a nuisance *per se,* but the contention is that the operation in the manner in which it is carried on in the locality where the place of business is situated constitutes a nuisance, and we are of the opinion that the preponderance of the evidence sustains this contention.

The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population. Under these circumstances, private rights must yield to the public good, and a court of

equity will afford relief, even where a thing, originally harmless under certain circumstances, has become a nuisance under changed conditions.

Appellee pleads a license from the city in bar of the right to abate the nuisance, but the fact that the city granted a license to operate a hide and fur business does not imply that it could be operated in a manner so as to constitute a public nuisance, or to bar the city from suppressing the nuisance. *Durfey* v. *Thalheimer, supra; Wilder* v. *Little Rock,* 150 Ark. 439.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree in favor of the city of Fort Smith, according to the prayer of the complaint, restraining appellee from maintaining a nuisance.

HARRELL v. SALINE OIL & GAS COMPANY.

Opinion delivered April 10, 1922.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where the complaint, in an action to cancel an oil and gas lease, set forth the lease, which provided that if no well was commenced by a certain date the lease should terminate unless the lessee tendered a given rental, and alleged a failure to pay such rental as agreed, and both parties directed their proof entirely to the question of such payment, it was too late on appeal to take advantage of the plaintiff's failure to plead and prove that no work had been done on the leased premises, since, if the complaint was indefinite, the remedy was a motion to make it more definite and certain.
2. MINES AND MINERALS—NOTICE OF FORFEITURE OF LEASE.—Under an oil and gas lease providing for its termination if no well should be commenced by a certain date unless the lessee paid a certain rental, notice of forfeiture was not necessary where the lessor remained in possession; time being of the essence of the contract and no re-entry being required.
3. MINES AND MINERALS—FORFEITED LEASE—REINSTATEMENT.—After forfeiture of an oil and gas lease, the lessor cannot reinstate the lease after he leased the land to another.

Appeal from Drew Chancery Court; *E. G. Hammock,* Chancellor; reversed.

P. S. Seamans, for appellant.

Notice is not necessary to declare a forfeiture upon the failure to pay the stipulated rentals. *Epperson* v. *Helbron,* 145 Ark. 566. Especially is this true where the lease does not provide for any notice. 152 Pac. 597. However, the execution by the lessor of a second lease, with knowledge thereof on the part of the first lessee, is sufficient notice. 86 N. Y. 368; 67 N. E. 259; 62 L. R. A. 869; 24 Cyc. p. 1357. A refusal of the lessor to accept rent from the lessee in sufficient notice. 105 S. W. 424.

Henry & Harris, for appellee.

No declaration of forfeiture was made. 225 S. W. 345; 44 Ind. App. 207; 88 N. E. 859; 160 Pac. 94; L. R. A. 1917-B 1184. Upon failure to pay rentals title does not revest in lessor, but he then merely has the right to declare a forfeiture. Thornton's Law of Oil & Gas, sec. 175; 98 Atl. 955.

Acceptance of rentals estops the lessor. Thornton, sec. 177; 99 S. W. 668. Only the lessor, not a stranger, can avail himself of the right to declare a forfeiture. Thornton, secs. 175 and 177; 176 S. W. 816.

McCULLOCH, C. J. Appellant instituted this action in the chancery court of Drew County to cancel a lease executed by Harper Green, the owner of a tract of land in that county, to appellee, Saline Oil & Gas Company, permitting the latter to explore the land for oil and gas and to develop same if discovered. The contract was in writing, executed by the parties on January 19, 1920, and granted to the lessee the right to explore for gas and oil, and, if the mineral was developed, to pay to lessor one-eighth of the price for the commodities developed and sold. The contract contained the following clause:

"If no well is commenced on said land on or before the 19th day of January, 1921, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to Harper Green, who is hereby appointed agent for such purpose, in the manner hereinafter provided, the sum of thirty dollars, which shall

operate as a rental to recover the privilege of deferring the commencement of a well for twelve months from said date."

The lessor, Green, executed a second lease to appellant on January 24, 1921, and the contention of appellant is that at the time of the execution of the lease to him there had been a forfeiture by appellee of its lease from Green.

It is alleged in the complaint that appellee, not having commenced a well on the leased land within a year, as specified in the contract, failed to pay the rental as stipulated in the contract on or before the date mentioned therein and that the lease thereby became forfeited.

The answer contained a denial of all the allegations of the complaint with respect to forfeiture, and also pleaded that there was no forfeiture by reason of the fact that there had been no declaration or notice by the lessor of the termination of the lease.

There was a decree dismissing the bill for want of equity.

It is contended by counsel for appellee that there is neither allegation nor proof that exploration or development work was not commenced on the place within a year from the date of the lease, and that for this reason the question of forfeiture or abandonment by reason of the failure to pay the rental does not arise. We are of the opinion that this contention is not sustained by the record, and that the point is raised here for the first time.

The terms of the lease contract are set forth in the complaint, and there is a statement that the lessee failed to pay the lessor said rental "in accordance with the terms of said contract, and, having failed to in any manner whatever make such payment on or before the 19th of January, 1921, allowed said lease contract to lapse and become null and void." This allegation was denied in the answer. It was equivalent to an allegation, inferentially at least, that work had not been commenced on the land within the time mentioned, for the contract

is set forth in the pleadings, and it is shown that according to its terms the failure to pay the rental within the time specified would not operate as a forfeiture unless there had been a failure to commence work within that time.

The allegation was, it is true, imperfect and indefinite, but the remedy was by motion to make the complaint more definite and certain in this respect.

It is the same with regard to the proof in the case. Both sides directed their proof to the question of payment of the rental, and nothing was said by the witnesses about the failure to commence work. It is clear that both sides introduced proof upon the assumption that there had been no work commenced on the land, and both sides treated the issue of fact in the case to be whether or not there had been a forfeiture on account of the failure to pay rental.

Appellee's manager, in his testimony concerning the failure to pay the rental within the stipulated time, spoke of it as a delinquency, and this necessarily implied that no work had been done on the land.

It is too late now to take advantage of defects in the pleadings and proof as to the failure to allege and prove directly the fact that there had been no work done on the leased premises.

There is really no dispute concerning the material facts in the case. Green was living on the land at the time of the execution of the first lease and continued to reside there up to the trial of this cause. The rental under the lease was not paid to Green, and on January 24, 1921, appellant drove out to Green's home and secured another lease from him on substantially the same terms as the one formerly executed and under which appellee claims.

The evidence shows that Green hesitated about executing the lease until he could make a further inquiry at one of the banks at Monticello to ascertain whether or not appellee had paid the rental money within the time specified in the contract, and he finally executed the

lease to appellant with the distinct understanding that if, upon further inquiry, it was found that appellee had paid the rental within the time specified, the lease to appellant should be canceled. It was found upon further inquiry that appellee had not paid the amount into the bank, but on January 29, 1921, appellee paid the rental money to Green, who accepted the same and tendered to appellant the sum of twenty dollars, which was paid to him as consideration for the execution of the lease to appellant. This sum was rejected by appellant, and the present suit was immediately instituted.

This brings us to the decisive point of the case—whether or not a declaration of the forfeiture, or notice of the intention on the part of the lessor to declare a forfeiture before the payment of the rental, is essential to the consummation of the forfeiture.

We have decided that the time specified for performance in a contract similar to the one now under consideration is of the essence of the contract. *Epperson* v. *Helbron,* 145 Ark. 566.

It is contended on behalf of appellee that the case just cited also decides, according to his contention, that there must be a declaration of forfeiture before the offer to pay the rental in order to consummate the forfeiture, but we do not find on consideration of the opinion in that case that that was the question presented or decided. It is true that it was contended in that case that there was a waiver of the forfeiture by failure to give notice, before the payment of the rental, of an intention to forfeit. But we decided that the placing of notice in the mails by the lessor, properly addressed to the lessee, was sufficient notice; we did not go into the question at all of the necessity for notice. We must therefore treat the question as still being an open one, so far as being covered by the decisions of this court.

According to the great weight of authority, notice of forfeiture is not necessary under a contract similar or identical with the one now under consideration in order to terminate the contract. The authorities on the subject

are to the effect that where the parties state that the contract shall be terminated unless certain acts are performed within a certain time, the contract comes to an end without further action unless notice is provided in the contract itself. That rule is stated in Thornton on the Law of Oil and Gas, Vol. 1, Sec. 182, as follows:

"If the lessor be in possession, notice to the lessee of his intention to declare a forfeiture is not necessary, unless the lease provides for it; and if a notice is necessary, the execution of a second lease, to the knowledge of the first lessee, is a sufficient notice to him."

It was decided in the following cases that notice was not required: *Allegheny Coal Co.* v. *Bradford Oil Co.,* 21 Hun (N. W.) 26, affirmed in 86 N. Y. 368; *Mitchell v. Probst,* 52 Okla. 10, 152 Pac. 597; *Jennings-Heywood Oil Synd.* v. *Houssiere-Latreille Oil Co.,* 119 La. 794; *Brown* v. *Wilson,* 58 Okla. 392, L. R. A. 1917-B, 1184; *Gadbury* v. *Gas Co.,* 162 Ind. 9, 62 L. R. A. 895.

In some of the cases a distinction is made between contracts which provide for forfeiture in the event of failure to commence work within the stipulated time "unless" rentals be paid within a certain time, and where the contract provides for payment of rental in the alternative. In the Oklahoma case of *Brown* v. *Wilson, supra,* it was decided that there was no real distinction between the two forms of contract, but in the *Natural Gas Co.* v. *Wolcott,* 98 Atl. 955, the Supreme Court of Pennsylvania decided that, where the contract was in the alternative, notice of forfeiture was essential. In the decisions which hold that notice is not essential it is upon the ground that, time being of the essence of the contract, if the lessor remains in possession, there can be no reentry, and no further act or notice is necessary in order to terminate the contract.

We think the reasoning of these cases is sound, and in the present instance there was a forfeiture or abandonment of the contract by the lessee. Of course, the lessor had no right to reinstate the contract by acceptance of rentals after having leased the land to appellant.

It follows that the decree was erroneous, and the same is therefore reversed, and the cause is remanded, with directions to enter a decree in favor of the appellant in accordance with the prayer of the complaint.

SHELPMAN v. SHELPMAN.

Opinion delivered April 10, 1922.

1. DIVORCE—CUSTODY OF CHILD.—A decree awarding to a divorced husband the custody of an infant daughter will be upheld where it appears that the father is able and willing to furnish a home and other advantages to the child, while the mother is not so situated.
2. DIVORCE—ALIMONY.—A court has power to award alimony to a divorced wife, even where the divorce is granted on the husband's complaint.
3. DIVORCE—ALIMONY.—Where the original decree gave the wife custody of a child and $60 a month alimony, and was subsequently modified by giving the child to the husband, it was not improper, in the modified decree, to fix alimony at $40 a month, in view of his financial ability.

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

Samuel M. Casey, for appellant.

Under the circumstances of this case, although this court has held that alimony may be allowed a wife where the divorce was granted at the suit of appellant (88 Ark. 302) it would be wrong to compel appellant to contribute to his divorced wife's support. Ann. Cas. 1915-C p. 1252; 106 N. E. 428; 128 N. W. 649.

The custody of a child as between parents living apart is determined solely with respect to the best interests of the child. *Jackson* v. *Jackson,* 151 Ark. 9.

Lewis Rhoton, for appellee.

McCULLOCH, C. J. The parties to this appeal were formerly husband and wife, but were divorced by a decree of the chancery court of Independence County, rendered January 1, 1920, on complaint of the husband charging misconduct on the part of the wife.

There were two children, issue of the marriage, a boy and a girl, and the court in the divorce decree awarded the custody of the boy to the father, and awarded the custody of the girl to the mother. The court also awarded the wife alimony in the sum of sixty dollars per month. There was no appeal from that decree.

The present proceeding was instituted by petition of the husband in the chancery court of Independence County to modify the former decree by awarding the custody of the girl to him and to strike out the allowance of alimony.

It is alleged in the petition, as grounds for modification of the former decree, that the defendant resides in the city of Little Rock, where she had taken the child with her, and that she had been guilty of such misconduct and was so neglectful of the welfare of the child that she was not a fit person to have the child in her custody, and that the probation court at Little Rock had awarded the custody of the child to the plaintiff.

There was an answer to the petition, in which the defendant denied the charges of misconduct on her part or neglect of the welfare of the child, and she asked that the former decree be modified by increasing the allowance of alimony to the sum of seventy-five dollars per month.

The cause was heard by the court on oral testimony, which has been properly preserved in the record and brought up for our consideration, and the former decree was modified by awarding the custody of the girl to the plaintiff, but providing that the defendant should have the right of receiving the children for a visit during one month of each year.

The former decree in regard to alimony was also modified so as to reduce the amount of the monthly payments to the sum of forty dollars.

The court also made an additional order requiring the plaintiff to pay the accumulated delinquent installments under the former decree.

Each party has appealed.

The testimony is somewhat voluminous, and the witnesses are numerous, embracing close relatives of the parties, and their friends.

Testimony was adduced tending, with considerable force, to show that the defendant is not a fit person to have the custody of the girl child, and that she is not so situated in her life in Little Rock that she can afford a proper home for the child. This testimony is denied, however, and there are witnesses in Little Rock who testified that defendant's conduct is above reproach and that she is altogether capable of taking proper care of the child and of properly rearing her. It is unnecessary to state this evidence in detail, for it would serve no useful purpose to do so.

We are convinced, as the chancellor seems to have been, that the father is so circumstanced as to be able to give a better home and sanctuary to the child than is the mother, and that it is to the best interests of the child that she should be with her father.

Defendant is living in the city of Little Rock, where she is engaged as a professional nurse. She has no home of her own to offer to the child. The plaintiff resides in the city of Batesville, where he has a residence of his own, and his mother keeps house for him. The evidence tends to show that he is able, financially and otherwise, to afford the best advantages to his children, and that he is, under the circumstances, the proper person to have the custody of both of the children.

The fact that the two children can, under these circumstances, reside together is not without considerable force in determining the question of the custody of the girl. In order to support this part of the decree of the chancery court it is not necessary to find that the defendant has been guilty of misconduct which involves her moral character, though there is some testimony tending to show that she has been associating with and receiving attentions from a certain undivorced married man in Little Rock.

The decree awarding the custody of the girl to the plaintiff may well be based solely upon the ground that the defendant is not so situated that she can furnish a home and other advantages to the child, while the plaintiff is abundantly able and is willing to do so.

There was, as before stated, no appeal from the former decree, and we are not called on to review the decision of the chancery court allowing alimony to the defendant, notwithstanding the fact that she was the guilty party and the divorce was granted on account of her misconduct. The court had the power to award alimony, even where the divorce was granted on the complaint of the husband. *Pryor* v. *Pryor,* 88 Ark. 302.

We have now only to deal with the question of reduction of the amount of alimony. The proof shows that the amount awarded under the modified decree is not out of proportion to the financial ability of the plaintiff to pay, and that the award is not excessive. The fact that the custody of the daughter has been taken away from the defendant does not necessarily afford ground for holding that the further continuance of the award of alimony was erroneous.

It does not appear that the court originally allowed alimony solely on the ground that the custody of the child was awarded to defendant. The proof shows that the plaintiff was then, as now, financially able to contribute to the support of his wife, and the court, in reducing the amount, may have taken into consideration the fact that the defendant no longer had to support the child. It was, at least, proper for that to be taken into consideration.

The proof shows that the defendant receives a very small income from her professional activities and earns scarcely enough to live on, whilst the plaintiff is in good circumstances and is drawing a liberal salary.

The defendant does not complain of the reduction made by the court, but the complaint as to that part of the decree comes from the plaintiff, who contends that the award should have been stricken out altogether.

We cannot say, under the evidence, that it was improper for the court to continue the alimony for the reduced amount.

The decree is therefore affirmed on both appeals.

STANDARD OIL COMPANY OF LOUISIANA v. BRODIE.

Opinion delivered April 10, 1922.

1. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—Every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.
2. STATUTES—CONSTRUCTION AGAINST ABSURDITY.—Where a statute is susceptible of two constructions, one of which would lead to an absurdity and the other would not, the latter will be adopted.
3. STATUTES—CONSTRUCTION ACCORDING TO INTENT.—In the construction of a statute, the strict literal meaning ought not to prevail where it is opposed to the intention of the Legislature.
4. TAXATION—VALIDITY OF GASOLINE TAX.—Acts 1921, p. 685, providing that persons, firms or corporations who sell gasoline, kerosene or other products to be used in propelling motor vehicles using combustible type engines over the highways of this State, shall collect from such purchaser one cent for each gallon so sold, imposes a tax upon the use of public highways, and is not invalid as imposing a tax on property in violation of the uniformity clause of the State Constitution, though the Legislature, by Acts 1921, p. 490, had previously imposed a privilege tax on automobiles according to their capacity.
5. TAXATION—POWER TO TAX USE OF HIGHWAYS.—Under Const. art. 16, § 5, granting power to the Legislature to tax privileges in such manner as may be deemed proper, the Legislature is authorized to impose a tax for State purposes on the use of the public roads for revenue purposes.
6. CONSTITUTIONAL LAW—DISCRIMINATORY TAX.—Acts 1921, p. 685, § 1-4, providing that persons, firms or corporations selling gasoline, kerosene or other products to be used in propelling motor vehicles using combustible type engines over the highways of the State shall collect from such purchaser one cent for each gallon so sold, is not invalid as being arbitrary, unreasonable and discriminatory in its application in that it does not affect vehicles propelled by steam, electricity or gasoline purchased out of the State.
7. CONSTITUTIONAL LAW—GASOLINE TAX.—Acts 1921, p. 685, §§ 1-4, providing for collection of a tax on gasoline, kerosene and other

products used in propelling motor vehicles, is not invalid as violating the due process clauses of State and Federal Constitutions.

8. STATUTES—UNCERTAINTY.—Acts 1921, p. 685, §§ 1-4, providing for collection of a tax on gasoline, kerosene and other products used in propelling motor vehicles, is not invalid for uncertainty.

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

Gus Ottenheimer, Reid, Gray, Burrow & McDonnell, for appellants.

The act imposes a tax either upon property, the sale thereof or purchase and ownership thereof, and is therefore a tax upon the property itself, and void. 12 Wheaton 419; 197 U. S. 60; 91 U. S. 275; 73 Sou. 193; 23 R. C. L. 36; 41 Sup. Ct. Rep. 272; 72 Sou. 892. The title of the act should be considered in arriving at the intention of the Legislature. 234 S. W. 45; 124 Ark. 475; 138 Ark. 131.

The tax imposed is not a privilege tax. 32 Cyc. 390; 6 Words & Phrases, p. 5586; 23 R. C. L. p. 236. Since the act does not so expressly declare, act 606 cannot be construed as conferring a privilege for the use of the highways of the State. 70 Ark. 554; 36 Cyc. 1179. A statute is not presumed to make any alteration of the common law other than as expressly declared. 115 Ill. App. 31; 23 Ind. 32; 125 Ind. 176; 50 Am. St. Rep. 334; 40 Mo. 253; 55 S. W. 92; 117 Fed. 452; 12 Ky. Law Rep. 839; 13 Ky. Law Rep. 89; 86 N. Y. 8, 49; 57 A. 910; 44 S. E. 760; 80 Ala. 219; 6 Ark. 280; 32 Ark. 59; 47 Ark. 442; 59 Ark. 344; 71 Ark. 556; 59 Ark. 81; 70 Ark. 481. The act being penal must be strictly construed. 6 Ark. 131; 13 Ark. 405; 43 Ark. 413; 59 Ark. 341; 53 Ark. 334; 56 Ark. 45; 38 Ark. 519; 79 Ark. 517; 68 Ark. 34.

The tax construed as a privilege tax is unconstitutional, because violative of art. 2 sec. 18 of the Constitution. 85 Ark. 573; 12 C. J. 117; 70 Ark. 549.

The act violates the due process clauses of the State and Federal Constitutions in that dealers are required to perform services for the State without compensation. 94 Ark. 27; 113 Ark. 149; 91 Fed. 93; 55 Fed. 26.

The act is void for uncertainty. 34 Ark. 224; 45 Ark. 158; 105 Ark. 280; 52 Fed. 917; 39 Cyc. 969; 25 R. C. L. 810; 6 D. C. 75; 59 N. E. 489.

J. S. Utley, Attorney General, *Elbert Godwin* and *Wm. T. Hammock,* Assistants, and *Geo. W. Emerson,* prosecuting attorney, for appellee.

The tax is not a property tax but rather a tax on the use of the highways by certain vehicles using gasoline.

The legislative intention must be inferred from the plain meaning of the words used. 133 Ark. 1; some meaning must be given every word, if possible. 135 Ark. 262; and sections must be read and construed in the light of each other. 131 Ark. 129; 140 Ark. 398. The title of an act is not conclusive of legislative intent. 138 Ark. 381.

The act does not contravene sec. 2, art. 18, Const. because no immunity is granted to any class. The tax is laid alike on all persons similarly situated, and is a valid act. 70 Ark. 549; 85 Ark. 512.

The due process clause of the Constitution is not violated by the act. No fundamental rights are infringed. 204 U. S. 241; 74 Ark. 174; 95 U. S. 714; 134 U. S. 232; 113 U. S. 703; 160 U. S. 452; 115 U. S. 321.

The act does not contravene sec. 2, art. 18, Const. be- Constitution of Arkansas. 99 Ark. 1; 49 Ark. 100. The Legislature has power to make such laws as are not prohibited by the Constitution. 112 Ark. 342; 43 Ark. 527; 1 Ark. 513; 4 Ark. 473; 130 U. S. 641; 173 U. S. 592. Nor does it violate the Fourteenth Amendment to the Constitution of the United States. 113 U. S. 27; 127 U. S. 678; 128 U. S. 82.

McCULLOCH, C. J. This litigation calls for an interpretation, and involves the validity, of a statute enacted by the General Assembly of 1921, providing for the collection of a tax upon the sale of "gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways." (Acts 1921, p. 685). The va-

lidity of the tax is challenged on numerous grounds, which will be discussed in the order presented in the briefs of counsel.

The title of the statute is as follows: "An Act to levy a tax upon gasoline used in the propelling of motor vehicles, and for other purposes."

Section 1 of the statute, which is the one imposing the tax, reads as follows:

"That all persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles, using combustible type engines, over the highways of this State, shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1c) per gallon for each gallon so sold."

Section 2 requires all dealers in the sale of gasoline for use in propelling motor vehicles to register with the county clerk of their respective counties and to file a report on or before the tenth day of each month, showing the sales of gasoline, kerosene or other products purchased for use in the propelling of motor vehicles.

Section 3 provides that all dealers who shall sell gasoline or other products upon which the tax is imposed and who shall fail to collect the same "shall be personally liable for the amount of such tax so uncollected," and that such dealers shall pay to the treasurer of the county the sum of one cent per gallon for all gasoline sold for the purposes named.

Section 4 requires all wholesale distributers of gasoline and like products suitable for the use of propelling motor vehicles to file with the county clerk of their respective counties a statement showing the amount of gasoline and other such products sold by them to retailers. A penalty of not less than ten nor more than one thousand dollars is imposed on dealers who shall fail to account for all moneys due by them under the terms of the statute.

Another section provides that of the tax so collected one-half shall be credited to the general road fund of the

county, and the other half shall be transmitted to the treasurer, to be placed to the credit of the highway improvement fund.

It is first contended, in the attack on the validity of the statute, that it constitutes the imposition of a property tax on gasoline and the other commodities mentioned, and that it is void because in violation of the uniformity clause of the Constitution of this State. It is conceded in all quarters that if the imposition is, in effect, a property tax it is void. This calls for an interpretation of the statute for the purpose of determining the character of tax sought to be imposed.

In the outset of the discussion it is well to call attention to certain rules of interpretation for the purpose of determining the constitutionality and validity of a legislative enactment.

The Supreme Court of the United States has said that "the elementary rule is that every reasonable construction must be resorted to in order to save the statute from unconstitutionality." *Hooper* v. *California,* 155 U. S. 657.

In the recent case of *Dobbs* v. *Holland,* 140 Ark. 398, we announced the same rule, and we treated it as so familiar in the rules of interpretation of statutes that it was unnecessary to cite authorities in support. We have also said that if a statute is susceptible to two constructions, one of which would lead to an absurdity and the other not, the latter would be adopted. *State* v. *Jones,* 91 Ark. 5. There are many decisions of this court announcing and adhering to those rules and giving them application under a variety of circumstances. *Hartford Fire Ins. Co.* v. *State,* 76 Ark. 303; *Pryor* v. *Murphy,* 80 Ark. 150; *Bowman* v. *State,* 93 Ark. 168; *Garland Power & Dev. Co.* v. *State Board of R. R. Incorporation,* 94 Ark. 422; *Hughes* v. *Kelley,* 95 Ark. 327; *Leonard* v. *State,* 95 Ark. 381; *State* v. *Handlin,* 100 Ark. 175; *Snowden* v. *Thompson,* 106 Ark. 517; *State* v. *Trulock,* 109 Ark. 556.

In the case of *State* v. *Trulock, supra,* we quoted, with approval, the following statement on this subject by Mr. Sutherland:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statutes; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." 2 Lewis' Sutherland, Statutory Construction, § 376.

When the interpretation of this statute is approached in conformity with the rules thus stated, it is easy to discover in the language an intention on the part of the lawmakers to impose a tax, not on property, but on a privilege, so as to bring the enactment within constitutional limits. The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of the gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured.

If it had been intended merely to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the bases of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself.

"In construing a statute," said this court in *State* v. *Embrey,* 135 Ark. 262, "some meaning should be given to every word contained therein, if possible." It is our duty, therefore, to give some meaning and effect to that part of the statute which prescribes the use of the gasoline in propelling an automobile along the highway as the final test of the basis of the tax, and especially is it our duty to do this when the constitutionality of the statute depends upon giving some effect to that feature of it.

Counsel for appellants insist that, even if this is not a direct tax on the gasoline itself, it is, at least, a tax on the use of the gasoline, and that this constitutes a tax on the property itself, for the reason that it is a tax on the only available use to which the article is susceptible. In other words, they invoke the rule that has been announced in some quarters, to the effect that a tax levied upon the only available use to which an article is susceptible is, in effect, a tax on the article itself. 26 R. C. L. 236.

It may be conceded that a tax on gasoline for its only available use would, in effect, be a tax on the commodity itself, but such might not be the case as to other articles, and we are unwilling to subscribe unqualifiedly to the doctrine that a tax on the only available use of an article is, in every instance, a tax on the article itself. In fact, this court repudiated the doctrine in the case of *Fort Smith* v. *Scruggs,* 70 Ark. 549, where Judge RIDDICK, speaking for the court, said:

"Counsel say that a tax on the use of an article is a tax on the article itself. While this may be true of a piano, bedstead, or cooking-stove, the use of which involves no injury or detriment to the public or its property, as to wheeled vehicles it is different, for they are made to be used upon roads and streets. The streets belong to the public, and are under the control of the Legislature, whose province it is to enact laws for their improvement and repair. The chief necessity for keeping improved streets is that they may be used for the

passage of wheeled vehicles, and the wear of the streets caused by the passage of such vehicles over them makes necessary constant and expensive repairs. For this reason, no doubt, the Legislature considered it to be equitable and just that owners of such vehicles should, in addition to the general tax upon their property, pay something for the privilege of using the streets as driveways, the amount paid to go towards keeping the streets in good repair. This is what the Legislature attempted to do."

But, as we have already said, this is not a tax on gasoline, but on the use on the public highway of the vehicles mentioned, and the case comes, therefore, within the doctrine announced by Judge RIDDICK in the Scruggs case, *supra,* that the tax on the article used does not constitute a tax on the article itself, for the privilege is not upon the article but upon the use of it on the public highway. It is, in effect, the use of the public highway that is taxed, and not the use of the article itself.

Among other reasons stated by counsel for appellants in the argument why this statute should not be interpreted as imposing a tax on automobiles used on the public highways, is that such a tax is imposed under another statute, and that a statute amending the former one and increasing the amount of taxes was passed by the Legislature and approved by the Governor only a few days before the enactment of the statute now under consideration. Acts 1921, p. 490. This is indeed a circumstance of some value in arriving at the intention of the Legislature, but it is by no means conclusive, for the other statute merely levied a tax on the privilege according to the capacity of the car, whilst the present statute, as now interpreted, imposes a tax on the privilege according to the extent of the use of the car. It is not unreasonable to suppose that by the former statute the lawmakers intended to impose a minimum privilege tax, laid according to the capacity of the car, and by the statute now under consideration they intended to impose an additional tax according to the extent of the use of the car on the public highway. It is, at least, our duty

to ascribe to the lawmakers such an intention as is compatible with the Constitution of the State, by which they were bound, and to which, we must presume, they intended to conform.

Our conclusion, therefore, is that, under a fair interpretation of the statute, it imposes, not a property tax, but a tax upon the privilege of using automobiles on the public highway.

The validity of the tax is questioned, even as a privilege tax, on the ground that the Legislature had no power to impose it as a State tax for revenue purposes.

The Constitution provides (sec. 5, art. XVI) "that the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper." It is contended that this provision of the Constitution is a limitation upon the taxing power of the State for revenue purposes, and that the power to tax is limited to the subjects specifically mentioned—that the use of the word "privileges" must be construed, under the doctrine of *ejusdem generis,* to relate only to the subjects which precede its use. Counsel rely, for this contention, upon the decision of this court in *Washington* v. *State,* 13 Ark. 752, under a provision of the Constitution of 1836 almost identical with the provision on this subject in the present Constitution. We do not think that the case just cited decides what counsel contend that it does. The substance of that decision is that the constitutional provision mentioned is a restriction upon the power of taxation of privileges, and that it does not authorize taxation upon a privilege which was a common right of every citizen.

In the later case of *Baker* v. *State,* 44 Ark. 134, Chief Justice COCKRILL summarizes the effect of the ruling in the Washington case, *supra,* as follows:

"We do not understand this case, reading it all together, to limit the power of legislation for State purposes to the taxation of such privileges as were technically known as such at the common law, notwithstanding an expression to that effect occurs in the opinion. We

think the Legislature is not restrained by anything in the organic law from laying a tax on the franchise of a corporation, and the reasoning of the learned judge who delivered the opinion in Washington's case, *supra*, leads to that conclusion."

We understand the effect of this decision to be that the restriction is not to the privileges specifically mentioned in the Constitution, nor privileges which were "technically known as such at the common law," but that the restriction relates merely to privileges which were matters of common right. This being true, there is nothing in the provision of the Constitution referred to which prohibits taxation for State purposes of the use of the public roads. While the public highways are for the common use of all, they belong to the public, and it is within the power of the Legislature either to regulate or to tax the privilege of using them. This power was declared in express terms by Judge RIDDICK in the Scruggs case, *supra.*

Again it is argued that the statute, treating it as imposing a privilege tax, is arbitrary and unreasonable in that it discriminates against the users of certain kinds of cars, while exempting from the burden of taxation users of other kinds of cars, and that it also exempts cars propelled by the use of gasoline not purchased in this State. Illustrations are given of the discriminatory effects of the statute in the fact that it includes only motor vehicles using combustible type engines, whereas there are certain motor cars in use that are propelled, some by electricity and some by steam; also that residents near the borders of the State may conveniently purchase gasoline in a bordering State for use in a car propelled along the highway in this State.

It is true that, under the terms of the statute, a motor car propelled otherwise than by the explosive type of engine escapes the taxation imposed by the statute, and it must also be conceded that evasions of the law in the manner indicated in the argument of counsel are possible,

But this does not render the statute arbitrarily discriminatory in a legal sense.

We have often said that complete uniformity in matters of taxation is unattainable, and it is not essential to the validity of a tax, either upon property or upon privilege, that it be absolutely free from inequalities or discrimination. The lawmakers have some discretion, even in legislating with reference to the power of taxation as restricted by the terms of the Constitution, and they may determine the scope and extent of the exercise of the taxing power, and a mere incidental inequality or discrimination does not affect the validity of the statute.

The Supreme Court of the United States, in the case of *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251, speaking on a kindred subject, said:

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for goverment-al purposes there cannot be an *exact* exclusion or inclusion of persons and things."

The same principle has been announced and applied by this court in *Williams* v. *State,* 85 Ark. 464; *St. L. I. M. & S. Ry. Co.* v. *State,* 86 Ark. 518; *St. L. I. M. & S. Ry. Co.* v. *State,* 102 Ark. 205, and *State* v. *Kansas City & Memphis Ry. & Bridge Co.,* 117 Ark. 606.

The fact that there may be evasions of a taxation statute does not affect its validity, for all such statutes are open to evasions. If the general classification is not discriminatory, then mere incidental discriminations or opportunities for evasions do not affect its validity.

It is next contended that the due process clause of the Constitution of this State and of the United States is violated by the requirement laid upon the dealers in gasoline to collect and pay the tax. It must be remembered that the tax is not laid on the sale of the gasoline, nor upon the business of the dealer. The dealer is not required to pay the tax, but to collect it, keep and present an account thereof and pay it over to the county treasurer. The purpose of the statute is two-fold, namely, to impose a tax upon the purchaser of gasoline for the use of the car, and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the county treasurer. It is certainly within the power of the Legislature to regulate the business of selling gasoline, and it is not an unreasonable regulation, for it does not involve the payment of any fee, nor the performance of any unreasonable task.

Counsel base their contention in this respect upon decisions, particularly those of the Supreme Court of the United States, holding that the validity of a regulation requiring the collection of a tax upon corporate stock at the source, that is, through the corporation issuing the stock, is dependent upon the fact that a lien is given to the corporation against the stock in the hands of the holder—in other words, that there must be some mode of reimbursement provided before the duty can be imposed upon a person other than the taxpayer to collect the tax. *Clement National Bank* v. *Vermont,* 231 U. S. 120; *New York* v. *Purdy,* 231 U. S. 373; *First National Bank* v. *Commonwealth,* 9 Wall. 353; *First National Bank* v. *Chehalis County,* 166 U. S. 440; *Citizens' National Bank* v. *Kentucky,* 217 U. S. 443; *National Safety Deposit Co.* v. *Stead,* 232 U. S. 58.

That principle is not ignored in the provisions of the statute now under consideration, for the dealer has ample opportunity to reimburse himself in advance by the collection of the tax before the commodity is delivered. He has the power to compel obedience to the law by refusing to sell the gasoline unless the tax is paid, and the

dealer may adopt reasonable means of ascertaining the real purpose of the purchaser of the article. Of course, there may be evasions, and it cannot always be definitely ascertained what the purpose of the purchaser of the gasoline is, so as to determine whether or not he is attempting to evade the law, but, as before stated, these inherent defects in all such statutes do not affect their validity.

The presumption must be indulged that the vast majority of people who purchase gasoline for use in motor vehicles will obey the law rather than attempt to evade it, and the fact that the few may evade the law does not afford reasons for striking it down. There is scarcely a tax law on the statute books of this or any other State that is not evaded in exceptional instances.

Finally, it is argued that the law is vague and uncertain—so much so that it is incapable of enforcement. The interpretation which we have given to the statute, and which, we think, is a fair and reasonable one, relieves it from this charge of uncertainty, for we think that it means what we have stated in this opinion, and that it can be readily understood.

The fact that there may be a difference of opinion as to the meaning of the language of a statute does not render it too vague or uncertain to be enforceable. It is not infrequent that statutes have to be construed by the courts before laymen, or even lawyers, have a settled view as to the proper interpretation, but a statute which is fairly susceptible to definite interpretation is not too vague for enforcement.

Our conclusion therefore upon the whole case is that the statute is valid, and the decree is therefore affirmed.

NORMAN v. S. L. JOSEPH MERCANTILE COMPANY.

Opinion delivered April 10, 1922.

1. MORTGAGES—INSUFFICIENCY OF DESCRIPTION.—Mortgages of cotton described as "6 acres of cotton grown on the John Moore lease," which land consisted of 12 acres, *held* void for uncertainty of description, as it furnished no description from which it could be ascertained what particular 6 acres were intended.
2. MORTGAGES—NOTICE.—Persons purchasing personal property with actual notice of a mortgage thereon take free from such mortgage where the description in the mortgage does not identify the property intended to be mortgaged, as the purchaser is required only to take notice of the description in the recorded mortgage.

Appeal from Greene Circuit Court; *D. G. Beauchamp,* special judge; affirmed.

Jeff Bratton, for appellant.

Where a mortgage covers an undivided interest in a whole crop, it is not necessary that it designate the manner in which the interest conveyed should be separated from the balance. 11 C. J. 470; 48 Ark. 293.

The notice was sufficient. 51 Ark. 414; 23 Ark. 744; 58 Ark. 91.

Block & Kirsch and *Fuhr & Futrell,* for appellee.

The description in the mortgage was void for uncertainty. 41 Ark. 70; 43 Ark. 350; 11 C. J. 470; 31 Am. Rep. 652.

WOOD, J. One W. C. Rasberry executed to appellant a mortgage in which the property mortgaged was described as "six acres of cotton grown on the John Moore lease." Rasberry and one John Moore owned an undivided one-half interest on cotton that was grown on twelve acres of land designated as the "John Moore lease." The S. L. Joseph Mercantile Company, a corporation, and Bertig Bros., a partnership, purchased of Rasberry cotton owned by Rasberry that was grown on the John Moore lease. They purchased the cotton after the appellant had told them that he had a mortgage on Rasberry's cotton. The appellant instituted separate actions against the appellees to recover of them respec-

tively the amounts paid by them to Rasberry for the cotton. The causes were consolidated for trial, and by consent of parties were tried by the court sitting as a jury. The court, upon the facts, rendered judgment in favor of the appellees, from which is this appeal.

The mortgage was void because of uncertainty in the description. It furnishes no data by which it can be ascertained what particular six acres of cotton grown on the John Moore lease of twelve acres was intended. "A mortgage covering crops growing on a certain number of acres in a larger tract, without specifying the particular part intended, is void for uncertainty." 11 Cor. Jur. 470; *Dodds* v. *Neal,* 41 Ark. 70; *Krone & Co.* v. *Phelps,* 43 Ark. 350.

As between the appellant and the appellees, the latter only had to take notice of the description in the mortgage that was on file in the office of the circuit clerk of Greene County. *Krone & Co.* v. *Phelps, supra.* The judgment is correct, and it is therefore affirmed.

McGREGOR v. ECHOLS.

Opinion delivered April 10, 1922.

1. VENDOR AND PURCHASER—DAMAGES FOR BREACH OF CONTRACT.—The proper measure of damages for breach by the purchaser in an executory contract for the sale of land is the difference between the contract price and the market value at the time of the breach, less the portion of the purchase price already paid.
2. VENDOR AND PURCHASER—INCUMBRANCE NO DEFENSE WHEN.—It is no defense to an action by the vendor on an executory contract of sale that at the time the contract was executed the property was incumbered by a vendor's lien, if the incumbrance was removed before the time for completing the purchase.

Appeal from Woodruff Circuit Court, Southern District; *J. M. Jackson,* Judge; reversed.

STATEMENT OF FACTS.

This was a suit by a vendor against his vendee for the breach of an executory written contract for the sale of land.

On the 28th day of April, 1920, D. H. Echols entered into a written contract whereby he agreed to sell to J. D. McGregor about 630 acres of land in Woodruff County, Ark., for the sum of $50,000. The sum of $500 was paid to Echols by McGregor at the time the instrument was signed, and it was provided that McGregor might pay $9,500 in cash on January 1, 1921, and execute eight promissory notes for $5,000 each for the deferred payments. The instrument also provided that Echols should remain in possession of the land and be entitled to the rents thereof for the year 1920.

On January 1, 1921, D. H. Echols executed a warranty deed to said land to Joe D. McGregor and tendered the same to him and demanded the payment of $9,500 from him and the execution of his promissory notes for the balance of the purchase money. McGregor refused the tender and declined to carry out the contract on his part. Echols then instituted this suit against him in the circuit court to recover damages.

In addition to the above facts, it was shown at the trial that Echols had purchased the land from Dr. R. R. James for $40,000. He paid $10,000 in cash, and Dr. James retained a lien on the land for the balance of the purchase money. On the 1st day of January, 1921, Dr. James executed an instrument in writing in favor of D. H. Echols whereby he agreed to accept the purchase money notes of Joe D. McGregor to the amount of his vendor's lien and to release his vendor's lien on said land. There were about $1,600 or $1,700 worth of mules and farming implements that went with the sale of the place. McGregor never took possession either of the land or of the personal property.

McGregor offered to prove that the market value of the land on the 1st day of January, 1921, was more than $50,000. The court excluded this testimony and instructed the jury to return a verdict for the plaintiff in the sum of $7,800.

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

Mathis & Trice and *C. F. Greenlee,* for appellant.

The court erred in directing a verdict for the plaintiff.

The measure of damages for breach of contract to purchase land is the difference between the price agreed to be paid for the land and its real value at the time the contract is broken. Sutherland on Damages, vol. 2, p. 196; 6 Gray 25; 7 M. & W. 474; 127 Iowa 545; A. & E. Ann. Cas. vol 4, p. 789; 2 Warvelle on Vendors, sec. 937; 67 Am. Dec. 278; 2 Sutherland on Damages, sec. 1758; Wood's Mayne on Damages, sec. 243; Hall on Damages, p. 366; 98 Iowa 242; 52 L. Rep. Ann. 258; 51 N. H. 167; 12 Am. Rep. 76; 63 N. H. 171; 10 App. D. C. 379; 40 Ind. 466; 16 Abb. Pr. 133; 66 Am. Dec. 394; 62 Pa. 148; 51 N. H. 167; 39 Cyc. 2114; 47 Ark. 519; 2 Ark. 397; 6 Wheat. 109; L. R. 3 Q. B. 1 L. R. 4 Q. B. 659; 40 N. Y. 59; 65 Me. 87; 58 Mo. 32; 17 Amer. Rep. 678; 78 Ill. 222; 20 Am. Rep. 261; 55 Ark. 376; 70 Ark. 39; 92 Ark. 111; 79 Ark. 338; 40 Fed. 677; 55 Ark. 199.

A purchaser of real estate is entitled to a marketable title free from incumbrance and defects, unless he expressly stipulates to accept a defective title. 63 Ark. 548; 66 Ark. 436; 85 Ark. 289; 11 Ark. 75; 121 Ark. 482; 97 Ark. 397; 108 Ark. 490; 87 Ark. 490; 126 Ark. 420; 103 Ark. 425.

Roy D. Campbell, for appellee.

The court was correct in rendering judgment for the defendant. Where a party agrees to purchase real estate at a stipulated price and subsequently refuses to perform his contract, the loss in the bargain is the measure of damages. Sutherland on Damages, p. 38; 33 C. C. A. 550; 178 U. S. 1; 52 L. R. A. 258.

Whenever a contract is breached the party to the contract that is without fault is entitled to his action for any damage he has sustained. 80 Ark. 232; 13 Cyc. 53; 78 Ark. 336; 97 Ark. 533; 80 Ark. 288; 91 Ark. 427; 95 Ark. 363; 78 Ark. 336; 69 Ark. 219; 105 Ark. 433; 111 Ark. 485; 122 Ark. 192; 140 Ark. 78; 145 Ark. 182; 122 Ark. 189; 103 Ark. 584.

HART, J. (after stating the facts). The court erred in instructing a verdict for the plaintiff. The plaintiff purchased the land for $40,000 and sold it to the defendant for $50,000. The defendant paid $500 at the time the written contract for the sale of the land was executed. There was about $1,600 or $1,700 of personal property that was to go with the land. By deducting the $500 paid when the contract was executed and the value of the personal property in the sum of $1,700 from $10,000, the estimated profits of Echols, the court arrived at the sum of $7,800, for which the jury was directed to return a verdict in favor of the plaintiff.

The court did not adopt the proper measure of damages. It is true that McGregor committed a breach of the contract by failing to accept the deed tendered by Echols and to carry out his part of the contract, but this left Echols in possession of the land and of the personal property. In such cases the rule as announced by this court, which is in accord with the weight of authority on the question, is to the effect that, upon the breach by the vendee of an executory contract for the sale of land, the vendor may have an action at law for damages, and his measure of damages is the difference between the contract price of the land and its market value at the time of the breach, less the portion of the purchase price already paid. *Fears* v. *Merrill,* 9 Ark. 559; *Old Colony Railroad Corporation* v. *Evans,* 6 Gray (Mass.) 25; *Porter* v. *Travis,* 40 Ind. 556; *Hodges* v. *Kowing,* 58 Conn. 12; *Pritchard* v. *Mulhall* (Iowa) 4 Ann. Cas. 789; *Muenchow* v. *Roberts,* 77 Wis. 520, and *Hogan* v. *Kyle,* (Wash.) 35 Pac. 399.

In an action by the purchaser of land for a breach of the contract to convey, this court has also laid down the rule that the measure of damages is the difference between the contract price and the value of the land when the breach occurred, with interest on such difference. *Kempner* v. *Cohn,* 47 Ark. 519.

In *Old Colony Railroad Corp.* v. *Evans,* (Mass.) 6 Gray, 25, 56 Am. Dec. 394, the rule of damages is clearly

stated as follows: "In actions against a vendee on a contract for the purchase of real estate, we had supposed it to be a well settled rule that when a party agreed to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the salable value of the land at the time the contract was to be executed."

It follows that the court erred in excluding the testimony offered by the defendant as to the market or salable value of the land at the time he breached the contract and in directing a verdict for the plaintiff.

It is also insisted by counsel for the defendant that the plaintiff is not entitled to recover, because Dr. James had a lien on the land for $30,000. The record showed that Dr. James executed an instrument in writing releasing his vendor's lien for the unpaid purchase money upon the delivery to him of the notes to McGregor for a like sum. The general rule is that where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation. Incumbrances on the land when the contract is made will form no ground of objection thereto if removed before the time of completing the purchase. 39 Cyc. 1931-1932; *Townsend* v. *Goodfellow,* (Minn.) 41 N. W. 1056.

The record shows in the present case that the incumbrance was removed by the date that Echols was required to execute a deed to the land to McGregor. Therefore, the contention of the defendant on this point is not well taken.

For the error in directing a verdict for the plaintiff, as indicated in the opinion, the judgment must be reversed and the cause remanded for a new trial.

AUGUSTA COOPERAGE COMPANY v. BLOCH.

Opinion delivered April 10, 1922.

1. EQUITY—AFFORDING COMPLETE RELIEF.—Where, to a complaint at law, defendant tendered an equitable issue, equity will assume jurisdiction and retain it for the purpose of disposing of all the issues raised by the pleadings.
2. REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.—In a suit to reform an instrument, the evidence to establish a mutual mistake must be clear, unequivocal and convincing.
3. EQUITY—ADMINISTERING COMPLETE RELIEF.—Where plaintiff in an action at law sought the recovery of treble damages for cutting timber, under Crawford & Moses' Dig., § 10320, and the defendant had the cause transferred to equity, the chancery court, having thus acquired jurisdiction and having determined that plaintiff was entitled to treble damages under the statute, should have awarded such damages without sending the case back to the law court.
4. TRESPASS—UNINTENTIONAL WRONG—TREBLE DAMAGES.—Where the cutting of elm timber by the defendant on the land of plaintiff was the result of inadvertence and mistake and not a wilful wrong, plaintiff could recover only the value of the property when taken.
5. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where a decree of the chancery court is sustained by the preponderance of the evidence, the cause will not be reversed, though erroneous reasons for the decree were given by the court.

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

J. F. Summers, for appellant; *Geo. B. Webster,* of counsel.

Written instruments may be reformed on the ground of mutual mistake, and proof of such mistake may be established by parol evidence. 98 Ark. 10; 71 Ark. 614; 98 Ark. 23; 144 Ark. 23.

The elm timber was not wilfully cut, but was done in good faith, and the value of the property when first taken must govern. 87 Ark. 80.

The only competent evidence of value of the timber was by actual sales, which fixed the market price. 92 Ark. 297.

Gustave Jones, for appellee.

The case was improperly transferred to the chancery court, to escape the award of treble damages. This court has held, however, that in cases originating in chancery treble damages can be awarded.

Reformation of a contract, on account of the mistake of one of the parties, will not be granted. 99 Ark. 480; 83 Ark. 131; 74 Ark. 336; 89 Ark. 668. To justify reformation, proof of mistake must be established not merely by a preponderance of the evidence, but by proof that is clear, unequivocal and decisive. 101 Ark. 46; 108 Ark. 503; 104 Ark. 475; 132 Ark. 227; 94 Ark. 621; 120 Ark. 326; 111 Ark. 205.

The trespass was wilful, and treble damages should have been awarded. 69 Ark. 302; 87 Ark. 80; 96 Ark. 87; 105 Ark. 157.

The question of value is one entirely of opinions of witnesses and does not require expertness on the subject. 137 Ark. 592; 130 Ark. 547.

WOOD, J. This action was instituted by the appellees against the appellant in the circuit court to recover damages. The appellees alleged that they were the owners of certain tracts of land in sections 22 and 34 in township 10 north, range 3 west, in Jackson County, Arkansas, and that appellant wilfully trespassed upon these lands by cutting and removing therefrom elm timber to the amount of 290,000 feet, which appellant converted into 870,000 staves of the value of $17,400, for which appellees prayed judgment.

The appellant answered denying all the material allegations of the complaint and set up that it had purchased of the appellees all the elm timber on the sections mentioned, and that, in a deed executed by the appellees to the appellant, conveying the different kinds of timber the appellant had purchased from the appellees, through mutual mistake the elm timber was omitted. That the appellant, knowing that it had purchased the elm timber and believing that it was included in the deed,

proceeded to cut and remove, along with the other timber, 123,000 feet of elm timber from section 22. Appellant denied that it cut and removed any elm timber from section 34. The appellant also alleged that all of the elm timber cut except 33,000 feet was cut more than three years before the commencement of the action and pleaded the statute of limitations to all except 33,000 feet. The appellant made its answer a cross-action against the appellees, and asked that the cause be transferred to equity and that the timber deed be reformed so as to include the elm timber in section 22. The appellees answered denying the allegations of the cross-complaint. The appellant's motion to transfer to equity was granted.

The allegations of appellant's cross-complaint stated a cause of action which entitled appellant to have the cause transferred to the chancery court. The appellant sought reformation of the deed under which it claimed the right to cut the timber in controversy. This gave the chancery court jurisdiction, and, having entertained jurisdiction for that purpose, the court ruled correctly in retaining the cause and in disposing of all the issues involved.

1. The primary question in the case is whether or not the appellees sold to the appellant the elm timber as alleged in appellant's cross-complaint. The appellant contends that the elm timber growing on the tracts mentioned in sections 22 and 34 was sold by the appellees and purchased by the appellant, and this timber should have been mentioned specifically, along with the other timber, in the deed evidencing the transaction; that it was the intention of the parties that this should be done, and that, through mutual mistake of parties in not calling the attention of the draftsman of the deed to this fact, the elm timber was not included therein.

On this issue, a witness who was appellant's superintendent at the time of the alleged sale of timber, testified that he made a survey of the timber before the purchase, and that it was his understanding that appellant was to purchase the gum timber on section 34 and all the soft

woods on section 22 suitable for cooperage stock, which included gum, elm, maple, hackberry and sycamore.

Another witness (Massey) for the appellant testified that when he looked over the timber with a view to purchase same J. H. Keel, one of the appellees (who was representing the other appellees), said that appellant would only get the gum species from section 34, but on section 22 appellant would get everything except the oak and hickory. In other words, appellant was to get the soft wood species including gum, elm, maple, hackberry, sycamore, cottonwood, ash and cypress. This witness stated that he was present at Newport when the contract was made for the timber and heard the conversation relative to the contract between the parties, that is, between Lyons and Keel representing the appellees, and Heckart and Diamant representing the appellant. Concerning this conversation the witness said: "Mr. Diamant made the remark, 'I suppose you all know or understand the purpose of this meeting.' Mr. Lyons said, 'Yes.' Mr. Diamant said, 'I understand that Bloch, Lyons and Keel want to sell the gum on No. 34,' having a list there he had prepared, with the gum and elm and different species, and went over the ash, hackberry, maple, etc., on 22, and said, 'Is that right?'" He went ahead with his conversation with Mr. Lyons and he said, "Have you a price?" and Mr. Lyons said, "Yes." Witness "did not go with them when they went to draw the contract."

Mr. Lyons testified concerning the transaction substantially as follows: Diamant, Heckart, Keel and witness met at the hotel, and Diamant told witness that he would like to buy the gum timber on section 34 and section 22 which was owned by Bloch, Lyons, and Keel. He wanted to know what I wanted for it, and I told him I wanted $13,000 cash. They agreed upon the consideration and terms of payment and went over to Joe Stayton's office, an attorney, and gave the details to Mr. Stayton. After Mr. Stayton had started writing the contract for the gum on the two sections, something came up about

the hackberry, sycamore and tupelo gum. Tupelo gum was not mentioned at first—just the main gum. As there was very little of this timber on these tracts, we decided that we would include those in this price, for it didn't amount to anything from the amount of timber that was standing. The written contract exhibited with the pleadings is absolutely the contract made between the Augusta Cooperage Company and Bloch, Lyons and Keel. It specifies each class of timber specifically as to what they were to get. The witness was asked the following question: "Was there at any time any agreement, understanding or intention to convey to them the elm and ash?" Ans. "No sir, we were under the impression at that time that we had a contract out upon the ash and elm, and that we could not sell it if we wanted to."

J. H. Keel, one of the appellees, testified substantially corroborating the testimony of Lyons. He stated that while Mr. Stayton was drawing the contract the question was asked whether the appellees could put in the ash and the elm with the other varieties of soft wood mentioned, and witness stated, "We couldn't sell the ash and elm. We couldn't let those two go. We could put in the other timber." The reason the witness so stated was because his recollection was "that they had a contract out for both the ash and the elm with other people, which contract had not expired."

We need not pursue this issue further, for it will be observed that there was a sharp conflict in the testimony as to whether or not the appellees sold to the appellant the elm timber, and as to whether or not such timber was omitted from the deed evidencing the transaction through mutual mistake. In view of such conflict in the testimony, it is apparent that the appellant has not proved by a preponderance of the evidence that the elm timber was sold and that it was not included in the deed through mutual mistake of the parties. The appellant therefore falls far short of establishing a cause of action for a reformation of the deed. In one of our recent cases upon

this subject we said: "Equity will not reform a deed on account of mistake in description unless the proof of such mistake be clear, unequivocal and convincing, nor unless the mistake is clearly shown to have been common to both parties. While there must be something more than a mere preponderance of evidence to show a mutual mistake, the rule does not require that the proof be undisputed. The requirements of law are fully met when the testimony tending to show a mutual mistake is unequivocal and clear, that is, such as to satisfy and convince the court that the mistake was made and that the instrument was so drawn as not to express what the parties to the contract intended." *Beneaux* v. *Sparks,* 144 Ark. 23. Other cases are *Greenhaw* v. *Cohn,* 74 Ark. 336; *Varner* v. *Turner,* 83 Ark. 131; *Cherry* v. *Brizzolara,* 89 Ark. 668; *McKnight* v. *Wilmington,* 94 Ark. 621; *Wales-Riggs Plantation* v. *Banks,* 101 Ark. 461; *Tedford Auto Co.* v. *Thomas,* 108 Ark. 503; *Eureka Stone Co.* v. *Roach,* 120 Ark. 326; *Hoffman* v. *Rice-Stix Dry Goods Co.,* 111 Ark. 205; *Welch* v. *Welch,* 132 Ark. 227; *Waddell* v. *Bowdre,* 151 Ark. 474.

2. The trial court found that the trespass was wilful, but refused to award treble damages, citing *Cooley* v. *Lovell,* 95 Ark. 567; *Hendricks* v. *Black,* 132 Ark. 473. These were cases originating in courts of chancery to enforce penalties, and we held that "courts of equity will not aid in the enforcement of penalties." But, where one goes into a court of law to recover treble damages awarded by the statute (§ 10320, C. & M.) and the defendant in the action asks and succeeds in having the cause transferred to equity, the chancery court, having acquired jurisdiction and having determined on trial of the issues that the plaintiff is entitled to treble damages under the statute, may follow the law and award such damages without sending the cause back to the law court.

But while the appellant's alleged cause of action for reformation of the deed breaks down under the above rule, it does not follow from the above facts that the

trespass was wilful, and that the appellees are entitled to treble damages. On the contrary, while the above testimony does not prove clearly and unequivocally that it was the intention of the parties to sell the elm timber and to have the same included in the deed, it occurs to us that it was sufficient, taken in connection with other testimony in the record, to show that the agents and servants of appellant in cutting the elm timber were not wilful trespassers. The testimony of appellant's agent, Massey, who was in charge of appellant's logging operations during the period covered by these alleged trespasses, shows that he believed that the appellant had purchased the elm timber and had the right to cut and remove the same. Although he was mistaken in this belief, nevertheless, the circumstances detailed by him were such as to warrant the conclusion that he honestly entertained such belief, and therefore was acting in good faith in cutting the elm timber, believing that he had a right to do so.

In *U. S.* v. *Flint Lumber Co.*, 87 Ark. 80, we held, quoting from *Pine River Lbr. Co.* v. *U. S.*, 186 U. S. 279, and *Woodenware Co.* v. *U. S.*, 106 U. S. 432, as follows: "Where the trespass is the result of inadvertence or mistake and the wrong was not intentional, the value of the property when first taken must govern." Also citing *U. S.* v. *Anthony Ry. Co.*, 192 U. S. 524. Therefore, the court ruled correctly in refusing to allow appellees treble damages, although its ruling was grounded upon an erroneous reason.

3. The next question is, what was the quantity and value of the elm timber cut by the appellant? The trial court found that the appellant, during the years 1917, 1918 and 1919, had cut 128,218 feet of elm timber from the land of the appellees and found that the value of this timber was $2,412.07, which was about $19 per thousand feet. This issue as to the quantity and value of the elm timber cut is purely one of fact. The testimony bearing upon this issue is quite voluminous, and it could serve no useful purpose as a precedent to set it out and discuss it in detail.

After a careful consideration of it we have reached the conclusion that the preponderance of the evidence shows that the stumpage value of the elm timber would amount to the sum at least of $2,412.07, the amount of the decree of the trial court. Even though the trial court gave erroneous reasons for its findings and decree, nevertheless, we find that the amount of the decree based on the stumpage value of the timber was justified by a preponderance of the evidence in the record.

There is no error which should cause a reversal of the decree of the trial court, and the same is therefore affirmed.

VAUGHAN v. HUMPHREYS.

Opinion delivered April 10, 1922.

1. INSURANCE—ATTORNEY'S FEE AS PART OF RECOVERY.—The attorney's fee, which the statute permits to be recovered from an insurance company upon its failure to pay the loss after demand made, is a penalty given to reimburse the policy holder for expenses incurred in enforcing the contract of indebtedness, and is taxed as costs in the case, and therefore is part of the recovery against the insurance company.
2. ATTORNEY AND CLIENT—PERCENTAGE OF RECOVERY.—Where an attorney's contract gave him certain percentage of the recovery in a certain action against an insurance company, and the client recovered from the company, in addition to the amount of the policy, a sum for an attorney's fee, the attorney is entitled, not to the entire fee so recovered, but only to the stated percentage of the attorney's fee in addition to his percentage on the balance of the recovery.
3. ATTORNEY AND CLIENT—RIGHT TO COSTS AND EXTRA ALLOWANCE.—As between an attorney and his client, as well as between the client and third persons, a judgment of costs, whether consisting only of those items taxable as of course, or of an extra allowance as well, belongs to the client.

Appeal from Prairie Circuit Court, Northern District; *George W. Clarke,* Judge; affirmed.

Brundidge & Neelly and *Emmet Vaughan,* for appellant.

Mann & Mann, for appellees.

HART, J. This appeal involves the construction of a contract for compensation between an attorney and his client.

Appellant entered into a contract in writing with appellees to bring suit on a life insurance policy in the sum of $5,000, and the clause of the contract providing for the compensation of the attorney is as follows:

"The parties of the second part (appellees) hereby agree to pay the parties of the first part (appellant) as compensation for legal services, in the event they recover of the Kansas City Life Insurance Company for said policy, the sum of forty per cent. of recovery, the said parties of the first part accepting a fee contingent upon recovery, and agree to pay or advance all costs of the suit that may become necessary to be paid, and the parties of the first part agree that no liability shall attach either to the guardian or to Maggie Ridout on any account whatever."

Suit was brought against the insurance company, and judgment was rendered in favor of appellees in the sum of $5,000 and the accrued interest. The attorney's fees were fixed by the court at $500. The circuit court allowed the attorney forty per cent. of the whole amount recovered by the plaintiffs in the suit against the insurance company. This included the face of the policy, interest, and the penalty and attorney's fees allowed under the statute.

It was the contention of the attorney that he was entitled to the whole of the attorney's fees allowed in the suit against the insurance company and forty per cent. of the other items. The attorney had collected the judgment against the insurance company and had retained the amount to which he deemed he was entitled under the contract.

From the judgment rendered against him in favor of appellees, appellant has duly prosecuted an appeal to this court.

Our statute provides that, upon the failure of the insurance company to pay the loss after demand made,

such company shall be liable to pay to the holder of the policy, in addition to the amount of loss, twelve per cent. damages, together with all reasonable attorney's fees for the prosecution and collection of said loss.

The attorney's fee is a penalty given to reimburse the policy-holder for expenses incurred in enforcing the contract of indebtedness, and is taxed as costs in the case. *Arkansas Ins. Co.* v. *McManus,* 86 Ark. 115, and *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554. Hence the attorney's fee is part of the recovery of the policy-holder against the insurance company.

The legal meaning of "recovery" is the obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose. The contract under consideration provides that the attorney shall have "forty per cent. of recovery." This means forty per cent. of the amount recovered by the policy-holder, which, as we have seen, includes the amount of the attorney's fee allowed by the statute to the policy-holder. Under the statute, this is a much a part of the recovery of the policy holder as is the face of the policy and the penalty provided by the statute.

As between an attorney and his client, as well as between the client and third persons, a judgment for costs, whether the costs consist of those items taxable as of course or of an extra allowance as well, belongs to the client. *McIlvane* v. *Steinson,* 85 N. Y. Sup. 889.

It follows that the judgment must be affirmed.

ARKANSAS ROAD CONSTRUCTION COMPANY *v.* EVANS.

Opinion delivered April 10, 1922.

1. HIGHWAYS—CONTRACTOR'S BOND.—The bond required by Crawford & Moses' Dig., § 5446, of a highway contractor, which requires him to pay all persons supplying him with material or labor in the prosecution of the work, inures to the benefit of those furnishing labor and materials for the work under a subcontractor, so as to enable them to sue on such bond.

2. ASSIGNMENTS—SUB-CONTRACTOR'S CERTIFICATES OF INDEBTEDNESS. —Certificates of indebtedness issued by a sub-contractor to laborers working under him are not binding on the principal contractor and are not assignable so as to permit the assignee to sue thereon without making the assignor a party.
3. APPEAL AND ERROR—DEFECT OF PARTIES.—A defect of parties is waived unless objection to the complaint on that ground is raised in the court below, either by answer or special demurrer, and such objection cannot be raised for the first time in the Supreme Court.
4. APPEAL AND ERROR—DEFECT OF PARTIES RAISED HOW.—An objection that certificates of indebtedness issued by a sub-contractor to his laborers for work on a highway were not assignable does not present the objection that the assignor should have been made a party to an action on the certificates by the assignee against the principal contractor.

Appealed from Howard Circuit Court; *Percy Steel,* special judge; affirmed.

STATEMENT OF FACTS.

Appellee commenced this suit in the justice court against appellants to recover $86.35. The Arkansas Road Construction Company made a contract with Road Improvement District No. 7, of Howard County, Ark., to construct the Mineral Springs and Saratoga road in Howard County, Ark., according to certain plans and specifications; and associated with it Gregory & Wilson to help finance it and, as compensation therefor, to share in the profits. They made a contract with Davies Brothers to construct about three miles of the road. Certain laborers worked for Davies Brothers in the construction of the three miles of road sublet to them by the Arkansas Road Construction Company. Davies Brothers issued to these laborers certificates that they owed them the amounts named therein for labor on the Mineral Springs and Saratoga road. The laborers made a written assignment of these certificates to W. D. Evans who, upon payment being refused, brought suit against the Arkansas Road Construction Company.

An answer was filed in which liability was denied, and in which, as a further defense, it was alleged that

W. D. Evans was not entitled to maintain the action because the claims were not assignable.

Judgment was rendered in favor of the plaintiff by the justice of the peace, and an appeal was taken to the circuit court. There the case was tried upon the facts stated above and also the evidence of witnesses tending to show that the labor had actually been performed on said road to the amount of said certificates of indebtedness.

There was also introduced in evidence the contractor's bond, which contained, among other provisions, the following: "and shall pay all bills for materials and labor entered in the construction of said work."

The circuit court directed a verdict in favor of appellee, who was the plaintiff below, and the appellant, Arkansas Road Construction Company, which was one of the defendants below, has duly prosecuted an appeal to this court.

W. P. Feazel, for appellant.

There was no privity of contract between appellee, or his assignors, and the appellants. 100 Ark. 47; 144 Ark. 8; 65 Ark. 27.

The appellee, having failed to make his assignors parties, cannot maintain this suit. 47 Ark. 541.

Jas. S. McConnell, for appellee.

HART, J. (after stating the facts). In *Oliver Construction Co.* v. *Williams,* 152 Ark. 414, it was held that our statute providing that a contractor's bond given thereunder for the faithful performance of public work shall inure to the benefit of those furnishing labor and materials, and that an action may be maintained by one of such persons to recover for labor performed or materials furnished in the fulfillment of the contract. To the same effect see *United States Gypsum Co.* v. *Gleason* (Wis.) 17 L. R. A. (N. S.) p. 906; *Knight & Jillson Co.* v. *Castle* (Ind.) 27 L. R. A. (N. S.) p. 573 and case note, and *National Surety Co.* v. *Hall-Miller Decorating Co.* (Miss.) 46 L. R. A. (N. S.) p. 325.

In the last mentioned case, in discussing the reason for the statute providing for the execution of such a bond by the contractor in the case of public works, the court said: "Taking it as a cold-blooded business proposition, this clause in the bond would naturally encourage subcontractors of the best sort to take contracts to do certain parts of the work; it would tend to prevent the abandonment of the work by mechanics not promptly paid their wages by the contractors, who might be suspected to be of doubtful financial solvency; it would procure the best work and material and the prompt services of all workers and subcontractors; and all of this would redound to the benefit of the public. It must be borne in mind that the mechanics, materialmen, and laborers could have no lien upon the building, and that the trustees, representing the State, would not be bound to reserve money with which to pay their claims; but they would have to depend upon the contractor alone. Taking these things into consideration, the bond, in a way, supplied the place of the mechanics' lien law, and thus gave an additional security to all persons working upon this building and supplying material therefor; and this alone was, in our opinion, of the highest importance to the State."

These principles of law control the present case, and under our statute the Arkansas Road Construction Company, the principal contractor, would be liable to laborers who performed work on the road for subcontractors.

It is next insisted by counsel for appellants that the judgment must be reversed because the laborers to whom the subcontractors issued the certificates of indebtedness were not made parties to the action.

While the statute referred to above makes the principal contractor liable for all labor performed and materials furnished on a public improvement, the subcontractor's certificate of the amount due by him to a laborer cannot be said to be an account stated in favor of the laborer against the principal contractor. *St. L. I. M. &*

S. R. Co. v. *Camden Bank,* 47 Ark. 541. The certificates of indebtedness do not bind the principal contractor and are therefore not assignable so as to permit the assignee to bring action upon them without the assignor being a party.

It is well settled, however, in this State that a defect of parties is waived unless objection to the complaint on that account is raised in the court below, either by answer or by special demurrer for that purpose. It can not, therefore, be raised for the first time in this court. *Murphy* v. *Myar,* 95 Ark. 32; *Crawford County Bank* v. *Baker,* 95 Ark. 438; *Love* v. *Cahn,* 93 Ark. 215; and *Spear Mining Co.* v. *Shinn,* 93 Ark. 346, and cases cited.

It is true that the answer in the present case alleges as a defense that the claims were not assignable. But no objection was made that there was a defect of parties, or that the complaint should be dismissed because the assignors of the claims were not joined as plaintiffs.

The case was tried below on the merits and the principal ground of defense was that the principal contractor was not liable under the statute for labor done on the road by the servants of the subcontractor. Therefore the objection that there was a defect of parties comes too late here.

It follows that the judgment must be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* JOHNSON.

Opinion delivered April 10, 1922.

1. RAILROADS—NOT SUABLE FOR INJURY DURING FEDERAL CONTROL.—A railroad company was not liable for injury to a passenger while its road was under Federal control.
2. RAILROADS—FEDERAL CONTROL—SUBSTITUTION OF PARTIES.—The substitution of the name of a United States agent appointed under the Transportation Act of February 28, 1920, as defendant in an action for injuries to a passenger on a railroad under Federal control when at the time of such substitution he had been succeeded in office by another, was improper.

3. RAILROADS—FEDERAL CONTROL—SUBSTITUTION OF PARTIES—PROCESS.—The substitution as defendant of the United States Agent for the Director General of Railroads after trial did not constitute a new action requiring service on the party substituted, where such substitution was made merely to correct an error in the another instruction covering that subject.
4. TRIAL—INSTRUCTION ALREADY COVERED.—Refusal to give an instruction as to the duty of a railway brakeman to protect the appliances of his train was not error where the court gave another instruction covering that subject

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

Pryor & Miles, for appellant.

The court erred in refusing to direct a verdict in favor of the defendants.

Heartsill Ragon, for appellee.

Appellant having failed to ask for a ruling on his demurrer is in no attitude to object to the jurisdiction of the court. 134 Ark. 254; 95 Ark. 405; 27 Ark. 235; 90 Ark. 86; 114 Ark. 87.

There was no error in substituting the agents of the government for Walker D. Hines, Director General. New service was not necessary. 147 Ark. 604; *Payne* v. *Stockton,* 147 Ark. 598.

The action was properly brought against the railroad and the Director General. 225 S. W. 639; 146 Ark. 170; 146 Ark. 232; 225 S. W. 640; 106 S. E. 755.

It was not error to refuse to give an instruction which was covered by an instruction already given. 136 Ark. 272; 126 Ark. 310.

SMITH, J. Plaintiff sued the Missouri Pacific Railroad Company and Walker D. Hines, Director General of Railroads, alleging that on the 14th day of December, 1918, he had received certain injuries while a passenger between Hartman and Clarksville, Arkansas, as a result of an assault made upon him by the brakeman on the train. A separate answer was filed by the railroad company, in which it denied that it was operating passenger

trains at the time alleged in the complaint; and an answer was filed by the Director General denying specifically the allegations of the complaint in regard to the assault.

There was a trial before a jury on May 6, 1921, and at the conclusion of all the testimony each of the defendants asked the court for a directed verdict, but the ground therefor is not stated in the record. This request was overruled, and the case proceeded to the jury, and a verdict was returned against the defendants jointly in the sum of $250. Judgment was entered on the verdict, and thereafter separate motions for a new trial were filed. Upon the argument of the motion for a new trial the court entered an order substituting the names of John Barton Payne and James M. Davis, as agents of the government, in place of the name of Walker D. Hines, and overruled both motions for a new trial. There appears to be a judgment against the railroad company, Hines, Payne and Davis, and each of these defendants has appealed.

It is first insisted that judgment was improperly rendered against the railroad company; and this insistence appears to be well taken. *Missouri Pac. R. Co.* v. *Ault,* 256 U. S. 554.

It is next insisted that error was committed in substituting the names of the successors in office of Walker D. Hines after the rendition of the judgment, the contention being that a retrial should have been ordered after the substitution of parties, and that the name of Payne should not, in any event, have been substituted, as at the time of the substitution he had himself been succeeded in office by Davis; and this appears to be a fact. It appears, therefore, to have been unnecessary and improper to substitute the name of Payne, as Davis was the substituted agent then acting for the Federal Government under the designation of the President of the United States, as required by the Transportation Act of Congress approved February 28, 1920. But should a

retrial have been ordered after the substitution of the name of Davis?

A similar question was presented in the case of *Payne* v. *Stockton,* 147 Ark. 598. In that case the name of Payne was substituted for that of Hines, and, while the substitution in that case was made before the trial of the cause, the objection was made in that case, as in this, that no service had been had against the person substituted, which is, of course, the point in the case, for, if service is required, the substitution could not be made either before or after the trial without service being first had. In the case just cited we said: "We do not think, however, that any new service was necessary. The object of the suit was to bring an action against the United States. The United States employed the same attorneys to act for John Barton Payne as had acted for Walker D. Hines as Director General. When these attorneys entered the appearance of Walker D. Hines, as Director General of Railroads and Special Agent, they entered the appearance of the United States to the suit, and the substitution of John Barton Payne, Agent, instead of Walker D. Hines, Director General of Railroads, was merely to correct an error in the name of the representative of the United States."

In the instant case an answer was filed in the name of Hines as Director General, alleging misconduct on the part of the passenger, which, if established by the testimony, would have defeated a recovery. The cause was tried on the issues there joined. The answer entered the appearance of the alleged agent of the United States, and there is no contention that any other or different defense could or would have been made had the substitution of names been made before the trial, as was done in the case of *Payne* v. *Stockton, supra,* instead of after the trial, as was done in the instant case; and we conclude here, as we did there, that no error was committed in correcting an error in the name of the representative of the United States."

Error is also assigned in the refusal of the court to give certain instructions. It is the theory of appellant that plaintiff, who is a boy fifteen years old, got on the rear end of the train, with a number of other boys who were not passengers, but that plaintiff acted in unison and in conspiracy with these other boys on the back of the train to turn on the emergency air, and an instruction was asked to the effect that, if this was true, the brakeman would have been justified in using reasonable force in preventing the boys from turning on the air in the emergency brake, but the instruction was not given.

Plaintiff admitted that he went to the rear end of the last coach, but he says he did so for the purpose of watching the boys, who had climbed on to the steps of the rear car, jump off as the train passed a railroad crossing; that he knew nothing about the air whistle on the rear of the train, and had nothing to do with turning it on, and when it was turned on by one of the boys he became frightened and started into the coach to deliver up his ticket, but as he started into the coach the brakeman grabbed him around the throat and choked and otherwise assaulted him.

It is true, of course, that the brakeman had the right, and was under the duty, of protecting the appliances of the train, and especially those as important as the air-brakes, from officious meddlers; and for the protection of these appliances and the consequent safety of other passengers he had the right to use such force as was reasonably necessary for that purpose. This right and duty was covered, however, by an instruction numbered 3, which was given at appellant's request, reading as follows: "You are instructed that the law imposes a duty upon a railroad company, as a carrier of passengers, to exercise the highest degree of care in the operation of its passenger trains for the safety and protection of passengers thereon, and to use all reasonable means within its power to keep its equipment in a reasonable safe condition and to prevent interference therewith, or

annoyance to the passengers, and, in doing so, and through its agent and employees, may use such reasonable force as may seemingly be necessary under the peculiar facts and circumstances to prevent interference with its trains or jeopardizing the safety of its passengers and employees thereon, and, in doing so, would not be liable in damages therefor."

The case presents a sharp issue of fact between the plaintiff and two of the other boys who were on the back of the train, on the one hand, and the brakeman, on the other, and, however much we may be disposed to accept as true the version of the brakeman as to what occurred when the air was applied and the train suddenly stopped, the verdict of the jury concludes that question in plaintiff's favor.

The judgment against the railroad and that against Hines and Payne will be dismissed. The judgment against Davis will be affirmed.

WOODSON v. MCLAUGHLIN.

Opinion delivered April 10, 1922.

1. TRIAL—TESTIMONY OF PARTIES WHEN UNDISPUTED.—Though statements of a party will not ordinarily make a case of undisputed evidence, they will be so considered where the opposing parties were called to the stand, and did not deny the truth of their testimony.
2. MALICIOUS PROSECUTION—TERMINATION OF PROSECUTION.—Where a prosecution was dismissed by compromise or settlement with the prosecuting witness, it is not such a final determination of the matter in the defendant's favor as will support an action for malicious prosecution.

Appeal from Pulaski Circuit Court, Third Division; *Archie House,* Judge; affirmed.

Oscar H. Winn, for appellants.

Hendricks & Snodgress, for appellee.

None of the defendants could have been guilty of false imprisonment under the facts. 34 Ark. 105; 95

Id. 227. It devolved upon plaintiff to show affirmatively both malice and want of probable cause. 101 Ark. 37.

SMITH, J. This suit grows out of the differences between the parties which led to the suit of *Woodson* v. *McLaughlin,* 150 Ark. 340, and many of the circumstances there involved were again inquired into at the trial from which this appeal comes. This present suit is one to recover damages for an alleged malicious prosecution instituted in furtherance of McLaughlin's wrongful purpose to eject J. F. Woodson and the members of his family from the house which they were occupying as share-croppers on McLaughlin's farm.

In support of the allegations of the complaint, testimony was offered tending to show that McLaughlin had used threatening and abusive language toward J. F. Woodson, and had instigated one Davis to cause a warrant to be issued for the arrest of J. F. Woodson and his brother, E. F. Woodson, who was living with him, charging them with a breach of the peace by using threatening and abusive language, and that this was done without probable cause therefor.

Davis testified that he had a contract to move the house, and attempted to do so, but was driven away by the Woodson brothers, who abused him and threatened him with personal violence. This the Woodsons denied, and, according to their version of the affair, they were themselves the persons threatened and abused, and they were arrested without probable cause.

The parties defendant were McLaughlin, the owner of the land, Davis, who had the contract to move the house, and Cox, the deputy constable who served the warrant. These defendants filed a joint answer, in which they denied all the allegations of the complaint.

Without reviewing the testimony, it may be said that a case was made for the jury that the Woodsons had been arrested without probable cause; but the testimony shows that when the case was called before McLaughlin, who, as justice of the peace, had issued the

warrant, the parties began to talk compromise and settlement, and the prosecution was finally dismissed by consent after the parties had discussed and compromised their differences.

McLaughlin testified that while the parties were assembled at his store, where he was accustomed to hold his court as a justice of the peace, J. F. Woodson approached him and proposed a settlement of the case, and that he told Woodson the prosecution was under the control of Davis, and that Woodson asked him to speak to Davis about dismissing it; that he did so, and that Davis declined to dismiss the prosecution on the ground that the Woodsons had threatened him, and he was afraid they would commit some act of violence against him; that he communicated this statement to the Woodsons, and received assurances from them that they would do Davis no harm, and he reported that fact to Davis, whereupon, in consideration of this promise, Davis asked that the prosecution be dismissed, and that order was entered. McLaughlin testified that J. F. Woodson agreed to pay the costs of the case, and that he later did so. This testimony in regard to the compromise and settlement of the prosecution does not appear to have been denied, although both the Woodsons were recalled to the stand after that testimony had been given.

J. F. Woodson did deny that he agreed to pay the costs. After being recalled he testified that nothing was said, when the prosecution was dismissed, about paying the costs, but that some days later, when a bale of cotton, which he had grown, had been sold by McLaughlin, the constable's costs, amounting to $2.50, (the only costs charged in the case) were deducted by McLaughlin from Woodson's share of the proceeds of the cotton, and that he (Woodson) protested at the time against the deduction being made. This occurred several days after the prosecution had been dismissed; but there appears to be no denial of McLaughlin's statement that a compromise of the matter was effectuated as a result of his

negotiations between Davis and the Woodsons, even though there was a misunderstanding about the payment of the costs. Davis substantially corroborates McLaughlin about the compromise and settlement of the case. There was a directed verdict in favor of the defendant, from which is this appeal.

It is true Davis and McLaughlin are parties to this litigation, and their statements would not, therefore, ordinarily make a case of undisputed evidence; but, inasmuch as the Woodsons testified, and were recalled to again testify after McLaughlin and Davis had given their testimony in regard to the terms of the compromise, without denying the truth of this testimony, it will be taken as making a case of undisputed evidence. *Gish* v. *Scantland,* 151 Ark. 594.

In the article on Malicious Prosecution in 18 R. C. L., p. 25, it is said: "It is generally held that where the original proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties, or solely by the procurement of the accused as a matter of favor, or as the result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of an action for malicious prosecution."

Among the annotated cases cited in the note to the text quoted is that of *Baxter* v. *Gordon Ironsides, etc, Co.,* 13 Ont. L. Rep. 598, 7 A. & E. Ann. Cas. 452. In the note to this case it is said: "The rule is well settled that, where the proceeding is dismissed or abandoned by procurement of the party prosecuted, by settlement or compromise with the prosecutrix or plaintiff in the action, it is not such a final determination of the matter in his favor as will support an action for malicious prosecution." Many cases are cited in the notes supporting it.

A case very extensively annotated is that of *Graves* v. *Scott,* 51 S. E. 821, 2 L. R. A. (N. S.) 927. Beginning at page 945 of this annotated case many cases are cited in support of note E, reading as follows: "If the prose-

cution is brought to an end by settlement or compromise, or by the hand of the accused, it is not a sufficient termination upon which to found an action."

See also *Craig* v. *Ginn,* 53 L. R. A. 715; *Waters* v. *Winn,* L. R. A. 1915-A 601, and the cases cited in the notes to these cases.

The testimony being undisputed that a compromise was effected as a result of which the prosecution, out of which this litigation arises, was settled, a verdict was properly directed in defendant's favor. It is true J. F. Woodson did testify that he did not agree to pay the costs, and we must assume that the jury would have so found in view of the fact that the verdict was directed against him; but this was only a detail of the compromise, and one which did not prevent the consummation of the settlement by the dismissal of the original prosecution.

It is true also that McLaughlin was the justice of the peace who issued the warrant, and that the case was tried upon the theory that he had instigated and prompted Davis in making the affidavit before him upon which the warrant of arrest was based, and, as we have said, there was testimony upon which the jury might have found that this was done without probable cause. If these things were true, then McLaughlin was disqualified to try this case by reason of his interest in the prosecution; but the Woodsons admit that they did not ask the change of venue to which they would have been entitled if their theory of the case is true. But the justice court of that township had jurisdiction of the offense charged in the warrant of arrest, and McLaughlin was a justice of the peace, and, as such, he made the order dismissing the prosecution. So that, whatever may be said about his right to try this case, it was a part of the compromise and settlement that he should make the order which ended the prosecution, and that order was entered and the prosecution was ended, and that prosecution was as effectually and finally disposed of as if there had been no question about his jurisdiction.

No error appearing, the judgment is affirmed.

UNION MARINE INSURANCE COMPANY v. HIGH.

Opinion delivered April 10, 1922.

INSURANCE—BREACH OF PROMISSORY WARRANTY TO KEEP FIRE EXTINGUISHER.—Where an automobile insurance policy, in consideration of a reduction in the premium, stipulated that a fire extinguisher would be kept on the automobile insured, and a fire destroyed the automobile where no extinguisher was on it, the extinguisher having been exhausted at a fire two weeks previously, there was a breach of a promissory warranty, which avoided the policy, though there was evidence that the loss would have occurred had the extinguisher been on the car.

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

McMillen & Scott, for appellants.

The undisputed testimony shows that appellee is not entitled to recover. The court should have directed a verdict for the insurance company. There was not only no substantial compliance, but no compliance at all, on the part of the insured, with the contract. 57 Ark. 279; 58 *Id.* 277; 83 *Id.* 126.

Chas. A. Walls, for appellee.

A substantial compliance with the contract was all that was required. C. & M. Digest, § 6148; 85 Ark. 33.

The proof is that, had the fire extinguisher been filled and on the car, it could not have extinguished the fire. 104 Ala. 176.

Melbourne M. Martin, for cross-appellant, Yale Automobile Company.

SMITH, J. This is a suit on a fire insurance policy covering an automobile and containing the following recital: "In consideration of the reduction in premium granted under this policy, it is made a condition thereof that the insured will at all times during the life of this policy carry on the automobile insured, in a readily accessible place, at least one fire extinquisher known as Pyrene, approved by the Underwriters' Laboratories of the National Board of Fire Underwriters, and bearing their label; and that the insured will use due diligence

to maintain the said fire extinguisher in full and complete working order during the life of this policy."

The owner of the car equipped it with an extinguisher, which he exhausted in extinguishing a fire in his car on or about December 21st. Later, on the 1st or the 4th of January, the car again caught fire, and on this occasion was destroyed. At that time there was no extinguisher in the car, which failure the owner explained by saying that he had tried to have the extinguisher recharged at his home (Lonoke), but there was no one there to do the work. Someone told him to bring or send the car to Little Rock and have the extinguisher recharged, but he had no way to bring or send it to Little Rock after his first fire. He also testified that the fire was of such a character that it could not have been extinguished, even if he had had an extinguisher.

An instruction was given which told the jury that if the extinguisher had been provided and exhausted in extinguishing a fire, and that the owner had thereafter "exhausted every effort to have it refilled and could not by said efforts have said extinguisher ready to use at the time of the fire," to find for the owner, although there was no extinguisher on the car when the fire occurred.

Another instruction told the jury that if "the fire which destroyed the car was beyond control of the party when it was discovered, and that the fire extinguisher could not have extinguished the flame had it been attached to the car at the time the fire was discovered, and that the fire could not have been put out and the car saved by the use of the extinguisher, had it been attached to the car," to find for the plaintiff, if the jury also found that every effort had been made to have the extinguisher refilled.

There was a verdict and judgment for the plaintiff, and the insurance company has appealed.

It is insisted that there was a substantial compliance with the provision of the policy set out above requiring that a fire extinguisher be carried on the car, and that the instructions set out above properly submitted to the

jury the question of substantial compliance. We do not think so. In our opinion no case was made for the jury, and the verdict should have been directed in favor of the insurance company.

It does not appear what use the owner had made of the car between the date of the first fire and that of the second. He had completed the journey during which the first fire occurred. He had taken the car home, and an interval of from ten days to two weeks intervened after he had exhausted his extinguisher by use in extinguishing a fire before the second fire occurred. His use of the car after the first fire was purely voluntary and in violation of the requirement that it should be equipped with an extinguisher.

In the case of *Mechanics' Insurance Co.* v. *Thompson*, 57 Ark. 279, the policy sued on made the application for insurance a part thereof and a warranty, and the following question and answer appear in the application: "Will you agree as a condition of this insurance to keep in the same room, and within ten feet of the gin-stand, one barrel full of water and two buckets?" Answer: "Yes." Construing this question and answer, Judge BATTLE, for the court, there said: "The object of the second agreement or warranty is apparent. The barrel of water and two buckets were evidently required to be kept within ten feet of the gin-stand for the purpose of being promptly used in extinguishing any fire that might originate in or at the gin-stand. The terms of the agreement necessarily imply that the water and buckets should have been at all time readily accessible. Its purpose could not have been subserved in any other manner. The barrel within ten feet of the gin-stand was not readily accessible. It was not known where the buckets were on the night of the fire. The assured therefore failed to perform the second agreement." For the failure to keep this promissory warranty the judgment against the insurance company was reversed.

At section 316 of the article on Fire Insurance in 26 C. J., p. 248, it is said: "In the absence of a stipula-

tion in the policy the fact that there was not a constant and ever ready water supply and appliances for the extinguishment of fires will not relieve insurer from liability; and a stipulation to maintain such equipment during the life of the policy cannot be implied from the fact that it is described as a part of the property insured. But if it is provided that the premises shall be so equipped, a failure to comply with the provision will avoid the policy. Such provisions, if inserted in the policy or properly referred to therein, are generally regarded as promissory warranties. But a statement as to fire appliances not clearly made a warranty is a representation only, and is governed by the principles relating to representations generally." See cases cited in note to the text quoted; and see, also, 2 Clement on Fire Ins. p. 62; 3 Joyce on Fire Ins., sec. 1970; 1 May on Fire Ins., sec. 157; *Southern Ins. Co.* v. *White,* 58 Ark. 277.

It having been agreed, in consideration of a reduced premium, that a fire extinguisher should be carried on the car, this agreement became a promissory warranty, and it was breached when a voluntary use of the car was made without that equipment.

Nor is it important that the fire might not have been extinguished had the extinguisher been provided. There is no question in this case of the sufficiency of the extinguisher, as there was no extinguisher of any kind on the car when it burned. The insurance company had contracted for a certain protection, to which it was entitled, whether efficacious under all conditions or not. The failure to furnish this protection was a breach of the warranty and avoided the contract.

The judgment will therefore be reversed, and the cause dismissed.

KNAPP v. GRAY.

Opinion delivered April 10, 1922.

1. VENDOR AND PURCHASER—EVIDENCE.—In a suit by a vendor on a contract which made the purchaser's agreement to buy land dependent upon the purchaser's selling other land to a third party, defendant having denied having made such sale, a judgment rendered in favor of the purchaser's broker for his commission in procuring such sale was competent on the question whether the purchaser had sold such other land.
2. EVIDENCE—EXPLANATION OF JUDGMENT.—In a vendor's action against a purchaser for breach of a contract whereby the purchaser's agreement to buy the land was to depend on his selling other land to a third party where the purchaser denied having sold the other land, upon proof of a judgment against the purchaser in favor of his broker for commission for procuring such sale being introduced, it was competent to prove that the purchaser assented to the judgment, not because the sale had been effected, but to prevent the inconvenience and expense of litigation.
3. GARNISHMENT—AGAINST MAKER OF NOTE.—In a garnishment proceeding against the maker of a note payable to the defendant, the court erred in rendering a personal judgment against the maker without impounding the note or requiring proof that it was non-negotiable.
4. GARNISHMENT—CONCLUSIVENESS OF GARNISHEE'S ANSWER.—The answer of a garnishee, not traversed, must be presumed to be true.

Appeal from Franklin Chancery Court, Ozark District; *J. V. Bourland,* Chancellor; reversed in part.

Partain & Carter, for appellants.

The attachment should not have been sustained. C. & M. Digest, sec. 570.

Judgment should not have been rendered against the garnishee. 96 Ark. 568; 53 Ark. 523. The court should have permitted proof of interpleader's ownership of the attached property. 47 Ark. 111; 114 S. W. 621; 154 S. W. 81; 63 Ark. 289; 120 S. W. 920; 119 S. W. 899; 114 S. W. 172; 153 S. W. 304; 71 Am. St. Rep. 50; 119 Am. St. Rep. 581.

A judgment or decree is conclusive only between parties to an action or their privies. 64 Ark. 330; 64 Ark. 447; 87 Ark. 418; 150 S. W. 397; 35 Ark. 450.

Willard Pendergrass and *Evans & Evans*, for appellee.

HUMPHREYS, J. The issues in this case as finally made up by the pleadings presented the questions: First, whether appellees, W. H. Gray and Laura Gray, were entitled to a personal judgment against appellant I. J. Knapp in the sum of $8,967.66, and a decree declaring a lien and for a foreclosure of same against about 280 acres of land in section 35, township 10 north, range 26 west, in the Ozark district of Franklin County, Arkansas; second, whether judgment should have been rendered against L. S. Swepston on a writ of garnishment issued in the foreclosure proceeding; third, whether the attachment issued in the foreclosure proceeding, directed to the sheriff of Crittenden County and levied upon the east half of the northeast quarter of section 28, township 7 north, range 7 east, should be sustained; and fourth, whether Isa D. Knapp should recover the lands in Crittenden County on her interplea.

The cause was submitted to the chancery court upon the pleadings and evidence, which resulted in the rendition of a personal judgment in favor of appellees W. H. and Laura Gray against I. J. Knapp for the amount claimed and a decree declaring a lien upon and a foreclosure and order of sale against the lands in Franklin County. Also the rendition of a personal judgment against L. S. Swepston upon the writ of garnishment in the sum of $1,200, and a decree sustaining the attachment on the Crittenden County land for the payment of any deficiency judgment that might exist after the sale of the Franklin County lands.

The record reflects that on the 9th day of February, 1920, appellee W. H. Gray, acting for himself and his wife, Laura Gray, entered into a written contract with appellant, I. J. Knapp, conditionally selling the Franklin

County land to the said Knapp. The condition incorporated in the written contract was that it should become binding and effective on the said Knapp if he could complete an executory sale of his Crittenden County lands to L. S. Swepston. The sale of the Crittenden County lands to Swepston depended upon whether the title thereto could be perfected and whether payment of certain mortgages existing upon the lands could be arranged. Thereupon W. H. Gray and I. J. Knapp proceeded to Crittenden County, where they arranged with the Crittenden County Bank & Trust Company to remit to W. H. Gray the major portion of $5,400 when L. S. Swepston should make the first payment on the Crittenden County lands. Thereafter I. J. Knapp took possession of the Franklin County lands and managed and controlled them. Subsequently I. J. Knapp paid W. H. Gray $350 upon the purchase price of the Franklin County lands. The receipt recites that it was a payment on the contract. Knapp explained that it was paid to enable Gray to purchase another place, and without intention to waive the condition in the written contract. Later on I. J. Knapp and L. S. Swepston canceled their executory contract for the sale and purchase of the Crittenden County lands, and entered into a lease contract with an option on the part of L. S. Swepston to purchase it for the same consideration at a fixed future time. This option on the part of Swepston was never exercised. The rental contract provided that Swepston should pay $200 to an attorney and $1,200 to I. J. and Isa D. Knapp. The $1,200 note was executed to them jointly. The title to the Crittenden County lands was in the name of I. J. and Isa D. Knapp, his wife, appearing as an estate in entirety on the face of the deed. Isa D. Knapp interpleaded for the land on the ground that it was her individual property, and in the course of the trial offered to prove that the lands were purchased with her individual money, and that the name of I. J. Knapp was inserted through mistake and not for the purpose of creating an estate by the entirety.

This evidence was excluded by the court, over the objection and exception of appellant Isa D. Knapp.

L. S. Swepston filed an answer to the writ of garnishment, in which he admitted executing a note for $1,200, due and payable on the first day of January, 1921, for the rent of the lands in Crittenden County, payable to I. J. Knapp and his wife, Isa D. Knapp, and stating that he did not know whether the said I. J. Knapp and Isa D. Knapp were the legal holders of said note, and therefore prayed that the court require the surrender of the note before rendering judgment on the writ of garnishment, which answer was sworn to and filed on the 8th day of July, 1920. Judgment was rendered against Swepston for the amount of the note, over his objection and exception, without proof that the note was non-negotiable or requiring the production of same.

The alleged grounds for the issuance of the attachment were that "said defendant Knapp has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder or delay his creditors; and that said defendant Knapp is about to sell, convey or otherwise dispose of his property with such intent." The grounds for the attachment were controverted under oath. No proof was introduced tending to show that I. J. Knapp had sold or was about to sell and dispose of his property with the fraudulent intent to cheat, hinder and delay his creditors in the collection of their debts.

In the course of the trial appellee was permitted to introduce in evidence, over the objection and exception of appellant I. J. Knapp, the pleadings and judgment for $300 in the case of F. K. Lashbrook *v.* I. J. Knapp and Isa D. Knapp. This was a compromise judgment for commissions for selling the Crittenden County property for the Knapps to L. S. Swepston. I. J. Knapp offered to explain that he consented to the judgment, not because the sale had been effected through the instrumentality of Lashbrook, but simply to prevent the

inconvenience and expense of further litigation. The court excluded this explanation, over the objection and exception of appellants. The evidence was in sharp conflict and quite close as to whether I. J. Knapp waived the condition in the written contract for the sale and purchase of the Franklin County lands. There is some direct evidence and many circumstances tending to show that he agreed to take the Franklin County lands, whether he completed the sale of his Crittenden County lands to Swepston or not. The chancellor made two distinct findings in his decree, one to the effect that Knapp agreed to take the Franklin County lands whether he sold the Crittenden County lands or not, and another to the effect that there was no failure on the part of Knapp to close the sale of the Crittenden County land. The latter finding seems to have been based largely upon the judgment and decree in favor of Lashbrook against the Knapps for the commission, indicating that the judgment conclusively established the fact that there was a completed sale. It was competent to introduce the Lashbrook judgment as a circumstance tending to show that there was a completed sale of the Crittenden County land, but it was clearly error to exclude the explanation offered concerning that judgment. The Lashbrook judgment, in connection with the explanation erroneously excluded by the court, did not conclusively establish a completed sale, nor do we think it and the other evidence in the case, which we have carefully examined, was sufficient to sustain the finding of the chancellor to the effect that the sale of the Crittenden County land to Swepston was effected or concluded. While we are convinced that the trial court erred in finding that there was no failure on the part of I. J. Knapp to close the sale of the Crittenden County land, we are not convinced that the court was in error in finding that Knapp agreed to take the Franklin County lands irrespective of whether the sale to Knapp was consummated. We do not think the finding in this regard was clearly contrary to the weight of the evidence. It was therefore proper for the trial court, under that finding, to

render a personal judgment against I. J. Knapp for the contract price of the Franklin County lands, and to decree a foreclosure and sale thereof to pay the purchase price.

The next question to be determined on the appeal is whether the court erred in sustaining the attachment against the Crittenden County land. The grounds of the attachment were controverted, and we are unable to discover any evidence in the record tending to show that I. J. Knapp had sold or was about to sell any of his property with the fraudulent intent to cheat, hinder and delay his creditors. In fact, W. H. Gray is in the position of insisting upon a sale of the Crittenden County land to Swepston in order to obtain a part of the purchase price therefor as a payment on the purchase price of the Franklin County lands, and therefore is in no position to say, because he rescinded that sale and gave an option upon the Crittenden County land to Swepston, that Knapp was disposing of his property for the purpose of defeating his creditors. In rescinding the sale the property contracted to Swepston was regained. It is not shown that the option given to Swepston to purchase in the future put or tended to put the property or the proceeds of the sale beyond the reach of creditors. We think there is an entire absence of evidence in the record upon which to sustain the writ of attachment against the Crittenden County land.

The next question presented on this appeal is whether the court erred in rendering a personal judgment against L. S. Swepston, the garnishee herein, to apply on any deficiency judgment not satisfied by the sale of the Franklin County lands. The answer of Swepston admitted the execution of a $1,200 note to I. J. Knapp and Isa D. Knapp jointly for rents upon the Crittenden County land, but alleged that the note was not due, and that he did not know who the legal holder of the note was, and asked that the court require a surrender or impounding of the note before rendering judgment against him. As stated before, a judgment was rendered

against him without requiring proof that the note was non-negotiable or impounding it. This court said, in the case of *Head* v. *Cole,* 53 Ark. 523, that "where it appears that the garnishee is a debtor on commercial paper given to or held by the defendant, the court should decline to render any judgment against the garnishee unless it first compels the delivery of the paper into court, or until the paper matures and it is made to appear that the defendant still holds it. That is to say, the court should protect the garnishee against the danger of paying a debt twice, without destroying the essential properties of commercial paper, which we are confident the Legislature never intended to impair by the enactment in reference to garnishments. These views are sustained by a current of authority, uniform so far as we are advised. Tied. on Com. Paper, § 251, p. 415; Dan. Neg. Inst. § 800a." We think it inferable from the following allegation in the answer of Swepston that the note was negotiable, to-wit: "And he further states that he does not know whether the said I. J. Knapp and Isa D. Knapp are the legal holders of said note." This allegation in the answer of Swepston was not traversed and must be presumed to be true. *Beasley* v. *Haney,* 96 Ark. 568. Under the rules announced in *Head* v. *Cole, supra,* and *Beasley* v. *Haney, supra,* it was error to render a personal judgment against L. S. Swepston.

Having ruled that the chancery court should have dissolved the attachment, the court was necessarily without jurisdiction to determine the interest of the interpleader in the Crittenden County land. The only jurisdiction acquired by the Franklin Chancery Court over the Crittenden County land grew out of the issuance and levy of the writ of attachment on said land. The court was therefore without jurisdiction to determine that I. J. Knapp and Isa D. Knapp owned the Crittenden County land in entirety, and the decree to that effect cannot preclude the interpleader from litigating her rights in the property in any court acquiring and exercising jurisdiction over the property. In this view it is not

material and it is unnecessary to determine whether the court erred in excluding the evidence offered by her to the effect that the property was purchased with her individual money, and her husband's name inserted in the deed through mistake.

The decree rendering a personal judgment against I. J. Knapp for the purchase money of the Franklin County lands and for a foreclosure and sale of same is affirmed, but, on account of the errors mentioned, is reversed in all other particulars, and remanded, with directions to dissolve the attachment and discharge the garnishee.

GLOVER v. GLOVER.

Opinion delivered April 10, 1922.

1. TRUSTS—PAROL TRUST.—Where a husband conveyed lands to his wife by deeds absolute on their face, a subsequent decree of divorce awarding the same lands to her in lieu of dower in the rest of her husband's property in pursuance of her parol promise to reconvey to her husband, was erroneous as an attempt to graft a parol express trust upon the several deeds.
2. TRUSTS—CONSTRUCTIVE TRUST—PAROL EVIDENCE.—Equity will not impress a constructive trust on property conveyed by a husband to his wife in the absence of allegation or proof that she obtained the deeds through fraud or duress or under circumstances rendering it inequitable for her to hold the legal title.
3. DIVORCE—DIVISION OF PROPERTY.— A decree of divorce awarding to the wife, in lieu of dower, real estate conveyed to her by defendant, not through wrongdoing on her part or in contemplation of a separation, but as a gift in consideration of love and affection, *held* erroneous as depriving her of dower on account of gifts theretofore made, to which Crawford & Moses' Dig., § 3511, relative to a division of property on granting a divorce, is inapplicable.

Appealed from Pulaski Chancery Court; *J. E. Martineau,* Chancellor; reversed.

Geo. A. McConnell and *Lewis Rhoton,* for appellant.

Price Shofner and *Mehaffy, Donham & Mehaffy,* for appellee.

HUMPHREYS, J. On the 13th day of September, 1920, appellant instituted suit against her husband, appellee, in the Pulaski Chancery Court to dissolve the bonds of matrimony existing between them upon statutory grounds and for a part of his property, both real and personal, in lieu of her dower interest therein. Appellee filed an answer denying the alleged causes for divorcement, and a cross-bill seeking cancellation of deeds executed to him in the years 1910 and 1916 conveying certain real estate to appellant, alleging that it was conveyed to her in trust, and for an accounting of the proceeds of other lands likewise conveyed to her in the year 1916, but sold by her to innocent purchasers. Appellant filed an answer to the cross-bill, admitting that deeds were executed by appellee in the years 1910 and 1916, conveying certain real estate to her, but denying that it was conveyed to her in trust. The cause was submitted to the court upon the pleadings and evidence, which resulted in a decree granting appellant a divorce and vesting in her, in lieu of dower in appellee's property, the furniture and jewelry left in her possession when the abandonment occurred, and the real estate, and proceeds of that part sold by her, which appellee had conveyed to her in the years 1910 and 1916. An appeal has been prosecuted to this court from that part of the decree refusing to endow appellant of an interest in the personal and real property held by appellee in his own name at the time the suit was instituted. As no appeal has been taken from the decree annulling the marriage contract, it is unnecessary to incorporate in this opinion the marital infelicities inducing the separation.

Appellant and appellee lived together for more than twenty years, during which time a large estate was accumulated through their joint efforts. In addition to performing her household duties, appellant assisted appellee in the conduct of his business. In the year 1910 appellee conveyed to appellant by warranty deed their home place, the same being lot 6, block 46, in the city of Little Rock. In October, 1915, appellee brought a suit

against appellant for divorce, but it was dismissed in November, a reconciliation having been effected. In June and August, 1916, while appellant and appellee were living together, lot 5, block 46, city of Little Rock, lots 11 and 12, block 5, Ratterree's Addition, lot 10, block 20, Kimball's South Park Addition, and lot 4, block 12, DuVall's Addition, all being additions to Little Rock, were conveyed by appellee to appellant by warranty deeds. All the deeds were absolute upon their face, containing no provision of trust. Subsequently appellant sold the property in Kimball's South Park Addition and DuVall's Addition for a little less than $10,000 net to her. Appellee testified that he made each of the conveyances to his wife for the purpose of protecting himself against his creditors should he fail in business, and that on each occasion she promised to convey the property back to him when he wanted it or should request her to do so. Other witnesses corroborated his testimony in this regard. Their evidence was contradicted by appellant, who testified that the home place was conveyed to her as a birthday present, and the property conveyed to her in 1916 was conveyed in fulfillment of a peace offering made when her husband obtained a reconciliation and dismissal of the divorce suit instituted in the fall of 1915. The decree of the court awarded appellant certain furniture retained by her at the time of the separation and the real estate conveyed to her in the years 1910 and 1916, and the proceeds therefrom, in lieu of her dower interest in the rest of her husband's property. The effect of this decree was to graft an express trust upon the several deeds by parol evidence. This was error. *Harbour* v. *Harbour,* 103 Ark. 273; *Carpenter* v. *Gibson,* 104 Ark. 32.

There was no allegation or proof tending to show that appellant, through fraud or duress, or under circumstances which rendered it inequitable for her to hold the legal title and enjoy the beneficial interest therein, obtained the deeds. So equity should not impress a constructive trust upon the property in favor of appel-

lee. There is not a hint in the pleadings or evidence that appellant procured the deeds through wrongdoing on her part or that the conveyances were made to her in contemplation of a separation. On the contrary, the record reflects that the conveyances were made in contemplation of a continued happy and harmonious marital relationship. Under the allegations and the evidence the conveyances should have been treated as gifts. Section 3511 of Crawford & Moses' Digest, making provision for a division of property where a divorce has been awarded, does not apply to gifts made by the husband to the wife for love and affection. The decree deprived appellant of her dower interest in the property, both real and personal, on account of gifts theretofore made to her by him, and for that reason was erroneous. The decree of the court should not have taken into consideration these gifts in assigning property in lieu of appellant's dower interest in the estate of her husband. The decree is therefore reversed and the cause remanded, with directions to award appellant property in lieu of dower in the estate owned by appellee, not including the property conveyed prior to the separation by appellee to her.

FT. SMITH SPELTER COMPANY v. CLEAR CREEK OIL & GAS COMPANY.

Opinion delivered April 10, 1922.

1. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—Where the Supreme Court, on remanding a cause, directed the trial court to make a finding as to the reasonableness of a rate fixed by the Corporation Commission, and the trial court refused to make such finding, and found of record that it was bound by directions of the Supreme Court to conform to the rates fixed by the Corporation Commission, the error appears on the face of the record, and need not be brought up by bill of exceptions.
2. APPEAL AND ERROR—NECESSITY OF MOTION FOR NEW TRIAL.—Where, in a proceeding to fix gas rates, the trial court's judgment recites an erroneous finding that it was bound to conform the rates to those fixed by the Corporation Commission, the Su-

preme Court was not required to affirm the judgment for want of a motion for new trial, since, there having been no trial, no motion for new trial was necessary.

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

Daily & Woods and *Mehaffy, Donham & Mehaffy,* for appellant.

Appellants were entitled to a finding by the circuit court on the reasonableness of the rates fixed by the Corporation Commission, on the evidence adduced before that commission. This court so declared on former appeal, and that is the law of the case. 148 Ark. 260. This court did not on that appeal fix the rates, neither had it authority so to do, as its jurisdiction is appellate only. Const., art. 7, § 4; 39 Ark. 82; 94 *Id.* 119; C. & M. Dig., § 2129.

Hill & Fitzhugh, for appellee.

1. The declaration of law objected to was not brought into the record by bill of exceptions, and there is, therefore, nothing to review. 36 Ark. 491; 59 *Id.* 178; 60 *Id.* 260.

The procedure prescribed by § 28, act 571 Acts 1919, p. 433, relates only to the judicial review of the record made before the Corporation Commission. Questions of practice arising, not out of the record made before that body, but occurring in the circuit court, must conform to the methods prescribed by law for the review of such questions. A motion for new trial was therefore necessary. 148 Ark. 156; Crawford's (Ark.) Digest, Appeals and Error, 179, § 116 (D), *Id.* 181, § 181. See also, 107 Ark. 462, 468; 96 *Id.* 434.

2. The court said on former appeal, 148 Ark. 260, 268, that "the testimony adduced by appellant tends to establish the facts that the rate specified in these contracts with the parties mentioned is not remunerative, and the evidence is sufficient to support the finding of the commission fixing the rate at approximately nine cents per thousand cubic feet for use by the manufacturing plants." That decision is conclusive and was binding on the trial

court. 137 Ark. 341; 131 *Id.* 509; 129 *Id.* 43; 129 *Id.* 116; 132 *Id.* 617; 134 *Id.* 605; 138 *Id.* 267; 131 *Id.* 509; 136 *Id.* 156; 122 *Id.* 491.

HUMPHREYS, J. This case is before us a second time. On the first appeal the judgment of the trial court, dismissing the petition of the Clear Creek Oil & Gas Company, was reversed and remanded with directions to try the case upon the evidence adduced before the Arkansas Corporation Commission, and to determine therefrom whether the rates fixed by said Commission for the sale of natural gas were reasonable. In remanding the cause this court used the following language, pertaining to the directions given to the trial court, to-wit: "The parties are entitled to a finding by the trial court on the issue as to the reasonableness of the rates fixed by the Commission, that is to say, a finding based on the evidence adduced before the Commission. The judgment is therefore reversed, and the cause remanded for further proceedings." The case on former appeal is reported in 148 Ark. at page 260, under the style of *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.,* and reference is made to the reported case for a full statement of the facts and issues involved therein.

Upon the remand of the cause the trial court was requested by appellants herein to ascertain whether the rates for the sale of gas fixed by the Corporation Commission were reasonable under the evidence presented to the Commission. The trial court refused the request. The request and refusal were in the form of declarations of law. Appellant's requested declaration of law, which was refused by the court, was as follows:

"That, under the opinion of the Supreme Court on a former appeal, which was rendered April 18, 1921, and rehearing denied May 30, 1921, that this court has the right to make a finding and fix a rate at what this court thinks the evidence before the Corporation Commission justifies, and that this court is not required by the former decision of the Supreme Court in this case to find the rate as fixed by the Corporation Commission."

The court declared as a matter of law that he was bound to find the rates fixed by the Corporation Commission from the following statement appearing in the opinion of the court: "The evidence is sufficient to support the finding of the Commission fixing the rate at approximately 9 cents per thousand cubic feet for use by the manufacturing plants." The court thereupon approved and confirmed the rates fixed by the Corporation Commission, as follows: 15 cents per M cubic feet for the first 300,000 cubic feet; 13 cents per M cubic feet for the next 300,000 cubic feet; 10 cents per M cubic feet for the next 2,400,000 cubic feet; and 9 cents per M cubic feet for all gas used over 3,000,000 cubic feet, to be computed monthly. From the judgment thus approving and confirming the rates of the Corporation Commission an appeal has been duly prosecuted to this court.

Appellants insist upon a reversal of the judgment because it was rendered without a trial upon the record presented to the Corporation Commission. Appellee's insistence is that the appellants cannot be heard to complain because the declaration of law requested by appellants and refused by the court, as well as the declaration of law given by the court, were not brought into the record by a bill of exceptions. Also because a motion for new trial was not filed. A number of cases are cited by learned counsel for appellee holding that facts proved or admitted on the trial and declarations of law made by the court upon them must be brought into the record by a bill of exceptions. *Hall* v. *Bonville,* 36 Ark. 491; *Bradley* v. *Harkey,* 59 Ark. 178; *Dunnington* v. *Frick Company,* 60 Ark. 250. These cases have application where there has been a trial, but none where a trial had been refused or denied, as in the instant case. Declarations of law erroneously refused and given in the absence of a trial are necessarily in the same category as demurrers erroneously sustained or overruled by the court. Such errors appear on the face of the record, and consequently do not have to be brought into the record by a bill of exceptions. Following the same line of rea-

soning, a motion for new trial was unnecessary, as the court refused to try the case in accordance with the mandate. Until there had been a trial, a motion for a new trial could have no place. As it was unnecessary to file a motion for a new trial or to bring the declarations of law refused and given by the court into the record by a bill of exceptions in the instant case, in order to prosecute an appeal to this court, no useful purpose would be served by construing section 28 of act 571 of the Acts of the General Assembly of 1919, providing a remedy by appeal to the Supreme Court of Arkansas from the judgment of the circuit court.

The error of the trial court in denying appellants a trial upon the merits grew out of a misinterpretation of the following language used by the court in the opinion handed down on the former appeal of the case, to-wit: "The testimony adduced by appellant tends to establish the fact that the rates specified in these contracts with the parties mentioned is not remunerative, and the evidence is sufficient to support the finding of the Commission fixing the rate at approximately nine cents per thousand cubic feet for use by the manufacturing plants." In using the language quoted the court had reference to the legal sufficiency of the evidence to support the finding of the Commission, and had no reference whatever to the weight of the evidence. The cause was remanded for the court to determine the reasonableness of the rates fixed by the Commission upon the weight of the evidence. The law of the case, as declared by this court on the former appeal, is that both parties, appellants and appellee, are entitled to a trial by the circuit court on the issue as to the reasonableness of the rates fixed by the Commission upon the evidence presented to the Commission. This can only be done by hearing the evidence and determining from the weight thereof whether the rates fixed by the Commission are reasonable. In other words, this court ruled on the former appeal that the rates fixed by the Commission did not bind the circuit court.

For the error indicated, the judgment is reversed and the cause remanded, with directions to the circuit court to determine from the weight of the evidence presented to the Corporation Commission whether the rates fixed by the Commission are reasonable.

ROSS DRAINAGE DISTRICT v. CLARK COUNTY.

Opinion delivered April 10, 1922.

COUNTIES—CLAIM FOR BRIDGE CONSTRUCTED WITHOUT AUTHORITY.—Under Const. art. 19, § 16, and Crawford & Moses' Dig., §§ 827-9, when bridges of the second class are built at the county expense, plans must be adopted and contracts for same let at public outcry; and where a county judge in vacation entered into a contract with a drainage district to reimburse it for a bridge to be built, and the contract was never ratified by the county court, a claim for constructing the bridge was properly disallowed.

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

Callaway & Callaway, for appellant.

J. H. & D. H. Crawford and *Luke F. Monroe,* for appellee.

The contract entered into between the county judge, in vacation, and the appellant was not binding upon Clark County. Const. 1874, art. 7, sec. 28, C. & M. Digest, § 2279; 36 Ark. 641; 55 Ark. 437; 127 Ark. 470; 117 Ark. 334.

HUMPHREYS, J. Appellant, Ross Drainage District of Clark County, presented a claim against the appellee, Clark County, to the county court of said county in the sum of $4,300.35 for the construction of bridges built across certain public highways in constructing the drainage ditches in said district. The county court refused to allow the claim, from which an appeal was prosecuted to the Clark Circuit Court. In the circuit court the issues were tried by the court sitting as a jury, which resulted in a judgment disallowing the claim, from which an appeal has been duly prosecuted to this court.

Special act No. 92 of the General Assembly of Arkansas, 1917, creating the drainage district in question, contained no provision requiring the drainage district to build bridges over ditches dug by it across public highways in the construction of its drainage system. A test case as to whether the district or the county should build bridges over the ditches where they crossed public highways resulted in a ruling by this court, on appeal, that said drainage district could not be required to build bridges over the ditches cut across the public highways, in the absence of a provision in the act requiring it to do so. *Board of Directors of Ross Drainage Dist.* v. *State,* 147 Ark. 91. During the pendency of the test case the president of the board of directors of said district entered into the following written contract with the county judge of said county, in vacation, and the prosecuting attorney of the Eighth Judicial District of Arkansas, which included Clark County, to-wit (omitting formal parts): "This agreement, executed on this, the day and date hereinafter mentioned, by and between Clark County, Arkansas, as represented by J. T. Green and Luke Monroe, respectively county judge of said county and prosecuting attorney of the Eighth Judicial District of Arkansas, and hereinafter referrred to as the county, party of the first part, and Ross Drainage District, of said county, acting by and through W. E. Miller, president of the board of directors, and hereinafter referred to as the district, party of the second part, witnesseth:

"Whereas, the improvement under way by said district crosses certain county roads of said county, and act 92 of the General Assembly of 1917, under which said district is operating, does not specify whether or not the district shall bridge the ditch where same crossed such public roads. And whereas, as the district has already built one such bridge and the county one, and a third bridge must soon be constructed; and whereas, in view of the further fact that the county will at once institute legal proceedings to determine whether or not the

district should construct such bridges; it is therefore agreed between the parties hereto as follows, to-wit:

"The district will proceed to construct the bridge, the necessity for which is now imminent, and, in the event the courts finally hold that it is not the duty of the district to do such bridging, the county agrees that it will reimburse the district for the said bridge heretofore built by it and for such other bridging, bridge or bridges which the district shall hereafter build or contract. Provided, if the courts hold that it is the duty of the district to do such bridging, or build such bridges, the district agrees to reimburse the county for the bridge heretofore constructed by the county as hereinbefore mentioned. It being the intention of this agreement that such obligation or obligations be discharged by the county or district as may be decided by the courts."

The drainage district proceeded, under the contract, to construct bridges over the drainage canals aforesaid at a total cost of $4,300.35. The bridges constructed were between 30 and 60 feet in length, and, under the statute law of this State, are denominated bridges of the second class. The statute law provides that when bridges of the second class are ordered built at the expense of the county, plans and specifications therefor must be adopted and posted in accordance with the requirements of the statute, and contracts for building same must be let at public outcry at the courthouse door to the lowest and best responsible bidder. Const. of Ark., art. 19, § 16; Crawford & Moses' Dig., §§ 827-829. The contract upon which the claim presented was based was made by the county judge in vacation, and was never ratified by the county court. The bridges were not constructed in accordance with the requirements of the statute. The bridges having been constructed without authority, the claim was properly disallowed; otherwise any one might, without authority, construct a bridge on a public highway, whether needed or not, and compel the county to pay for it. The record does not reflect that the county court ever accepted the

bridges, or that the county took charge of them and permitted the public to use them as public bridges. So we are not called upon to determine in this case whether the county would have become liable had it accepted and permitted the public to use the bridges. The only question presented for determination on this appeal is whether a claim presented for the construction of bridges based upon an unauthorized contract can be collected from the county. This question was settled in the negative in the case of *Howard County* v. *Lambright,* 72 Ark. 330.

No error appearing, the judgment of the circuit court is affirmed.

MOTOR WHEEL CORPORATION *v.* CHILDS.

Opinion delivered April 17, 1922.

1. SALES—RESCISSION OF CONTRACT.—Where a buyer, on the seller's refusal to permit his inspector to examine articles sold, telegraphed to seller: "Cancel order and forget it. Our man knows our requirements," and seller replied: "No stock being loaded. Trouble no inspector. If this man fair sample of your inspectors, the order is already canceled," there was a mutual rescission of the contract.
2. CONTRACTS—ORAL AGREEMENT IN SUBSTITUTION FOR WRITTEN CONTRACT.—An oral agreement to carry out a previously canceled written agreement according to its terms must be tested as an oral contract, as it depends for its existence upon an oral agreement.
3. CONTRACTS—RESCISSION—CONSIDERATION.—A contract containing mutual obligations may be rescinded by mutual consent, such reciprocal obligations being the consideration for the rescission as well as for the original undertaking.
4. EVIDENCE—PAROL EVIDENCE IN EXPLANATION OF WRITING.—A confirmatory letter written by one of the parties after they had entered into an oral agreement of sale, which letter did not completely state the terms of the contract, was merely evidentiary in part of what the contract was, and therefore is subject to explanation by either party.

Appeal from Calhoun Circuit Court; *C. W. Smith,* Judge; reversed.

E. L. Westbrooke, for appellant.

The contract was rescinded by mutual consent by the passage of the various telegrams. 93 Ark. 447; 98 Ark. 219.

If one party furnishes a legal ground for rescission, his assent to a rescission declared by the other is unnecessary. 13 C. J. 601, § 624; 128 Ark. 535.

The parties made a new oral contract, which abrogated the written contract (92 Ark. 254; 146 Ark. 385; 136 Ark. 507; 5 Ark. 651) and thereafter the contract was on a "car to car" basis. There was no breach of this contract.

Had appellee interpreted the matter as a breach of the original contract and expected to insist upon the performance of that contract or demand damages for the breach thereof, he should have at once so notified the appellant. 83 Ark. 533; 55 Atl. 599; 6 R. C. L. p. 1025; 3 Elliott on Contracts, § 2032. His failure to do so amounted to waiver. Bishop on Contracts, § 792; 83 Fed. 684; 103 N. W. 112; 92 S. W. 88; 81 N. E. 574; 148 Fed. 145; 48 So. 213; 84 Pac. 232.

The verdict should have been set aside by the court. 126 Ark. 427; 47 Ark. 562; 98 Ark. 304; 94 Ark. 566; 100 Ark. 598; 98 Ark. 334; 129 Ark. 448; 133 Ark. 166; 132 Ark. 451; 125 Ark. 488.

Wallace Townsend, for appellee.

Appellee did not acquiesce in appellant's breach of the contract. Appellant was therefore liable in damages for the loss occasioned appellee. 93 Ark. 447.

The jury settled the conflict in the evidence. 108 Ark. 574.

The case was properly one for the jury. 71 Ark. 445; 105 Ark. 136. There being substantial evidence to sustain the verdict, the court was correct in not setting it aside. 15 Ark. 403; 15 Ark. 542.

McCULLOCH, C. J. Appellee was the plaintiff below and sued appellant to recover damages in the sum of $23,532 for alleged breach of a contract between the

parties for the manufacture, sale and purchase of wood material for use in making automobile wheels. There was a trial of the cause before a jury, which resulted in a verdict in favor of appellee for the recovery of damages in the sum of $6,000, and an appeal has been duly prosecuted.

Appellant is a foreign corporation, organized under the laws of Michigan, but is doing business in the city of Memphis, Tennessee, and the transactions which form the basis of this litigation were conducted by appellant through its Memphis office.

Appellee was engaged in the manufacture of wood materials at Banks, Arkansas, and the contract involved herein was for the manufacture by appellee of automobile rim-strips and spoke-billets at his plant at Banks and the sale thereof to appellant at specified prices.

On July 31, 1920, the parties entered into a written contract whereby appellee agreed to manufacture and sell to appellant, at stipulated prices, twenty-five carloads of rim-strips and spoke-billets. Appellant agreed in the contract to purchase and accept said material subject to its own inspection at Banks when ready to load on railroad cars for shipment. The contract provided that shipment should start during the week beginning August 2, 1920, and be completed by November 1, 1920.

It is shown by the testimony that the first car for shipment under the contract was gotten ready immediately prior to August 18, 1920, and appellant sent its inspector, named Bastian, to Banks for the purpose of inspecting the stock as loaded on cars, as per contract, and on the day just mentioned a controversy arose between appellee and the inspector concerning the accuracy and correctness of the latter's inspection. This controversy resulted in a suspension of the loading of the car, and Bastian telegraphed appellant at its office in Memphis to the effect that the inspection had been stopped, and that the car was being loaded without inspection. Appellant thereupon sent to appellee a telegraphic message worded as follows:

"Bastian advises stock being loaded without inspection. Order reads our inspection. Wire trouble quick."

Appellee replied by wire on the same day as follows:

"If you want my stock, send inspector. This man cannot inspect my stock."

Still later on the same day appellant sent the following message to appellee:

"Cancel order and forget it. Our man knows our requirements."

Immediately on receipt of that message appellee sent the following by wire to appellant:

"No stock being loaded. Trouble no inspector. If this man fair sample of your inspectors, the order is already canceled."

This was the last communication between the parties at that time, but on the next day appellee appeared at appellant's place of business in Memphis, and they there entered into further negotiations concerning the transactions between them.

It is undisputed that there was an agreement entered into between the parties at the meeting in Memphis to the effect that appellee should proceed to manufacture rim-strips and spoke-billets and ship the same in carload lots to appellant, and that the latter should accept the same subject to inspection in Memphis, but there is a conflict in the testimony as to the full extent of the agreement made there between the parties. Appellee testified that there was no new contract between the parties except with regard to the inspection, and that the agreement was that appellant should accept performance of the original contract, but that a few cars should be shipped to appellant at Memphis subject to inspection there and that if the inspection at Memphis did not prove satisfactory appellant would send another inspector to appellee's place of business at Banks for the purpose of inspecting the remainder of the stock to be shipped under the contract.

On the other hand, appellant contends, and the witnesses introduced tend to establish the fact, that the ne-

gotiations and agreements between the parties at Memphis had no reference to the original contract, which had already been canceled and rescinded, but that a new oral contract was entered into whereby appellee agreed to ship carloads of stock to Memphis subject to inspection by appellant there, and that appellant was only to accept such number of cars on those terms as appellee was willing to ship from time to time, and that there was no agreement with respect to the number of cars to be shipped under those terms.

There is no controversy, however, that the price of the stock was the same as that specified in the original contract.

After this meeting between the parties at Memphis, appellee returned to Banks, and the next day appellant mailed to appellee the following letter:

"Confirming our conversation had with you while at our office today with reference to order for automobile strips and billets which you hold, it is our understanding that you will try out a few cars and ship same subject to inspection at the factory, shipping the hickory and oak rim-strips to Lansing and the spoke-billets to Memphis, you to draw on us at Memphis through the Commercial Trust & Savings Bank for 80 per cent. of the invoice, we to send you inspection report and balance promptly on receipt of inspection report. It is also understood that we are to take about 25 per cent. red oak in the 54-inch lengths, truck rims only, you making the 45-inch lengths out of hickory only."

This letter was received by appellee, and it is the only written communication between the parties bearing directly upon the details of the transactions between the parties at Memphis on the occasion above mentioned.

The contention of appellant is that this letter had reference solely to the new oral agreement made in Memphis. But, on the other hand, the contention of appellee is, and he testified to that effect, that this letter had reference to the original written contract, or "order"—as the witness designated the contract.

Appellee then proceeded to make shipment to appellant, and the car, the shipment of which had been held up on account of the controversy concerning the inspection, was shipped by appellee to appellant, and the latter accepted and paid for the same on the terms contended for by appellee. There were four carloads shipped, two cars of strips and two cars of billets.

On September 11, 1920, appellee mailed to appellant a letter requesting the latter to send an inspector to load out the stock. That portion of the letter which has bearing upon the present controversy reads as follows:

"Would like for you to send an inspector to load out the stock which I sold you. It takes so long to get a report on car after it is shipped. I have four cars which I shipped to West Chester in June that I have no report on. * * * * * * I do not care to load out any more stock until I get a report on at least one or two cars that I have shipped you. It seems that the first car that I shipped should have been in before this time.

"The last time I was in Memphis, we had an agreement that I was to draw 80 per cent. on the stock. The first draft was returned, but finally paid. You wrote me a letter authorizing me to draw on you for 80 per cent., and to send a draft to a certain bank in Memphis. I did this, with invoice and B/L attached to draft.

"I made a deal with you for this stock, and turned down a deal as fully as good, and with quite a lot less trouble to handle, for this one.

"Let me know when you can have an inspector here, so I can get some cars placed."

On September 13 appellant wired appellee as follows: "Stop all production for us. Wire amount now cut. Writing." This was followed up by a letter mailed by appellant to appellee confirming the telegram and explaining that the necessity for canceling the business relations between the parties was the decline in the automobile industry, and the letter concluded with the following paragraph:

"It is our intention to take such stock as you have out and cut for us, but cannot take more than what you have cut on receipt of our wire, unless it is necessary to cut just enough to make a minimum car. Advise amount cut, and we will send inspector."

On receipt of this letter, appellee wrote to appellant as follows:

"I have car rims and car billets. Will wire as soon as I get cars placed, so you can send inspector. You could not use two more cars on the order given me, besides the two I have cut, could you? I have gone to considerable expense to get this order out, and feel that you should take what timber I have out. I have the logs on the road, and would have had them all cut, but the railroad would not furnish me with cars to move them. Let me hear from you by return mail. Also let me know if you can send inspector on short notice."

The two cars referred to in the above letter were shipped out and were received by appellant at destination.

On September 16 appellee sent a wire to appellant requesting the latter to send an inspector, and appellant replied as follows:

"Impossible send inspector quick. Stack stock on hand. Cut one car each hickory billets strips. Will send best inspector latter part of next week. Load everything cut then."

There were other telegrams that passed between the parties with respect to the inspection of the cars, but they relate to cars which appellant had expressed a willingness to accept.

On October 25 appellee wired to appellant notifying it that he had a car of rim-strips and about a car of billets, and asked for an inspector. One of appellant's employees went to Banks on November 1, according to his testimony, for the purpose of making an inspection, but claims to have found no stock ready. This was the last transaction between the parties.

Among other instructions, the court gave the following, over the specific objection of appellant:

"If you find defendant breached its contract of July 31, 1920, with plaintiff, and if you find the plaintiff sustained damages by such breach, and if you do not find that plaintiff acquiesced in the action which he alleges to be a breach of the contracts, you are instructed that plaintiff's damages is the difference between the contract price of the total amount of strips and billets which defendant contracted for but refused to take and the total cost of the manufacturing and loading them on the cars ready for shipment."

This instruction was erroneous and prejudicial, for the reason that it submitted to the jury the question whether or not the original contract of July 31, 1920, had been canceled without the consent of appellee, and whether there had been a breach of that contract without the acquiescence or consent of appellee.

We are of the opinion that, according to the undisputed evidence, the original written contract between the parties was rescinded by the communications between them on August 18, 1920, which were in the form of telegraphic messages and about which there is no dispute.

After appellee had unequivocally refused to permit Bastian to inspect the stock, appellant sent the following message: "Cancel order and forget it. Our man knows our requirements." This was a distinct and unequivocal proposal to cancel or rescind the contract on account of the controversy with regard to the inspection, and appellee made the following answer to that proposal: "No stock being loaded. Trouble no inspector. If this man fair sample of your inspectors, the order is already canceled." No other interpretation can be placed upon the language of this message than that it was an acceptance of appellant's proposal to cancel the contract on account of the controversy with regard to the inspection.

It is true that this message stated the qualification that if Bastian was a fair sample of the inspectors sent out by appellant the order was already canceled, but the

parties had already come to the distinct disagreement about the inspection, and the message reads that the contract "is already canceled," meaning, necessarily, that the cancellation resulted from their failure to agree upon the proper man to do the inspecting.

There was undoubtedly a complete acquiescence on account of the controversy between the parties that they would cancel or rescind the contract and not insist upon a further effort to perform it according to its terms.

The court erred, therefore, in giving this instruction, for it permitted the jury to find that this contract was still in force, and that appellant's refusal by telegram dated September 13 to accept any more stock further than the carloads already manufactured was a breach of this contract.

If the original contract was in force, the telegram of September 13 was a breach thereof because it constituted a refusal to accept any more carloads other than those already manufactured and ready to ship.

Appellant's contention is that this telegram was not a breach of its contract, for the reason that the original written contract had been rescinded, and that, under the terms of the oral contract made in Memphis on August 19, it was not bound to accept any definite number of carloads of stock.

It was a question for the jury to determine what the contract made in Memphis on August 19 was,—whether it amounted, as contended by appellee, to an agreement of sale according to the terms specified in the original written contract, or whether it was merely a contract, as contended by appellant, for the acceptance of such amount of material as appellee should see fit to ship.

Since we find that the original written contract was canceled by the telegraphic correspondence on August 18, it follows that the contract negotiated in Memphis on the following day was an oral one, notwithstanding it had reference to the sale of stock according to prices mentioned in the written contract. Even if it was an agreement to carry out the original contract according to its

terms, it must be tested as an oral contract, for it depended, for its existence, upon an oral agreement. *Izard v. Connecticut Fire Ins. Co.,* 128 Ark. 433.

The original contract contained mutual obligations of the respective parties, and it was within their province to rescind it by mutual consent, such reciprocal obligations being the consideration for the rescission as well as for the original undertaking. So, after the original contract had been rescinded, the parties could, and, according to the testimony adduced on the part of appellant, did, enter into negotiations for a new contract covering the subject-matter of the old contract.

This new contract was, as before stated, an oral one, even though it adopted the terms of the old contract by reference thereto. The confirmatory letter written by appellant to appellee on the next day was not complete in itself so as to state the terms of the new contract. It was therefore merely evidentiary, in part, of what the contract was and is subject to explanation by either party.

This state of the proof makes it a question for the jury to determine what the extent of the contract was that was entered into between the parties on the occasion named, and the case should have gone to the jury solely on that question and on the question of the alleged breach thereof.

It is true that appellee in the complaint asserted the right of recovery solely on the original contract, but proof was directed towards the transaction between the parties on the occasion of their meeting in Memphis, and as this testimony was introduced without objection, it constituted an election to treat the pleadings as amended so as to conform to the proof.

We cannot sustain the judgment, however, upon a presumed finding of the jury in favor of appellee on that issue, for the jury may have based the verdict upon the finding that the original written contract had not been rescinded.

The court gave, at appellant's request, an instruction (No. 4) setting forth the correspondence between the parties between the dates of September 15, 1920, and October 25, 1920, and concluded with directions to the jury that if they found that appellant "within a reasonable time sent an inspector to inspect and accept such material as was tendered by plaintiff, and on arrival of inspector at plaintiff's premises plaintiff had no stock on hand to inspect of the kind embraced in the contract, that there was no refusal of defendant to comply with the terms of the contract."

This instruction was more favorable to appellant than it was entitled to, for it assumed that appellee had acquiesced in the agreement to insist on the shipment of only such stock as had been manufactured. It was a question for the jury to determine whether or not, from this correspondence, appellee acquiesced in the terms proposed by appellant in its letter of September 13 confirming the telegram with regard to accepting no more stock except that which had been manufactured.

For the error in giving instruction No. 3 over appellant's specific objection, the judgment is reversed and the cause remanded for a new trial.

ACREE v. PATTERSON.

Opinion delivered April 17, 1922.

1. SCHOOLS AND SCHOOL DISTRICTS—REVIEW OF ORDERS OF COUNTY BOARD OF EDUCATION.—While certiorari is the proper remedy for review by the circuit court of orders of the county board of education making changes in the school districts, the remedy thus afforded is merely a review of errors of the board, and not a trial *de novo* upon the merits.
2. SCHOOLS AND SCHOOL DISTRICTS—REVIEW OF ORDERS OF COUNTY BOARD—EVIDENCE.—On certiorari to review on order of the county board of education changing boundaries of school districts, the circuit court is not bound by the record made before the board, but other evidence may be considered to acquaint the court fully with all matters presented to such board.

3. SCHOOLS AND SCHOOL DISTRICTS—NOTICE OF PROPOSED CHANGE.—In proceedings under Crawford & Moses' Dig., § 8823, on petition of the electors of certain districts for a change in the boundaries of the districts, the failure of the petitioners to give notice of the proposed change in the manner required by Crawford & Moses' Dig., § 8821, renders the proceedings void; such notice being jurisdictional.

4. SCHOOLS AND SCHOOL DISTRICTS—ATTACK ON ORDER CREATING NEW DISTRICT—PARTIES.—Directors of school districts affected by an order changing their boundaries, being electors, are proper parties to a proceeding to test the validity of an order of the county board creating a new district out of the former districts.

5. SCHOOLS AND SCHOOL DISTRICTS—CREATION OF NEW DISTRICT—PARTIES.—Where certiorari to contest the creation of a new school district out of the three old districts was brought in the name of the old district and of one director of each district, it will be presumed, until the contrary is shown, that the districts were parties, and that each of the three named directors joined in the petition in their individual capacity.

6. SCHOOLS AND SCHOOL DISTRICTS—CREATION OF NEW DISTRICT—PARTIES.—Each of the three old school districts from which a new school district was formed was a proper party in interest in a proceeding to test the validity of an order of the county board of education creating the new district.

7. SCHOOLS AND SCHOOL DISTRICTS—CERTIORARI—PARTIES.—Objection that certiorari to test the validity of an order creating a new school district was directed against the petitioners for the new district, instead of against the county board of education, goes to the form and not the substance of the controversy, especially where the writ ran to the secretary of the board and commanded the production of the records, which was equivalent to making the board itself a party.

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

W. F. Reeves, for appellant.

Appellee's remedy was by appeal and not certiorari. 25 Ark. 32; 37 Ark. 318; 30 Ark. 435; 35 Ark. 180; 52 Ark. 213.

The petition for the writ of certiorari was not verified, which rendered it fatally defective. 6 Cyc. 781-783.

The petition did not contain proper parties. They were not suing as a board but as individuals.

The petition did not contain proper parties defendant. The board of education was a proper party, as well as the directors of District No. 90.

J. F. Henley, for appellee.

The 1919 act created no right of appeal and certiorari was the proper remedy. 49 L. R. A. (N. S.) 565; 44 L. R. A. (N. S.) 1211-14.

The proper parties plaintiff and defendant were named in the petition. It was not necessary to allege a representative capacity of the petitioners, or that they would suffer any personal loss. The question is purely of a public nature, and any citizen had the right to bring the case. 44 L. R. A., *supra.* District 90 was not a proper party since it never existed, having been created without the posting of proper notices.

Appellant waived the failure to verify by failing to call specific attention thereto in his demurrer. C. & M. Dig., §§ 1190 and 1246; 88 Ark. 433; 71 Ark. 609.

The board of education had no jurisdiction. 116 Ark. 293.

McCULLOCH, C. J. This appeal is from a judgment of the circuit court of Searcy County quashing an order of the board of education of that county creating a new school district, designated as No. 90, out of territory formerly embraced in districts Nos. 29, 33 and 81.

Several of the questions raised on the appeal have been settled in the decision of this court in *Mitchell* v. *School District No. 13, ante* p. 50. We decided in that case that the statute creating the county board of education substituted the board for the county court, and only transferred the power to the board without repealing or in anywise affecting the statutory procedure with respect to matters heretofore within the power of the county court.

The statute provides that new school districts may be formed, or changes in boundaries may be made "upon a petition of a majority of all the electors residing upon the territory of the districts to be divided." Crawford & Moses' Digest, § 8823.

The statute further provides that notice of the proposed change shall be given by posting hand-bills in "four or more conspicuous places in each district to be affected, one of said notices to be placed on the public school building in each affected district." Crawford & Moses' Digest, § 8821.

In this instance the petition was filed with the county board of education for the creation of a new district out of territory of the three districts mentioned above. There was a remonstrance filed, but the court granted the order establishing the new district. The district as established, however, embraced a smaller area than that described in the petition.

Appellees, Patterson, Moore and Beck, each of whom was a director of one of the three districts mentioned above, applied to the circuit court for a writ of certiorari to bring before that court for review the proceedings before the county board of education. The writ was granted and on hearing thereof in the circuit court the judgment appealed from was rendered.

The cause was heard upon the pleadings and upon affidavits showing that, according to the evidence adduced before the county commissioners, the notice of the change in the districts was not given in the manner prescribed by statute.

We have already decided, as before stated, that the power to make changes in school districts has been transferred from the county court to the county board of education, and that certiorari is the proper remedy for review by the circuit court of such orders rendered by the board. *Mitchell* v. *School District No. 15, supra.* The remedy thus afforded is merely a review for errors of the board and not for trial *de novo* upon merit. But the circuit court was not bound by the record made before the inferior tribunal, and other evidence *dehors* the record was admissible for the purpose of acquainting the court fully of all the matters presented to the inferior tribunal. *Hall* v. *Bledsoe,* 126 Ark. 125.

It is shown that, according to the evidence adduced before the board, the notice was not given as required by statute, and, as the giving of the notice was jurisdictional, the proceedings creating the new district were void. *Lewis* v. *Young,* 116 Ark. 291; *Mitchell* v. *School District No. 13, supra.*

It is unnecessary to determine whether or not appellees are correct in another ground which they set forth for declaring the order of the board to be void.

It is contended, however, that appellees are in no position to attack the validity of the order. Appellees are named as "School Districts Nos. 29, 33 and 81, Dan Patterson, Elisha Moore and Robert Beck," and it is alleged in the petition that Moore is a director in District No. 29, that Patterson is a director in District No. 33, and that Beck is a director in District No. 81.

Conceding that the individuals named, though directors, had no authority to bring their respective districts into the litigation, it is shown that they were directors of the district, which necessarily implied that they were electors, and this gave them such an interest as made them proper parties in litigation to test the validity of the order of the board of education.

It does not appear, however, from the petition that the three districts were represented solely by one director of each. The presumption must be indulged, until the contrary is shown, that the districts were brought in by all three of the directors in each, and that these three individuals also joined in the petition for the writ in their own individual capacity.

Each district affected by the creation of the new district was a proper party in interest in the proceedings to challenge the validity of the order creating the new district out of that territory. In fact, the old districts were, under the statute itself, parties to the proceedings. *School District No. 44* v. *School District No. 10,* 128 Ark. 383.

Again, it is urged that the writ should run against the county board of education, instead of against the pe-

titioners before the board for the creation of the new district. This merely goes to the form and not to the substance of the controversy, for the real parties to the controversy were before the court, attacking and defending the validity of the order made by the board of education. The writ, in fact, ran to the secretary of the board and commanded the production of the records, and this was tantamount to making the board itself a party to the proceedings.

We are therefore of the opinion that the defect, if any, was merely one of form and not of substance.

Judgment affirmed.

KELLOGG v. STATE.

Opinion delivered April 17, 1922.

1. LARCENY—ALLEGATION OF OWNERSHIP.—In indictments for larceny, the allegation of ownership is material, and must be proved as alleged.
2. CRIMINAL LAW—FORMER ACQUITTAL.—A former acquittal, under an indictment charging the larceny of cottonseed from a certain person does not bar a subsequent prosecution for larceny of the same quantity of cottonseed from another person, unless the larceny, though from different owners, was but single act or transaction, or the persons named in the two indictments are in fact one and the same.
3. CRIMINAL LAW—IDENTITY OF OWNER OF STOLEN PROPERTY NAMED IN DIFFERENT INDICTMENTS.—Where a former indictment for larceny alleged the ownership of the stolen cotton to be in A. C. Core, and the jury found defendants not guilty, the fact that a second indictment for stealing the same quantity of cotton at the same time named the owner as A. E. Core, without any proof that A. C. Core and A. E. Core were one and the same person, does not show that they were the same persons.
4. NAMES—MIDDLE INITIAL.—Though the middle initial of a name is ordinarily immaterial and may be disregarded, such rule does not apply where such initial is necessary to distinguish two different individuals.
5. CRIMINAL LAW—FORMER JEOPARDY.—It was not error to overrule a plea of former acquittal where it does not affirmatively ap-

pear that the prosecution is for the same offense as that for which defendants had been acquitted.

6. CRIMINAL LAW—ALLEGATION OF TIME—INSTRUCTION.—Though an indictment for larceny charged the theft as having been committed on a certain day, it was not error to charge the jury that it was their duty to convict the defendants if they stole the property within three years next before the finding of the indictment.

7. CRIMINAL LAW—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.—An instruction that circumstantial evidence is legal evidence and is to be considered in determining whether the defendants are guilty, and that when circumstances are so thoroughly connected as to form a chain that convinces beyond a reasonable doubt, the jury should convict the same as upon regular proof, *held* substantially correct.

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; affirmed.

Robert J. White, for appellant.

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

WOOD, J. The appellants were jointly indicted for the crime of grand larceny, which it is alleged was committed as follows: "The said George Kellogg and John Oliver on the 24th day of October, 1919, in the county and district aforesaid, unlawfully and feloniously did take, steal and carry away six hundred and seventy-one pounds of seed cotton of the value of one hundred dollars, the personal property of A. C. Core."

The appellants were placed on trial on this indictment, and the jury returned the following verdict: "We, the jury, find the defendant not guilty of stealing A. C. Core's cotton." The court thereupon directed that "the defendants' case be returned to the grand jury for investigation." The grand jury on the following day returned into court an indictment charging Cleve Hickson, John Oliver and George Kellogg of the crime of grand larceny committed as follows: (Here the indictment, after adding the name of Cleve Hickson, is in precisely the same language as that set forth above except it names the property as that of A. E. Core.) To the last indict-

ment the appellant entered a plea of former jeopardy, which in due form set out that the appellants herein had been tried and acquitted "of the identical offense for which they were here charged."

The court overruled their plea, and they were put upon trial upon the last indictment.

It could serve no useful purpose to set out in detail the testimony which was adduced to establish the charge on the part of the State. It consisted of circumstantial evidence. The testimony tended to show that on Friday night, October 24, 1919, A. E. Core left some seed cotton in a wagon on a road which led from Paris to Fort Smith. During the night 671 pounds of the cotton were stolen of the value of $100. The theft occurred in Logan County, Arkansas. The following morning Core and others made an investigation and found where a car had stopped about fifty feet east of where the wagon stood which contained the cotton. The cotton was scattered from the wagon to the place where the car had been, and there were tracks of three persons at the place where the cotton was taken from the wagon to the car. The tracks of the car indicated that the back casings were "Diamond" tread, the right front casing a "Horseshoe" tread, and the left front casing a "Goodrich" tread. These car tracks were traced into the town of Paris and where they turned north at the Catholic church going in the direction of Cleve Hickson's. Some time after midnight, October 24th, a car was driven to the home of Cleve Hickson and stopped. The next morning a Dodge car was seen standing at the home of the appellant Oliver having on its wheels casings making the same kind of tracks made by the car in which the stolen cotton is supposed to have been carried away. The appellants were seen in a Dodge car belonging to Cleve Hickson in the immediate neighborhood where the cotton was stolen between midnight and four o'clock in the morning on the night of October 24, 1919. The stolen cotton had a peculiar small brown seed. The seed of cotton found at Hickson's place was the same

The appellants admitted that they were in possession of Cleve Hickson's car from Thursday morning until Saturday morning covering the time when the cotton was stolen. The testimony on behalf of the appellants tended to establish an alibi. On its own motion the court instructed the jury as follows: "Circumstantial evidence is legal evidence, and is to be considered by you in determining whether or not the defendants are guilty of this offense. When circumstances are so thoroughly connected as to form a chain that convinces you beyond a reasonable doubt, it will be your duty to convict upon circumstantial evidence the same as regular proof." The jury retired to consider its verdict, and afterwards returned into court and asked the court if it could convict the defendants for grand larceny for stealing the cotton at any other time than the night they were seen on the road—the night when the cotton was taken. Thereupon the court instructed the jury as follows: "That is a question that you gentlemen must determine, and not me. I said to you that if you believed beyond a reasonable doubt that the defendants took, stole or carried away the cotton, the property of A. E. Core, of greater value than $10, then it would be your duty to convict the defendants of grand larceny and fix their punishment in the State Penitentiary for some period of time not less than one year or more than five years, if they took, stole and carried away any cotton belonging to A. E. Core within three years next before the finding of the indictment." The appellants duly objected and reserved their exceptions to the rulings of the court and in overruling their plea of former jeopardy. The jury returned a verdict finding the appellants guilty and fixing their punishment at one year in the State Penitentiary. Judgment of sentence was pronounced against them according to the verdict, from which is this appeal.

1. The court did not err in refusing to sustain appellants' plea of former jeopardy. This court has repeatedly ruled that "in indictments for larceny allegation of ownership is material and must be proved as al-

leged." *Mooney* v. *State,* 137 Ark. 410, and cases there cited. *Fletcher* v. *State,* 97 Ark. 1; *Wells* v. *State,* 102 Ark. 627; *McLemore* v. *State,* 111 Ark. 457; see also *McIntosh* v. *State,* 108 Ark. 418, where we said: "Correctly naming the owner is essential to identify the stolen property".

In the first indictment on which appellants were tried the property was described as the personal property of A. *C.* Core, and the jury returned a verdict specifically finding that the appellants did not steal A. C. Core's cotton. Under the first indictment, therefore, the appellants could not have been convicted on proof that they had stolen the property of A. *E.* Core. Upon such proof there would have been a material and fatal variance between the allegations and the proof. "A conviction or acquittal under a charge of larceny from one person will not operate as a bar to a subsequent prosecution of larceny from another person, unless the larceny, although from different owners, was but a single act or transaction, or the persons named in the two indictments are in fact one and the same." 14 Stand. Ency. Proc. p. 603.

The appellants, in their plea of former jeopardy, set up that under the former indictment they had been tried and acquitted on the same offense as that contained in the second indictment upon which they were about to be tried, but there was nothing in their plea to show that A. *C.* Core and A. *E.* Core are one and the same person, and we do not discover any evidence to that effect in the record. Since the allegation of ownership was material and essential to the identification of the stolen property, in the absence of any proof that the initial "C" in the first indictment was but a misnomer and that it should have been "E" and was intended to be and should have been "E" in order to describe A. *E.* Core instead of A. *C.* Core, we are unable to conclude that the trial court erred in finding, as he must have found, that A. *E.* Core and A. *C.* Core were not one and the same person. It is stated in *Fincher* v. *Hanegan,* 59 Ark. 151: "The law knows but one Christian name. Entire omission of a

middle letter is not a misnomer or a variance. The middle letter is immaterial, and a wrong letter may be stricken out or disregarded." See also *State* v. *Smith,* 12 Ark. 622. But this is only true, as the cases show, when the mistake in the middle name is made in designating the same person. When the middle name is used to designate and distinguish different persons, then it becomes very material. This distinction was noted by Judge BATTLE in *Fincher* v. *Hanegan, supra,* when he said: "But this (the middle name) was immaterial unless there were more than one person of the same name, and the middle name or the initial thereof was unnecessary to identify the Henry Ward who had executed it."

Here we take it that the court must have found on the trial of the first indictment that A. *C.* Core was a different person from A. *E.* Core. At least it must have been proved that the cotton belonged to A. *E.* Core instead of to A. *C.* Core, for the court found it necessary to order that "the defendants' case be returned to the grand jury for investigation" and the insertion of the true name of the owner of the property. See *Blankenship* v. *State,* 55 Ark. 244; *Andrews* v. *State,* 100 Ark. 184.

It does not affirmatively appear that the prosecution in this case is for the same offense as that for which the defendants have already been acquitted. Therefore, the court did not err in overruling appellant's plea. *Turner* v. *State,* 130 Ark. 48.

2. There was no error in the instruction which the court gave the jury in response to the inquiry when they returned into court while considering their verdict. There was no election upon the part of the State to narrow the investigation of the offense charged in the indictment to the particular day named in the indictment, and there was no effort on the part of the State to prove that the appellant had stolen any other seed cotton of A. E. Core than the particular 671 pounds alleged in the indictment. That was the kind of cotton specifically described in the indictment. Under this indictment, if the court had instructed the jury that they could consider the theft of any

other kind of cotton than that specifically described, it would have been error. But such was not the inquiry of the jury, and such was not the instruction of the court. The jury inquired if they could convict the appellants of stealing the cotton at another time than the night they were seen on the road—the night the cotton was taken. The court, in response, told the jury that the offense charged in the indictment covered a period of three years next before the finding of the indictment. In *McLemore* v. *State, supra,* the accused was charged with larceny of a cow belonging to one Murphy, with no specific description. The evidence on the part of the State was directed to the larceny of a cow with a "crumpled horn", and the State elected to prosecute on the charge of stealing this particular cow. But in that case the court instructed the jury that in arriving at their verdict they were not to confine themselves to the cow with the "crumpled horn," but that they should find the defendant guilty if they found that within three years before the finding of the indictment he did steal and carry away *any cow,* the property of Murphy, etc. We held that the giving of the instruction, under the indictment and proof, was erroneous.

But the facts of the case at bar, as we have seen, differentiate it from the above case, and the court did not err in instructing the jury in this case that if the appellants took, stole and carried away the cotton of A. E. Core within three years before the finding of the indictment it would be their duty to convict. The jury may have been convinced, and their inquiry and finding indicates that they were convinced, that the appellants stole the cotton, but they may or may not have found that the theft occurred on the particular night they were seen on the road, as testified by the witnesses. In other words, the jury may have concluded that the witnesses were mistaken as to the particular day or hour when the theft occurred, but that the particular cotton was stolen as charged within three years of the finding of the in-

dictment. These were matters within the province of the jury, as the court properly informed them.

3. Instruction number 3 was not happily phrased, but there was no specific objection to it. There was no inherent vice in the instruction. On the contrary, the law was substantially declared in conformity with the decisions of this court in *Carr* v. *State,* 81 Ark. 589, and *Lackey* v. *State,* 67 Ark. 416. See also *Gill* v. *State,* 59 Ark. 422.

4. It cannot be said as a matter of law that there was no evidence to sustain the verdict. On the contrary, the issue of the guilt or innocence of the appellants was one of fact for the jury, and their verdict on this issue is conclusive here. There is no reversible error.

The judgment is therefore affirmed.

CARUTHERS v. DAVIS.

Opinion delivered April 17, 1922.

DISMISSAL AND NONSUIT—EFFECT OF ORDER.—Where, in an action against a railroad company and a Federal agent, which accrued while the road was operated by the United States, an order sustaining a motion to dismiss as to the railroad company because the cause of action was against the Federal agent alone was no broader than the motion and operated as a dismissal as to the railroad company alone.

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

A. D. Whitehead, for appellant.

The court erred in dismissing appellant's complaint as to Jas. C. Davis, agent, sec. 206, act of Congress 1920; 147 Ark. 605. Appellant's vested rights were not destroyed. 147 Ark. 605.

Thos. B. Pryor and *Daggett & Daggett,* for appellee.

The complaint should have been dismissed as to Jas. C. Davis. *Mo. Pac. Rd. Co.* v. *Ault,* 256 U. S. 554.

WOOD, J. This action was brought by the appellant against James C. Davis, agent of the United States Government, and the Missouri Pacific Railroad Company to recover damages in connection with the shipment of certain household goods. It was alleged that James C. Davis as the agent of the United States government was in control and was operating the Missouri Pacific Railroad Company and the Yazoo & Mississippi Railroad Company, railroad corporations, and that, through the negligence of the defendants' agents and employees in a manner which is specifically set forth in the complaint, the damage was caused for which appellant seeks to recover.

Summons was issued only against the Missouri Pacific Railroad Company and was served, as shown by the return of the sheriff, as follows: "I have this third day of October, 1921, duly served the within by delivering a true copy of the same to the within named Missouri Pacific Railroad Company through its agent, E. J. Wyeth, as herein commanded."

The following motion was filed: "Comes the Missouri Pacific Railroad Company and moves the court to dismiss this cause of action as to it, and shows the court that the cause of action set out in plaintiff's complaint occurred and accrued on the 12th day of December, 1919, at which time the Missouri Pacific Railroad Company was under the control of and was being operated by the Federal Government, and therefore plaintiff's cause of action, if any he has, is against the agent of the United States, as provided in the act of 1920, known as the Tiller Transportation Act."

The record contains the following order: "Now on this day comes the defendant by attorney C. E. Daggett, Esq., and by leave of the court files motion to dismiss the cause, which said motion coming on to be heard and the court, being well and sufficiently advised, doth grant said motion, to which ruling of the court in dismissing said cause the plaintiff at the time excepted and asked that his exceptions be noted of record, which was done."

The appellant prosecutes his appeal from this order.

It will be observed that there is no final judgment dismissing the cause of action either against the Missouri Pacific Railroad Company or against the Director General, James C. Davis. The record entry of the final order from which the appeal is taken only shows that the motion to dismiss was granted. The motion itself shows that it was a motion made by the Missouri Pacific Railroad Company "to dismiss this cause of action as to it." So, if the order of dismissal could be treated as a final judgment, it at most would be but a final judgment dismissing the cause as to the Missouri Pacific Railroad Company. That was all that was asked in the motion and all that could be granted within the pleading.

It is not contended that the court erred in dismissing the complaint as to the Missouri Pacific Railroad Company. There is no other issue before us in any possible view of the record. The judgment therefore is correct, and it is affirmed.

ADAMS v. STATE.

Opinion delivered April 17, 1922.

1. COURTS—JURISDICTION OF CIRCUIT COURTS.—The correct method of ascertaining what jurisdiction the circuit courts have in civil and criminal cases is to see what cases are exclusively confided to the jurisdiction of other tribunals; the residuum belonging either concurrently or exclusively to the circuit courts.
2. COURTS—JURISDICTION OF CIRCUIT COURTS.—Crawford and Moses' Dig., §§ 6196, 6197, and 6201, conferring on the circuit court power to abate a liquor nuisance by injunction *held* valid.

Certiorari to Jefferson Circuit Court; *W. B. Sorrels,* Judge; affirmed.

T. G. Parham, for appellant.

Circuit courts have no jurisdiction in matters of equity, Const. art. 7, § 15, since the Legislature has seen

fit to establish chancery courts. This power is lodged in chancery courts. 18 Ark. 252. Injunction had its origin only after the establishment of courts of chancery. I Pom. Eq. Juris. §§ 170-171; 14 R. C. L. p. 319, sec. 18. Injunction does not lie where there is an adequate remedy at law. 98 Ark. 427.

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

Chancery courts are creatures of the Legislature. Since under the provisions of the Constitution the Legislature could create said courts and give them certain jurisdiction, it also had the right to divest them of a part of such jurisdiction, or to confer concurrent jurisdiction on circuit courts of certain matters.

The circuit court having authority to grant temporary injunctions, certainly it could punish for violation of an order so granted. 123 Ark. 180.

HART, J. The State of Arkansas, upon the relation of the prosecuting attorney for Jefferson County, charged S. B. Adams with maintaining a public nuisance in said county by selling intoxicating liquors in a storehouse occupied by him in Pine Bluff, Ark.

Upon the evidence introduced, the circuit court found that Adams was maintaining his house as a public nuisance as aforesaid, and he was enjoined from keeping or selling intoxicating liquors therein. Subsequently it was shown to the circuit court that Adams had violated the judgment of the court by continuing to keep and sell intoxicating liquors in his said house. Thereupon Adams was adjudged guilty of contempt, and to reverse that judgment he has duly prosecuted this appeal.

Appellant's sole ground for reversing the judgment is that the circuit court had no jurisdiction to enjoin him from selling intoxicating liquors in his storehouse in Pine Bluff, Arkansas, and that consequently he could not be guilty of contempt of court in disobeying said order. The judgment of the circuit court was based upon

our statute defining certain public nuisances and providing for the abatement thereof.

Sec. 6196 of Crawford & Moses' Digest provides in substance that engaging in the sale of intoxicating liquors in violation of the laws of the State in any building in the State is declared to be a public nuisance and may be abated under the provisions of the act.

Sec. 6197 confers concurrent jurisdiction upon the chancery and circuit courts of the State to abate such nuisance.

Section 6201 provides that if the existence of the nuisance be established an order of abatement shall be entered as a part of the judgment or decree of the court, and that the judgment or decree shall perpetually enjoin the defendant from maintaining such nuisance.

We have already had occasion to construe this statute in the cases of *Hickey* v. *State,* 123 Ark. 180, and *Marvel* v. *State,* 127 Ark. 595.

In the former case the proceedings to abate the nuisance were in the circuit court; and, although the case turned upon other issues, the jurisdiction of the circuit court was recognized.

In the latter case it was held that chancery courts at the time of the adoption of our present Constitution had jurisdiction to abate a public nuisance by injunction, and that the act in question did not confer upon the chancery courts of this State any additional jurisdiction.

The correct method of ascertaining what jurisdiction the circuit courts have in civil and criminal cases is to see what cases or class of cases are confided by the Constitution exclusively to the jurisdiction of other tribunals, and the great residuum belongs concurrently or exclusively to the circuit courts. *State* v. *Devers,* 34 Ark. 188, and *Whitesides* v. *Kershaw,* 44 Ark. 377, and *Payne* v. *Rittman,* 66 Ark. 201.

It will be noted that the case of *Marvel* v. *State,* 127 Ark. 595, does not hold that chancery courts have exclusive jurisdiction to abate public nuisances.

It follows from the authorities cited above that the circuit court would have concurrent jurisdiction to abate such public nuisance, and restraining the defendant from continuing to use his house for the illegal sale of intoxicating liquors would be the most effectual means to abate the nuisance.

There are many instances of the circuit and other courts having concurrent jurisdiction. For instance, our statute gives the circuit court jurisdiction in cases of partition, and the court has held that this remedy is cumulative only, and that the statute does not take away the original jurisdiction of chancery courts. *Moore* v. *Willey,* 77 Ark. 317.

Again it is held that chancery courts have concurrent jurisdiction with that given by statute to the circuit courts in the enforcement of the mechanics' lien laws of the State. *Carr* v. *Hahn,* 126 Ark. 609.

So too in *Gans* v. *State,* 132 Ark. 481, the court held that concurrent jurisdiction is not inconsistent; and therefore that jurisdiction conferred upon one court does not operate to oust other courts otherwise possessing it.

In *Eilenbecker* v. *Plymouth County,* 134 U. S. 31, it was held that the district court of a county in Iowa is empowered to restrain a person from selling intoxicating liquors in the county and that disobedience of the order subjects the guilty party to proceedings for contempt and punishment thereunder.

In discussing the question Mr. Justice MILLER, who delivered the opinion of the court, said: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution

of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offense as a crime after it has been committed."

As we have already seen, the Legislature had the power to make a house where intoxicating liquors are kept and sold a public nuisance and to confer concurrent jurisdiction upon the circuit court to abate such public nuisance. The remedy by injunction would in many cases be the most effectual method of abating such public nuisance, and we are of the opinion that the Legislature might confer upon the circuit court the power to abate the nuisance by that method.

If the circuit court had the power to abate the nuisance by injunction in the first place, it is certain that it would have power to punish the appellant for contempt for a disobedience of its order.

Therefore the judgment will be affirmed.

TAYLOR v. TAYLOR.

Opinion delivered April 17, 1922.

1. DIVORCE—DIVISION OF PROPERTY—RES JUDICATA.—In a proceeding by plaintiff against defendant, from whom she had obtained a divorce, to have one-third of his property set apart to her under Crawford & Moses' Dig., § 3511, *held* that the statute contemplated a division of the husband's property when the decree of divorce was granted, and that if the wife failed to ask for and obtain the relief when the decree was granted, the matter became *res judicata.*
2. JUDGMENT—RES JUDICATA.—Generally, in subsequent proceedings in the same court for settlement of property rights between parties, the matters which were or which might have been litigated in the first suit are *res judicatae.*
3. DIVORCE—DIVISION OF PROPERTY—RES JUDICATA.—A wife, having procured a decree of divorce, cannot, on suing for a division of the property, contend that the decree is valid for the purpose of retaining the decree of divorce and invalid as determining her property rights.

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

John W. Palmer, for appellant.

Where a divorce is granted, the wife is entitled to the same interest or estate in the husband's real property as she would have acquired as dower in case of his death. 65 Ark. 518; 94 Ark. 485; 64 Ark. 518; 116 Ark. 427; 121 Ark. 64; Kirby's Digest, § 2884; 37 N. W. 67; 9 R. C. L. 571.

Where property rights are not adjudicated in the divorce action, the judgment is not *res judicata* as to such rights so as to bar subsequent action for their adjustment. 9 R. C. L. 461.

There was not final decree of divorce. The chancery court was without jurisdiction to dispose of the property at a subsequent term. 101 Ark. 522.

Danaher & Danaher, for appellee.

The decree was final. No appeal was taken in the time allowed. 24 Ark. 522.

Plaintiff waived her right to have dower set aside to her by not demanding that it be done in the original action. 143 Ark. 4; 59 Ark. 448. Divorce is a bar to dower. 59 Ark. 448; 116 Ark. 427.

HART, J. Willie Albert Taylor brought this suit in equity against Frank B. Taylor, from whom she had previously obtained a divorce, to have set apart to her on-third of his real and personal property, under § 3511 of Crawford & Moses' Digest.

The complaint alleges that the plaintiff obtained a decree of divorce from her husband on June 6, 1914, in the chancery court of Jefferson County, Ark., but that the decree was not entered of record during the term at which the divorce was granted. It is alleged that the court of its own motion at a subsequent term entered a decree *nunc pro tunc.*

A certified copy of the record in the divorce proceedings is made an exhibit to the present suit. Plaintiff asked for a divorce from her husband on the ground of

ill treatment. She alleges in her complaint that no property was accumulated during the marriage. She asked for an absolute divorce from her husband, and for such sum for her support as the court might deem proper.

No defense to the suit was made by the husband. The decree recites that, after hearing the evidence, the court was of the opinion that the prayer of the plaintiff's complaint should be granted. It was decreed that the bonds of matrimony existing between the plaintiff, Willie Albert Taylor, and the defendant, Frank B. Taylor, should be set aside and that both should be restored to all the rights and privileges of unmarried persons. There was no appeal from this decree.

In the present case there was a finding and decree in favor of the defendant, and the plaintiff has appealed.

The plaintiff obtained a divorce from the defendant on the ground of ill treatment, and her sole ground for a reversal of the present decree is that she is entitled by independent proceedings to secure the division of property given her under § 3511 of Crawford & Moses' Digest. It will be borne in mind that she is not seeking a restoration of her own property under the first part of the section, but is seeking one-third of the land whereof her husband was seized of an estate of inheritance during the marriage. The first part of the section providing for a restoration of the property which either party obtained from or through the other during the marriage seems to have been borrowed from Kentucky. In construing the Kentucky statute, the court said that it did not require that the decree of divorce should order the property to be restored; but that the statute seems to have contemplated that the latter order should be based upon the former and consequently that it might be made afterwards. In short, it was held that the section was designed to regulate the mode of enforcing the right of restoration of property acquired during the marriage. *Williams* v. *Gooch*, 3 Met. (Ky.) 486.

Again, in a case note to 11 L. R. A. (N. S.) 103, it is said that where the institution of community property

of husband and wife exists and there is a statute providing for its division in connection with divorce proceedings, the general rule is that where the community property is not referred to in the decree of divorce, the parties become, as to such property, tenants in common. Hence she may recover it in a separate proceeding. We do not think that either of that class of cases controls here.

In the first class of cases the statute provides a remedy for the restoration of property obtained by one spouse from the other during the marriage. It does not affect the title to the property, but simply restores it.

In the latter class of cases, when the divorce is granted it causes a dissolution of the marital rights in relation to the community property, and the wife is entitled to her share of such property and also to her own separate property, if any she had.

So it will be seen that in each class of cases there is a restoration or division of property between parties who have a vested interest in it. The statutory estate given to the wife when she obtains a divorce from her husband is in the nature of dower. The statute provides that, when the wife is granted a divorce against the husband, she shall be entitled to one-third of the husband's personal property absolutely and one-third of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, for her life, unless, etc. The concluding part of the section provides that such decree shall be a bar to all claim of dower in and to any of the lands or personalty of the husband then owned or thereafter acquired on the part of his wife divorced by the decree of the court. This was but declaratory of the common law as it already existed in this State.

In *Barrett v. Failing,* 111 U. S. 523, it was said that, unless provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties dissolving the bonds of matrimony put an end to all obligations of either party to the other, and that a valid

divorce from the bonds of matrimony for the fault of either party cuts off the wife's right of dower, and the husband's tenancy by the curtesy, unless expressly or impliedly preserved by the statute.

This case was cited in *Wood* v. *Wood,* 59 Ark. 441, where it was held that divorce from the bonds of matrimony bars the wife's right of dower. The question involved in this appeal was touched upon, but not decided in that case. There the former wife had filed a bill of review to set aside a decree of divorce from the bonds of matrimony obtained by her husband. She contended as a part of her relief that a third part of the estate of her divorced husband should be set apart to her, according to the terms of the statute under consideration in this case. With respect to her contention the court said: "But she did not assign the failure to do so as error in her bill of review, and seek to have it corrected. On the contrary, she sought to have the decree of divorce from the bonds of matrimony set aside, and thereby to surrender the right to one-third of her husband's estate, if she was entitled to it, and for a divorce from bed and board and for alimony against appellee. She therefore has no right to complain in this court that she did not recover that which she neither asked for nor desired. Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than $200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situated in another State. Nothing appears in the record, outside of the evidence, to show that the court committed

an error of law in failing to divide the estate of the husband in accordance with the act."

It seems, from the reasoning of the court in that case, that our statute allows one-third of the husband's estate to be assigned to the wife when she obtains a divorce, and not afterwards. She would have no interest in the nature of dower in her husband's estate after the divorce was granted, and if she could enforce the right by independent proceedings after the divorce was granted great confusion and uncertainty would result. After a divorce from the bonds of matrimony the husband might marry again, and, under § 3514 of Crawford & Moses' Digest, in the event of his death, his widow would be endowed of a one-third part of all the lands whereof he was seized of an estate by inheritance at any time during the marriage, unless the same had been relinquished in legal form.

So it will be seen that if the first wife is entitled to maintain a separate suit for one-third of her husband's property under § 3511, this would to an extent repeal § 3514 of Crawford & Moses' Digest with respect to dower. The title to the lands owned by the husband during the period of his marriage with his first wife would still be in him after he married again, and, in the event of his death before the statute of limitations barred his divorced wife from her recovery, the widow and the divorced wife would each under the respective statutes be entitled to dower in the same lands. This the lawmakers evidently did not intend. They manifestly intended to change the common-law rule that a divorce from the bonds of matrimony barred dower and to give the wife an estate in the nature of dower when a decree of divorce was granted in her favor. If she did not ask and obtain the relief when the decree of divorce was granted, to her the matter became *res judicata.*

This holding is in accordance with the general rule that in subsequent proceedings in the same court for the settlement of property rights between parties the matters which were or might have been litigated in the first

suit are *res judicatae. Livingston* v. *New England Mtg. Security Co.*, 77 Ark. 379, and *Taylor* v. *King*, 135 Ark. 43.

Again, it is contended by counsel for the plaintiff that she is entitled to the relief prayed for in this case because she was not present when the divorce decree was entered *nunc pro tunc* by the court on its own motion. There might be some ground for this contention if the plaintiff was seeking to set aside that decree. She does not seek to have that decree set aside, but on the contrary seeks to uphold it. It was for her benefit, and she can not consider it valid for one purpose and invalid for another. She must accept or reject it in its entirety.

As stated in *Wood* v. *Wood, supra,* she has no right to complain in this court that she did not obtain relief which she neither asked nor desired in the chancery court.

It follows that the decree must be affirmed.

SACHS v. NORTON-WHEELER STAVE COMPANY.

Opinion delivered April 17, 1922.

1. APPEAL AND ERROR—FINDING ON CONFLICTING EVIDENCE.—A finding of the circuit court on conflicting evidence will not be disturbed on appeal.
2. VENDOR AND PURCHASER—SEVERANCE OF RENT FROM FEE.—Where the annual rent of land on January 15, was payable in advance, and the vendor collected it when due, and before he deeded the land to a purchaser on January 20, this had the effect of severing the rent for the year from the fee.

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

STATEMENT OF FACTS.

Lewis Sachs brought this suit in the circuit court against the Norton-Wheeler Stave Company, a firm composed of E. R. Norton and A. G. Wheeler, to recover the sum of $300 alleged to be due as rent on a certain tract of land.

The defense was that the lessees had paid the rent to the proper person and that the plaintiff was not entitled to it. On the 15th day of January, 1916, R. M. Fletcher leased to the Norton-Wheeler Stave Company a tract of land for five years and the lessees agreed to pay as rent $300 per annum payable in advance.

On May 17, 1917, the lease was assigned to J. C. Clippard and Wm. B. Schaefer, who thereafter collected the rent for the years 1918, 1919 and 1920. The rent for 1920 is in controversy in this case. J. C. Clippard and Wm. B. Schaefer also by deed acquired title to said land and in the summer of the year 1919 agreed to sell the land to Lewis Sachs.

According to the testimony of Lewis Sachs, the agreement to sell the land to him was made in the summer of 1919, but there was some disagreement about the form of the deed and the sale was not finally closed by the execution of a deed by Wm. B. Schaefer until the 26th day of January, 1920. At that time Sachs paid to Schaefer the purchase price of the land, and it was understood that the rent from that time on should be paid to him. On the 26th day of January, 1920, Sachs demanded the rent of E. R. Norton, a member of the firm of the Norton-Wheeler Stave Company. Norton told him that he would have to get an order from Mr. Schaefer before he could pay the rent to Sachs. Norton paid the rent to Schaefer on the 10th day of February, 1920. Schaefer made the deed to S. & E. Sachs, as directed by Lewis Sachs. The deed was filed for record on March 31, 1920. The lease contract in question was assigned by Clippard and Schaefer to S. & E. Sachs, but the date of the assignment does not appear. The testimony of Lewis Sachs was corroborated by his son.

Wm. B. Schaefer was a witness for the defendants. According to his testimony, the sale of the land was consummated some time during the month of January, 1920, and, as a part of the consideration for the deed, Schaefer was to retain all the rents he had collected. He had collected the rent for the year 1920, and retained it as a

part of the consideration for the sale of his interest in the land to Sachs. Subsequently Schaefer assigned his rights in the lease contract to S. & E. Sachs. He thinks the assignment was made in February or March, 1920.

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

The court made a special finding of fact in favor of the defendants and judgment was rendered in their favor. To reverse that judgment the plaintiff has duly prosecuted an appeal to this court.

Taylor & Jones, for appellant.

The fee simple title to land carries with it the right to absolute dominion, where the property is rented at the time it is conveyed, and unless the deed reserves the right in the grantor to collect the rents, these pass as a necessary incident with the land to the grantee. 92 Ark. 319; 123 Ark. 23; 10 Ark. 9.

Bridges & Wooldridge, for appellee.

The rent of the land goes to the one who owns the reversion at the time the rent falls due, regardless of the question of ownership during the earning period. L. R. A. 1915-C, p. 231, note (e); *Id.* p. 299 note (b); *Id.* p. 245. See also 16 R. C. L. p. 852; *Id.* p. 915; 92 Ark. 315. The rents may be severed from the reversion, so that the right to collect rent notes does not pass with the reversion. 96 Ark. 230.

HART, J. (after stating the facts). Counsel for the plaintiff seek to reverse the judgment on the authority of *Latham* v. *First National Bank of Ft. Smith,* 92 Ark. 315, and *Gailey* v. *Ricketts,* 123 Ark. 18. In those cases it was held that where property is rented at the time it is conveyed, the right to receive the rent subsequently due passes to the grantee, unless the deed reserves the right in the grantor to collect and receive the rents.

The case was tried before the circuit court sitting as a jury, and those cases would have been authority for the plaintiff if the finding of fact by the trial court had been in his favor. According to the testimony of the

plaintiff himself, while the trade for the land was practically agreed upon in the summer of 1919, it was not closed until the deed was executed and the purchase price paid on the 26th of January, 1920.

According to the testimony of the plaintiff, and of his son, payment of the rent was demanded of the defendants on the 26th day of January, 1920, and E. R. Norton, one of the defendants, told the plaintiff that he could not pay him the rent until he had procured an order to that effect from Wm. B. Schaefer. Norton himself says that he does not recollect definitely about this; but he was accustomed to paying the rent promptly as provided in the lease, in order to avoid a forfeiture of the lease. He paid Schaefer the rent for the year 1920 in order to avoid a forfeiture of the lease.

According to the testimony of Schaefer, he had collected the rent before the deed was executed and the balance of the purchase price was paid by Sachs. The parties understood that the rent was payable in advance on the 15th day of January, 1920, and that Schaefer had collected it as a part of the purchase price before the sale was finally consummated. Some time in February or March, later, he made an assignment of the lease contract to S. & E. Sachs, as directed by Lewis Sachs.

As we have just seen, the testimony for the plaintiff and the defendants as to when Schaefer collected the rent was in direct and irreconcilable conflict. The trial court settled this issue in favor of the defendants, and under the settled rules of practice in this State that finding cannot be disturbed on appeal.

If Schaefer collected the rent when due, he did so before he finally consummated the sale of the land to Sachs. The question of parol reservation of the rent is not involved in this appeal, as contended by counsel for the plaintiff. The rent was payable on the 15th day January in advance, and Schaefer had a right to collect the rent when it became due. He testified that he did this before he executed the deed to Sachs. This had the ef-

fect of severing the rent of the land for the year 1920 from the fee.

It follows that the judgment must be affirmed.

FLANNAGAN v. CITIZENS' STATE BANK OF KEITHSBURG, ILL.

Opinion delivered April 17, 1922.

1. VENDOR AND PURCHASER—NOTICE OF INCUMBRANCE.—One who deraigns title through a deed reciting a mortgage is affected with notice of it, though the deed to him warranted that the land was free from incumbrance.
2. VENDOR AND PURCHASER—EFFECT OF PRIOR INCUMBRANCE.—One who purchases land by a deed which recites the existence of a prior incumbrance, takes subject thereto, though the prior mortgage was defectively acknowledged; but he does not become personally liable for such mortgage debt unless he expressly assumes it.
3. ABATEMENT AND REVIVAL—FORMER SUIT PENDING.—It was immaterial that at the time a suit to foreclose a mortgage was instituted there was a suit pending in another State on a note secured by such mortgage if that suit was dismissed before decree.

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

C. E. Elmore and *Oscar E. Ellis,* for appellant.

An acknowledgment to a mortgage must show that it was executed for the "consideration" and purpose therein mentioned, otherwise it is void as to all persons except the parties to the transaction. C. & M. Dig., § 1521; 20 Ark. 190; 32 Ark. 598; 33 Ark. 63; 35 Ark. 62; 37 Ark. 91; 40 Ark. 537; 42 Ark. 140; 49 Ark. 83; 56 Ark. 88; 61 Ark. 123; 111 Fed. Repts. 647. While a purchaser is charged with actual notice of such defect, where he could have discovered same (103 Ark. 429; 144 Ark. 79), yet there is nothing in appellant's deed nor in the deed to his grantor to put him upon notice. However the mortgage was void from the beginning, even though appellant had actual knowledge.

The curative act of 1919 could not interfere with vested rights of third parties. 43 Ark. 156; *Id.* 420; 58 Ark. 117; 62 Ark. 431.

H. A. Northcutt and *P. C. Goodwin,* for appellee.

The fact that a suit was pending in Oklahoma, which had been dismissed, would not be a bar to this suit. 32 Ark. 332 and cases cited.

The purchaser was charged with constructive notice of any defects in his title. 50 Ark. 329; 15 Ark. 184; 29 Ark. 650; 14 Ark. 69; 35 Ark. 100; 103 Ark. 429; 147 Ark. 533; 48 Ark. 260.

SMITH, J. This suit was brought to foreclose a mortgage, which had been properly assigned to appellee but which had been defectively acknowledged, in that the word "consideration" was omitted in the officer's certificate. The mortgage was executed on September 13, 1915, by O. H. Munyon and his wife, and secured a note for $2,000, due three years after date. Appellant, Lee Flannagan, filed a motion to be made a party defendant; and an order to that effect was made without objection. Flannagan filed an answer alleging ownership of the land described in the mortgage sought to be foreclosed, and deraigned title thereto through mesne conveyances set out in the answer as follows: Munyon conveyed to Grandjean, who conveyed to Lansford, who conveyed to Flannagan. These were all warranty deeds, and the ones from Grandjean to Lansford and from Lansford to Flannagan covenanted that the land was free from all incumbrances. The deed from Munyon to Grandjean, however, contained the following exception: "Except a mortgage to A. C. Watson for $2,000, dated September 30, 1915, and to run three years after date, at 7 per cent., due September 30, 1916, and annually thereafter."

The court held that this recital was binding upon Flannagan, as it appeared in his chain of title, and ordered the foreclosure of the mortgage; and this appeal is from that decree.

We think the court committed no error in its ruling. In the case of *Clapp Bros. & Co.* v. *Halliday Bros.*, 48 Ark.

258, a second mortgage recited the existence of a prior one and directed the mortgagee in the second mortgage to apply the proceeds of certain of the property mortgaged to the payment of the first mortgage. This first mortgage was defective in that the word "consideration" was omitted in the officer's certificate of acknowledgment. The question of priority arose between the mortgagees, which the court disposed of in the following language: "By accepting a mortgage which recited the first mortgage, and provided for its payment, the plaintiffs had estopped themselves to deny the existence of that mortgage and the validity of its lien. Jones on Chattel Mortgages, 2 Ed., § 488."

In that case it was also determined that the mortgagee in the second mortgage was not personally liable for the debt secured by the first mortgage, although he had appropriated proceeds of the sale of certain cotton covered by both mortgages. This was held on the theory that the second mortgagee had not expressly assumed to pay the prior mortgage, but had merely taken his mortgage subject to the prior incumbrance, and the second mortgagee was required to pay only the value of the cotton converted. *Sunny South Lbr.* v. *Neimeyer Lbr. Co.,* 63 Ark. 268; *Ghio* v. *Byrne,* 59 Ark. 280; *Millington* v. *Hill, Fontaine & Co.,* 47 Ark. 301; *Madden* v. *Suddarth,* 144 Ark. 79.

The application of these cases to the instant case is denied because the recital of the outstanding incumbrance is not contained in the deed to Flannagan. The deed to him contains, as has been said, a covenant that the land was free from all incumbrances. But the deed which does contain the recital of the incumbrance subject to which the deed was made is in the line of Flannagan's title, and he was therefore affected with notice of it, and it was his duty to inquire whether the incumbrance had been discharged. *Gaines* v. *Summers,* 50 Ark. 327; *Abbott* v. *Parker,* 103 Ark. 429; *Madden* v. *Suddarth, supra; Star Lime & Zinc Mining Co.* v. *Arkansas National Bank,* 146 Ark. 246. In other words, the deed through

which Flannagan claims was made subject to the mortgage, and as Flannagan's title is deraigned through this deed he is affected with notice of its recitals and takes subject thereto.

The case of *Clapp Bros. & Co.* v. *Halliday Bros., supra,* is authority for saying that there is no obligation on the part of any one claiming through the deed from Munyon to Grandjean to pay the incumbrance therein recognized as existing against the land; but such purchasers took subject to that incumbrance.

In bar of this action it is alleged that there is a suit pending in Oklahoma on the note secured by the mortgage here sought to be foreclosed. And so there was at the time of the institution of this suit. But before the rendition of the decree here appealed from the suit in Oklahoma was dismissed; and that suffices. *Grider* v. *Apperson,* 32 Ark. 332; *Moore & Co.* v. *Emerick,* 38 Ark. 203.

Decree affirmed.

GREEN *v.* CONSERVATIVE LOAN COMPANY.

Opinion delivered April 17, 1922.

USURY—BROKERAGE FEE.—Where a loan company loaned money for 10 years at 6 per cent., charging a brokerage fee, which was paid by notes maturing within three years, for service in procuring the loan, the transaction was not usurious, if the interest and fee did not exceed lawful interest for ten years, though the fee and interest charged exceeded the legal rate for three years.

Appeal from Montgomery Chancery Court; *Jethro P. Henderson,* Chancellor; affirmed.

Isaac L. Awtrey, for appellant.

The amount of interest exacted of the defendant for the loan was greater than the legal rate of interest and rendered the contract usurious and void. Art. 19, § 13, Const.; C. & M. Digest, § 7353.

E. L. Carter and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The contract was valid and binding. 27 R. C. L. p. 209, § 10; 156 N. W. 667; 94 Ga. 306; 32 L. R. A. 208; 109 Ark. 69; 141 U. S. 384; 86 Ark. 25; 87 Ark. 539.

SMITH, J. On October 5, 1917, appellee entered into a contract with the appellant, under the terms of which appellee agreed to obtain for appellant a loan of $1,750, to be secured by a mortgage on his farm, for a period of ten years, for which a note bearing interest at six per cent. was to be executed. At the same time, and as part of the same transaction, appellant executed to appellee three notes, each for $116.66, without interest to maturity, and maturing in one, two and three years after date. These three last notes represent a brokerage fee of $350 which appellant agreed to pay for services of appellee in making the loan, and as appellee made the loan itself the notes for this brokerage fee were made payable to its order and were secured by a second mortgage on the land on which the first mortgage was given. The first of these brokerage notes was paid, but default was made in the payment of the second and third, and this suit was brought to foreclose the mortgage securing them.

The defense interposed is that the transaction was usurious and void. The insistence is that the principal note of $1,750 bore interest at 6 per cent., and the three notes maturing in 1, 2, and 3 years are in law interest paid for the principal loan, and that the $105 interest on the principal loan due each year and the $116.66 payable for each of the first three years amount to $221.66 for each of the first three years and is more than 10 per cent. on the principal loan.

It is true that the payments for each of the first three years amount to $221.66, and that this is more than 10 per cent. on the sum loaned, and if the loan had been made for a period of three years only, the contract would be usurious and void. But the loan was not for three years. It was for ten years, and a calculation has been submitted which appears to be correct—and its correctness is not challenged—which shows that if the pay-

ments are made as called for by the contract, a sum in excess of 10 per cent. will not have been collected.

This calculation credits the annual payment of $105 to be paid each year, and also credits the annual payments of $116.66 to be made during each of the first three years as partial payments in accordance with the statutes of this State controlling in such cases; and it appears that when this has been done the total sum paid at the end of the ten years will be $220.38 less interest than would have been collected had a straight charge of 10 per cent. per annum been made, as might lawfully have been done. In other words, appellant borrowed, and received, $1,750 under a contract calling for its repayment in such a way as that at the end of the ten years he will have paid $220.38 less than 10 per cent. for the money borrowed during the time it was borrowed; and the transaction is not, therefore, usurious.

In the case of *Ellis* v. *Terrell,* 109 Ark. 69, a note was given for $200, due in 5 years, and bearing interest at 6 per cent. from date; but the borrower received only $160, the sum of $40 being deducted at the time the loan was made. This transaction was held usurious, but not because of the deduction made when the loan was negotiated, which deduction was 20 per cent. of the face of the note. The court treated the amount loaned as being $160, the face of the note less the cash deducted, and ascertained that the amount agreed to be paid exceeded 10 per cent. on the amount actually loaned for the 5-year period covered by the note.

When the same test is applied here it is found that the contract does not require the payment of any sum in excess of 10 per cent. for the use of the money loaned for the period of time for which the loan was made.

This court is committed to the proposition that, in determining whether a contract is usurious or not, we will ascertain the intention of the parties; and if it appears that the parties intended, by their contract, that the borrower should pay any sum in excess of 10 per cent, during the time the borrower is to have the use of the

money loaned, then the contract is usurious and void, whatever the method may have been to conceal this intent. If this intent does not exist, and the contract does not contemplate and call for the payment of a sum in excess of 10 per cent. for the use of the money during the time the borrower is to have its use, then the contract is not usurious.

There appears to be no subterfuge here to exact the payment of usury. Upon the contrary, if the payments are made as called for in the contract, a sum less than 10 per cent. will have been paid for the use of the money loaned during the time it was loaned; and the contract is not, therefore, an usurious one.

The decree of the court below accords with the law here announced, and it is therefore affirmed.

HODGE v. BROOKS.

Opinion delivered April 17, 1922.

1. APPEAL AND ERROR—IMPROPER EVIDENCE—INVITED ERROR.—In an action for alienating the affections of plaintiff's wife, where plaintiff, as part of his case in chief, offered testimony that plaintiff's credit was good, which testimony plaintiff announced was in rebuttal and offered at that time because the witness was called away, the error, if any, in admitting plaintiff's evidence that plaintiff's credit was bad and that he did not pay his bills was invited, and does not call for a reversal, especially where the court charged the jury not to consider the plaintiff's ability to pay his bills.
2. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—ILL WILL.—An instruction in an action for alienating the affections of plaintiff's wife that plaintiff must show that defendant "wrongfully and wilfully" alienated the affections of plaintiff's wife was proper.
3. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.—In an action for alienating the affections of plaintiff's wife, it is essential that plaintiff prove that there should have been a conscious purpose on defendant's part to do a wrongful act.
4. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—LIABILITY.—An instruction, in an action for alienating a wife's affections, that defendant was not liable if the affections of plaintiff's wife were

alienated by plaintiff's acts was called for by evidence on defendant's behalf that plaintiff's wife left him because of his neglect in failing to furnish proper support.

Appeal from Howard Circuit Court; *A. P. Steel,* special judge; affirmed.

W. P. Feazel and *W. C. Rodgers,* for appellant.

1. The court in its instructions 1 and 17 placed a greater burden on the plaintiff than is required by law in such cases. Neither were they justified by the allegations of the complaint. 88 Ark. 562; 89 Ind. 118, 127; 61 Ala 9, 11; 6 Wyo. 419; 45 Pac. 1073; 88 Mich. 633; 48 Minn. 466.

2. The court erred in admitting, over plaintiff's objections, testimony introduced by defendant to show plaintiff's financial condition and in instructing the jury that they could only consider the same as tending to show facts that might have caused the separation or loss of affections. 3 Ind. App. 232. Since the court later did instruct the jury that they could not consider plaintiff's poverty or his want of ability to pay his debts, etc., this amounted to a conflict in instructions justifying reversal. 123 Ark. 594, 600.

3. It was not necessary to prove any particular sum as damages, in order to recover. Proof of alienation of the wife's affections and the breaking up of the home, was sufficient. 88 Ark. 562.

Steve Carrigan, for appellee.

1. There is no error in the instruction complained of. The word "wilfully" as used therein is proper. Rodgers on Dom. Relations, § 177; 45 S. W. 652; 13 R. C. L., § 513; 75 N. W. 101; 40 N. Y. 390; 45 Fed. 319. The use of the word "wilful" in a civil action and instruction does not carry with it the meaning of "malice." 1 Bishop, Crim. Law, § 428; Webster's New Int. Dict., "Wilful"; 162 Fed. 556; 91 N. W. 904; 109 S. W. 1047; 91 S. W. 1123; 79 *Id.* 1111; 181 Mo. 192; 92 S. W. 674; 194 Mo. 377; 92 S. W. 684; 194 Mo. 717; 98 S. W. 2; 200 Mo. 1; 84 S. W. 984, 186 Mo. 174; 64 Atl. 194.

2. The gist of the action is the loss, without justifiable cause, of the comfort, society and services of the wife. If plaintiff's loss in this case was caused by the voluntary act of the wife, upon justifiable cause, he cannot recover. If the loss was caused by the acts or persuasions of the defendant without any real cause, and in bad faith towards the plaintiff, he may recover; but the burden is on him to prove these facts. 40 N. Y. 390; 48 S. W. 601.

SMITH, J. Appellant Hodge was the plaintiff below, and sued to recover damages for the alleged alienation of the affections of his wife by appellee Brooks, defendant below. The testimony made a case which would have supported the verdict had it been in Hodge's favor, although no attempt was made to show that any immoral relation ever existed between Brooks and Mrs. Hodge, nor was there any testimony that these two had ever been seen in a compromising position, the nearest approach thereto being that it was testified that on one occasion Brooks showed Mrs. Hodge how to drive an automobile and during the lesson had his arm resting on the seat back of his pupil. This occurred, however, in the day-time and on one of the principal streets of the town of Mineral Springs.

Hodge and his wife resided in a house with Brooks, the house being one Brooks had rented in the town of Mineral Springs. The testimony shows that Brooks became dissatisfied with this arrangement and ordered Hodge to vacate. This order was given and obeyed in February, 1921. In April thereafter Mrs. Hodge left her husband and returned to her people, who lived in an adjoining county, where she has since resided, and in September thereafter Hodge brought this suit.

The conduct of Brooks complained of consisted principally of assistance to Mrs. Hodge in the discharge of her domestic duties and little personal services about the house; of carrying her from her home in Mineral Springs in an automobile owned by Brooks to Saratoga, ten miles away, where she taught school; and

in lending her money on two occasions, first to buy a knitting machine which cost about $75, and afterwards to buy a suit costing about $40. In explanation of this testimony, it was shown that Hodge and his wife were comparatively a young couple; that Brooks was sixty-four years old, and badly crippled with rheumatism, using two canes when he walked; that Brooks was physically unable to work, but his financial condition permitted him to live without working; that he drove Mrs. Hodge to her school at her husband's request and upon his promise to pay for the service; that, as Brooks had no regular employment, he assisted in the discharge of many of the little duties around the house as a matter of occupation and courtesy; and that the money loaned was lent with the knowledge and at the request of Hodge; and that Brooks had done nothing to induce Mrs. Hodge to leave her husband.

Over Hodge's objection the court admitted testimony to the effect that Hodge did not pay his bills and that his credit was not good. The error of this action was mitigated somewhat by an instruction numbered 8, given at Hodge's request, reading as follows: "You cannot take into consideration the poverty or want of ability of the plaintiff to pay his debts; nor the fact that the defendant, Brooks, may think that he does not give his wife the pleasures and luxuries that he, Brooks, thinks she ought to have in this case, since such matters do not justify the alienation of the affections of the plaintiff's wife from him, if they have been alienated."

If it be true that this instruction did not remove the prejudice arising out of the admission of the incompetent testimony, then it may be said that the error was an invited one. Hodge first testified in his own behalf, and then called as a witness Dr. Toland. It was stated at the time that Dr. Toland was being called out of time, as he had to leave town to visit a patient, and that the testimony was being offered in rebuttal. However, at that time there was nothing to rebut, as Hodge alone had testified. Dr. Toland was the owner

of the house which Brooks had rented at the time Hodge and his wife were living with him. Dr. Toland testified that Hodge's credit was good, and that he had never hesitated to attend either Hodge or his wife professionally, whether they had the cash money to pay for his services or not.

Numerous objections are urged to the instructions given in the case; but we think those which require discussion are disposed of by what we shall say in regard to instructions numbered 1 and 17 and another numbered 3 given at the request of Brooks and over Hodge's objection. Instruction numbered 1 reads as follows: "You are instructed that, in order for the plaintiff to maintain this action against the defendant, the burden devolves upon the plaintiff to show by a preponderance of the testimony that the defendant in this case wrongfully and wilfully attempted to alienate the affections of the plaintiff's wife, and that he wrongfully and wilfully attempted to deprive the plaintiff of his wife's society, and that such attempt was successful, and that this plaintiff was not a consenting party to such acts or conduct of the defendant by which plaintiff claims that the defendant alienated his wife's affections with." Hodge objected to this instruction generally and specifically "because the use of the word 'wilfully' and the words 'wrongfully and wilfully' would or might be misleading to the jury, and because the law gives relief in cases of this kind if the affections are alienated culpably, though not wilfuly and wrongfully."

Instruction numbered 17 reads as follows: "You are instructed that, before the plaintiff can recover in this cause, he is required to establish all the allegations of his case by a preponderance or greater weight of the evidence. Your verdict in this case must be based upon legal evidence submitted to you and not upon guesswork or conjecture. And if, after hearing all the evidence in the case, you are not satisfied by the preponderance or greater weight of the evidence that the acts of the defendant as alleged in the complaint are true, or that the defend-

ant wilfully and in bad faith to the plaintiff alienated plaintiff's wife's affections, your verdict should be for the defendant." Hodge objected to this instruction generally and specifically "because it justifies a recovery notwithstanding the defendant may have alienated the affections of plaintiff's wife, providing he did not do so in bad faith, even though the jury might find that he did so wilfully and wrongfully. Also because the words 'wilfully' and 'wrongfully' as used in the instruction require a more flagrant case of alienation than the law calls for; also for the reasons stated in plaintiff's objections to instruction No. 1 given for the defendant."

We think no error was committed in giving the instructions set out above. No specific objection was made to the use of the words "bad faith," and we think they were used in the instruction in the same sense as were the words wilfully and wrongfully. Hodge was not required to show, to sustain his cause of action, that Brooks entertained any personal ill-will or malice towards him; but we do not think the instructions imposed that requirement. They did require that Brooks' conduct towards Mrs. Hodge should have been prompted by the conscious purpose of winning away from Hodge the *consortium* of his wife.

In the case of *Boland* v. *Stanley,* 88 Ark. 562, this court said: "The loss of what is termed in law '*consortium,*' that is, the society, companionship, conjugal affections, fellowship, and assistance of the wife, is the principal basis for actions of this kind," that is, actions for alienating the affections of one's wife. In the same case it was also said: "Whoever invades the hallowed precincts of a home, and, without justifiable cause, by any means whatsoever severs the sacred tie that binds husband and wife, alienating her affections from him, and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages for his wrongful conduct. Rogers, Dom. Rel., § 177; Schouler's Dom. Rel., § 41; Tiffany, Per. & Dom. Rel. 74; 15 Am. & Eng. Enc. Law, 862. In such cases whether or

not there were malevolent or improper motives is always a material consideration."

Without so intending, one might acquire or lose another's affections. The defense here interposed was that, by his own neglect, Hodge had lost the *consortium* of his wife, and several members of her family so testified. It was also denied that Brooks had won the affections of Mrs. Hodge; and it was further asserted that, if such was the case, there had been no conscious purpose so to do.

The thing forbidden and made actionable is the entry of a home by a wrongdoer and the consequent loss of *consortium* by the injured spouse; and it does not matter whether this entry is by physical violence or subtle influence; but it is essential that there should be a conscious purpose to do a wrongful act. One who does this has acted wilfully and wrongfully and in bad faith to the injured spouse, and is liable to respond in damages therefor.

What we understand to be a correct statement of the rule in such cases is found at section 515 of the article on Husband and Wife in 13 R. C. L. p. 1466, where it is said: "As a general rule an intentional alienation or enticing away must be shown, and it may be laid down as a general rule, where there is no element of seduction or adultery, that a defendant in an action for alienation of affections is not liable unless he acted maliciously or from improper motives implying malice in law, whether he is a parent of or a stranger to the plaintiff's spouse. While it is true that, as is hereinafter shown, it requires more evidence to establish malice on the part of a parent than is necessary in the case of a stranger, this difference is an evidential one merely."

Among the annotated cases cited in the note to this section is our case of *Boland* v. *Stanley, supra,* which is annotated in 129 Am. St. Rep. 114.

Other instructions objected to, including No. 3, mentioned above, declared the law to be that if the affections of Mrs. Hodge "were alienated either by Hodge him-

self, or his conduct, or by any other act, except the wrongful acts of the defendant," the defendant was not liable. One is, of course, responsible only for the effects of his own conduct, and the instructions are not questioned as correct declarations of the law, but they are said to be abstract. We think it appears, from the very general statement we have made of the issues of the case, that instruction numbered three and others of similar purport are not abstract.

Upon a consideration of the whole case, we find no prejudicial error, and the judgment is affirmed.

VANCE v. BELL.

Opinion delivered April 17, 1922.

1. SALES—DELIVERY.—In a sale of chattels, delivery is a question of intention of the parties, as manifested by overt acts, and a sale will be treated as completed where any act has been done which was intended by the parties as a delivery.
2. SALES—SUFFICIENCY OF DELIVERY.—Where a seller of chattels in the possession of his employee instructs such employee that he has sold them to another and directs him to hold them for the buyer, this constituted a symbolical delivery and effected a change in the possession of the property.

Appeal from Sevier Circuit Court; *B. E. Isbell,* special Judge; reversed.

Lake & Lake, for appellant.

Delivery is a question of intention, manifested by overt acts. 119 Ark. 215; 54 Ark. 304; 62 Ark. 592; 91 Ark. 240; 35 Ark. 304; 102 Ark. 344; 148 Ark. 576; 106 Ark. 483; 54 Ark. 305; 236 U. S. 97, 59 Law Ed. 483.

Taking possession under the power in a mortgage is such a delivery as satisfies the statute. 213 Mass. 210; 100 N. E. 333.

Findings of fact by a court sitting as a jury are as conclusive as the verdict of a jury and will not be disturbed if there is evidence to support them. 60 Ark. 250; 25 Ark. 562; 25 Ark. 558; 33 Ark. 97; 34 Ark. 524; 36 Ark. 260; 53 Ark. 161; 56 Ark. 621.

Abe Collins and *E. K. Edwards,* for appellee.

The testimony fails to show an actual or visible delivery of the property. 1 S. W. 707; 47 Ark. 210.

Where a pre-existing debt is the consideration for a sale of chattels, the purchaser is not treated as a purchaser for value and protected as an innocent purchaser. 24 R .C. L. 384; 57 Ark. 574.

This case is controlled by the following decisions: 47 Ark. 210; 65 Ark. 37; 1 S. W. 707.

HUMPHREYS, J. This is an appeal from a judgment in favor of appellee C. A. Bell, as constable, and appellees Lockesburg Hardware Company and Planters' Bank of Lockesburg, as interpleaders, in a replevin suit which had been brought by appellant to recover certain personal property seized by said appellee Bell as constable under a writ of attachment obtained by appellee Lockesburg Hardware Company in a suit between it and the Federal Lumber Company, and an execution obtained by the Planters' Bank of Lockesburg upon a judgment procured by it against the Federal Lumber Company. Appellant claimed the title and right of possession of the property under a bill of sale executed to it by the Federal Lumber Company on May 5, 1921. The interpleaders, creditors of the Federal Lumber Company, claimed the right of possession of the property under attachment and execution liens acquired by levy of writs upon the property in question on the 6th day of May, 1921. The cause was submitted to the trial court, sitting as a jury, upon the pleadings and evidence, which resulted in a finding, and judgment accordingly, that the purported sale of said property by the Federal Lumber Company on the 5th day of May, 1921, to appellant as trustee for the State National Bank of Texarkana was incomplete at the time the writs of attachment and execution were issued and levied, because there had been no delivery sufficient in law to pass the title of said property from the Federal Lumber Company to appellant in his capacity as trustee.

The undisputed facts tending to establish a delivery of the property in question to appellant on the 5th day of May, 1921, prior to the issuance and levy of the writs of attachment and execution, are as follows: The Federal Lumber Company, a corporation domiciled at Texarkana, Miller County, executed a mortgage upon the property in question, together with other property, to the State National Bank of Texarkana to secure a large indebtedness. The mortgage was never filed or recorded in Miller County, the mortgagor's domicile. A part of the property mortgaged was located at or near Lockesburg, in Sevier County. About the 1st of April, 1921, M. B. Armstrong was employed by the Federal Lumber Company and placed in possession of the property belonging to it in Sevier County. He operated a mill for it at Lockesburg. A part of the property was placed in a pasture belonging to Robbie Jacques, near Lockesburg, and part of it in a corral at the residence of Walter Lowery in Lockesburg. On the 5th day of May, 1921, the Federal Lumber Company executed a bill of sale to the State National Bank of Texarkana on the property in Sevier County, as well as other property covered by the mortgage, in part payment of the mortgage indebtedness. The bill of sale was delivered on the day it was executed to appellant as trustee for said bank, and George Hicks, president of the Federal Lumber Company, telephoned M. B. Armstrong, who was in control of the property as its employee, to hold same in the future as the property of the State National Bank aforesaid, informing him that the Federal Lumber Company had that day sold same to said bank. At the same time the bank, through Stuart Wilson, its vice-president, notified Armstrong by letter of the transaction, accepting him as its custodian of the property. Immediately after receiving the information, Armstrong notified the men working at the mill of the transaction and that he had assumed charge of the property for said bank, and that they would receive their wages in the future from the bank. He also employed a night watchman to watch the mill

property for the State National Bank, who went to work on the night of the 5th of May. On the following morning, May 6th, the Lockesburg Hardware Company had an attachment issued and placed in the hands of C. A. Bell, constable of Red Colony township, who levied the same on the property in the corral at the residence of Walter Lowery, and on the same day the Planters' Bank of Lockesburg had an execution issued on a judgment which it had theretofore obtained against the Federal Lumber Company, and placed same in the hands of said constable, who, on the same day, levied it upon the property in the pasture of Robbie Jacques.

Under the record thus stated, the sole question presented on this appeal for determination is whether the direction given by the Federal Lumber Company to its employee, M. B. Armstrong, who was in control of the property, to hold the same as employee or agent of the State National Bank in the future, and the acceptance by said bank of M. B. Armstrong as its employee or agent, was an overt act effecting the delivery of the property within the meaning of the law. This court ruled, in the case of *Hodges Bros.* v. *Bank of Cove,* 119 Ark. 215, that (quoting syllabus): "In a sale of chattels, delivery is a question of intention of the parties, as manifested by overt acts, and a sale will be treated as completed where any act has been done which was intended by the parties as a delivery." The transfer of the employee, agent or custodian who had control of the property in the instant case, and the acceptance of him by the bank as its employee, agent or custodian for the purpose of holding the property in the future for it, was clearly an overt act manifesting an intention on the part of the parties to deliver the property. In *Russell* v. *Haltom,* 76 Ark. 506, a case quite similar to the instant case, this court said: "Counsel for appellant contends that there was no delivery of the property under the bill of sale, and that the title did not pass against creditors. On this issue, too, the verdict of the jury settled the question against appellant's contention. It was shown that the

delivery of the property was made at the time of the execution of the bill of sale, and that the same was left in the possession of one Grayson, an employee of appellant, to hold for appellees. Counsel contends that this was equivalent to retention of possession by appellant, and that no title passed. This contention is not, however, sound, for the reason that Grayson, though an employee of appellant, could have been constituted the agent of appellee for the purpose of holding the property, and the evidence shows that such was a fact. This constituted not only a constructive delivery, but an actual change of possession. Either is sufficient to complete a sale free from fraud. *Shaul* v. *Harrington,* 54 Ark. 305; *Lynch* v. *Daggett,* 62 Ark. 592; *White* v. *McCracken,* 60 Ark. 613."

In the instant case, Armstrong, an employee of the Federal Lumber Company, who had control of the property in question, was constituted the agent of the State National Bank for the purpose of holding the property for said bank, and this is shown by the undisputed evidence. The proof by the undisputed evidence of this overt act was a symbolical delivery effecting the change of the possession of said property. The court therefore erroneously found that the liens under the writs of attachment and execution were prior and paramount to the title acquired under the sale by appellant for said bank.

The judgment is reversed, and judgment rendered here in favor of appellant.

COLEMAN v. UTLEY.

Opinion delivered April 17, 1922.

JUDGMENT—RIGHT TO JUDGMENT NOTWITHSTANDING VERDICT.—Where the undisputed evidence showed that plaintiff was entitled to a certain amount if he was entitled to recover anything, verdict for a lesser amount was arbitrary, and it was error to deny plaintiff's motion for judgment for the full amount.

Appeal from Howard Circuit Court; *A. P. Steel,* special Judge; reversed.

W. P. Feazel, for appellant.

The court erred in denying appellant's motion for judgment. C. & M. Dig., § 6273; 100 Ark. 47; 133 Ark. 221. A new trial should have been granted. A new trial will be granted where the verdict is clearly against the evidence. 2 Ark. 360; 70 Ark. 385; 34 Ark. 632; 103 Ark. 370.

D. B. Sain, for appellees.

The motion for new trial should have been overruled. 100 Ark. 629; 122 Ark. 100; 76 Ark. 115; 74 Ark. 478.

Where plaintiff voluntarily goes to trial without an answer being filed, he cannot make objection for the first time in this court. 109 Ark. 69; 112 Ark. 332.

HUMPHREYS, J. Appellant instituted suit against appellees in the Howard Circuit Court to recover $282.90 for advances alleged to have been made by appellant to appellee John Graham to enable him to produce a crop on lands rented to him by appellant. It was alleged that, after the major part of the crop had been planted, appellee John Graham sold the crop to appellee, A. F. Utley, by and with the consent of appellant, the consideration being that A. F. Utley should pay all of Graham's indebtedness to appellant on account of advances made to make said crop. Appellee A. F. Utley filed an answer, admitting that he purchased the crop by and with the consent of appellant, with the understanding that he would pay Graham's indebtedness to appellant on account of advances made to plant the crop, upon condition that John Graham would stay on the place and help produce the crop; that, after remaining two or three weeks, said Graham refused to further assist in the cultivation of the crop and moved off the place. The cause was submitted to a jury upon the pleadings and evidence, which resulted in a verdict in favor of appellant for $141.45. Thereupon appellant moved for a judgment for $255.90, notwithstanding the verdict, on the ground

that under the undisputed evidence appellant was entitled to recover that amount. Over the objection and exception of appellant, the court overruled the motion and rendered judgment in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

The record reflects that appellant rented and was residing upon the farm of Dr. Toland in the year 1920; that he rented a part of the land to appellee John Graham on which to plant corn and cotton; that after planting all of the corn and a part of the cotton he sold the crop, with appellant's consent, to appellee A. F. Utley. At the time the sale was made appellant had made advances to appellee Graham in the total amount of $282.90, all of which was used in planting the crop, except $27 furnished to Graham for a wedding suit. The evidence introduced by appellant tended to show that the consideration for the purchase of the crop was the absolute assumption by A. F. Utley of Graham's indebtedness to appellant on account of advances made by appellant to plant the crop. The evidence introduced by appellee Utley tended to show that he assumed the indebtedness of Graham for said advances on condition that Graham would remain upon the place and assist in the cultivation of the crop; that he refused to render this assistance and moved away from the farm.

Appellant insists that it was the duty of the court to declare as a matter of law upon the record in the case that he was entitled to recover the sum of $255.90, notwithstanding the verdict of the jury to the effect that he was entitled to recover only $141.45. This insistence of appellant is based upon the fact that the verdict of the jury settled the only controverted question of fact in favor of appellant, which finding necessarily entitled plaintiff to a judgment for the full amount of the advances made and used in planting the crop. The uncontradicted testimony revealed that appellant had advanced Graham, at the time he sold the crop to Utley, $255.90, which was used in planting the crop. The only dispute in the testimony was whether at the time of the

purchase Utley assumed the payment of the amount so advanced absolutely or conditionally. The theory of appellant was that he assumed the payment absolutely, and that of appellee Utley was that he assumed the payment conditionally, and that the condition failed. The cause was submitted to the jury upon each theory, and the finding of the jury in favor of appellant in any sum was necessarily a settlement of the disputed fact in favor of appellant, and against appellee Utley. The finding in favor of appellant in an amount less than the amount advanced was therefore an arbitrary finding. The verdict, as to the amount, was necessarily without any evidence to support it, as the undisputed evidence showed appellant was entitled to the whole amount advanced for the purpose of planting the crop or to nothing. In this state of the record it was the duty of the court to sustain the motion filed by appellant and render a judgment upon the undisputed facts disclosed by the record for the full amount of the advances made to plant the crop, notwithstanding the verdict of the jury for a less amount. *Collier* v. *Newport Water, &c., Co.,* 100 Ark. 47; *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221.

The judgment is therefore reversed, and judgment directed to be entered here for $255.90 in favor of appellant.

FRANCIS *v.* ARKADELPHIA MILLING COMPANY.

Opinion delivered April 17, 1922.

1. MASTER AND SERVANT—NEGLIGENCE—PLEADING.—The allegation that personal injuries to an employee were caused by the employer's negligence in leaving sacks of feed stacked in such manner that they fell of their own weight included the employer's negligence in unstacking the sacks.
2. MASTER AND SERVANT—ASSUMED RISKS.—An employee of ordinary intelligence, experienced in the line of his duty and not working under the immediate direction of a superior, assumes the risk of dangers incident to conditions produced through the negligence of the employer which are obvious and imminent, and which he must have known and appreciated in the exercise of ordinary care for his own safety, in the performance of his duties.

3. MASTER AND SERVANT—ASSUMED RISK.—An experienced employee, 20 years old, knowing of the dangerous condition of stacked sacks of feed which fell and caused his injuries, assumed the risk and cannot recover.

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

W. H. Mizell and *Callaway & Callaway,* for appellant.

Plaintiff made out a case of negligence on the part of the defendant, and the matter should have been submitted to the jury for determination. 100 Ark. 53.

Plaintiff did not assume the risk of injury from the negligence of the master or his fellow workmen. 118 Ark. 49; 106 Ark. 25.

The doctrine of *res ipsa loquitur* applies. 29 Cyc. 591. While this doctrine is usually applied in the case of common carriers, it may apply with equal force as between master and servant. 105 S. W. 1057, 13 L. R. A. (N. S.) 140; 202 Ill. 144; 139 Ark. 489; 86 Ark. 76; Vol. 8 Encyc. of Evidence, p. 886.

McMillan & McMillan and *T. D. Wynne,* for appellee.

Appellant assumed the risk, and a verdict was properly directed. 89 Ark. 50; 76 Ark. 69; 97 Ark. 486; 95 Ark. 560; 100 Ark. 462.

There was no allegation of negligence in the complaint as to the taking down of the sacks, and proof directed to this issue could not avail plaintiff. 41 Ark. 394; 29 Ark. 500; 13 Ark. 88.

The defect, if any, was open and obvious. 90 Ark. 392.

HUMPHREYS, J. Appellant instituted suit against appellee in the Clark Circuit Court to recover damages in the sum of $5,000 on account of personal injuries received from falling sacks of feedstuff in one of the rooms of appellee's grain elevator at Arkadelphia, through the alleged negligence of appellee in stacking the said feedstuff and leaving the same stacked to such height and in such manner as to cause same to fall from its own weight upon appellant while engaged in cleaning the floor of

said room, which work was in the line of his duty. Appellee filed an answer denying that it negligently stacked the feedstuff, or that it left same stacked in a negligent manner, and interposing the further defenses of assumed risk and contributory negligence by appellant. The cause was submitted upon the pleadings and evidence, at the conclusion of which the court peremptorily instructed a verdict for appellee, over the objection and exception of appellant. From the directed verdict, and the judgment rendered in accordance therewith, an appeal has been duly prosecuted to this court.

The evidence, stated in its most favorable view to appellant, was, in substance, as follows: Appellant, a man twenty years of age, was employed by appellee to truck sacks of feedstuff, which were stacked in warerooms at appellee's elevator in Arkadelphia, into cars on the outside of the building for the purpose of shipment, and also to clean up rice hulls which had been spilled on the floor in said rooms. He had nothing to do with taking the sacks down from the pile. This was done by another or other employees. After the sacks had been removed from the stack, appellant would assist in loading them on his truck and then push the load out to the car, and after unloading it would come back for another load. On the morning of the injury, which occurred about nine o'clock, after appellant had been engaged for an hour in trucking sacks of rice hulls out of the room in which the injury occurred, the foreman took him away from this work and sent him, for about 30 minutes, to another part of the mill. He was then sent back to the room to clean up the spilled rice hulls from the floor. While bent over, scooping up the hulls, several sacks fell off the pile and inflicted the injury complained of. In unstacking the piles the custom was to begin at the top and unstack them towards the bottom, leaving them in the shape of stairsteps. In this particular room, on this occasion, the stacks had been removed in such way as to leave those standing perpendicular. In fact, the stacks bulged out to some extent towards the top. At the time the injury

occurred appellant had been working for appellee in the same capacity for about three months, and was familiar with the manner of stacking and unstacking the sacks of feedstuff. He knew the manner in which the sacks should be removed from the stacks in the several warerooms, and the manner in which the stacks should be left when only a part of the sacks were removed. The stacks were open to the view of any one entering the several warerooms.

Appellant insists that under the allegation of the complaint and proof adduced a disputed question of fact as to whether appellee was negligent in stacking or unstacking the sacks was presented for determination by the jury. Appellee, on the other hand, contends that the only allegation of negligence in the complaint was that the sacks were negligently stacked, and that the undisputed proof shows that the sacks were properly stacked. The allegation in the complaint was broad enough not only to include negligent stacking, but also negligent unstacking of said sacks. Part of the allegation is that appellee left the stacks of sacks in such manner as to cause same to fall from their own weight. Upon the question of negligence on the part of appellee it was therefore improper to take the case from the jury, unless the undisputed evidence showed that appellant assumed the risk. Appellant insists that the court erred in holding that the undisputed facts showed that he had assumed the risk incident to falling sacks occasioned through the negligence of his employer, appellee. An employee of ordinary intelligence, experienced in the line of his duty, and not working under the immediate direction of a superior, assumes the risk of dangers incident to conditions produced through the negligence of his employer which are obvious and imminent and which he must necessarily have known and appreciated in the exercise of ordinary care for his own safety in the performance of his duties. *St. L. S. W. R. Co.* v. *Compton,* 135 Ark. 563; *Hunt* v. *Dell,* 147 Ark. 94; *Scott* v. *Wis-*

consin & Ark. Lbr. Co., 148 Ark. 66; *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 232.

The evidence reflects that appellee was familiar with the place where he was working, and that the condition in which the sacks were left through the negligence of the employees of appellee was obvious and imminent to any one working around the stacks of sacks. In fact, the danger was so patent and open that it might have been observed by casual observation. The stack as left was not only perpendicular, but it was leaning or bulging out at the top. The record does not indicate that appellant was too young or inexperienced to appreciate the dangers incident to the condition in which the stack was left after a part of the sacks had been removed. Appellant was 20 years of age at the time the injury occurred, and had been in the employ of appellee as a trucker for about three months, and understood how the foodstuff should be stacked and unstacked with a view to the safety of the employees. The condition complained of, which produced the injury, being perfectly obvious and of such simple character that one of ordinary intelligence and experience would necessarily have known and appreciated the dangers incident thereto, the court correctly declared, as a matter of law, that appellant assumed the risk.

No error appearing, the judgment is affirmed.

MURPHY v. PROVINCE.

Opinion delivered April 24, 1922.

1. DEATH—RECOVERY FOR—DISTRIBUTION.—Where a cause of action for the wrongful death of a locomotive engineer may be brought under either the Federal or State statutes, the distribution of the sum recovered is controlled by the statute under which recovery is had.
2. DEATH—RECOVERY UNDER STATE OR FEDERAL STATUTE—COMPLAINT.—In an action for the death of an engineer in the employ of a railroad company, a complaint which fails to show whether deceased was engaged in interstate commerce or not

at the time he was killed will support a recovery under either the Federal or State statute providing an action for wrongful death.

3. DEATH—RAILWAY LOCOMOTIVE ENGINEER—STATUTE REGULATING RECOVERY.—Where a locomotive engineer, while not engaged in interstate commerce, was killed in the performance of work in the line of his duty directly connected with and incident to the use and operation of a railroad, an action for his death is based on Crawford & Moses' Dig. § 7138 *et seq.*, and not on Lord Campbell's act (*Id.*, §§ 1074, 1075).

4. DEATH—REPEAL OF STATUTE.—Crawford & Moses' Dig., § 7138 *et seq.*, known as the Railroad Hazards Act, repealed the Lord Campbell's Act (*Id.*, §§ 1074, 1075), so far as the two acts were necessarily inconsistent, though the former act provides that it shall not be held to limit the duty of common carriers by railroads or impair the rights of their employees in the existing laws of the State.

5. DEATH—BENEFICIARIES.—Under Crawford & Moses' Dig., § 7138, providing that a railroad company "shall be liable for all damages to any person suffering injury while he is employed by such carriers, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee," *held* that an adult daughter who for ten years had lived with her husband apart from her father, and was not dependent upon him and had received no contributions from him during that time, was not entitled to share in the sum recovered for his death.

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

E. B. Kinsworthy and *B. S. Kinsworthy,* for appellant. Under our statutes (C. and M. Dig.,) §§ 1070-1075) the next of kin who are entitled to damages for the death of a parent are limited to such as sustained a pecuniary loss by his death, and cannot be held to include children living apart from the deceased parent and not dependent upon him. 53 Ark. 117; 51 Ark. 509; 76 Ark. 555; 79 Ark. 62; 93 Ark. 183; 104 Ark. 59; 134 Ark. 1; 203 Pa. St. 511; 93 A. S. R. 774; 272 N. Y. 8, 607.

Where recovery for the death of the parent was had under the Federal statute, the same rule applies as contended for under our State statute. See 57 L. Ed. 1031, 228 U. S. 702; 57 L. Ed. 785, 228 U. S. 173; 59 L. Ed. 1433, 238 U. S. 507.

Allyn Smith, for appellee.

The fund should be distributed under the statute of descents and distributions in the proportion it would have been had it been personal property. See 41 Ark. 187; 103 U. S. 11; 222 S. W. 735. The widow is entitled only to a distributive portion. 98 Ark. 102; 79 Ark. 62; 52 Fed. 371; 197 Pac. 97; 14 A. L. R. 509 and notes; 28 Ohio St. 191; 14 S. W. 559; 87 Mich. 374.

In making the distribution the statute must be followed and distribution made as with other personal property. 111 Ala. 572; 59 Ala. 272; 24 Ark. 487; 726 Iowa 158; 108 Iowa 695; 160 N. C. 432; 128 Ga. 371; 18 Ill. 349; 26 Ia. 400; 21 Ill. 606.

McCULLOCH, C. J. Appellant's husband, W. T. Murphy, was a locomotive engineer, engaged in railroad service on the line of the Missouri Pacific Railroad Company, then under government control, and while in such service and working in the line of his duty at Cotter, Arkansas, he received personal injuries from which death ensued.

Appellant and her husband resided in Baxter County, Arkansas, and letters of administration were issued to her upon the estate of said decedent, and she instituted an action in the circuit court of Pulaski County against the Director General of Railroads to recover damages on account of the death of said decedent, alleging that it was caused by negligence in the operation of the railroad. Damages in the sum of $1,000 were sought on account of the pain and suffering of the deceased, and damages in the sum of $9,000 were asked as compensation for the next of kin.

There was a judgment in favor of appellant as such administratrix for the recovery of $500 on the first count for damages, and for the recovery of $7,500 on the second count.

Appellee is a daughter of said decedent, and she instituted the present action in the chancery court of Pu-

laski County against appellant to recover a share of the amount collected under said judgment.

Appellee set forth in her complaint the pleadings in the original action instituted by appellant as administratrix against the Director General of Railroads, and she alleged that she was one of the children and distributees of the estate of said decedent and was entitled to an equal share of said amount so recovered.

Appellant filed her answer in the cause, disputing the right of appellee to share in the amount so recovered, and the record contains a recital that the cause was heard upon an agreement that "the copies of the complaint and judgment entry set forth in plaintiff's complaint are correct, and the facts set forth in defendant's answer are true."

The answer of appellant recites the fact that there are four living children of said deceased, W. T. Murphy, one of whom is an infant nine years of age, and the other three, including appellee, are adults, and that appellee is a married woman, twenty-six years of age, who was, at the time of the death of said W. T. Murphy, and for about ten years prior thereto, living apart from said decedent and was not dependent on said decedent, nor was she receiving any contributions of any kind from him.

It was the contention of appellee below, as here, that the recovery of the funds in controversy was secured in an action under the statute of this State which is generally referred to as having been patterned after Lord Campbell's Act (Crawford & Moses' Digest, §§ 1074, 1075), which provides that the recovery secured thereunder "shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

The lower court sustained the contention of appellee and rendered a decree in her favor for a child's part, or one-fourth, of the sum recovered by appellant, after deducting the widow's share of one-third.

The contention of appellant is that said decedent was, at the time of the injury which caused his death, engaged in the operation of a locomotive while used in interstate commerce, and that the recovery was had either under the Federal employers' liability act or under a statute of this State other than the one under which appellee seeks recovery, which provides a different method of distribution of the funds thus secured. Crawford & Moses' Digest, § 7138, *et seq.*, Acts of 1911, p. 55.

The first question, therefore, which we must determine is, which one of the statutes the original cause of action and the recovery were predicated upon, for if the funds were recovered under the Federal statute, they must be distributed according to the terms of that statute (*Taylor* v. *Taylor,* 232 U. S. 362); and if under one of the statutes of this State, the amount recovered must be distributed according to the statute which authorizes the recovery.

The original complaint and the judgment of the court thereon were incorporated in the complaint in the present action. The complaint in the former action did not contain an allegation to the effect that Murphy was engaged in interstate commerce at the time of his injury, nor did it contain any allegation indicating that he was not so engaged. The complaint may be treated as silent on that subject. The action was brought by the personal representative of the decedent, which was authorized by either of the three statutes now under consideration, and under the complaint as unamended there might have been a recovery either under the State statutes or the Federal statute, according to the facts disclosed in the proof. *St. L. I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240.

The facts of the case, as recited in the answer of appellant, which is conceded to state the facts correctly, are that Murphy was engaged in interstate commerce at the time of his injury. But, even accepting the allegations of the original complaint itself as denoting the character of the accident, it was one not based on §§ 1074 and 1075, Crawford & Moses' Digest, but it was

based on the more recent statute referred to above. Crawford & Moses' Digest, § 7138, *et seq.*

The later statute, just mentioned, related to what we have denominated as railroad hazards, and we have construed the statute to include "every employee who, when injured, was performing some work in the line of his duty, directly connected with and incident to the use and operation of a railroad." *St. L. I. M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377; *St. L. I. M. & S. Ry. Co.* v. *Wiseman,* 119 Ark. 477.

It was alleged in the original complaint that Murphy, at the time of his injury, was in the employ of the defendant, "not operating any engine, but on said date was assisting Engineer Schultz to disconnect engine 2395 at Cotter, and on account of defects in said engine the radiator rod was blown out of said engine, striking said Murphy in the back of the head, breaking his skull," etc.

This allegation brings the cause of action within the last statute referred to as interpreted by the cases cited above. It is clear, therefore, that the other statute of this State (the one patterned after Lord Campbell's Act) has no application, and we need not determine what the distribution would be under that statute.

The act of 1911, *supra,* contains a provision in the last section to the effect that the act shall not be held "to limit the duty of common carriers by railroad, or impair the rights of their employees in the existing laws of the State." This provision may be conceded to show an intention on the part of the Legislature not to repeal any statute then in existence except those repugnant to the terms of the later statute, but that statute necessarily operated as a repeal of any other statute conferring a right of action under the facts set forth in this statute. The two statutes are inconsistent to that extent, and the last one repeals the first to that extent. This is necessarily so, for the remedies of the two statutes are entirely different and for the benefit of different persons.

It is unnecessary to determine whether the original recovery should be treated as one under the Federal statute, or as one under the statute of this State last mentioned. It might have been under either of those statutes, according to the fact whether or not the employee was engaged in interstate commerce.

The Federal statutes have been interpreted by the Supreme Court of the United States to authorize a distribution of the amount recovered only to the next of kin mentioned who are injured by the wrongful or negligent act. That court has repeatedly held that the statute was intended to afford compensation only to those who sustain injuries resulting from the death of the decedent, and that the distribution must be limited to that class. *Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 59; *Gulf, C. & S. F. Ry. Co.* v. *McGinnis,* 228 U. S. 173; *Taylor* v. *Taylor, supra; Central of Vermont R. R.* v. *White,* 238 U. S. 507.

That part of our statute which describes the persons on whom the right of action is conferred, and the beneficiaries thereunder, is in almost the same language as that of the Federal statute. It provides that common carriers by railroad "shall be liable for all damages to any person suffering injury while he is employed by such carrier, or, in the case of the death of such employee, to his or her personal or legal representative, for the benefit of the surviving widow or husband and children of such employee; if none, then to such employee's parents; if none, then to the next of kin of such employee, for such injury or death resulting in whole or in part from the negligence," etc. Crawford & Moses' Digest, sec. 7138. There are one or two slight changes in the statute from the language employed in the Federal statute, but it is evident that the writer of our statute had before him the Federal statute and used it as a model. When the whole statute is read together, it is clear that it was intended to cover the same subject as that covered by the Federal statute so far as it affects causes of action of the kind

described other than while the employee was engaged in interstate commerce.

The more explicit interpretation of the Federal statute by the Supreme Court of the United States, beginning with the Vreeland case, *supra,* came after the adoption of the statute by the lawmakers of this State, and the doctrine of borrowed interpretation cannot, perhaps, be invoked, but we have no doubt of the correctness of the subsequent interpretation of the Federal statute, and our statute is, of course, subject to the same interpretation. That statute does not contain any express provision or direction with reference to the distribution of the fund, as is the case with respect to our statute patterned after Lord Campbell's Act. But it does clearly appear from the statute that the recovery is for the benefit of the person or class of persons who suffer injury on account of the death caused by the wrongful act, and, in the absence of an express provision to the contrary in the statute itself, the only reasonable interpretation is that the participation in the distribution of the fund must be limited to those who are to be compensated for the injury.

We are therefore of the opinion that under this statute appellee is not entitled to participate in the distribution of the fund in controversy, for it is undisputed that she sustained no pecuniary injury by the wrongful act which caused the death of her father. According to the agreed statement of facts, she was not dependent on her father, and she was not receiving any contributions from him or expecting any, but on the contrary she was married and living with her husband, apart from her father.

The judgment is therefore reversed, and the cause is dismissed.

BRACKVILLE v. HOLT.

Opinion relivered April 25, 1922.

1. DESCENT AND DISTRIBUTION—BURDEN OF PROVING RELATIONSHIP.—One who claims to be heir to a decedent on a distribution of the estate must establish relationship to the decedent.
2. APPEAL AND ERROR—PREJUDICIAL ERROR.—Where one claiming to be the daughter and sole heir of a decedent laid claim to her estate, and her claim was contested by collateral heirs, a finding of the trial court in favor of the contestee was erroneous and prejudicial in view of the court's further finding that if the burden of proof had been upon the contestee her proof would have failed to preponderate.
3. COURTS—PROBATE JURISDICTION.—Where there was no controversy concerning the appointment of an administrator, and no question of inheritance and no prayer for distribution of the estate, the probate court had no jurisdiction to declare a person an heir of a decedent.
4. COURTS—PROBATE JURISDICTION.—The jurisdiction of the probate court is confined to the administration of estates which come under its control and to determine questions which are necessarily incident to such administration.

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

Horace Chamberlin, for appellant.

The character of a pleading is determined from its allegations and not from its name. 54 Ark. 468. On appeal from the probate court to the circuit court, the appellate court is required to try the cause *de novo,* without regard to which side perfected the appeal. C. & M. Dig., sec. 2261. The burden of sustaining an action is upon the party alleging the facts constituting the issue. 68 Ark. 284.

The trial court erred in holding that only the declarations of Mrs. Foster would be admissible for the purpose of proving pedigree. 15 Ark. 604; 24 Ark. 587; 133 Ark. 72; 17 Cyc. 822; 86 N. W. 55.

The testimony was not legally sufficient to sustain the trial court's finding in favor of appellee. 112 Ark. 47; 57 Ark. 402; 17 Cyc. 817; 85 N. E. 979; 100 U. S. 693; 229 S. W. 404; 118 Ark. 349.

C. P. Harnwell, for appellee.

The court properly held that the burden of proof was on the contestants. Bailey on "*Onus Probandi*" p. 322; 178 Ala. 375; 59 So. 609; 56 Am. Dec. 206; 36 L. R. A. (N. S.) 530; 113 Ga. 791; 84 Am. St. Rep. 259; 196 Ill. 71; 59 Miss. 588; 42 Am. Rep. 381; 32 N. C. 185; 36 Ore. 417; 47 L. R. A. 548; 37 S. C. 19; 60 Kan. 572; 70 Neb. 429; 71 Ala. 80; 63 Miss. 357; 51 Ill. App. 317; 4 Ind. 444; 4 Ky. Law Rep. 625; 30 La. Ann. 511; 38 Tex. 160; 108 Ark. 521; 72 Ark. 44; 97 Ark. 502; 133 Ark. 72; 134 Ark. 183; 139 Ark. 236; 24 Ark. 411.

McCULLOCH, C. J. Mrs. Victoria E. Foster, the widow of Frank Foster, deceased, was a resident of the city of Little Rock and died intestate on May 14, 1920, leaving an estate valued at $8,000, consisting entirely of personal property.

On May 29, 1920, a petition was presented to the probate court of Pulaski County naming appellants as the collateral heirs of said decedent and asking that W. E. Lenon be appointed as administrator of the estate of said decedent. On the same day Mr. Lenon, who was the president of the People's Savings Bank, a banking corporation in the city of Little Rock, presented an application in the name of his bank, praying that that institution be appointed as administrator of said decedent. The court granted the last-named petition and appointed the People's Savings Bank as administrator.

It does not appear from the record which one of these petitions was filed first during that day, and there was no response nor opposition to either of the petitions. There had been no objections made to the appointment either of Mr. Lenon or the People's Savings Bank. The appointed administrator qualified and took charge of the estate of the decedent.

In the petition for the appointment of the People's Savings Bank, Daisy F. Holt was mentioned as the daughter and only heir at law of said decedent, and on June 11, 1920, she filed a plea denominated as "a response to the petition for the appointment of Mr. Lenon as ad-

ministrator," but the substance of the petition is merely a protest or contradiction of the claim of the collateral kin to the inheritance of the estate of said decedent. She alleged in that plea that she was a daughter and sole heir at law of the decedent, Mrs. Foster. She alleged also that Mrs. Foster left a last will and testament in an old trunk on the premises, and that she (appellee) was the sole beneficiary under said will. The prayer of that plea was for an order of the court for the surrender to the administrator of said trunk and contents, and that she "be decreed and adjudged to be the child and sole heir of her mother, Victoria E. Foster, and for all other proper, just and equitable relief in the premises."

Appellants, as collateral heirs, appeared and filed a response to the plea of appellee, and in that plea they denied that appellee was the child of Mrs. Foster.

The probate court, after hearing the testimony, made an order as follows: "That the proof shows that Daisy Foster Holt is the sole child and heir of the deceased, Victoria Foster; that she is the daughter of the deceased, not a foster daughter as contended for by the contestants, and the court so holds and decrees, and that, as such daughter, she is entitled to all the rights in her mother's estate given her under the common law and the statutes of Arkansas."

There was nothing embraced in the order with reference to the distribution of the estate in the hands of the administrator.

The present appellants prosecuted an appeal to the circuit court, and the cause was heard by the court on oral testimony directed solely to the question whether or not appellee was a daughter of the decedent, Mrs. Foster. The testimony was conflicting and supported a finding either way on the issue presented. There was a judgment in favor of the appellee affirming the judgment of the probate court.

In overruling the motion for a new trial, the court incorporated the following statement in the order: "And the court, after argument of counsel, finds that the evi-

dence, submitted upon the allegations of the response of contestee and the answer of contestants, is so equally balanced that the granting of a new trial is primarily dependent upon a determination of where the burden of proof properly lies. The court therefore finds that the burden of proof was properly placed during the trial upon the contestants herein, and therefore the judgment of the court was proper in sustaining and affirming the judgment of the probate court. The court further finds that, if the burden of proof was erroneously placed upon the contestants and should have been placed upon the contestee, then the contestee's proof fails to sufficiently preponderate over contestant's proof, and the judgment of the court should have been in favor of the contestants, and the judgment of the probate court reversed."

We are of the opinion that the court erred in its ruling as to the burden of proof.

After the probate court acquires jurisdiction over the estate of a decedent, the question of inheritance can only arise upon an order for the distribution of the estate to the heirs, and a claimant to this estate must establish the right to the inheritance by proof of relationship to the decedent.

The law fixes the inheritance on proof of relationship, and, as appellee claims the right of inheritance as the daughter of the decedent, it devolves upon her to prove that relationship.

An administrator has no right to distribute the estate of his intestate until ordered by the court, and, as before stated, a claimant for the property asking for such an order must prove his or her relationship.

This is not a trial of the rights of property in an adversary proceeding, and the condition of the pleadings, therefore, has little or nothing to do with the question of the burden of proof, but the fact that a party was claiming the inheritance and asking for a distribution of the property in his or her favor casts upon the applicant the burden of establishing the inheritance by proof of relationship to the decedent.

The error of the court calls for a reversal of the judgment, for it appears, from the recitals in the order of the court, that the judgment of the court would have been different but for this erroneous conclusion as to the law of the case.

This much is said in view of a further controversy to be settled later, concerning a distribution of the inheritance, but it is also clear to us that the probate court and the circuit court on appeal were both without jurisdiction to determine the question of inheritance from said decedent upon the issues presented, and that the judgment must not only be reversed, but the cause must be dismissed.

The jurisdiction of the probate court is confined to the administration of estates which come under its control and to determine questions which are necessarily incident to such administration. *Moss* v. *Sandefur,* 15 Ark. 381; *Fancher* v. *Kenner,* 110 Ark. 117; *Shane* v. *Dickson,* 111 Ark. 353; *King* v. *Stevens,* 146 Ark. 443; *Gordon* v. *Clark,* 149 Ark. 173.

All that the court determined in the present case was that appellee was the daughter and sole heir at law of the decedent. The judgment was merely declaratory in its effect, for nothing else was before the court. There was no controversy concerning the appointment of the administrator, and there was no question of inheritance involved in the prayer that one of the appellants be required to turn over the old trunk, containing the Bible and alleged will, to the administrator. Nor was there any prayer for the distribution of the estate. In fact, the time had not arrived for a final distribution of the estate, and such distribution could only have been ordered upon the execution of bond for the refund of the part so distributed. Crawford & Moses' Digest, § 216 *et seq.*

The question of inheritance could only arise as an incident to the distribution of the estate; and, since there was no prayer for distribution, the court had no jurisdiction to declare the right of inheritance.

The judgment is therefore reversed, and the cause remanded, with directions to dismiss the proceedings for want of jurisdiction.

HUMPHREYS, J., (dissenting). The majority are mistaken in their statement that there was no prayer for distribution of the estate. By reference to the original pleading of appellants it will appear that they asked that "the estate be distributed to them as tenants in common after the payment of any debts which may be due by said estate." It is true that the time had not arrived for final distribution of the estate, as suggested by the majority, but the estate and all the parties interested therein were before the court, except the creditors, if there were any. They were protected under the prayer, which requested that distribution be made subject to the claims of creditors against the estate. While the parties, by agreement, could not confer jurisdiction upon a court where it had no jurisdiction, the subject-matter involved here was a matter over which the probate court had exclusive jurisdiction, and, the parties being before it, it seems to me that they might waive the time and thereby empower the court to adjudicate the matter at the time instead of later. The parties treated the suit as one for distribution, and having waived the time therefor, which prejudiced no one, it was, in my opinion, the duty of the probate court to distribute the estate, subject to the indebtedness, if any, to the parties entitled thereto. The result of the opinion of the majority is to require the parties to again litigate in the same court the same issues involved in the record now before this court on appeal. This is an unnecessary burden to place upon the parties when they themselves have not raised the question that the application for distribution was premature.

I agree with the majority that the burden rested upon appellee to prove that she was the daughter of the deceased, and that the circuit court erred in placing the burden on appellant, and that on this account the case should be reversed. I cannot agree with the majority

in directing a dismissal of the proceedings. I think the judgment should have been reversed, and the cause remanded for further proceedings. Therefore, I dissent from the majority in directing a dismissal of the case.

STRAUGHAN v. BENNETT.

Opinion delivered April 24, 1922.

1. DEEDS—PRESUMPTION OF EXECUTION.—Where a mortgage contains a certificate of acknowledgment and is duly placed of record, this makes a *prima facie* case of the proper execution of the deed.
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—In an action to set aside a foreclosure of a mortgage, a finding by the trial court that the mortgage was signed by the mortgagor's wife was *held* not against the preponderance of the evidence.
3. MORTGAGES—PROOF OF PUBLICATION OF NOTICE OF FORECLOSURE.—Under Crawford & Moses' Dig., § 6807, providing that notice of mortgage foreclosure sales shall be published in some newspaper published in the county, evidence *held* sufficient to prove the publication of such a notice.
4. MORTGAGES—ORAL APPOINTMENT OF SUBSTITUTED TRUSTEE.—Where a mortgage provided for the substitution of a trustee for the original trustee named therein, an appointment of a substituted trustee indorsed on the mortgage record on the day of a sale conducted by him was sufficient, his appointment having been made orally prior to commencement of the foreclosure proceedings.
5. ESTOPPEL—MORTGAGOR PAYING RENT.—Where a mortgagor of land lived thereon two years after it had been sold at foreclosure sale, and paid rent to the purchasers at such sale and then abandoned the property and permitted the purchasers to take possession and make valuable improvements, and made no claim to the land for more than six years, he is estopped to assert the invalidity of the foreclosure sale.
6. ESTOPPEL—CONCLUSIVENESS AS TO PRIVIES.—Where a mortgagor was estopped to question the validity of a foreclosure sale, his grantees were likewise bound by his acts.

Appeal from Ouachita Chancery Court; *J. Y. Stevens*, Chancellor; reversed.

Gaughan & Sifford, for appellant.

The appointment of the substituted trustee to make the sale need not be in writing. 71 Ark. 487; 91 Ark. 395. Oral evidence to prove the appointment was admissible. 35 Ark. 47; 65 Ark. 53.

The doctrine of laches applies to the claim of appellees. 71 Ark. 209.

The appellee's bill should have been dismissed for want of tender of payment of the mortgage debt. 53 Ark. 71; 129 Ark. 275.

Pace, Campbell & Davis, for appellee.

The deed of trust was void because not signed by Amanda McGehee. C. & M. Dig., sec. 5542. Signature by mark must be witnessed. C. & M. Dig., sec. 9732; 70 Ark. 449. The positive and unimpeached testimony of the wife that she did not sign the deed had greater force than the certificate of the notary. 38 Ark. 278; *Crawley* v. *Neal,* 152 Ark. 232.

The foreclosure sale was void because no lawful notice thereof was given. 84 Ark. 298; C. & M. Dig. 6807. The burden rested on appellant to show publication and that the land was correctly described, etc. 19 R. C. L. pp. 598-600, secs. 413-415; 76 Miss. 613; 71 A. S. R. 536; 75 Am. Dec. 701; 178 Mass. 453; 51 Am. Dec. 95; 8 A. S. R. 661; 1 Mich. 338.

Oral testimony as to the appointment of the substituted trustee was properly excluded. Appellant saved no exception to the ruling of the court and cannot now complain. 9 Ark. 530; 127 Ark. 292; 96 Ark. 156; 123 Ark. 548; 44 Ark. 103; 78 Ark. 284. The second trustee deed was properly excluded. 106 Ark. 342. Appellees are not estopped by laches. 30 Ark. 520; 72 Ark. 267; 64 Ark. 104.

McCULLOCH, C. J. The tract of land in Ouachita County, containing 160 acres, which is the subject-matter of the present litigation, was originally owned by Beauregard McGehee, a colored man, who received a patent from the United States and who occupied the land as a home and cultivated it as a farm.

Appellees assert title to the land under a conveyance from McGehee, and appellants claim title under a mortgage or deed of trust, alleged to have been executed by McGehee and wife in the year 1910, and under a foreclosure deed pursuant to the powers contained in the said deed of trust.

A firm of merchants doing business under the name of Watts & Bro. were the holders of the deed of trust alleged to have been executed by McGehee and wife.

This is an action instituted by appellees to cancel the mortgage to Watts & Bro. and the foreclosure deed pursuant thereto. They allege that the deed was not signed by McGehee's wife, which rendered the mortgage void, as the land constituted McGehee's homestead.

The mortgage was dated April 29, 1910, and was to secure a debt in the sum of $425, evidenced by a promissory note. The names of both McGehee and his wife, Amanda, were signed to the note as well as to the mortgage, and the signatures were witnessed by a notary public, R. C. Lockett, before whom the acknowledgment appears to have been taken. The deed was immediately placed of record. P. Lynch Lee was named in the deed as trustee, and power was conferred upon the trustee to sell in default of payment of the debt. The deed also contained a provision authorizing the holders of the debt to substitute and appoint a trustee to act in the place of Lee in the event of the latter's death, disability or refusal to act.

Lee died in the year 1911, and the foreclosure was made by a substituted trustee, one Walker. The sale was made by Walker on April 7, 1914, and a deed was executed by him to the purchasers on the same day.

There was a written indorsement on the mortgage, dated April 7, 1914, appointing Walker as substituted trustee, and this writing is signed by Watts & Bro., the holders of the note.

The land was purchased at the sale by Watts & Bro. and subsequently sold to other parties, who were made defendants and are now the appellants in this appeal.

McGehee continued to reside on the place for two years after the sale and paid rent to Watts & Bro. He removed from the land in the latter part of the year 1916 or the early part of 1917, and has not resided on the land since then. He executed a quitclaim deed to A. W. D. Overton on May 11, 1920, reciting a cash consideration of ten dollars paid, and other considerations not disclosed. Overton executed conveyances covering his interest in the land to his co-appellees, and this suit was instituted by them on July 5, 1920.

Appellants, who purchased from Watts & Bro., entered into possession of the land and made valuable improvements thereon between the dates of their respective purchases and the execution of the deed by McGehee to Overton.

There are two issues of fact in the case, one of which relates to the validity of the mortgage, or deed of trust, and the other to the validity of the foreclosure.

It is conceded that the land in controversy was McGehee's homestead, and there is an issue of fact whether or not his wife signed the mortgage. If she did not sign it, the instrument was void under the statute which declares that all instruments affecting the homestead are void unless signed by the wife. Crawford & Moses' Digest, § 5542.

The other issue relates to the question whether or not notice of the foreclosure was given.

A certificate of acknowledgment was appended to the mortgage, and it was duly placed of record, and this made a *prima facie* case of the proper execution of the deed. Crawford & Moses' Digest, § 1532; *Polk* v. *Brown,* 117 Ark. 321; *Nevada County Bank* v. *Gee,* 130 Ark. 312.

The burden of proof, therefore, rested upon appellees to prove that the deed was not executed or acknowledged by McGehee's wife. The court made an express finding on this issue of fact, as recited in the decree, and found that the deed was executed and acknowledged by McGehee's wife, and that it was a valid mortgage. The

question for us to determine is whether or not this finding of the chancellor was against the preponderance of the testimony.

McGehee and his wife both testified that they did not execute this mortgage. They admitted that they had executed a mortgage to Watts & Bro. on a part of this land in the year 1900, and also that they executed another mortgage to Watts & Bro. on all of this land in the year 1903, but, as before stated, they each denied their signatures to the mortgage now in controversy.

The two mortgages which the witnesses admitted that they executed were acknowledged before an officer other than Lockett, but Beauregard McGehee in his testimony admitted that he had made an acknowledgment before Lockett of a mortgage to Watts & Bro.

Amanda McGehee testified that she could write a little and could write her name, and she stated that she always wrote her own name when signing a deed. It appears from the other deeds exhibited in evidence that her signature was in her own handwriting, but this particular deed was signed by mark. Lockett, the notary public, testified that both McGehee and his wife signed and acknowledged the mortgage. He was called to the witness stand more than once, and in his first statement he said that he was not personally acquainted with Amanda McGehee, and he also said that he had no personal recollection of taking the acknowledgment. But when called to the stand later, he explained his former statement by saying that he meant that he only knew Amanda McGehee and the other McGehee women when he saw them, but was not personally acquainted with them as he was with the men of the family, with whom he had had frequent business dealings. In the meantime, Amanda McGehee had been introduced as a witness in Lockett's presence, and when he was recalled to the stand he stated that he remembered then that she was the woman who signed and acknowledged the execution of the mortgage before him. He stated that he wrote her name and that she touched the pen, or made her mark.

With the burden of proof on appellees to show that the deed was not properly executed, and with the finding of the chancellor against appellees on this issue, we should not disturb the findings unless we conclude that it is against the preponderance of the evidence, and we think that the evidence does not preponderate against the finding of the chancellor that the deed was executed.

Counsel for appellees rely on the discussion in *Watson* v. *Billings,* 38 Ark. 278, where the relative weight of the testimony of a widow asserting dower and the justice of the peace who took the acknowledgment were discussed, but in that case the deed containing the relinquishment of dower was unrecorded, and the burden was on the other party to prove the execution of the deed. There was a finding also by the chancellor that the relinquishment of dower had not been executed. That case therefore is without any controlling force in the present case, and our conclusion is that appellees have not introduced sufficient proof to overcome the presumption arising from the certificate of the officer and the record of the deed. Counsel also rely on the recent case of *Crawley* v. *Neal,* 152 Ark. 232, but that case, too, is inapplicable for it involved the question of admissibility rather than the weight of testimony.

The court, as before stated, upheld the validity of the deed, but declared the foreclosure invalid on the ground that there was no valid appointment of the substituted trustee, for the reason that the appointment in writing was not made on a date before the sale, but after the preliminary steps towards the sale had been taken. There is therefore no finding, either express or implied, on the question whether or not the notice of foreclosure was given.

The trustee's deed contained a recital to the effect that notice was given in the manner prescribed in the deed of trust, which was by posting notices.

The statute provides that notices in conformity with mortgages, deeds of trust, etc., shall be published in

some newspaper in the county (Crawford & Moses' Digest, § 6807), and appellants adduced testimony tending to show that there had been publication made in that manner. Walker, the substituted trustee, and Mr. Watts testified on this subject, and each of them stated in his testimony that the notice was published in one of the newspapers at Camden. There was no contradiction of this testimony, but the contention of appellees is that the testimony is too vague and uncertain to base a finding upon. The newspaper was not introduced in evidence, nor was the editor introduced, nor any testimony other than the statements of Walker and Watts. The affidavit provided by statute (Crawford & Moses' Digest, § 6808) as evidence of such publication was not introduced, but that was not the exclusive method of proof. *Allen* v. *Allen,* 126 Ark. 164.

It is conceded by counsel for appellees that the testimony of Walker and Watts was competent to prove the publication of notice of sale, and it was admitted in the trial below without objection, but counsel contend that it is not of sufficient weight to justify a finding on the subject. Our opinion is, however, to the contrary, for this testimony was not contradicted, and while neither of the witnesses could state the language of the notice, they both undertook to give the substance of it, and they stated that it was a notice of the time and place of sale, with a description of the land. When the testimony of each is read as a whole, it shows that they meant to testify positively that the notice contained all of the essential elements to make a valid notice. Counsel comment upon certain language of each of the witnesses as tending to show a vagueness and uncertainty, but the testimony of each must be read as a whole, and we think that their statements, which are not contradicted, are to the effect that they remembered the substance of the notice, and that it contained all the requirements.

We are of the opinion that the evidence was sufficient, and that the sale was valid.

The court erred in holding that the substitution of the trustee had to be in writing, and erred in refusing to permit appellants to show that there was an oral appointment of the trustee before he began to take steps leading up to the foreclosure, even though the indorsement was not made until the day before the sale. It was not essential to the validity of the sale that the appointment of the trustee should be in writing, but written authority was essential in order to confer authority to make the deed. *Daniel* v. *Garner*, 71 Ark. 484.

When the deed was executed, there had been authority in writing indorsed upon the mortgage, so the deed was valid and conveyed the legal title—the equitable title having been acquired at the trustee's sale. *Daniel* v. *Garner, supra.*

Our conclusion is, therefore, that a valid legal title was acquired under the foreclosure sale and deed.

In addition to that, we think that McGehee was estopped by his own conduct from asserting title to the land, and that appellees, as his grantees, are also bound by his acts. McGehee remained on the land for two years after the foreclosure and paid rent, and then voluntarily removed from the premises and made no assertion of title or claim to the land for more than six years, when he quitclaimed it to Overton, one of the appellants. In the meantime the purchasers at the foreclosure sale and their subsequent grantees occupied the land and made valuable improvements thereon. It is true that McGehee says in one place that he did not know of the foreclosure, but it was publicly conducted, and he remained on the place, paying rent, and then abandoned the land. Counsel for appellees contend that his removal from the land merely amounted to a surrender of possession to Watts & Bro. as mortgagees, but his conduct shows more than that, and it clearly appears that he intended it as a complete abandonment of the land under the foreclosed mortgage. Under these circumstances, he is estopped to assert the invalidity of the foreclosure, for, if there were any defects or irregularities in the fore-

closure, he should not have abandoned the premises and knowingly permitted the purchasers and their subsequent grantees to enter and make valuable improvements.

Appellees rely on the case of *Wood* v. *Holland,* 64 Ark. 104, as holding that there was no estoppel under circumstances of this kind, but in that case the question was not concerning the invalidity of the sale, but related to the right of redemption, and the court held that a voluntary surrender of possession to the purchaser did not work an estoppel against the assertion of the right of redemption. There is a distinction between the two cases, and a very clear reason for it. Assertion of the right of redemption is not inconsistent with admission of the validity of the sale, and therefore a voluntary surrender of possession is not tantamount to a relinquishment of the right of redemption, whereas such a surrender to the purchaser under a foreclosure sale is inconsistent with the claim of invalidity of the foreclosure. This is but an additional ground why the original mortgagee and his grantees, the present appellees, should be denied the right to attack the foreclosure sale.

Therefore, on each of the grounds stated, the decree will be reversed with directions to dismiss the complaint for want of equity.

SMITH v. JOHNSON.

Opinion delivered April 24, 1922.

1. LANDLORD AND TENANT—ADVANCES TO TENANT.—In addition to his lien for rent, Crawford & Moses' Dig., § 6890, gives a landlord a lien on the tenant's crop for all "necessary supplies," etc., to enable the tenant both to make and to gather his crop.
2. LANDLORD AND TENANT—LIEN FOR ADVANCES.—A landlord seeking to assert a crop lien for supplies furnished to his tenant must bring himself within the statute (Crawford & Moses' Dig., § 6890) by proving that the supplies furnished were reasonably necessary to enable the tenant to make and gather the crop.
3. LANDLORD AND TENANT—FINDING THAT ADVANCES WERE NECESSARY UPHELD.—In a suit by a landlord to enforce a lien for neces-

sary supplies furnished to a tenant, evidence *held* to sustain chancellor's finding that such supplies were "necessary" within Crawford & Moses' Digest, § 6890.

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

Streett, Burnside & Streett, for appellant.

The statute gives the landlord a preferred lien over any mortgage or other conveyance of the crop, for necessary supplies, to enable his tenant to make and gather his crop. C. & M. Dig., sec. 6890; Tiffany on Landlord & Tenant, vol. 2, p. 1911. The advancement must have been made in good faith. 90 N. C. 276. The lien cannot extend beyond the terms of the statute. 80 Ark. 244; 83 Ark. 119.

The court will take judicial notice of the seasons. 14 Ark. 286; 31 Ark. 557; 35 Ark. 169.

The court is not bound to accept as true the statements of a witness. 38 S. E. 56. The testimony of a witness to that which is a physical impossibility, must be rejected. 112 Ill. App. 346. Statements of a party to a suit, although not contradicted by direct testimony, are not conclusive. 106 Ark. 501; 129 Ark. 369. Testimony which is contrary to the physical facts has no probative force. 38 S. W. 308.

Jas. R. Yerger and *N. B. Scott,* for appellee.

McCULLOCH, C. J. This appeal involves a controversy between parties who respectively assert liens on a crop of cotton grown during the year 1917 on a certain plantation in Chicot County.

Robert Johnson was a tenant of appellees Trulock & Evans, under a contract that he would pay one-fourth of the crop as rent, and his share of the crop was twenty-eight bales after deducting the one-fourth delivered for rent. His share of the crop, when gathered and marketed, brought $3,142.11, and the account of appellees Trulock & Evans against him for money and supplies aggregated $3,518.93, which was $376.82 in excess of the amount of the proceeds of his share of the crop. Tru-

lock & Evans assert a lien on the crop for the full amount of the account.

Appellant's intestate, J. T. Smith, was a local merchant, and in July, 1917, took a mortgage on Johnson's crop and sold him merchandise to the extent of $961, for which a lien on the crop is asserted in the present action.

This action was instituted by appellant's intestate, and a portion of the crop was taken under attachment. The chancery court sustained the superior lien of Trulock & Evans for the full amount of their account, which left nothing upon which appellant's intestate could assert a lien.

The cause was heard below upon the accounts of the parties and the testimony of Evans, one of the appellees, who stated in his testimony that the items of the Trulock & Evans account were correct and that the whole of the account was for supplies furnished to Johnson to make and gather the crop, and that everything furnished was necessary to enable Johnson to make and gather the crop.

The accounts of the respective parties are conceded to be correct so far as they represented the items of advances made to Johnson, and the only controversy in the case is whether or not the whole of the advances made by Trulock & Evans was necessary to enable Johnson to make and gather the crop.

It appears from the accounts exhibited with the pleadings that up to November 24, 1917, Trulock & Evans had furnished Johnson money and supplies amounting, in the aggregate, to $1,879.20, and had received about three-fourths of the crop, which overpaid the account. The account shows that on and after that date Trulock & Evans furnished Johnson money and supplies to the extent of $1,639.73.

Counsel for appellant concede that the account up to November 24 represented items for advances which were necessary to make and gather the crop, but they contend that the large amount furnished thereafter was

not shown to be necessary to gather the crop, and that that part of the account does not constitute a lien on the crop as against the mortgage lien of appellant.

The amount of the account furnished after November 24, and after about three-fourths of the crop had been gathered, does indeed seem to be unreasonable on its face, but there is no testimony bearing upon that feature of the case except that of Evans himself, and he stated positively and unequivocally that each item furnished was necessary to enable the tenant to make and gather the crop. Counsel for appellant did not cross-examine him at all, and he was not asked to go into details concerning any of the items of the account. He was not asked to explain why so large an amount was necessary. He was not asked concerning the condition of the crop nor the lateness of the season nor the size of the tenant's family for the purpose of ascertaining how much was necessary for him to be furnished. In other words, learned counsel saw fit to rest their client's case solely upon the apparent unreasonableness of the account upon its face.

It is true that we are not bound by the uncontradicted statements of Evans, who was one of the interested parties, but where there is no contradiction of his testimony and no effort to have him explain the account and the circumstances under which it was furnished, we do not feel that we would be justified in disregarding his positive statements, which counsel themselves did not attempt to break down by cross-examination.

The statute (Crawford & Moses' Digest, § 6890) gives a landlord, in addition to his lien for rent, a lien on the crop for all "necessary supplies, either of money, provisions, clothing, stock, or other necessary articles," to enable the tenant to make and gather the crop. The lien is not confined to advances to enable the tenant merely to make the crop; it also covers supplies furnished for gathering the crop.

A landlord asserting a lien must bring himself within the terms of the statute in order to enforce the lien

against a third person. *Few* v. *Mitchell,* 80 Ark. 243; *Kaufman* v. *Underwood,* 83 Ark. 118. It devolves upon the landlord in such a case to prove that the supplies furnished were reasonably necessary to enable the tenant to make or gather his crop, and it is usually a question of fact in each case for the determination of the trial court or jury whether or not the advances so furnished were reasonably necessary for that purpose. *Bourland* v. *McKnight,* 79 Ark. 427; *Earl* v. *Malone,* 80 Ark. 218.

In the present case we are unable to say that the apparent unreasonableness of the amount of the account for supplies furnished during the gathering season was sufficient to overcome the positive statements of one of the witnesses to the effect that each item was necessary to enable the tenant to gather the crop. In that state of the proof the finding of the chancellor on that issue should not be disturbed.

Affirmed.

LYBRAND v. WATKINS HARDWARE COMPANY.

Opinion delivered April 24, 1922.

1. EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—In an action on account against a partnership, where the written articles of partnership expressly obligated the partnership to assume all liabilities and indebtedness owed by a former firm, parol evidence was inadmissible to prove that only such debts of the old partnership as were exhibited at the time were intended to be assumed by the new partnership.
2. TRIAL—DIRECTION OF VERDICT.—In an action on an account against a partnership, where the amount of the indebtedness was undisputed, it was not error to direct a verdict.

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

Norwood & Alley, for appellant.

The itemized statement required by appellant at the time he entered into the contract makes clear the intention of the parties, and that he became liable only for such debts of the old firm as were there exhibited. The

agreement should be considered from the circumstances and viewpoint of the parties at the time. 90 Ark. 272; 113 *Id.* 174; *Wisconsin & Ark. Lumber Co.* v. *Fitzhugh,* 151 Ark. 81; 105 Ark. 421; 3 *Id.* 222; 63 *Id.* 63.

An incoming partner is not bound by the previous debts of the concern unless he makes himself so by express agreement. 49 Ark. 457; 77 Cal. 440; 64 Ga. 243; 101 Ill. App. 23; 27 Md. 645; 78 Va. 567; 107 N. Y. 260.

The testimony of appellant to the effect that he only assumed his part of the debts of the old firm mentioned in the exhibit to the contract was erroneously excluded. It was admissible to explain any apparent ambiguity or conflict raised by the eighth paragraph, and raised a jury question. 89 Ark. 368; 81 *Id.* 337.

Minor Pipkin, for appellee.

HART, J. The Watkins Hardware Company brought this suit in the circuit court against B. Hope and Early, Jones & Lybrand, a partnership composed of J. H. Early, J. E. Jones and L. H. Lybrand, to recover the sum of $1,524.43 for goods, wares and merchandise.

The firm of Early & Jones was the principal contractor for the construction of a highway in Polk County, Ark., and B. Hope was a subcontractor. The firm of Early & Jones, by a contract in writing, made itself responsible to the Watkins Hardware Company for the account of B. Hope. The latter purchased hardware from the Watkins Hardware Company to the amount of $1,524.43, which was due and unpaid at the time this suit was brought. Subsequently $1,216.61 was paid on the account, leaving a balance due at the time of the trial of the case of $307.88.

On the 12th day of October, 1920, J. H. Early and J. E. Jones entered into a contract with L. H. Lybrand whereby he became a member of the firm and interested in the construction of the road to be improved by the firm in Polk County, Ark. The written contract, after reciting that Lybrand had purchased a one-third interest in the firm and in the aforementioned contract recites

that Lybrand assumes "a one-third of the liabilities and indebtedness of said firm, and an itemized statement of all money, debts, mules and horses, machinery and tools and all other property owned by said firm, Early & Jones, up to date, hereto attached and made a part hereof," etc.

The contract of the firm with the road improvement district is attached to the contract of partnership and forms a part of it. Sec. 8 of the partnership contract reads as follows: "It is further agreed and understood by the parties hereto that all machinery, tools, horses and mules, money and chattels, and liabilities incurred and indebtedness owed under the former firm of Early & Jones is hereby assumed jointly by the firm of Early, Jones & Lybrand."

The defendant, Lybrand, offered to introduce in evidence a list of the debts owed by Early & Jones at the time he was received into the partnership and to testify that he only contracted to pay the indebtedness of the old firm which was exhibited to him at that time.

The court sustained an objection to this testimony offered by the defendant and directed the jury to return a verdict for the plaintiff.

L. H. Lybrand was the only member of the firm served with summons, and judgment was rendered against him in favor of the plaintiff in the sum of $307.80. To reverse that judgment, Lybrand has duly prosecuted an appeal to this court.

Lybrand seeks to reverse the judgment on the ground that he was only liable for the debts of the firm of Early & Jones which were exhibited to him at the time he entered into the contract of partnership with them, and that it was competent to prove by parol evidence that the debt sued on was not included in the list of debts of the firm so exhibited to him.

We can not agree with the defendant in his contention. The first clause of the contract which is recited above shows that Lybrand assumed one-third of the lia-

bilities and indebtedness of the firm of Early & Jones. It is true that the contract refers to a statement of all the money, debts, machinery, tools and all other property owned by the firm. This, however, does not mean the debts owed by the firm, but it means the debts that were due the firm. This is shown by the eighth clause of the contract which is copied above. It in plain terms provides that all the property of the firm is to be owned jointly and that all the indebtedness and liabilities of the former firm of Early & Jones was assumed by the firm of Early, Jones & Lybrand. The contract was complete in itself. It includes everything necessary to make a complete contract and there is nothing in its terms to indicate that it was not intended to express the whole agreement between the parties.

Therefore, the court properly held that all prior negotiations leading up to the written contract were merged therein and that the written contract could not be varied or modified by parol evidence. *Goodwin* v. *Baker,* 129 Ark. 513; *Armstrong* v. *Union Trust Co.,* 113 Ark. 509; *Cherokee Const. Co.* v. *Prairie Creek C. M. Co.,* 102 Ark. 428; and *Zearing* v. *Crawford, McGregor & Camby Co.,* 102 Ark. 575.

The list of indebtedness which Early & Jones exhibited to Lybrand was only a matter of inducement for the latter to enter into the contract of partnership. It was only one of the matters in the course of negotiation and did not form a part of the contract of partnership itself. Therefore, the court properly held that the plain import of the language used in the written agreement could not be varied by parol evidence. The amount of indebtedness was undisputed, and the court properly directed the jury to return a verdict in favor of the plaintiff against the defendant, Lybrand, for that amount.

Therefore, the judgment will be affirmed.

HUDDLESTON v. STEUART.

Opinion delivered April 24, 1922.

1. LIBEL AND SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.—In an action for slander, testimony that the statement in question was based on a current report concerning plaintiff was inadmissible in mitigation of damages where the court's instructions limited the jury's consideration to damages caused by defendant's statement.
2. TRIAL—NECESSITY OF REQUEST FOR INSTRUCTIONS.—Where an instruction as to a counterclaim for assault failed to state the duty of the assailant to withdraw in good faith before he could claim the right of self-defense, and, on objection by counsel, the court offered to submit an instruction on that subject if counsel would prepare it, on his failure to prepare it the giving of the original instruction was not error.
3. ASSAULT AND BATTERY—INSTRUCTION AS TO SELF-DEFENSE.—An instruction as to assault that if the assailant acted in necessary self-defense from real and honest conviction of the danger, the verdict should be for him, was erroneous in omitting the requirement that the assailant must have acted without fault or carelessness.

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

STATEMENT OF FACTS.

This was an action of slander brought by R. M. Steuart against John W. Huddleston. Huddleston denied the allegations of the complaint, and by way of cross-complaint sued Steuart for damages for unlawfully assaulting him.

According to the evidence adduced in behalf of the plaintiff, Steuart, he was a candidate for sheriff before the Democratic primaries in Pike County, Arkansas, and the defendant, Huddleston, in order to secure votes against him, told some of the voters that he, Steuart, had killed his father and had cursed his mother on her death-bed. Steuart did not kill his father and did not curse his mother on her death-bed. He had done nothing to his parents to give rise to such a report, and he suffered great humiliation and anguish of mind when he was informed of the language used about him by Huddleston.

On the part of the defendant Huddleston, evidence was adduced tending to show that Steuart about twenty years before had had a row with his father; that he had struck his father with his fist; that his father became sick in a few days and died in about a week thereafter from pneumonia. There was also introduced the evidence of a physician to the effect that pneumonia is sometimes caused by a blow.

Huddleston was a witness for himself on his cross-complaint. According to his testimony, Steuart followed him into Ballard's store in the town of Murfreesboro and tapped him on the back with his open hand and asked him why he not spoken to him before he came into the store. Huddleston had passed Steuart just before he entered the store. Previous to that time Steuart had threatened to sue Huddleston for slander on account of the remarks Huddleston had made about Steuart killing his own father. They had some words about this in Ballard's store, and Huddleston told Steuart not to get it into his head that he was afraid of him. Huddleston told Steuart, however, that he did not want any trouble with him, and then went back into the store and put both hands upon the counter. As he was standing there looking down towards the floor, Steuart hit him above the right eye with his right fist and knocked him senseless. Huddleston went down on his hands and knees and tried to get up. Steuart hit him again behind the right ear. Steuart knocked Huddleston to his knees the second time and then kicked him in the left side. Huddleston was going on a journey to a distant part of the county when he encountered Steuart, and had a pistol. He did not at any time attempt to use the pistol on Steuart or to hurt him in any other way. Huddleston was badly hurt by the blow he received from Steuart. Huddleston was about 59 years old and weighed about 156 pounds. Steuart was 35 years old, and was a very stout able-bodied young man.

Steuart was a witness for himself. According to his testimony, he went into Ballard's store to talk to Hud-

dleston about the slander case he anticipated bringing against him. During the course of their conversation Steuart saw the pistol which Huddleston was carrying, and Huddleston became angry and attempted to draw his pistol and shoot Steuart. Steuart then struck him with his fist and knocked him down on a bench. He did not strike Huddleston except to keep him from shooting him. Steuart did not make any attempt to jump on Huddleston or to kick him. About twenty years before that time Steuart's father had gotten drunk and tried to fight him. Steuart pushed his father away, and did not strike him at all.

Each party introduced evidence in corroboration of his own testimony. The above statement, however, contains the material evidence introduced by each party and is sufficient to present the issues raised by the appeal.

Among other instructions the court told the jury to first consider whether Steuart was entitled under the law and the evidence to recover of Huddleston, and, if so, to find the amount. The jury was then told to consider whether Huddleston was entitled to recover of Steuart, and, if so, to find the amount.

The jury was also told that, if it should find that both should recover, it should set-off the amount found in favor of each party and render a verdict for the difference in favor of the party for which it should find the larger amount.

The jury found a verdict for the plaintiff, Steuart, and from the judgment rendered the defendant Huddleston has duly prosecuted an appeal to this court.

Tompkins, McRae & Tompkins and *O. A. Featherston,* for appellant.

The defendant could properly be held responsible only for such damages as were caused by his own statements, and not for the statements made by others; he was therefore entitled to prove, in mitigation of damages, that he had heard these statements from various

different sources and that they had been current in the county for many years. 118 Ark. 81.

The undisputed evidence shows that Steuart was the aggressor in the assault. The question of self-defense was not properly in the case, and instruction 7 was objected to generally on that ground, and specifically because it ignored the duty on his part to make an honest effort to withdraw if he was the aggressor. We do not think the law imposes the duty both to point out the defect in an instruction and to ask a correct instruction covering the point. 141 Ark. 346. Having objected on the ground that self-defense was not an issue in the case, the effect of compliance with the court's suggestion to prepare an instruction would have been to waive the error in giving an instruction that subject. 93 Ark. 589; 94 *Id.* 524; 88 *Id.* 138. See also 135 Ark. 520, 527; 99 *Id.* 576; 62 *Id.* 286; 69 *Id.* 648.

Instruction 8 given by the court was erroneous in that it did not state that Steuart must have acted without fault or carelessness on his part. 75 Ark. 350; 59 *Id.* 132; 67 *Id.* 594; 69 *Id.* 649; 139 *Id.* 433; 116 *Id.* 17.

W. T. Kidd, for appellee.

The appellant did not offer to prove appellee's general reputation, but only that witness, Huddleston, had heard the rumor and repeated it. It was not competent, and was properly excluded. 95 Ark. 207; 55 *Id.* 501; 56 *Id.* 103; 52 S. W. (Ky.) 934.

If instruction 7 was open to the objection made by the appellant he should have asked a correct instruction covering the point. 47 Ark. 196; 80 *Id.* 354; 86 *Id.* 360; 95 *Id.* 409; 129 *Id.* 324; 67 *Id.* 416; 128 *Id.* 572; 114 *Id.* 399; 74 *Id.* 444; 75 *Id.* 142; *Id.* 373; 77 *Id.* 455.

Instruction 8 was not erroneous. The term, "reasonable man" and "without fault or carelessness," might either have been correctly used in the instruction. 29 Ark. 248; 55 *Id.* 593; 37 *Id.* 257; 77 *Id.* 97; 102 *Mass.* 155; 97 Ala. 55; 101 Cal. 229; 80 Ark. 92; 81 Iowa 138; 164 U. S. 492, 498; 69 Ark. 654.

HART, J., (after stating the facts). It is first insisted by counsel for the defendant that the judgment should be reversed because the court erred in refusing to allow the defendant to testify to certain facts before the jury. The defendant Huddleston, while on the witness stand, was asked from whom he got the information in regard to Steuart. The court sustained an objection to the question, and the defendant excepted to the ruling of the court and offered to state as a witness that he had heard the rumor about Steuart having killed his father just as he had stated it to the witnesses for five years, and that he had simply repeated what had been current rumor in the community for several years.

Counsel for the defendant insists that he was liable only for the damage caused by his own remarks, and that the offered testimony was admissible in mitigation of damages. Counsel invoke the rule laid down in *Simonson* v. *Lovewell,* 118 Ark. 81, to the effect that in awarding compensatory damages the jury might consider the fact that plaintiff bore the reputation of being a defaulter, or that his reputation for morality was bad in mitigation of damages. This principle had no application in the case at bar. Steuart's reputation for morality or immorality could not be established by showing that the remarks made by Huddleston were current rumor in the community. Of course Huddleston was only liable for the damages caused by his making the remarks, and was not liable for damages caused by other persons making the same remarks; but the instructions given by the court to the jury fixed the damages to the amount shown by the evidence in the case and thus confined the damages to the remarks made by Huddleston, for none other were proved to the jury. It follows that this assignment of error was not well taken.

It is next insisted that the court erred in giving one of plaintiff's instructions on the question of self-defense. It is insisted that Steuart followed Huddleston into Ballard's store and that the instruction ignored the duty devolving upon Steuart to attempt in good faith to with-

draw or abandon the difficulty before he could invoke the doctrine of self-defense. It is well settled that the court can not cover all the phases of a case in one instruction, and the record shows that when counsel made the objection now complained of to this instruction, the trial court told them that if they would prepare an instruction on self-defense fully defining it he would give it. This counsel declined to do, and we do not think the court under the circumstances erred in giving the instruction complained of.

It is next insisted that the court erred in instructing the jury on the measure of damages. We do not deem it necessary to set the instruction out. It is sufficient to say that it is in accordance with our previous decisions on the question. *Townsley* v. *Yentsch,* 98 Ark. 313; *Taylor* v. *Gumpert,* 96 Ark. 354; and *Murray* v. *Galbraith,* 95 Ark. 199.

It is next insisted that the court erred in giving instruction No. 8, which is as follows: "The court instructs the jury that the plaintiff was entitled to act upon appearances, and, if the language and conduct of Huddleston was such as to induce in the mind of a reasonable man, under all the circumstances then existing and viewed from the standpoint of Steuart, a fear that death or great bodily harm was about to be inflicted by Huddleston upon him, it does not matter if such danger was real or only apparent, and, if Steuart acted in necessary self-defense from real and honest conviction as to the character of the danger, if any, your verdict should be for Steuart on the cross-complaint, even though he was mistaken as to the extent of danger."

A specific objection was made to this instruction on the ground that the plaintiff must have acted without fault or carelessness on his part before he could invoke the doctrine of self-defense. In this contention we think counsel are correct. It is true that the defendant's standpoint is the proper one from which to view the imminency of the danger, but such belief on the part of the defendant must be an honest belief, and not due to his own negli-

gence. Mere honesty, however, is not in itself sufficient. The defendant must be free from fault or carelessness. If his belief is due to his own negligence, his honesty is not sufficient to justify the assault as having been done in self-defense. *Smith* v. *State*, 59 Ark. 132; *Magness* v. *State*, 67 Ark. 594; *Hoard* v. *State*, 80 Ark. 87; *Pickett* v. *State*, 91 Ark. 570, and *Dean* v. *State*, 139 Ark. 434. It may be said in this connection that the negligence which will prevent a homicide from being justifiable is negligence on the part of the slayer in making his self-defense, and not some prior negligence. *Elder* v. *State*, 69 Ark. 648.

It will be noted that, although specifically requested to do so, the court refused to incorporate into the instruction that the defendant must have acted without fault or carelessness on his part before he could justify the assault as having been done in self-defense. This ruling of the court necessarily resulted to the prejudice of the defendant. Under the instruction as given the jury might have found for Steuart on the theory that he honestly believed that he was about to receive great bodily harm at the hands of Huddleston, regardless of the fact of whether he was negligent or not in forming that belief. This is not the law. As we have just seen, he must have acted without fault or carelessness on his own part.

For the error in giving instruction No. 8, as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

CLIFFORD v. MCALESTER FUEL COMPANY.

Opinion delivered April 24, 1922.

EXECUTORS AND ADMINISTRATORS—PERSONAL LIABILITY OF EXECUTORS.—An executor purchasing coal to complete ditching contracts entered into by his testator in pursuance of direction in the will "to do all things necessary for the proper transaction of any old or new business which may seem to them [the executors] advisable" was not personally liable threfor, in view of the fact that the charge for the coal was made on the seller's books to the estate.

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

STATEMENT OF FACTS.

The McAlester Fuel Company sued John F. Clifford to recover $3,816.34 alleged to be due it for coal. The defendant denied liability.

The plaintiff is a corporation engaged in the business of buying and selling coal at McAlester, Okla. K. P. Alexander of Little Rock, Ark., was its agent, and as the representative of the plaintiff, had been selling coal for it in large quantities to Edgar J. Hahn for several years prior to his death. Hahn was a contractor and bond broker. In August, 1919, Hahn became ill and was carried to the St. Vincent's Infirmary in Little Rock, Ark. On the 16th day of August, 1919, he executed his will and died on the 20th day of August, 1919, in the infirmary. Hahn at the time of his death had entered into contracts with improvement district commissioners to construct seven drainage ditches and one road. The drainage contracts were far advanced in the course of construction. At the time of his death Hahn had large crews of men, a large amount of material, and a large amount of machinery which were used in the construction of said drainage projects. These contracts all provided for the completion of the improvement within a certain period of time and provided for damages against the contractor in the event they were not completed on the date designated.

The thirteenth and fifteenth clauses of Hahn's will are as follows:

"13. I hereby nominate, constitute and appoint Walter E. Orthwein of St. Louis, Mo., and Jno. F. Clifford, of Little Rock, Ark., my confidential friends, executors of this my last will and testament, and direct that neither of them shall be required to give bond or other security for the proper discharge of their duty hereunder."

"15. I hereby authorize and direct my said executors to do all things necessary for the proper settlement

of my estate, the payment of my debts and the transaction of any old or new business which may, to them, seem advisable. I hereby authorize, direct and empower them to execute, as in their discretion may seem proper, all deeds, leases or contracts, conveying either real or personal property, either in fee, absolute, as security or otherwise, and further direct that their acts in so doing be not questioned."

Walter E. Orthwein was Hahn's partner in the bond brokerage business with headquarters at St. Louis, Mo. He desired to wind up their partnership as surviving partner, and for that reason did not qualify as executor under the will. J. R. Vinson was appointed in his stead, and with John F. Clifford duly qualified as executor under the will of Edgar J. Hahn, deceased, and after consultation it was deemed to the best interest of his estate to carry out the drainage contracts which Hahn had obligated himself to perform.

Orders from the probate court to that effect were obtained, and the orders were couched in language as broad as the clause of the will above quoted. Hahn was a customer of the McAlester Fuel Company and was accustomed to buy large quantities of coal from it to carry out his drainage and road contracts. After his death his executors continued to buy coal from the plaintiff to be used in carrying out these drainage contracts.

The McAlester Fuel Company understood that the coal was purchased for this purpose and charged the same to the estate of Edgar J. Hahn, deceased. This was done after Alexander had investigated the matter and had been assured by the executors that the estate was solvent. The coal was furnished and charged exclusively to the account of Edgar J. Hahn's estate.

Suit was first brought against Hahn's executors with a view to holding his estate liable for the account sued on herein. That suit was dismissed, and subsequently the present suit was instituted for the purpose of holding Clifford individually liable. J. R. Vinson had died before the coal in question had been purchased.

The circuit court rendered judgment in favor of the plaintiff for the amount sued for, and to reverse that judgment, the defendant has duly prosecuted this appeal.

J. H. Carmichael and *Cockrill & Armistead,* for appellant.

Every man has the right to dispose of his property by will as he pleases, with only such limitations as the statute imposes (87 Ark. 243) and such will becomes the law to the personal representative of the deceased. 32 S. E. 16; 34 Ark. 251. The will in question instructed the executor to proceed with certain contracts if necessary for the preservation of the estate, and such acts on the part of the executor in carrying out the will became a charge against the estate and not against the executor individually. See 159 Calif. 755; 116 Pac. 47; 129 S. W. 823, 29 L. R. A. (N. S.) 264; 8 S. E. 180; 32 S. E. 16; 82 Ga. 177; 82 N. E. 194; 1 Daly 360; 10 Ala. 608; 51 Atl. 996.

The executor could at least make such purchases and do such things as were necessary to wind up the estate, or prevent waste. 115 Pac. 717; 69 Pac. 272; 46 S. W. 859; 53 Mo. App. 225; 52 N. E. 1067. See also *Rainey-Milburn Co.* v. *Ford,* 146 Ark. 563.

Sam T. Poe, Tom Poe, Malcolm W. Gannaway and *A. Carlyle Gannaway,* for appellee.

An executor is personally liable on a contract made by him, no matter whether the goods be charged to him personally or to the estate. 10 Ves. Jr. 110; 24 C. J. 60; Walker on Executors 228; 3 Williams on Executors 1689; 113 N. Y. 591; 2 How. (U. S.) 560; 32 N. J. Eq. 791; 34 Bea. 434; 12 N. Y. S. 389; 28 N. E. 254; 152 N. Y. S. 173; 135 Pac. 724; 6 Pac. 358; 38 Cal. 85; 20 Fla. 359; 7 Conn. 306; 72 Ala. 224; 5 Gray 403; 7 B. & C. 202; 56 Ark. 159; 34 Ark. 211; 61 Ark. 410.

Neither an order of court nor a direction in the will in any manner affects the personal liability of the executor to those with whom he contracts. 41 N. Y. 315; 34 Ark. 206.

HART, J. (after stating the facts). The theory of the court below, and that upon which it is sought to uphold the judgment, is that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. The general rule and numerous cases bearing on the question are collected and reviewed in Ann. Cas. 1915-C, at p. 367; 40 L. R. A. (N. S.) 201, and 3 A. L. R. pp. 1604 and 1608.

The general rule is that the claims and liabilities are fixed at the time of the death. With regard to these suits they must be brought by and against the personal representatives in their character as such. With regard to contracts made by the personal representatives themselves, in the course of administration, they are personal, although for the benefit of the estate. The reason is that the executor or administrator has no right to make a contract for a dead man. Hence the representative becomes the contracting party and is individually liable. *Bomford* v. *Grimes,* 17 Ark. 567; *Yarbrough* v. *Ward,* 34 Ark. 204; *Tucker* v. *Grace,* 61 Ark. 410; and *Bryan* v. *Craig,* 64 Ark. 438.

In the application of the general rule in *Altheimer* v. *Hunter,* 56 Ark. 159, it was said that it was not within the ordinary authority of a probate court to empower an administrator to continue the mercantile business of the deceased, and that an administrator is not empowered to bind the estate of a dead man by making a contract for him. The reason is that the death of a trader puts an end to his business and his executor or administrator has no authority to continue the business unless such authority is conferred by statute or by the terms of a will. The assets pass to the executor or administrator to be collected and applied to the payment of debts, and the remainder to be distributed to the heirs or devisees.

Again in *Altheimer* v. *Hunter, supra,* the court said that an executor may continue the business of his testator when empowered to do so by will, but that he becomes

personally liable for all the debts he contracts in the prosecution of his trust. This language was not necessary for a decision of the issue presented by the appeal in that case, but it is in accord with the general rule on the question as shown by the decisions cited in the case notes above referred to.

A leading case on that phase of the question is *Willis* v. *Sharp,* 113 N. Y. 586, 4 L. R. A. 493. In that case it was recognized that a testator may authorize or direct his executor to continue a trade or to employ his assets in trade or business; and that such authority will protect the executor from responsibility to those claiming under the will in case of loss without his fault or negligence, and also entitle him to indemnity out of the estate for any liability lawfully incurred within the scope of the power.

The court said, however, that it is the settled doctrine of the courts of common law that a debt contracted by an executor after the death of his testator, although contracted by him as executor, binds him individually, and does not bind the estate which he represents, notwithstanding it may have been contracted for the benefit of the estate. The principle upon which the case was decided was that an executor may disburse and use the funds of the estate for the purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. *Austin* v. *Munro,* 47 N. Y. 360.

Again in *Exchange Nat. Bank* v. *Bettes,* (Kan.) 3 A. L. R. p. 1604, it was held that the doctrine that the only effect of contracts made by an executor or administrator is to bind himself individually applies to a contract made by the personal representative, in attempting to carry on and complete a building contract entered into by the decedent in his lifetime.

It was contended in that case that an exception to the general rule would arise in case of building contracts entered into by the decedent during his lifetime, which remained incomplete at the time of his death, and which

the executor or administrator elected to complete. In that case the executor was not directed by the will of the testator to carry out his contract and the case falls within the general rule that the executor can not make a contract for a dead man without being authorized to do so by will or by statute expressly conferring such power. The testator may not have had in mind any one in whom he might have placed confidence sufficient to authorize him to carry out his contract. He might have deemed it more prudent to risk the loss which his estate might suffer in damages by reason of his death preventing his completion of his own contract. In any event, his will did not give his executor power to complete his contract and for that reason he could only administer the estate in due course of law and distribute the assets to the devisees after paying the claims probated against the estate. As we have already seen, he could not make a contract for his decedent without some authority to do so.

The cases where the testator has directed his executor to carry on his business come nearer being like the present case than any to which our minds have been directed; but such cases do not, in the opinion of the court, quite reach to the point here involved. In such cases the primary object of carrying on the business is for the profit to be made from continuing it. It is necessarily a new adventure and must be conducted by the executor independently of any direction or obligation on the part of his decedent. The executor would create new liabilities not expressly authorized by his decedent nor dependent upon any obligations incurred by him. Existing creditors and devisees under the will are not required to have the payment of their debts postponed to await the result of future adventures; and in such cases the executor cannot jeopardize the assets of the estate by making new and independent contracts, although they may be made for the benefit of the estate.

We think there is a marked distinction between a testator appointing a personal trustee in his will to carry on his business generally and directing his executor

to carry out a contract, the obligations of which he had assumed in his lifetime and which would become a charge upon his estate. In the one case, the executor is directed to carry on a new business for profit and in the other to wind up an old one for the purpose of distributing the assets of the estate to those entitled to them.

There are material facts in the present case which did not enter into the discussion or decisions of any of the cases collected above. We recognize the general rule to be that the powers, duties and obligations of the executor or administrator with respect to the estate are defined and limited by the will or statute. He has no interest in the assets, and therefore cannot charge them by any independent and new contract unless authorized by statute or the will.

Hahn made his will while lying sick in the hospital and died four days later. At the time he was stricken, he had various drainage ditches in the course of construction under contracts which were binding upon him and which would become charges against his estate. There had been a material rise in the prices of labor and materials since he had executed the contracts. He had the necessary machinery on hand with which to carry out his contracts. He had on hand a large amount of supplies and materials and was actively engaged in carrying out his contracts when he became sick. Doubtless he recognized the serious loss to his estate if no provision was made by him for completing his contracts. In the fifteenth clause of his will, in explicit and comprehensive language, Hahn conferred authority upon his executors to complete his unfinished contracts after his death. His evident purpose was to put his executors in his place with like authority as himself in the premises. The trust sought to be accomplished was not primarily to make a profit for the estate out of his business, but to dispose of and realize upon the assets to the best advantage. The language used is very broad and comprehensive. The testator directed his executors to do all things necessary for the proper settlement of his estate, the payment of

his debts, and the transaction of any old or new business which seemed advisable to them. They were empowered to execute, as in their discretion seemed proper, all deeds, leases or contracts, conveying either real or personal property in fee or as security or otherwise. The testator further directed that the acts of his executors in the premises should not be questioned and that neither of them be required to give bond.

Thus it will be seen that the testator had unlimited confidence in the honesty and business ability of his executors.

The language of the will is even broader than that in *Ferguson* v. *Ferguson,* 148 Ark. 290, which we construed to authorize the executor to mortgage the land of his testator for the purpose of borrowing money to enable him to cultivate the land for the current year. The executors in the case at bar were made the personal trustees of the testator for the purpose of carrying out his contracts and thus preventing great loss to his estate. Evidently there was no intention of continuing the business for the mere purpose of profit. The grant of the power and the imposition of the duties upon the executors were inconsistent with their personal liability in the premises. Such a trust could not be carried on without the expenditure of large sums of money, and the idea that the executor was expected to assume the burden thereof and the estate not be liable is utterly inconsistent with the terms of the will and the relation of the executors to the estate. They were given absolute power to sell or mortgage the estate, and the will further directed that their acts in so doing should not be questioned. The idea that the executors should be personally liable for expenditures made by them in carrying out the trust is inconsistent with the express power conferred upon them to make such contracts as they deemed necessary and to sell or mortgage the estate for that purpose.

The record shows that the plaintiff had been supplying Hahn with coal to be used in carrying out his

drainage contracts, and that it supplied the coal to his estate for the purpose of completing them. The plaintiff charged the estate with the coal sold, and the court is of the opinion that the peculiar circumstances of this case bring it within an exception to the general rule, and that the language of the will was sufficiently broad and comprehensive to empower the executors to make the contract sued on for the benefit of the estate. In short, the contract sued upon was made pursuant to express authority conferred by the will upon the executors to enable them to carry out contracts, the obligations of which had been incurred by the testator in his lifetime.

It follows that the court erred in finding for the plaintiff, and the judgment will be reversed and the cause remanded for further proceedings according to law.

WALTON v. ARKANSAS COUNTY.

Opinion delivered April 24, 1922.

TAXATION—RECOVERY OF ERRONEOUS ASSESSMENT.—Crawford & Moses' Dig., § 10180, providing for recovery of taxes erroneously assessed, has no application to the special road tax of ten cents an acre on lands belonging to nonresidents and situated in Arkansas County provided by Acts 1917, vol. 2, p. 2173; the former section referring to assessments made by the assessing officers or boards.

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

Appellant *pro se.*

The authorities agree that an unconstitutional statute is no statute, has no power, cannot be enforced. There was therefore in this case no taxing power. This is not a case of erroneous assessment, but the tax was invalid. There was a clear excess of power, and the property should have been exempt from the assessment of this nonresident land tax. Appellant was entitled to a refund of the taxes paid, under the provisions of the statute, C. & M. Digest, § 10180. 90 Ark. 413; 46 *Id.*

358; 37 Cyc. 1172; 6 R. C. L. 117; Am. & Eng. Ann. Cas. 1916-C, p. 227; *Id.* 1913-A, p. 471.

W. J. Wagoner and *Botts & O'Daniel,* for appellee.

The tax was not paid under compulsion within the legal meaning of the term, but, on the contrary was paid without protest, as found by the trial court. An illegal tax voluntarily paid cannot be recovered by the taxpayer. 107 Ark. 24; 98 U. S. 541, 543; 97 *Id.* 181. See also 37 Cyc. 1179; *Id.* 1180; 65 Ark. 155, 157; 46 *Id.* 358.

SMITH, J. This cause was heard in the court below on an agreed statement of facts, which may be summarized as follows. Walton is a nonresident of the State and is the owner of 1,573 acres of land in Arkansas County, and when he paid the taxes thereon for the year 1919 there was included in the taxes charged against him a special nonresident land tax of ten cents per acre. Walton paid this tax without knowing that it had been included in his receipt. This acreage tax was levied pursuant to a special act of the 1917 session of the General Assembly (Acts 1917, vol. 2, p. 2173) regulating the working of public roads in Arkansas County and providing a tax therefor. This act was held unconstitutional by this court in the case of *White River Lumber Co.* v. *Elliott,* 146 Ark. 551, on December 20, 1920. It was stipulated that, while Walton did not know this tax had been charged against his lands and included in his receipt, his lands would have been returned as delinquent and sold by the collector of taxes if this tax had not been paid.

After the decision of this court holding the special act unconstitutional, Walton filed a petition in the county court of Arkansas County asking the refund of this tax. The petition therefor alleged that of the tax so paid $24 had been placed to the credit of Road District No. 7, and $123.30 to the credit of Road District No. 6. These districts were not improvement districts. They were two of the districts into which the county had been divided under the road law for general road working purposes. The petition for the refund of this tax was filed in the office of the clerk of the county clerk on May 3, 1921, and was dis-

allowed by the county court on the same day. A similar order was made by the circuit court on appeal from the county court.

In the case of *White River Lbr. Co.* v. *Elliott, supra,* the lumber company paid its taxes under protest and notified the collector at the time that he would be called upon to refund the acreage tax then paid, and suit was brought against the collector while these taxes were still in his hands. We held in that case that, as the collector could have sold the lands for the non-payment of the taxes, and would have done so if they had not been paid, this would have constituted a cloud on the title, to prevent which the owner had the right to pay the taxes under protest and then sue the collector to recover them.

This proceeding was not instituted until more than a year had elapsed after the payment of the tax; in fact, it is a proceeding under section 10180 of Crawford & Moses' Digest, which reads as follows: "In case any person has paid or may hereafter pay taxes on any property, real or personal, erroneously assessed, upon satisfactory proof being adduced to the county court of the fact, the said court shall make an order refunding to such person the amount of the county tax so erroneously assessed and paid, and, upon production of a certified copy of such order to the Auditor, he shall draw his warrant on the State Treasurer for the amount of State tax erroneously assessed and paid. Such warrant shall be paid out of the appropriation to pay moneys arising from the erroneous assessment and collection of taxes. But in case there shall be no appropriation, or the appropriation shall have been exhausted, then the Auditor shall issue a certificate of indebtedness therefor."

It is the insistence of the petitioner that this section of the statute, as interpreted by this court in the case of *Clay County* v. *Brown Lumber Co.,* 90 Ark. 413, entitles him to have an order made by the county court directing the refund of the acreage tax which he paid.

We think, however, that the section quoted above does not authorize this proceeding. It is true that, in in-

terpreting this section (section 7180, Kirby's Digest) in the case of *Clay County* v. *Brown Lumber Co., supra,* the court said: "If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Digest, § 7180, give the owner a remedy for refunding of such taxes thus erroneously paid." But this language was used with reference to an "erroneous assessment," and the case of *Lyman* v. *Howe,* 64 Ark. 436, defines what is meant by an assessment of land for taxation, as follows: "The duty to assess devolves upon the assessor. Sand. & H. Dig., § 6485. No one else can perform that duty. Welty, Assessments, sec. 10. 'An assessment is an official listing of persons and property, with an estimate of the property of each, for the purpose of taxation.' Cooley, Tax. p. 351; Welty, Assessments, sec. 2.

"'All property subject to taxation shall be taxed according to its value.' Const. Ark. art. 16, sec. 5. So the fixing of some value upon property is indispensable to its assessment for taxation. Welty, Assessments, sec. 430. When the assessor does this in the first instance, then the board of equalization may equalize this valuation with the average valuation of other land, by raising or reducing same as the case may require, so as to fix its true value. Sand. & H. Dig., sec. 6530; *People* v. *Hastings,* 29 Calif. 451."

The tax here sought to be recovered was not assessed. It had no relation to and was not dependent upon the value of the land. It was not fixed by the usual assessing agencies. The Legislature itself fixed the tax as an imposition against the lands of that county for road-building purposes, on the arbitrary basis of ten cents for each acre owned by any nonresident of the State. Section 10180, C. & M. Dig., does not apply to such an imposition, and the relief prayed was properly denied.

WILLIAMS v. STATE.

Opinion delivered April 24, 1922.

1. CRIMINAL LAW—NECESSITY OF OBJECTIONS AND EXCEPTIONS.—Errors in the admission and exclusion of testimony and in giving and refusing to give instructions are not reviewable on appeal, in the absence of objection and exception thereto.
2. CRIMINAL LAW—RIGHT OF ACCUSED TO COUNSEL.—While the Constitution (art. 2, § 10) provides that in all criminal prosecutions the accused shall have the right to be heard by himself and his counsel, services of an attorney cannot be forced upon the accused, and if he conducts his own case he must object to the court's rulings which he wishes to review on appeal.
3. CRIMINAL LAW—MOTION IN ARREST OF JUDGMENT.—Under Crawford & Moses' Dig., § 3224, providing that the only ground for arresting a judgment shall be that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, *held* where the facts alleged in an indictment for robbery constituted a public offense, a motion in arrest of judgment was properly overruled.
4. INDICTMENT AND INFORMATION—TWO COUNTS.—An indictment in one count alleging that accused robbed another, and in a second count that he aided and abetted a third person to commit the robbery, charges a single offense.
5. ROBBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution for robbery evidence held sufficient to sustain a conviction of aiding and abetting another in committing robbery.

Appeal from Sharp Circuit Court, Northern District; *J. B. Baker,* Judge; affirmed.

David L. King, for appellant.

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

SMITH, J. Appellant was tried and convicted under an indictment containing two counts. The first count alleged that he robbed one A. E. McConnell. The second count alleged that one Sam Harmon had robbed McConnell, and that appellant "unlawfully and feloniously did stand by, aid, abet and assist the said Sam Harmon to do and commit said robbery in manner and form aforesaid."

Appellant appeared without counsel and asked permission to conduct his own defense. This right was ac-

corded him after the court had offered to appoint counsel to defend him if he desired counsel to be appointed.

The jury returned the following verdict: "We, the jury, find the defendant, John Williams, guilty of the crime of being an accessory to the crime of robbery as charged in the indictment, and fix his punishment at imprisonment in the State Penitentiary for a period of three years. (Signed) J. W. Phillips, foreman." Thereafter appllant employed counsel to represent him, and the attorney so employed filed a motion for a new trial, assigning numerous errors for the reversal of the judgment.

Most of the errors assigned relate to incidents connected with the trial in the admission and exclusion of testimony and in giving and refusing to give instructions; but, as no objections were made or exceptions saved, these questions are not presented for review. *Morris* v. *State,* 142 Ark. 297.

The Constitution gives one accused of crime the right to appear by himself and his counsel; but the services of an attorney cannot be forced upon him. Article 2, § 10, Const. 1874. He has the right, if he so elects, to conduct his own defense, but he does not thereby become absolved from the duty of observing the rules of practice designed to promote the orderly administration of the law. Appellant should therefore have made objection to such rulings of the court below as he cared to have reviewed by this court, and, as he made no objection to anything that occurred at his trial, there is presented for our review only such questions as can be raised without objection first being made in the court below.

A motion in arrest of judgment was properly overruled, as it is provided by statute that "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; and the court may arrest the judgment without motion on observing such defect." Section 3224, C. & M. Dig. The facts set out in the indictment do constitute a public offense.

No question is made about the sufficiency of the first count of the indictment charging appellant with the crime of robbery. The insistence is that the indictment upon which appellant was tried charged him with being guilty of the crime of robbery, whereas the jury returned a verdict against appellant of being an accessory to the crime of robbery—a crime not alleged or charged in the indictment.

We think appellant was charged with only one crime, and that was the crime of robbery. This crime was charged in two ways; first, that appellant did, himself, rob McConnell; second, that Sam Harmon robbed McConnell, and that appellant "did stand by, aid, abet and assist the said Sam Harmon to do and commit said robbery." But, as we have said, the two counts charged but a single offense.

This question was gone into thoroughly in the case of *Hunter* v. *State,* 104 Ark. 245, and what was there said is decisive of the question here raised. The indictment in that case charged that Hunter had killed and murdered one Patterson by stabbing him with a knife, whereas no attempt was made to show that Hunter had struck the fatal blow as charged, but only that he was present aiding and abetting in the commission of the offense, which was done by one Monasco.

It was there pointed out that our statutes have abolished the distinction existing at common law between principals in the first and second degrees, and that where this has been done, "an indictment of a principal in the second degree need not aver any facts other than those requisite to an indictment of the principal in the first degree. 22 Enc. Law & Pro. p. 360. See also 10 Enc. Pl. & Pr. p. 156."

It was there further said: "One present aiding and abetting the commission of a felony, formerly a principal in the second degree, is, under the statute, responsible for the result of the act done as though he had done it himself, a principal offender, and must be indicted and punished as such; and, in charging appellant with having

stabbed the deceased with a knife, his act was stated according to its legal effect, and a verdict upon testimony tending only to show that he was present, aiding and abetting in the commission of the offense is responsive to the charge, and not a variance therefrom. There is no longer a distinction between principals in the first and second degree, but all are principal offenders, and are required to be indicted and punished as such. *Evans* v. *State,* 58 Ark. 47; *State* v. *Kirk,* 10 Ore. 505; *Usselton* v. *People,* 149 Ill. 612; *State* v. *Payton,* 90 Mo. 220; *Commonwealth* v. *Chapman,* 11 Cush. 428."

The court there quoted with approval from 2 Bishop's Crim. Proc. § 1, § 3, par. 2, the following statement of the law: "Whenever one person's evil intent and another's criminal act combine, the allegations against the former may be either direct, that he did the thing, according to its legal effect, or indirect, that he instigated or procured the other to do it according to its outward form, and he did it. Whichever method is used in the averment, the proof may be that the defendant employed his personal volition or that he instigated another who did the act, as may be the more convenient to the practioner." But, after saying the practitioner might allege the commision of an act according to its legal effect, or according to its outward form, the same author says that "not often will the pleader elect to charge one as principal of the second degree; because, since this participant can be equally well convicted on an allegation of being the actual doer, or principal of the first degree, the latter method will ordinarily be deemed the more convenient." Bishop's Directions and Forms, § 115. This quotation also appears and is approved in the case of *Hunter* v. *State, supra.*

We have here an indictment which does in fact what Bishop says the pleader will not often elect to do, that is, charge one as principal in the second degree; but, as has been seen, this was not an improper thing to do, and the form of the verdict indicates that the conviction was had on this count.

The indictment also charges appellant as being a principal in the first degree; and this is the ordinary way of alleging the commission of the crime, but, as appears from the opinion in the case of *Hunter* v. *State, supra,* the two counts charge a single offense, and we need not further repeat the reasoning of that case here.

It is finally and very earnestly insisted that the testimony does not support the verdict. But, in our opinion, it is legally sufficient for that purpose. The testimony on behalf of the State is that Harmon—whose own conviction was affirmed by us on October 31, 1921, appeared at the home where McConnell lived with his maiden sister, a lady seventy-five years old. This old couple had a small iron safe, which Harmon compelled McConnell to unlock, and about $700 in money was found there, of which amount about $25 was in gold. The robber believed the old couple had more gold and demanded its surrender, and refused to accept as true their protestations that they had no more gold or other money. Both McConnell and his sister were bound, and for an hour or more they were subjected to revolting indignities and fiendish cruelty, all for the purpose of making them disclose the whereabouts of the gold which the robber insisted they possessed. While these outrages were continuing a second robber, who evidently had previously been on guard, came into the room. Both robbers wore masks, but they remained in the room long enough for the McConnells to closely observe them, and when Harmon was arrested and brought before them for identification a few days after the crime was committed, they were both positive that Harmon was one of the men who had abused and robbed them. They were less certain about the identity of appellant, but they both testified that he was about the size and make-up of the man who assisted in the robbery. A boy eighteen years of age, named Clarence Hill, testified that on the night of the robbery he saw Harmon and appellant at a place two miles from where Harmon and appellant lived and about six or seven miles from the McConnell home, and they

were walking from the direction of the McConnell home to their own home, and as he got within twenty-five or thirty feet of them, they stepped out by the side of a tree. Witness thought the men he saw were his father and a man named Phillips, and that they were trying to frighten him. So, to be reassured, he called out, "Where are you going?" and one of the men answered, "We are going fishing." Witness asked, "What did you catch?" and the same man answered, "Twenty" or "Forty," (the witness didn't remember which), and, after giving this last answer, they turned out of the road and went on. Appellant subjected this witness to a very searching examination, and made him admit that he might be mistaken, his statement being, "Of course I can't swear positive that it was them, but I do swear that I believe it was them." This witness also testified that he told his father the following day about meeting Harmon and appellant and seeing them leave the road and walk under a tree, and that he thought these men were his father and Phillips, and that they were trying to frighten him.

There was also testimony to the effect that appellant called on Sam Harmon after the latter had been arrested and said to him that if he hadn't already told anything, to keep his mouth shut, and he gave Harmon $5 and left the country the day before Harmon's trial commenced.

A witness named Harmon—whose relationship to Sam Harmon, if any existed, does not appear—testified that he heard a conversation between appellant and one Eddie Harmon, in which appellant solicited Eddie Harmon to assist in paying his attorney's fee, and stated that, if Eddie Harmon would do so, he (appellant) could beat his own case, and he (Eddie Harmon) would not thereafter be prosecuted. Will Harmon also testified that appellant solicited him to make a false charge on his books, dating it the day of the robbery, to aid appellant in establishing his alibi.

It may be said that appellant offered the testimony of several witnesses in support of his alibi, which, if true, made it impossible for him to have been present at the

time of the robbery. This testimony was evidently not believed by the jury, as is indicated by the verdict of guilty.

There is no error, and the judgment is affirmed.

FAIRVIEW COAL COMPANY v. ARKANSAS CENTRAL RAILWAY COMPANY.

Opinion delivered April 24, 1922.

1. APPEAL AND ERROR—FINAL ORDER.—An order sustaining a demurrer to the complaint but not rendering any judgment is not a final order from which an appeal will lie.
2. APPEAL AND ERROR—FINAL ORDER.—A recital that, after demurrer to the complaint was sustained, plaintiff excepted and declined to plead further and prayed an appeal to the Supreme Court is not equivalent to a rendition of final judgment for defendant.

Appeal from Logan Circuit Court, Northern District; *James Cochran,* Judge; appeal dismissed.

Robert J. White, for appellant.

Thos. B. Pryor, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the Logan Circuit Court for the northern district to recover damages on appellee's common-law liability for failure to furnish cars at the Hall Mine switch, about two miles from Paris, in said county, for the purpose of shipping coal from appellant's mine, near the Hall Mine switch, within a reasonable time after being requested to do so. A demurrer was filed to the complaint, which, upon hearing, was sustained by the court, over the objection and exception of appellant. The order sustaining the demurrer was in the following language: "Demurrer is by the court sustained; plaintiff at the time excepts and declines to plead further, and prays an appeal to the Supreme Court, which is granted, and 90 days given to file bill of exceptions herein."

Appellee insists that the appeal from the ruling on the demurrer was premature, as the order was not a final judgment. The appellate jurisdiction of this court is

confined to final orders, judgments and determinations of inferior courts of the State. So appeals from interlocutory orders are premature. Crawford & Moses' Digest, § 2129.

In the case of *Moody* v. *Jonesboro, L. C. & E. R. Co.,* 83 Ark. 371, it appeared in the order of the court that the demurrer to the answer was overruled in part and sustained in part, and that the plaintiff excepted to the ruling of the court, and elected to stand upon his demurrer, and prayed an appeal to the Supreme Court of Arkansas, which was granted. In passing upon the question as to whether the order was final or merely interlocutory, the court said: "The appeal in this case was premature, as no final judgment was rendered. The plaintiff filed a demurrer to the answer of defendant, which the court sustained as to certain defenses set up in the answer and overruled to other defenses contained therein. But no judgment was rendered disposing of the action in any way, not even a judgment for costs was rendered."

In the case of *Davis* v. *Receiver St. L. & S. F. R. Co.,* 117 Ark. 393, the court said: "When the court (referring to the trial court) sustained the demurrer, the plaintiff had his election to amend his complaint, or to rest and permit final judgment to be rendered dismissing his complaint and then appeal." In the case of *State* v. *Greenville Stone & Gravel Co.,* 122 Ark. 151, in holding that an appeal was premature, the court said: "An order sustaining a demurrer to the complaint is in effect a holding that the complaint is of no avail and, it seems, is as near a final order as could be conceived, that is not so in fact; yet we have often, and in some very recent cases, held that, 'where the trial court sustained a demurrer to a complaint without entering any further order or judgment, its action was not final and the order cannot be appealed from.' "

In the instant case it will appear by reference to the order that no final judgment was rendered dismissing the complaint; also that no judgment for costs was rendered

against appellant. It was clearly an interlocutory order, unless the use of the language to the effect that appellant refused to plead further amounted to a final disposition of the case. We think this language a mere recital of the attitude of appellant, and in no sense an act or order of the court. Certainly the language could not have greater effect than the language embraced in the *supra,* to the effect that the plaintiff elected to stand upon his demurrer. One statement seems to be no order in the case of *Moody* v. *Jonesboro, L. C. & E. R. Co.,* stronger than the other, and greater effect should not be given to one than the other. As no judgment was in words rendered disposing of the cause of action, or language used in the order importing that it was a final disposition of the case, the appeal was premature. The appeal is therefore dismissed without prejudice.

THOMAS v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered April 24, 1922.

1. JUDGMENT—RES JUDICATA—FORMER DISMISSAL.—Where an action was brought against the receiver of a railroad, and a motion to dismiss the complaint was made on the ground that another court had reserved the right to determine claims against the receiver, and defendant as purchaser at receiver's sale was made a party defendant and likewise filed its motion to dismiss the complaint on the same ground, a general order dismissing the cause as against all defendants was a final order, and precluded a second action against defendant purchaser.
2. JUDGMENT—RES JUDICATA—PARTIES.—The fact that a party in a prior suit was not a party in the pending suit, his interests having been disposed of to the defendant herein, did not preclude defendant from pleading the judgment in the former suit as *res judicata.*

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

Oscar H. Winn, G. A. Hillhouse, E. F. Duncan and *Otis W. Scarborough,* for appellant.

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

HUMPHREYS, J. This is an appeal from a judgment of the Jackson Circuit Court dismissing appellant's complaint against appellee, seeking to recover damages for an injury received by appellant on November 15, 1916, through the alleged negligence of the employees of B. F. Bush, who was at the time receiver of the St. Louis, Iron Mountain & Southern Railway Co. The complaint, as amended, alleged that appellee succeeded B. F. Bush in the operation of said railroad property by purchase, with full knowledge of all injuries inflicted upon persons and property by its predecessors, and that, on account of taking over said railroad, it assumed the liabilities of its said predecessors. The court dismissed the suit on appellee's plea of *res judicata*. This was the third complaint filed by appellant seeking to recover damages for the same injury. A nonsuit was taken on the second complaint, and the first was dismissed by the court for the want of jurisdiction, on the ground that the United States District Court for the Eastern Division of the Eastern District of Missouri, in which the receivership of B. F. Bush over said road had been administered, had reserved the right to determine and allow claims growing out of the liability of the receiver in operating said railroad properties. After B. F. Bush, as receiver for the St. Louis, Iron Mountain & Southern Railway Company, had filed a motion in the Jackson Circuit Court to dismiss appellant's first complaint, on the ground above stated, the appellee, the Missouri Pacific Railway Co., as purchaser at the receiver's sale, and successor in the operation of said railroad properties, was made a party defendant by appellant in said suit; whereupon it filed a motion to dismiss appellant's first complaint, adopting, in substance, the motion theretofore filed by B. F. Bush, receiver for the St. Louis, Iron Mountain & Southern Railway Co.

The order made by the court dismissing appellant's first complaint was entered under the style of *Alex Thomas* v. *B. F. Bush, as Receiver of the St. Louis, Iron Mountain & Southern Railway Co.* The order itself,

however, sustained the motion and dismissed the cause for want of jurisdiction and adjudged the costs against plaintiff (appellant). Appellant contends that this order of dismissal was not effective as a bar to his third complaint because the order was made in the receiver's motion and did not include the Missouri Pacific Railway Co. We cannot agree with appellant in this conclusion. After the Missouri Pacific Railway Company had been made a party, at the instance of appellant, and served by process, it filed a motion to dismiss the cause, adopting the motion of B. F. Bush, receiver, as a part of its motion. The judgment dismissing the cause being general, the language used had the effect of dismissing the case as against all defendants. It was a final order from which an appeal might have been prosecuted. Even if erroneous, which it is unnecessary to determine, appellant's only remedy to correct the error was by appeal.

Appellant also contends that the dismissal in the first suit was not a bar to the instant case because B. F. Bush, as receiver of the St. Louis, Iron Mountain & Southern Railway Co., was a party defendant in the first, but not a party in the instant case. We do not think this can make any difference, because the basis of both suits grows out of the alleged negligence of B. F. Bush as receiver of the St. Louis, Iron Mountain & Southern Railway Co. while operating the railroad properties, and it was alleged in both suits that the Missouri Pacific Railway Company was the purchaser and successor of its predecessors, and that by reason of taking over the operation of the railroad with knowledge of the claim it assumed the liability. The purpose of both suits was to enforce a claim arising under the administration of the railroad properties by B. F. Bush, receiver, against the Missouri Pacific Railway Co. as purchaser of the properties and successor to the former owners thereof. The issues therefore in both suits were identical, and the real parties in interest the same. The dismissal order was, in effect, an adjudication that appellant had no remedy against either the receiver or his successor, the Missouri

Pacific Railway Co., in the courts of Arkansas on account of the alleged injury, and was conclusive upon the parties and their privies. The judgment was based upon the motion to dismiss, and the only ground alleged in the motion for dismissal was that the properties of the St. Louis, Iron Mountain & Southern Railway Co., at the time the injury was received, were being administered in the Federal Court for the Eastern Division of the Eastern District of Missouri, which court had reserved in its orders the exclusive power and authority to adjudicate all claims growing out of the receivership. As above stated, this may have been an erroneous adjudication of appellant's rights, but it was final and appealable. The fact that a party in the original suit was no longer interested, because his interest had been disposed of, was omitted as a party defendant in another suit involving the same issues between the real parties in interest, could not be regarded as a new suit in the sense of precluding interested parties in the first suit from interposing a plea of *res judicata* upon issues determined in the first suit.

No error appearing, the judgment is affirmed.

MURCHISON v. STATE.

Opinion delivered May 1, 1922.

1. JURY—COMPETENCY OF JURORS.—In a criminal case a juror was not incompetent who had, in a general way, an opinion as to defendant's guilt or innocence, but stated that he knew nothing of the facts of the case or of any other charge against defendant, and that he could try the case on the testimony adduced, disregarding his general opinion.
2. INTOXICATING LIQUORS—EVIDENCE OF SALE.—In a prosecution for sale of intoxicating liquors, where the evidence showed that defendant owned the house where sales were made and employed another to run a lunch stand in the building, evidence that such employee was engaged in selling such liquors was competent as tending to prove that defendant was interested therein.
3. CRIMINAL LAW—COURT'S STATEMENT AS EXPRESSION OF OPINION.—In a prosecution for the sale of intoxicating liquors, where, in

overruling objections to testimony of sales made in defendant's absence, the court stated that the testimony showed that defendant was operating and controlling the house, and upon objection to such remarks the court admonished the jury to pay no attention to such statement, it was not objectionable.

4. WITNESSES—CROSS-EXAMINATION.—In a prosecution for selling intoxicating liquor, refusal to permit defendant's counsel to ask a witness on cross-examination where he got "white mule whiskey" on another occasion was not error.

5. CRIMINAL LAW—INSTRUCTION—GENERAL OBJECTION.—An instruction that "if you find that any witness has wilfully sworn false as to any material fact in issue in the case then you may disregard, if you see fit, all the evidence of any such witness, or you may give regard to that portion of the evidence of such witness as you may believe to be true or disregard that portion which you believe to be false," while not literally correct, is not open to a general objection.

6. CRIMINAL LAW—INSTRUCTION ALREADY COVERED.—The refusal of a requested instruction is not error when the instruction is substantially covered by one given.

7. CRIMINAL LAW—COERCION OF JURY.—Where the jury in a criminal case were recalled to the court room, and the judge inquired how they stood, and was told, "Eleven to one," and the judge stated that he saw "no reason why there should be no verdict, in this case, one way or the other," such remark, when considered with the whole of the judge's remarks, did not amount to coercion or to an expression of opinion on the weight of the evidence.

Appeal from Mississipppi Circuit Court, Chickasawba District; *R. E. L. Johnson,* Judge; affirmed.

Davis, Costen & Harrison, for appellant.

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

McCULLOCH, C. J. Appellant was convicted in the trial below under an indictment charging him with selling and being interested in the sale of intoxicating liquor.

In the trial of the case the State relied upon testimony tending to establish the sale of intoxicating liquor at appellant's place of business in the city of Blytheville, and there was evidence legally sufficient to warrant the jury in finding that whiskey was sold at that place, and that appellant had knowledge of the sale and was interested therein.

The first ground argued here for a reversal of the judgment is that the court erred in holding that one of the talesmen summoned by the sheriff was competent for service as a juror. After the court ruled upon the competency of the juror, appellant exercised a peremptory challenge, and thereafter exhausted his statutory number of peremptory challenges in making up the jury.

The talesman in question, Mr. Oberste, stated that in a general way he had an opinion concerning the guilt or innocence of the accused of the defense embraced in the indictment. On further examination by the court, he stated, however, that he knew nothing of the facts of this case or of any other particular charge of liquor-selling against appellant, and that he could try the case upon the testimony adduced, disregarding entirely his general opinion concerning the guilt or innocence of appellant.

The state of mind of Mr. Oberste, as established in substance by his statement made to the court, was that he had an opinion on his mind that appellant had been guilty of violating the laws against the sale of intoxicants, and that he would go into the jury box with that impression on his mind, but that he was not informed as to any facts upon which a charge of this kind against appellant was or could be predicated, and that he could try this case upon the testimony adduced. He was not asked to state, and did not state, the source of his information upon which his opinion was based. The juror was therefore not disqualified.

In the first place, it is not shown that the opinion of the juror was not based on mere rumor, and his statements of his mental attitude with respect to the matter showed that his opinion was necessarily based upon rumor, and not upon a statement of facts concerning appellant's guilt or innocence. There was no error of the court therefore in its ruling in this regard.

It is next insisted that the court erred in admitting certain testimony.

Appellant was the owner and occupant of a business house in the city of Blytheville, where he operated

a cold-drink stand. The ground floor consisted of a room about twenty-one feet in width and seventy-odd feet in length, with a small room cut off in the back end. There were rooms above, which appellant rented out to roomers. There was a man named Manning employed by appellant to run a hamburger stand in the main room of the store, and the State was permitted to prove that Manning sold whiskey at that place, and that he usually went back to the small room in the rear and brought out the bottles and delivered them to customers and collected the price.

One witness, Durham by name, testified that he bought whiskey from Manning at that place. Another witness, a carpenter who was working at the place, testified that he saw Manning make sales of whiskey, and that appellant was passing in and out of the room from time to time.

The sheriff of the county, Mr. Blackwood, testified that he raided the place several times and found fruit jars in the little room in the rear which smelled of whiskey, and that he found a funnel there which had the whiskey odor in it. Blackwood also testified that he lay in wait in the rear of the store one night and detected a person coming out of the back door with a bottle of liquor.

It is insisted that the court erred in admitting this testimony as to sales without showing that appellant was present at the time the sales were made, but we are of the opinion that the testimony was competent under the circumstances proved in the case, as the jury were warranted in drawing the inference from the facts proved that appellant was interested in the sale and had knowledge of the fact that Manning was selling whiskey. The place of business was owned and operated by appellant, and Manning was his employee. Appellant gave his personal attention to the operation of the business there, and, even though he was not present when Manning made the sales, if he was interested and knew that the sales

were being made by Manning, he was guilty under the statute. *Robinson* v. *State,* 38 Ark. 641.

Of course, the fact alone that Manning was the employee of appellant and sold intoxicants without appellant's knowledge or consent would not render appellant guilty of unlawful participation or interest in the sales (*Partridge* v. *State,* 88 Ark. 267); but, as before stated, if appellant was in fact interested in the sale and was aware of the fact that Manning was making the sales, he was equally guilty with Manning.

The court was therefore correct in permitting proof of sales made by Manning under the circumstances shown in the evidence.

Objections were made to remarks made by the court in overruling appellant's objections to this testimony, wherein the court stated, in substance, that the grounds for overruling the objections were that the testimony of the witnesses showed that the whiskey came out of appellant's house and tended to show that appellant was operating and controlling the house. The basis of the objection to this statement of the court is that it amounted to an expression of the opinion of the court on the weight of the evidence. When the objection to the remark was made, the court turned to the jury and gave the following admonition:

"You need not pay any attention to what the court said. I am simply making a ruling, and anything the court said you will pay no attention to, for the facts are for you to determine. And the court further states to you, with reference to the parties coming out of the back door of this place, as to what force and effect it has and the weight to attach to it, under the evidence, it is solely in your province to determine."

We do not think that the court's statement, when considered in connection with the admonition given to the jury, could be treated as an expression of the opinion of the court upon the weight of the evidence.

Again, it is insisted that the court erred in refusing to permit appellant's counsel to ask a witness on cross-

examination, where he got "white mule whiskey" on another occasion. The court held that it was unimportant where or from whom the witness had gotten liquor on other occasions, and appellant saved his exceptions to this ruling.

The court was undoubtedly right, for it is unimportant to inquire of the witness concerning the purchase of liquor from other persons at other times and places.

Appellant made a general objection to the following instruction given by the court:

"If you find that any witness has wilfully sworn false as to any material fact in issue in this case, then you may disregard, if you so see fit, all of the evidence of any such witness, or you may give regard to that portion of the evidence of such witness which you may believe to be true or disregard that portion which you believe to be false."

This instruction, when interpreted literally, was not a correct statement of the law on the subject, but, in the absence of a specific objection to it, appellant is not in an attitude to complain. *Bruder* v. *State,* 110 Ark. 402; *Johnson* v. *State,* 120 Ark. 193; *Griffin* v. *State,* 141 Ark. 43.

Error of the court is assigned in modifying the following instruction requested by appellant:

"The bare presence of the defendant at the time of the commission of the crime in question, if he were present, would not justify his conviction unless the evidence shows that he was by some act aiding, abetting, assisting or encouraging the person who actually committed the crime."

The change in the instruction was slight and merely changed the verbiage, which did not in anywise change the meaning of the instruction, and there was no error committed in this respect.

Finally, it is contended that the court committed error which was prejudicial to the rights of appellant in remarks made to the jury, after long deliberation over the case, which tended to coerce the jury into rendering a verdict.

It appears from the recitals of the bill of exceptions that, after the jury had been deliberating for a time, the court called the jury in and made inquiry of the foreman in the presence of the other jurors as to how the jury stood, and the foreman replied, "eleven to one." The court then stated that the jury would not be discharged, but would be required to deliberate further, and the court then gave further instructions concerning the form of the verdict and handed the jury forms for a verdict either for an acquittal or conviction. The jury came in again just before the noon recess, and, after announcing that a verdict had not been agreed upon, the court discharged them until the reconvening of the court, with the customary admonition not to discuss the case among themselves or permit any one else to speak with them concerning the case until they reconvened after the noon recess for further deliberation. After the recess, when the jury had assembled in the court room, the court made the following statement to the jury:

"Gentlemen of the jury, I just want to say that hung juries don't get the courts anywhere. It just means additional time taken up by the court and additional burden of expense on the public, and the court sees no reason why there should be no verdict reached in this case, one way or the other. As to how it goes, is a matter for you to determine, and I want you to take these forms of verdict and retire to the jury room and further consider this case."

It is insisted that this language of the court was calculated to operate as compulsion on the single juror who was holding out for acquittal to go over to the majority and join in a verdict of conviction. It will be observed, however, that the court in its statement admonished the jury that it was their duty to reach a verdict "one way or the other," and did not direct the attention of the jury to the particular verdict which should be rendered. It has been held in some of our decisions that a similar admonition given by the trial court to a jury does not constitute compulsion and is not reversible error.

Johnson v. *State,* 60 Ark. 45; *Jackson* v. *State,* 94 Ark. 169; *St. L. I. M. & S. Ry. Co.* v. *Carter,* 111 Ark. 272.

In *Johnson* v. *State, supra,* Judge BATTLE, speaking for the court, said:

"In the language objected to, no opinion as to the facts in the case is indicated, nor was the jury advised to yield their honest convictions for the purpose of arriving at a verdict. The court sought to impress them with the importance of a decision, and, while it did not ask them 'to yield up any question of conscience,' advised them to not be obstinate or too tenacious of their opinions. What, from this, were they reasonably to understand? Manifestly, that they should not be stubborn or unreasonable in adherence to their opinions. And this is the duty of jurors."

In the instance now before us for review, the court, by inquiry, elicited a statement from the foreman as to how the jury stood numerically, and it appeared from the statement that the jury stood eleven to one. It is generally a question of discretion with the court to determine how long a jury should be held together in an effort to agree upon a verdict, and there is no impropriety in the trial judge making inquiry as to the probability of the jury being able to arrive at a verdict if kept together for further deliberation. It is the opinion of the majority of this court that it is not improper for the trial court to inquire how the jury stands numerically, but the writer and Mr. Justice WOOD think that the practice is not one to be commended, for it is calculated to single out a juror or a small minority of the jurors as being especially in the mind of the court in any admonition that is given. In other words, the remarks of the court are rendered personal to some extent when the fact is openly brought to the attention of the court in the presence of the jury that a small minority is holding out against the majority. It is far better that whatever the court has to say to the jury in an admonition concerning the duty to arrive at a verdict should be entirely impersonal, and a single juror should not be made to feel that he is the sole object

of the court's remarks. However, we do not say that under all circumstances it constitutes reversible error for the court to thus elicit information concerning the standing of the jury and then to further give proper admonition as to the duty of the jurors in an effort to arrive at a verdict. The inquiry should, we think, be considered in determining the probable effect of the court's remarks and it might not, under some circumstances, be without controlling force.

In the present instance, when the whole of the court's remarks are considered together, we do not think that they amount to coercion or to an expression of opinion on the weight of the evidence and that they do not call for a reversal of the judgment.

We find, after careful consideration of the record, that there was no error committed by the court, and the judgment is therefore affirmed.

BANK OF SEARCY v. BALDOCK.

Opinion delivered May 1, 1922.

1. EVIDENCE—RELATIONS OF CO-SURETIES ON NOTE.—Where the relation of suretyship exists between joint promisors upon a bill or note, their relation may be shown for the purpose of establishing their relative equities as against each other.
2. PRINCIPAL AND SURETY—RIGHT TO CONTRIBUTION.—The reciprocal obligation of sureties to contribute proportionately to the payment of the principal debt does not depend upon an express contract between them, but is founded on principles of equity as a liability growing out of the mutual relationship.
3. EVIDENCE—RELATIONS OF CO-SURETIES.—It may be shown that of two sureties on a note one signed as accommodation for the other and the maker.
4. MORTGAGES—MORTGAGEE AS INNOCENT PURCHASER.—A mortgage executed by one tenant in common to plaintiff, conveyed only such rights as the mortgagor had, which were subject to a prior mortgage by both tenants in common, and the mortgagee in the subsequent mortgage was not an innocent purchaser as to equities which might arise between the two co-tenants as to the surplus funds after the foreclosure of the prior mortgage.

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

J. N. Rachels, for appellant.

Mrs. Hall and Mrs. Phillips were co-sureties for Hall on the Quattlebaum debt and were each liable therefor. One surety cannot take advantage of another so as to be relieved of joint liability. 147 Ark. 530. Mrs. Phillips is estopped from claiming that the debt must be paid by Mrs. Hall because she did not assert her claim and stood by and permitted the Bank of Searcy to take a mortgage upon Mrs. Hall's interest in the proceeds of the sale.

Where there is more property included in a trust deed than is sufficient to satisfy the debts, a pursuing creditor may file a bill to have the trust closed, and the proceeds applied first to the payment of the trust debts, and the excess to the satisfaction of complainant's debts. 18 Ark. 172; 18 Ark. 508.

As between parties having liens upon two funds, the holder of the prior lien may be compelled to first exhaust the fund upon which the other party has no lien. 72 Ark. 29.

Brundidge & Neelly, for appellee.

Appellee was not a co-surety with Mrs. Hall but an accommodation surety at the instance of Mrs. Hall. And the Quattlebaum debt should be satisfied out of Mrs. Hall's share of the proceeds. See 13 R. C. L. 1133; 94 Ark. 335, and cases there cited.

McCULLOCH, C. J. Alpha Smith (then unmarried) and Mrs. Eva Hall, wife of J. W. Hall, were the owners, as equal tenants in common, of certain real estate in the city of Searcy, which they inherited from their father, and which they occupied as their homestead.

J. W. Hall was engaged in the mercantile buiness in Searcy, and borrowed money from one Quattlebaum in the sum of $500, and executed his note for the same. Mrs. Hall and Miss Smith signed the note as joint makers and executed a deed of trust on said real property to appellee

Baldock as trustee to secure the payment of the debt to Quattlebaum. J. W. Hall was also indebted to appellant Bank of Searcy on a note in the sum of $1,000, executed to appellant, with certain other parties as sureties.

When the debt to appellant became due, an extension of time was granted in consideration of the execution by Hall and his wife of a mortgage on the latter's undivided half interest in said real estate to secure the payment of the debt to appellant. This mortgage was executed subsequent to the aforesaid deed of trust executed to secure the Quattlebaum debt.

The Quattlebaum deed of trust was foreclosed by appellee as trustee under the power of sale contained in the deed, and the property was purchased at the sale by T. J. Phillips, with whom Miss Alpha Smith had intermarried, and the price paid by Phillips for the property at the sale was $1,350, which, after paying the Quattlebaum debt, left a surplus of something more than $800.

Mrs. Hall then executed and delivered to appellant a written order, which constituted an assignment, directing appellee, as trustee, to pay over to appellant the sum of $420, which was about half of the surplus proceeds in the hands of appellee after paying off the Quattlebaum debt. Appellee refused to pay the same to appellant, stating that he would hold the proceeds subject to a settlement of the controversy between Mrs. Hall and Mrs. Phillips concerning the right to said surplus.

This action was brought by appellant in the chancery court of White County against appellee to compel the latter to pay over to appellant the amount of surplus funds in the appellee's hands covered by the order held by appellant from Mrs. Hall.

The contention of appellant is that Mrs. Hall and Mrs. Phillips were co-sureties for Hall on the note executed to Quattlebaum, that the surplus in excess of the amount paid in satisfaction of the Quattlebaum debt should be equally divided between said co-sureties, and that appellant was entitled to receive, under the order from Mrs. Hall, the latter's half of said surplus.

On the other hand, the contention of appellee, who defends under the rights and at the instigation of Mrs. Phillips, is that Mrs. Phillips was not a co-surety with Mrs. Hall, but that she was an accommodation surety at the instance of Mrs. Hall herself, and that the Quattlebaum debt should be satisfied out of Mrs. Hall's share of the proceeds of the foreclosure sale.

Appellant also contends that, even if the contention of appellee is sound with respect to the controversy between Mrs. Phillips and Mrs. Hall with reference to the division of the fund, this has no application as against the rights of appellant, who holds a mortgage on Mrs. Hall's undivided half interest, subject only to the prior Quattlebaum mortgage, and that appellant is not bound by any equities arising between the two owners of the property with respect to the distribution of the surplus fund.

Our conclusion is that appellant's contention on both propositions is unsound. Upon the issue of fact in the case, the testimony is with appellee. Mrs. Phillips testified, and she is not contradicted, that she executed the note at the earnest solicitation of both Hall and his wife, and that they both assured her that she would not be called upon to pay any part of the debt.

The evidence was sufficient to warrant the finding that Mrs. Phillips (Miss Smith, as she then was) did not execute the note as a co-surety with Mrs. Hall, but that it was the intention of the parties that she should merely sign the note and execute the mortgage as surety for Mrs. Hall as well as for Hall himself. On the face of the note itself, Mrs. Hall and Miss Smith were joint makers—not indorsers so as to make them liable in succession as between themselves.

We have often held that "where the relation of suretyship exists between joint promisors upon a bill or note, their relation may be shown as between themselves." *Vestal* v. *Knight,* 54 Ark. 97; *Hamiter* v. *Brown,* 88 Ark. 97; *Reed* v. *Rogers,* 134 Ark. 528; *Colvin* v. *Glover,* 143 Ark. 498.

The principle thus announced is sufficiently broad in its scope to permit co-sureties to prove their relations to each other for the purpose of establishing their relative equities as against each other.

The reciprocal obligations of sureties to contribute proportionately to the payment of the principal debt does not depend upon an express contract between them, but is founded upon the principles of equity as a liability growing out of the mutual relationship. *Weaver-Dowdy Co.* v. *Brewer,* 127 Ark. 462; *Reed* v. *Rogers, supra.* The true state of relationship, however, between co-sureties may be proved for the purpose of establishing their equities as between themselves. Within the operation of this principle, it was competent to show that, while Miss Smith and Mrs. Hall both signed the note, not as joint makers, but as sureties for J. W. Hall, it was not intended between themselves that Miss Smith should be a co-surety with Mrs. Hall, but that she was to be deemed an accommodation surety for both Hall and his wife. The effect of this was to show that, as between the parties themselves, Mrs. Hall was to be treated as a principal debtor and Miss Smith as a surety.

Appellant is in no better attitude in this case than Mrs. Hall would be if she were claiming the fund, for appellant, under its mortgage from Mrs. Hall and the order from her for the payment of the fund, merely stepped into her place, and appellant can claim only such equities as Mrs. Hall could assert.

The mortgage executed by Mrs. Hall to appellant only conveyed what rights she had in the property itself, which was subject to the prior mortgage to Quattlebaum, and appellant, by accepting the mortgage, was not an innocent purchaser as to the equities which might arise between the two owners in the surplus funds after the foreclosure of the mortgage.

The mortgage, or deed of trust, executed by the two tenants in common to Quattlebaum did not constitute a severable incumbrance upon the moieties owned by the several owners, but was given jointly as security for the

whole debt. Therefore, Mrs. Hall's half interest in the property was bound for the whole debt, and appellant in accepting the subsequent mortgage from Mrs. Hall did so with notice of the fact that the Quattlebaum deed was a superior incumbrance, and it is therefore not an innocent purchaser as against the equities of the owner of the other half of the land. In other words, the equities of Mrs. Phillips were superior in point of time and must prevail over those of appellant.

The decree of the chancery court was therefore correct, and the same is affirmed.

WATTS v. BRYAN.

Opinion delivered May 1, 1922.

HIGHWAYS—TAX—VOTE OF MAJORITY OF ELECTORS.—Amendment No. 3 of the Constitution authorizing a public road tax to be levied "if a majority of the qualified electors" of the county have voted it, requires a majority only of those voting on the question, not a majority of the highest number of votes cast at the election, nor a majority of all persons in the county entitled to vote.

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

W. F. Reeves, for appellant.

The court erred in overruling the demurrer of defendant.

The amendment did not require the affirmative vote of a majority of all the electors voting at the election for State and county officers. 45 Ark. 400; 69 Ark. 336; 15 Cyc. 388.

Qualified electors who are absent and not voting are considered as acquiescing in the result declared by the majority of those actually voting. 49 La. 422; 21 So. 647; 37 L. R. A. 761; 68 Md. 146; 5 North Dak. 594; 67 N. W. 958; 20 Ore. 154; 27 Atl. 45; 50 N. Y. 451; 2 Burrow (Eng.) 1017; 104 Ky. 629; 20 Wis. 572; 95 U. S. 360; 111 U. S. 556.

M. P. Hatcher, for appellee.

There was no error in overruling the demurrer.

The majority referred to means a majority of the votes cast at the election, and not a majority of those voting on the question. 45 Ark. 400; 9 R. C. L. sec. 118; 20 C. J. p. 205; sec. 266; 78 Ark. 432; 117 Ark. 465; 27 Ark. 217; 125 Ark. 557; 9 R. C. L. sec. 117; 6 L. R. A. 317; 135 Ark. 105.

The subject of road tax cannot be submitted under Amendment No. 5, except at a general election for State and county officers. 95 Ark. 336.

McCULLOCH, C. J. Appellees are citizens and taxpayers of Searcy County, and they instituted this action in the chancery court against appellant as the tax collector of that county to restrain him from collecting a road tax, alleging that it was levied by the county court without authority of a majority vote of the electors of the county as provided in the Constitution. The chancery court granted the relief prayed for in the complaint, the facts being made to appear from the records of the county, and an appeal has been duly prosecuted.

The facts appearing from the county records are that at the preceding general election the question of road tax was submitted to the electors, and there was a majority of those voting upon the question in favor of the road tax, but not a majority of those voting at the election.

The Constitution (Amendment No. 3, adopted at the general election of 1898) provides that the county courts of the State, with a majority of the justices of the peace, may levy a road tax of not exceeding three mills on the dollar "if a majority of the qualified electors of such county shall have voted public road tax at the general election for State and county officers preceding such levy at such election."

If the levy of the road tax by the county court was not based on the authority of a majority of the electors within the meaning of the constitutional provision, then

appellees, as citizens and taxpayers, have the right to restrain the collector from collecting the tax. *Merwin* v. *Fussell,* 93 Ark. 336.

The present inquiry, then, is narrowed to an interpretation of the language of Amendment No. 3 to determine what proportion of votes is required to authorize the levying of a road tax.

Counsel for appellees rely upon the case of *Rice* v. *Palmer,* 78 Ark. 432, in support of their contention that a majority of the highest number of votes cast at the election is required. The clause of the Constitution which was under consideration by the court in that case provides for the adoption of an amendment by "a majority of the electors voting at such election." The language of the amendment now under consideration is different, for it contains no express provision that there must be a favoring majority of those who vote at the election.

The language we are now considering is quite similar to that used in the clause of the Constitution (article 13, § 3) in regard to the removal of county seats, which received interpretation by this court in the case of *Vance* v. *Austell,* 45 Ark. 400. That provision of the Constitution is that a county seat shall not be changed "without the consent of a majority of the qualified voters of the county," and the language of the present amendment is that a road tax may be levied "if a majority of the qualified electors of such county shall have voted public road tax." The similarity of the two provisions is obvious.

In *Vance* v. *Austell, supra,* the court held that under this provision of the Constitution it was only necessary to have a majority of those voting on the question of removal. In the opinion in that case it was recognized that there was a conflict in the authorities on the proper construction of similar constitutional and statutory provisions, but the following was approved as the accepted doctrine according to the great weight of authority:

"Where a statute requires a question to be decided, or an officer to be chosen by the votes of a majority of the

voters of a county, this does not require that a majority of all persons in the county entitled to vote shall actually vote affirmatively, but only that the result shall be decided by a majority of the votes cast."

We think that the decision in the present case should be controlled largely by the views expressed in *Vance* v. *Austell, supra,* because of the similarity of the language used in the two provisions of the Constitution. There was nothing said in the provision dealt with in that case about the majority being of the votes cast at the election, and the provision of the Constitution now under consideration is the same in that respect. Among other authorities on this subject, the Supreme Court of the United States has given a similar interpretation to the same language as that used in the provision now under consideration. *Carroll County* v. *Smith,* 111 U. S. 556.

It has been said by this court that this "is a government of majorities," and that in elections only a plurality of the votes on a given question are required "unless there is some contrary specification in the organic law." *Hildreth* v. *Taylor,* 117 Ark. 465. There is, as before stated, no contrary specification in the clause of the Constitution now under consideration, and we should interpret the meaning of the language found in this clause in conformity with the rule of government by majority as expressed by those who exercise the elective franchise. In fact, the similarity of the language of that provision of the Constitution which was construed in *Vance* v. *Austell, supra,* justifies the inference that the framing and adoption of this amendment was in the light of the interpretation given to that language in the decision of this court cited above.

Our conclusion, therefore, is that Amendment No. 3 requires only a majority of those voting on the question in order to authorize the levy of a road tax, and that a majority of the highest number of votes cast at the election is not required.

The decree is reversed and the cause remanded, with directions to dismiss the complaint for want of equity.

HUMPHREYS, J., (concurring). I concur in the majority opinion to the effect that only a majority of the qualified electors voting for or against the public road tax in the general election was necessary to carry the road tax, and that the instant case is ruled by the case of *Vance* v. *Austell,* 45 Ark. 400. The majority, however, differentiate the instant case from the case of *Rice* v. *Palmer*, 78 Ark. 432, relied upon by appellee in support of his contention that a majority of the highest number of votes cast at the election was required to adopt the public road tax. In doing so they indirectly recommit themselves to the doctrine announced by the majority in the case of *Rice* v. *Palmer, supra.* In concurring in the reversal and dismissal of the instant case for the want of equity, it is not my purpose or intention to reaffirm the doctrine announced by the majority in the case of *Rice* v. *Palmer, supra.* I am in accord with the concurring opinion of Mr. Justice RIDDICK and dissenting opinion of Mr. Justice MCCULLOCH registered in that case, to the effect that the framers of the Constitution meant to require for the adoption of an amendment only a majority of all the electors voting upon that question at the election. In my opinion, the reasoning of Mr. Justice RIDDICK upon this particular point in his concurring opinion is unanswerable, and that the conclusion reached by him and Mr. Justice MCCULLOCH is sound. There can certainly be no escape from the correctness of their conclusion since the adoption of the initiative and referendum amendment to our Constitution.

LOGI v. STATE.

Opinion delivered May 1, 1922.

1. INTOXICATING LIQUORS—EVIDENCE OF MANUFACTURING.—Proof of mere possession of "choc beer" is insufficient to warrant a conviction of manufacturing intoxicating liquors where there was evidence that the beer had been bought of another.

2. INTOXICATING LIQUORS.—Proof of possession of a small quantity of hops and yeast was not sufficient to warrant a conviction of manufacturing intoxicating liquor where the testimony showed that they might have been procured for making bread.

3. INTOXICATING LIQUORS—"MALT LIQUOR" DEFINED.—"Malt liquor" is defined as a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by a distillation of malt or mash.

4. INTOXICATING LIQUORS—BURDEN OF PROOF.—The burden of proof is on the State in a prosecution for manufacturing intoxicating liquors.

5. CRIMINAL LAW—WEIGHT OF CIRCUMSTANTIAL EVIDENCE.—Where circumstantial evidence alone is relied upon to establish the guilt of one charged with crime, such evidence must exclude every other reasonable hypothesis than that of the guilt of the accused.

6. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—A conviction resting upon evidence which fails to come up to the standard prescribed by law is contrary to law, and it is the duty of the court to set aside the verdict.

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

Holland & Holland, for appellant.

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

HART, J. Antone Logi was indicted for the crime of manufacturing alcoholic, vinous, malt, spirituous or fermented liquors contrary to the provisions of sec. 6160 of Crawford & Moses' Digest. From the judgment of conviction he has duly prosecuted an appeal to this court.

It is earnestly insisted by counsel for appellant that the evidence is not sufficient to warrant the verdict, and we think that in this contention counsel are correct.

The chief witness for the State was John T. Tisdale, a prohibition enforcement officer. According to his testimony, he searched the dwelling house of appellant for intoxicating liquors in May, 1921. There was a cellar in the yard with a chicken coop over the top of it. Two barrels of "choc beer" were found in the cellar or hole in the ground. One of the barrels was nearly full, and

the other was about two-thirds full. They had pipes running from them to a cellar under the house. Both barrels were filled with a liquor called "choc beer," and it is intoxicating. The officer also found one carton containing four yeast cakes and a full carton containing six cakes. They were labeled "Yeast Foam" and were such as you buy out of a store. The officer also found two packages of hops and some sugar. He said that "choc beer" would ordinarily ferment in four days unless the weather was very cold. If it is exposed to air it will soon deteriorate, but if kept air-tight it would remain in kegs for fifteen or twenty days or perhaps ninety days. The "choc beer" in question appeared to have been covered up in the hole or cellar for about three weeks. The barrels had sacks over them and boards over the sacks. Then there was a piece of tin roofing over the boards and a chicken coop was set over it.

According to the testimony of appellant, he had bought the "choc beer" from John Loraine for his own use and had placed it in his cellar to preserve it. He had never engaged in the manufacture of any kind of intoxicating liquors and had never been interested therein. John Loraine hung himself a short time after he sold appellant the "choc beer."

Another witness, who was disinterested, testified that he saw John Loraine bring the two barrels of "choc beer" to the home of appellent and leave them.

The fourteen-year-old daughter of appellant was also a witness for him. According to her testimony the yeast cakes were used to make bread by her mother. There were also two little bunches of hops there, and her mother used them to make yeast.

The court correctly told the jury that the mere possession of the "choc beer" by appellant was not sufficient to convict him of manufacturing malt or intoxicating liquor.

It is insisted, however, that the possession of the hops and the yeast was sufficient to warrant the jury in finding him guilty.

Malt liquor is defined as a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by a distillation of malt or mash. *Sarlls* v. *United States,* 152 U. S. 570.

It will be noted that only a small amount of hops and yeast cakes were found at the home of appellant and these were only in such quantities as would naturally be used by a housewife in cooking. It is true that yeast is used to produce the fermentation of malt, but it was not shown that appellant had on hand any malt, mash or anything of the sort that might have been used in making choc beer.

It was also shown that the officer found some sugar at the house, but the quantity is not stated, and the finding of some sugar there is nothing more than would happen at any home. While the yeast and the hops could be used to ferment malt, nevertheless the yeast could be used for making bread and the hops for making yeast. The quantity found at appellant's house did not indicate that it was being used to make "choc beer" or other malt liquor.

It is suggested that the reason no quantity of malt, mash or any kind of grain that might have been used in making "choc beer" was not found at appellant's house was because he had used it up in making the "choc beer." If appellant had fermented the "choc beer" in the barrels in which it was found, the malt or grain would have settled in the barrels and have been found there. If appellant had manufactured malt liquors in other vessels, such vessels would have likely been found around his place and there would have been the grounds or residue of the grain which had been used in making the malt liquor. A search of the premises was made by the officer and none of these ingredients was found.

As we have already seen the possession of the "choc beer" itself was not sufficient to convict appellant of making it. It was not shown that appellant had purchased or had on hand any quantity of malt, hops, or yeast. To say that he had them on hand and had used

them in making "choc beer" would be merely a surmise. Considering the small quantity of yeast and hops found at appellant's house it is more likely that they were used in cooking than in making "choc beer." Anyway it would be a matter of conjecture to say that they were used in the manufacture of "choc beer." The burden of proof was on the State to establish that appellant had manufactured "choc beer," which is a malt liquor, contrary to the provisions of our statute, and having failed to meet this requirement of the law, a verdict of guilty can not be upheld on conjecture merely.

Where circumstantial evidence alone is relied upon to establish the guilt of one charged with crime, such evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Lowry* v. *State,* 135 Ark. 159, and *Green* v. *State,* 38 Ark. 304. A conviction resting upon evidence which fails to come up to the standard prescribed by law is contrary to law, and it is the duty of the court to set aside the verdict.

It follows that, the evidence not being legally sufficient to support the verdict, the judgment must be reversed, and the cause will be remanded for a new trial.

GAGE v. ROAD IMPROVEMENT DISTRICT NO. 3.

Opinion delivered May 1, 1922.

1. HIGHWAYS—LIABILITY ON CONTRACTOR'S BOND.—Under Crawford & Moses' Dig., § 5446, requiring a highway contractor to give a bond to the road district, conditioned to pay all indebtedness for labor and material furnished, and that action thereon, without involving the district in expense, may be brought by any person supplying labor and material, every such person has a separate and distinct cause of action.
2. COURTS—JURISDICTIONAL AMOUNT—SEPARATE CAUSE OF ACTION.—A circuit court has no jurisdiction of a consolidated suit on 72 separate causes of action in favor of as many persons on a highway contractor's bond for material and labor furnished, all of which causes except four were for a sum less than $100, although the aggregate amount exceeded the jurisdictional amount.

Appeal from Newton Circuit Court; *J. M. Shinn,* Judge; reversed.

STATEMENT OF FACTS.

Road Improvement District No. 3 of Newton County, Ark., for the use and benefit of the Hale Hardware Company and numerous other parties, brought suit in the circuit court against W. E. Gage, Wm. H. Spencer and the National Surety Company of New York, to recover judgment for the value of materials furnished and labor performed in the construction of a public road for the improvement of which said road improvement district was organized.

The complaint alleges that W. E. Gage and Wm. H. Spencer were the principal contractors to construct said improved road, and that they entered into a contract with said commissioners for the faithful performance of their contract. They also executed a bond with the National Surety Company of New York as surety to said road improvement district. The bond was conditioned for the faithful performance of the contract of W. E. Gage and Wm. H. Spencer with said road improvement district. The bond also contained a covenant that Gage and Spencer should pay all bills for materials and labor used in the construction of said improved road. A copy of the bond was exhibited with the complaint and made a part of it. A list of creditors who had furnished materials and performed labor on said road was attached to the complaint and made a part of it. There were about seventy-two claimants and the amount due each of them except four of them was less than $100.

The defendants interposed a special demurrer on the ground that the circuit court did not have jurisdiction because the amounts sued for were due on separate contracts and were for sums below the jurisdiction of the circuit court.

The court overruled the demurrer; and the defendants refusing to plead further, the court entered judgment in favor of said road improvement district against the defendants for the aggregate amount sued for.

To reverse that judgment the defendants have duly prosecuted an appeal to this court.

N. B. Maxey and *Geo. J. Crump,* for appellants.

The circuit court did not have jurisdiction. These were separate and distinct causes of action. Const. 1874, art. 7, sec. 11.

This is not a suit for the recovery of a penalty, but was an action for the recovery of a certain amount, and judgment for same.

The amount of each separate demand or cause of action determines the jurisdiction. 78 Ark. 595; 1 Ark. 252; 74 Ark. 615; 95 Ark. 195; 89 Ark. 435.

E. G. Mitchell, for appellees.

The circuit court had jurisdiction under sec. 5446 of Crawford & Moses' Digest.

HART, J. (after stating the facts). The suit is based upon sec. 5446 of Crawford & Moses' Digest, which is as follows:

"All contractors shall be required to give bond for the faithful performance of such contracts as may be awarded to them with good and sufficient security in an amount to be fixed by the board of commissioners, and said bond shall contain an additional obligation that such contractor, or contractors, shall promptly make payment to all persons, supply him, or them, labor and material in the prosecution of work provided for in such contract. Suit may be brought by and in the name of the district upon the bond given to the board. Any person, individual or corporation supplying labor and material shall have the right of action, and shall be authorized to bring suit in the name of the district for his, their or its use and benefit against said contractor and surety, and to prosecute same to final judgment and execution, but such action and its prosecution shall involve the district in no expense whatsoever."

The section in question is a part of our general statute relating to road improvement districts. The section provides that all contractors shall be required to give

bond for the faithful performance of their contracts with security in an amount to be fixed by the board of road commissioners. The section then provides that the bond shall contain an additional obligation that such contractors shall pay all persons supplying labor and materials in the prosecution of the work. It then provides that suit may be brought by and in the name of the district upon the bond given to the board. It provides further that any person supplying labor and materials shall have a right of action and shall be authorized to bring suit in the name of the district for his use against the contractor and his surety.

Continuing, the section provides that such person may prosecute his suit to final judgment and execution, but that the prosecution shall not involve the district in any expense.

The effect of this is to give the district a right to bring suit against the contractor and his surety for a breach of contract for the construction of the road. This part of the statute is for the benefit of the road district and gives it a right of action for the nonperformance of the contract by the contractor, or for a breach thereof by him.

The second condition of the bond is for the benefit of those furnishing material and labor used in the construction of the improved road. The statute in express terms gives such persons a right of action against the contractor and his surety. It is true that the statute provides that the suit may be brought in the name of the district, but it also expressly provides that such action shall not involve the district in any expense. This shows that the Legislature intended that each person furnishing labor or material, which is used in the construction of the road, shall have the control of the action against the contractor and his surety, and the various suits are separate and distinct causes of action against the contractor and the surety on his bond. Each person furnishing labor or material to be used in the construction of the road acts independently of the others, and the

various contracts are necessarily separate and independent agreements. A person who furnishes material under a contract made with the contractor or one of his subcontractors has no relation whatever to a person furnishing materials under another contract. So, too, different persons performing labor on the road under separate contracts have no relation to each other. Each person who brings himself within the provisions of the statute in making a contract has a right of action thereunder in the name of the district, but such action is for his own benefit and is separate and distinct from all other persons claiming rights under different contracts. Such is the effect of our construction of a similar statute in *Oliver Construction Co.* v. *Williams,* 152 Ark. 414, and *Arkansas Road Construction Co.* v. *Evans, ante* p. 142.

The action was commenced in the circuit court, and, since each cause of action was a separate one and was for less than the sum of $100, the circuit court had no jurisdiction of the subject-matter of the action. *Schaap* v. *First National Bank of Fort Smith,* 137 Ark. 251, and *S. A. Robertson & Co.* v. *Lewis Rich Const. Co.,* 151 Ark. 557.

According to the allegations of the complaint each party had a separate cause of action, and the circuit court was without jurisdiction of those where the amount sued for was less than $100.

Therefore, the court erred in not sustaining the demurrer to the complaint, and for that error the judgment will be reversed and the cause remanded for further proceedings according to law.

BARNETT v. McCLAIN.

Opinion delivered May 1, 1922.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Incapacity of an infant to sue in his own name cannot be raised for the first time on appeal from a judgment for the infant.
2. LIBEL AND SLANDER—ADMISSIBILITY OF TESTIMONY.—In an action for libel, in which plaintiffs were charged with having committed

perjury, testimony of grand jurors that one of the defendants who admitted his connection with the prosecution of plaintiffs for perjury but who had denied any connection with the alleged libel, had appeared before the grand jury in connection with the finding of the indictment charging defendants with perjury *held* admissible.

3. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.—A publication in a newspaper charging plaintiffs with having given perjured testimony is actionable *per se*.

4. LIBEL AND SLANDER—RIGHT TO COMPENSATORY DAMAGES.—Where libelous words are actionable *per se*, the plaintiff is entitled, as a matter of law, to compensatory damages, and is not required to introduce evidence of actual damages to entitle him to substantial damages.

5. PARTNERSHIP—LIABILITY FOR LIBEL.—Where a libelous publication was signed by one partner in the partnership name, the other partner would be liable though he did not authorize its publication, if the publication was to further any partnership plan or purpose or if he ratified it; but he would not be liable in the absence of ratification if the purpose of the publication was not to further the partnership business, but merely because of the individual volition of the partner who published it.

6. PARTNERSHIP—AGENCY.—Each partner is the agent of the partnership while acting within the scope of the partnership.

Appeal from Hot Spring Circuit Court; *W. R. Donham*, special judge; reversed as to Oscar Barnett.

Henry B. Means and *Martin, Wootton & Martin*, for appellants.

The trial court should have directed a verdict for appellants in the suit of Lola McCain. She was an infant and incapable of bringing or maintaining an action in her own name. C. & M. Digest, § 1111. See also 117 Ark. 547.

The appellants were not liable as partners. Bates on Partnership, § 461; 31 Minn. 268.

Oscar Barnett was not liable, in that the publication was not within the scope of the partnership agreement, and was not authorized by him. 51 Ind. 66; 7 Hun. 229; 92 S. W. 796; 13 So. 297; 9 Ill. 478; 14 Ill. App. 381; 56 Am. Rep. 169; 57 Ill. App. 296; 55 Am. Rep. 286; 7 Mo.

App. 329; 42 N. H. 25; 45 N. Y. 180; 21 Hun. 210; 18 N. Y. Supp. 215; 27 Tenn. 415.

The court erred in allowing R. M. Johnson, Albert Brown and Geo. Robertson, former grand jurors, to testify regarding what took place in the grand jury room concerning the indictment of Joe Porter for perjury. C. & M. Digest, §§ 2992-3; 99 Ark. 1; 136 S. W. 938; 84 S. W. 497; 73 Ark. 405; 66 S. W. 503; 140 S. W. 289; 100 Ark. 344; 152 S. W. 1019; 106 Ark. 131.

Isgrig & Dillon, for appellees.

The legal capacity of Lola McCain to sue was not taken advantage of as provided by statute. C. & M. Dig. § 1189; 117 Ark. 544. Questions are not raised at the trial below will not be considered on appeal. 108 Ark. 490; 74 Ark. 557; 74 Ark. 88.

If a partner in conducting the business of a partnership causes a libel to be published, the firm as well as the individual partner will be liable. Newell on Libel & Slander, 27. It is not necessary that the partner should publish the libel himself. 106 S. W. 837; 21 Ann. Cas. 485.

The individual members of a copartnership are civilly liable for torts, of which they have no knowledge, committed by any member of the firm in the conduct of the business. 104 N. E. 135; 41 L. R. A. (N. S.) 1223.

A civil action for libel can be maintained against a partnership where the wrong was done by one of the partners in the prosecution of the business. 83 Ala. 404; 3 So. 800; 106 S. W. 837; 133 Mass. 471.

Instruction No. 8 was a correct statement of the law. 99 N. E. 258; 41 L. R. A. (N. S.) 1223; 104 N. E. 135; 138 N. Y. Supp. 119.

The court properly refused to exclude from the jury's consideration evidence of malicious prosecution. 117 Ill. App. 198.

There was no error in permitting the grand jurors to testify. 12 R. C. L. 1039.

SMITH, J. Lola McClain, Joe T. Porter and Eugene Porter brought separate suits against Horatio Barnett and Oscar Barnett for damages for libel. The causes were consolidated and tried together, and each of the plaintiffs recovered judgment against both defendants for damages.

The litigation arose out of the publication, in August, 1918, in the Meteor, a newspaper published in Malvern, in which or near which city all of the parties lived, of the following advertisement:

"NOTICE TO BIDDERS.

"NOTICE IS HEREBY GIVEN, that any and all parties who may bid upon the above described property with view of securing title thereto are trespassers and will make themselves parties criminally thereto and will become a party to the conspirators now composed of E. H. Vance, Jr., and A. W. Jernigan as attorneys, and Joe T. Porter, Eugene Porter and Lola Porter, as witnesses, because the judgment from which the above described execution issued was secured by fraud practiced by said attorneys upon the court and upon the defendants, E. O. Barnett Bros., and by perjured evidence given by Joe T. Porter, Eugene Porter and Lola Porter as witnesses, all of which as facts appear upon the records of the circuit court records of Hot Springs County, Arkansas; as evidenced by transcript of case in *E. O. Barnett Bros.* v. *Joe T. Porter* and various affidavits now on file.

"(Signed) E. O. BARNETT BROS.
"By HORATIO BARNETT."

Horatio Barnett and Oscar Barnett are father and son, and for some years had been in business as partners under the firm name and style of E. O. Barnett Bros. This copartnership did a mercantile and brokerage business, and while thus engaged bought a mortgage which J. T. Porter had given to one Sligh on a mare and a crop of cotton and corn which Porter was growing on Sligh's farm, and the original litigation grew out of the proceeding brought to foreclose this mortgage.

The publisher of the paper testified that the article was a paid advertisement, authorized and paid for by Horatio Barnett. He further testified that he had done other printing for E. O. Barnett Bros., consisting principally of briefs in the Supreme Court, and that Oscar Barnett had paid for that work.

The above notice had reference to a sale about to occur under an execution which had issued in the case of *E. O. Barnett Bros.* v. *Joe T. Porter.* This litigation was long drawn out, and came before this court in the following appeals: *E. O. Barnett Bros.* v. *Porter,* 134 Ark. 268; *same,* 138 Ark. 65; *same,* 138 Ark. 613.

The defendants first filed a motion to dismiss the complaints on the ground that the firm had been dissolved in May, 1919, and that there existed no partnership assets. This motion was overruled; and the same fact was alleged in the separate answers filed in each of the cases. The answers further pleaded privilege, as relating to a pending suit in court; denied malice; and also pleaded the statute of limitations, and the truth of the publication. In addition, Oscar Barnett alleged in his answers that the publication was the individual act of Horatio Barnett and was unauthorized by him, and was not within the scope of the partnership agreement.

For the reversal of the judgment in the case of Lola McClain, it is insisted that she lacked capacity to sue, in that she was a minor. This question is, however, raised here for the first time; and the failure to raise it in the court below is sought to be excused on the ground that the infancy of the plaintiff did not appear in any pleading filed in the cause and the fact was first made known by the testimony offered at the trial. But no objection to her right to sue was made when this fact was developed in the testimony; and this question is disposed of in the case of *Davie* v. *Padgett,* 117 Ark. 544, where it was said: "It is insisted that under our statute, which provides that the action of an infant 'must be brought by a guardian or next friend' (Kirby's Digest, sec. 6021), that incapacity of an infant to sue in his own name is jurisdictional, and

that the question of jurisdiction may be raised at any stage of the proceedings, even on appeal to this court. The contention is, we think, unsound. The code of civil practice provides, as one of the grounds for demurrer, that the plaintiff has not legal capacity to sue, and that when such matter does not appear upon the face of the complaint, the objection may be made by answer (Kirby's Digest, secs. 6093-6096). The last section just cited provides that 'if no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same.' It thus appears that the statute itself provides that the incapacity of the plaintiff to sue may be waived by the defendant, and is waived by failing to take advantage of the defense at the time and in the manner pointed out by the statute. The judgment is not void because of the plaintiff's incapacity to sue, but that defect only constitutes error which calls for a reversal of the judgment, if taken advantage of in apt time."

It will be observed that the notice charges the plaintiffs with having given perjured testimony in the case of *Barnett Bros.* v. *Porter;* and it was shown that both father and son were instrumental in prosecuting Joe T. Porter and Eugene Porter for perjury, alleged to have been committed by them in that case. They were indicted for that offense, and upon their trial were acquitted.

Three members of the grand jury were permitted to testify that Oscar Barnett appeared before them in connection with the finding of this indictment.

No error was committed in admitting this testimony. In the first place, Oscar Barnett admitted his connection with this prosecution. He is a practicing attorney, and in that capacity consulted with his father and advised him that the parties were guilty of perjury. He admits doing this. Moreover, it was competent, aside from Oscar Barnett's admissions as a witness on the stand, to show his attitude and relation to this lawsuit and its management as circumstances from which the jury might

determine what, if anything, he had to do with the publication of the alleged libelous article. 12 R. C. L. p. 1039.

Defendants undertook to show that the article published was true, in that the plaintiffs in this suit had given perjured testimony in the original suit; and this defense was submitted under instructions against which no objections are urged; and the verdict of the jury is conclusive of that issue of fact.

The court refused to give, at the request of the defendants, instruction numbered 7, reading as follows: "You are instructed that you cannot find any damage beyond nominal damages unless the plaintiff proves such damages, and the court tells you that you cannot base your verdict on speculative damages, but it must be based on actual damages; and if the proof fails to show such actual damages your verdict must be for nominal damages only if you find from the evidence the plaintiff is entitled to recover against the defendant."

No error was committed in refusing this instruction. The article set out above charged the plaintiffs with the crime of perjury, and was therefore actionable *per se*. The law is that "where the slanderous words are actionable *per se*, the plaintiff is entitled as a matter of law to compensatory damages, and is not required to introduce evidence of actual damages to entitle him to recover substantial damages. In such case the plaintiff need not prove special damages in order to recover substantial damages. *Murray* v. *Galbraith*, 95 Ark. 199; 25 Cyc. 490." *Taylor* v. *Gumpert*, 96 Ark 354.

It is finally insisted that error was committed in giving, over the objection of Oscar Barnett, an instruction numbered 8, reading as follows: "You are instructed in this case that, if you believe from the evidence that Horatio Barnett and Oscar Barnett were acting together, or that Horatio Barnett was acting for them in a matter in which the partnership was interested, and in which he had a right to represent the partnership, then, although Oscar Barnett may not have published the libelous publi-

cation, then, if Horatio Barnett is liable, Oscar Barnett would be liable also."

This instruction appears to make the liability of Oscar Barnett depend upon that of Horatio Barnett, if there was a copartnership, and if Horatio Barnett was liable. But such is not the law. Oscar Barnett testified that he knew nothing about the publication of this article until he read it in the paper. Horatio Barnett was asked if Oscar Barnett knew of this article or had ratified it, and he answered, "No; it produced a little friction between us. He said I had done wrong; it was liable to get us in trouble; that I had better be careful about it."

Now, a partner may be civilly liable for the tort of his copartner; and he is liable if such tort is committed in the course of the partnership business; or if there is a ratification of such act with a knowledge of the circumstances of its commission. *McClure* v. *Hill,* 36 Ark. 268.

In 17 R. C. L. page 383, it is said: "According to the weight of authority, a civil action for the publication of a libel can be maintained against a partnership as such, where the wrong was participated in by all the partners, or was done by one of them in the prosecution of the firm's business."

The principle upon which a copartner may be held responsible for a libel is similar in principle to that upon which a corporation may be held liable. In the case of *Waters-Pierce Oil Co.* v. *Bridwell,* 103 Ark. 345, a corporation was held liable for slander, and we there said: "There is some conflict of authority in respect to the liability of a corporation for slander; but, inasmuch as a corporation must transact its business and perform its duties through natural persons, it is now well settled that a corporation is liable in damages for slander as it is for other torts. To establish its liability, the utterance of the slander must be shown to have been made by its authority or ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he is employed. (Citing cases)."

Each partner is the agent of the copartnership while acting within the scope of the copartnership. "If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner. So if any agent or servant of the firm defames any one by the express direction of the firm or in accordance with the general orders given by the firm for the conduct of their business. To hold either of the members of a partnership, it is not necessary that the partner should publish the libel himself. It is sufficient if he authorized, incited or encouraged any other person to do it; or if, having authority to forbid it, he permitted it, the act was his." Newell, Slander and Libel, (3rd. Ed.), § 472, p. 455.

See, also, Parsons on Partnership, § 100; Burdick on Partnership, p. 219; 1 Rowley, Modern Law of Partnership, § 513; Gilmore's Cases on Partnership, p. 396; 1 Bates on Partnership, § 315; Gilmore on Partnership, § 75; *Duquesne Distributing Co.* v. *Greenbaum,* 21 A. & E. Cas. 481.

If it was a part of the partnership purpose to deter bidding at the sale with reference to which the alleged libelous article was published, then both Horatio Barnett and Oscar Barnett are liable; or if Oscar Barnett authorized its publication, then he is liable. On the other hand, if the article was published by Horatio Barnett without authority of Oscar Barnett, and not in furtherance of any partnership plan or purpose, but only because of the individual volition of Horatio Barnett, then Horatio Barnett is alone liable.

For the error in giving instruction numbered 8 the judgment as to Oscar Barnett is reversed, and the cause remanded for a new trial. The judgment as to Horatio Barnett is affirmed.

EVANS v. HOYT.

Opinion delivered May 1, 1922.

1. EXECUTORS AND ADMINISTRATORS—VERIFICATION OF CLAIMS.—Crawford & Moses' Dig., § 101, requiring claims against estates of deceased persons to be verified, applies only to specific money demands due or to become due, and not to inchoate and contingent claims.
2. EXECUTORS AND ADMINISTRATORS—CLAIM AGAINST DECEASED CO-PARTNER—VERIFICATION.—A bill alleging that plaintiff's and defendant's intestates were partners, and that defendant's intestate was indebted to plaintiff, and asking for the appointment of a master to state an account between such partners, is a suit on a contingent or inchoate claim, and need not be verified, as required by Crawford & Moses' Dig., § 101.
3. PARTNERSHIP—SETTLEMENT BETWEEN COPARTNERS.—No specific money claim or demand can exist in favor of one partner against another growing out of the partnership affairs until there has been a settlement and some amount found due from the one to the other.
4. PARTNERSHIP—RIGHTS OF PARTNER.—Until the affairs of a partnership are wound up, the state of the account between the partners is inchoate and contingent.

Appeal from Independence Chancery Court; *Lyman F. Reeder,* Chancellor; reversed.

Samuel M. Casey, for appellant.

This being a suit by a partner against his deceased partner's administratrix, the probate court had no jurisdiction, and section 106, C. & M. Digest, requiring verification of the account, had no application. 57 Ark. 299; 117 Ark. 600.

The account could not be allowed by the administratrix nor by the probate court, as this court had no power to try the question of title to property or to adjust partnership accounts and make a final settlement. 116 Ark. 353; 123 Ark. 313. Such jurisdiction is vested in the chancery court.

To the effect that a verification of the claim, where one partner was seeking to recover property which the

administrator had taken charge of unlawfully, see 19 Ark. 443; 11 R. C. L. p. 279; 11 Ann. Cas. p. 1105; 50 Ark. 62.

The estate of a partner who has used the firm's assets for his own benefit becomes impressed with a lien in favor of creditors. 135 Am. St. 912.

Appellee is estopped to deny verification of the account because she waited until the day of trial to mention the matter. She should have demanded this before filing answer.

S. C. Knight and *Ernest Neill,* for appellee.

Appellant's claim should fail because not verified as required by statute (secs. 100 to 107, C. & M. Dig.), and as held in the following cases: 14 Ark. 246; 14 Ark. 237; 23 Ark. 604; 21 Ark. 519; 30 Ark. 756; 48 Ark. 304; 97 Ark. 546; 99 Ark. 523; 94 Ark. 60; 105 Ark. 95.

Objection to authentication may be made at any time before final judgment. 30 Ark. 756; 48 Ark. 304; 66 Ark. 327.

T. D. Crawford and *Samuel M. Casey,* for appellant, in reply.

Appellant was not asking for a specific money judgment against the estate—but merely that a master be appointed to state an account between the parties, therefore the nonclaim statute is not applicable. The claim was contingent and excepted from the operation of the statute of nonclaim—at least until it became due. 14 Ark. 246; 9 Ark. 412; 73 Wis. 533; 63 Ark. 218. The term "claim" as used is generally understood to mean a money demand. 80 Ala. 177; 9 Cal. 636; 52 Cal. 577; 105 Ark. 95.

HUMPHREYS, J. Appellant, A. A. Evans, filed a bill against appellee, Pearl Hoyt, in her capacity as administratrix of the estate of F. C. Hoyt, deceased, in the Independence Chancery Court, seeking to charge the estate with a large amount growing out of a partnership business for the purchase and sale of farm products, conducted under the name of F. C. Hoyt & Co., at Newark,

Ark., which was owned by F. C. Hoyt and appellant. The bill, in substance, alleged that A. A. Evans financed the concern and F. C. Hoyt managed it; that the partners were to share the profits and losses equally; that the business covered the years 1915, 1916, 1917, 1918, and until December, 1919, at which time F. C. Hoyt died; that the firm account was carried in the firm name in the First National Bank, at Newark, Ark., that in the conduct of the business F. C. Hoyt drew about 175 checks on the firm account for his individual use which were not charged on the books of the company against him; that F. C. Hoyt also used moneys belonging to the partnership to operate an individual business, and to purchase individual property, which was not charged to him on the books of the company; that he also used hay and feed belonging to the company for his individual purposes, which was not charged to him. A list of all the checks, giving the date, payee and amount of each, together with all the other items claimed, was filed as an exhibit to and made a part of the bill. The prayer of the bill was to charge the estate with the various sums and amounts used by F. C. Hoyt individually out of the partnership funds, and that a master be appointed to state an account between them.

Appellee filed an answer, denying each and every material allegation of the complaint. As additional defenses, she alleged settlements between appellant and her intestate from time to time during the period the business was conducted, and that appellant received from her intestate, or from the firm business, from time to time, sums aggregating more than appellant's interest or share in said business. On the 10th day of December, 1921, appellee, by permission of the court, amended her answer by including an allegation to the effect that the bill had not been verified as required by law, and that a verified statement of the account sued on had not been presented to appellee, as administratrix, as required by law, and upon that ground praying that the bill of appellant be dismissed. Immediately thereafter, according

to the record, the parties announced ready for trial, and the court treated the amendment to the answer as a motion to dismiss the bill, sustained the motion and dismissed the bill upon the ground that a verified statement of the account had not been filed in the action or presented to the appellee as required by law. From the decree dismissing the bill an appeal has been duly prosecuted to this court.

Appellant insists that his claim was not that character of demand embraced in section 101 of Crawford & Moses' Digest which must be authenticated by the affidavit of the claimant before suit could be brought upon it in the courts of this State. Section 101 of Crawford & Moses' Digest, in so far as it requires the claimant himself to verify a demand presented against an estate, is as follows: "The claimant shall append to his demand an affidavit of its justice, which may be made by himself or an agent, attorney or other person. If made by the claimant, it shall state that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due." The statute is dealing with the probation of claims against estates of deceased persons, and necessarily includes only claims susceptible to probate. The statute includes only specific money demands, due or to become due, and does not cover "inchoate and contingent" claims. *Walker* v. *Byers*, 14 Ark. 246. Appellant's insistence is that the claim sought to be recovered in the instant case was not for a specific money demand, but was dependent upon an accounting between the parties, and hence an inchoate contingent claim, and for that reason did not require authentication or verification as a prerequisite to the assertion of same in the courts of this State. Appellee's insistence is that the action brought is for the purpose of enforcing specific claims or items against the estate. A careful analysis and consideration of the bill has convinced us that it is an action for a partnership settlement, and not for the purpose of enforcing a specific money claim. It alleged

that appellant and appellee's intestate were partners; that appellee's intestate withdrew a large amount of money from the partnership fund for individual purposes with which he failed to charge himself on the books of the firm kept by him. The prayer of the bill was for the appointment of a master to state an account between appellant and appellee's intestate, and not for a judgment for any specific amount. The answer filed by appellee treated the bill as one for a partnership settlement. The allegations therein clearly indicate this, especially the allegation in reference to the settlements from time to time during the conduct of the partnership business, and also the allegation to the effect that appellant received from appellee's intestate, or from said firm business, from time to time, sums aggregating more than his interest or share in said business. The prayer of her answer not only asked for a dismissal of appellant's bill, but that it be treated as a cross-complaint and that the estate represented by her be allowed such amount as the court might find due her intestate. Our conclusion is that section 101 of Crawford & Moses' Digest, defining the mode of exhibiting demands against estates, has no application to actions between partners for partnership settlements. No money claim or demand can exist in favor of one partner against another until there has been a partnership settlement and some amount found due from one to the other. This is evident from the fact that a surviving partner has a right to wind up the affairs of the partnership without the intervention of proceedings in court. Until the affairs of the partnership are wound up, the state of the account between them is inchoate and contingent. Such claims are excepted from the requirements of the section of the statute pertaining to the presentation of claims against an estate to an executor or administrator.

The case of *Walker* v. *Byers*, 14 Ark. 246, cited and relied upon by appellee as controlling in the instant case, with reference to the necessity of authenticating the claim, is inapplicable, for the reason that the partner-

ship in that case had been dissolved and an account had been stated. Not so in the instant case; the action is for a partnership settlement.

For the reasons given, the decree dismissing appellant's bill is reversed and the cause remanded with directions to overrule the motion and reinstate the case.

HOLMES v. STATE.

Opinion delivered May 8, 1922.

1. INTOXICATING LIQUORS—EVIDENCE TO SUSTAIN CONVICTION.—Evidence *held* sufficient to sustain conviction of selling intoxicating liquor.
2. CRIMINAL LAW—REMARKS OF COURT.—Where the State's witness, in a prosecution for selling liquor, was asked whether he had seen defendant deliver whiskey at any other time or place, and in overruling an objection the court said that the testimony was admissible "as a circumstance to show that he was probably engaged in the business of selling liquor at the time this occurred, if it did occur; it goes to the jury in that way, and that way alone, and of the weight and effect thereof the jury is the sole and exclusive judge," the remarks did not constitute a comment on the weight of the testimony.
3. CRIMINAL LAW—GENERAL OBJECTION TO INSTRUCTION.—The court instructed the jury as follows: "If you find that any witness has wilfully sworn falsely as to any material fact in issue in the case, then you may disregard all the testimony of such witness, or you may give regard to that portion which you believe to be true, and disregard that portion which you believe to be false." *Held* not open to a general objection.
4. CRIMINAL LAW—FAILURE TO OBJECT TO IMPROPER REMARKS OF COURT.—Where no objection was made to the remarks of the court on the failure of the jury to reach a verdict, the error was waived.
5. CRIMINAL LAW—REMARKS OF COURT.—The trial court's remarks to the jury, upon report of a disagreement, that they had not considered the case long enough, that he was going to keep them together the rest of the week, and towards the end of the week would put them on bread and water, were improper.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. E. L. Johnson,* Judge; affirmed.

Davis, Costen & Harrison, and *Gravette & Rayner,* for appellant.

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

SMITH J. Appellant was convicted of selling intoxicating liquor, and has appealed.

It is first insisted that the evidence is not sufficient to sustain the verdict. But we do not agree with counsel in this contention. The State's case was made by a young man named T. E. McCullough, who testified substantially as follows: He and his father, W. E. McCullough, owned together a small mercantile business in the city of Blytheville, and on one occasion a salesman who sold and installed gum machines came into witness' place of business and went to work on some of his machines. The salesman was in an intoxicated condition. Appellant brought into the store a quart of moonshine whiskey, in a fruit jar, and set it over behind an ice box; he then went over to the salesman, who gave him $5, after which appellant left the store. Later the salesman was seen with some whiskey in a fruit jar similar to the one seen by witness McCullough. This witness had seen appellant on other occasions bring whiskey into the store.

It was admitted by appellant that he had on more than one occasion brought whiskey into the store, but he stated that in each instance he had brought the whiskey to W. E. McCullough, to whom it belonged and for whom he had been keeping it; and W. E. McCullough corroborated appellant in this statement. The transaction in which $5 changed hands was admitted, and the following explanation thereof offered. Appellant had bought one of the gum machines to be placed in a rooming-house owned by his wife and had made a deposit of $2.50 to cover his purchase. Appellant's wife decided not to buy the machine, and appellant so advised the salesman, who returned the deposit and in doing so gave appellant a five-dollar bill and received in change from appellant two dollars and fifty cents.

T. E. McCullough testified that he observed the parties closely, and no change was given by appellant to the salesman when he received the five-dollar bill.

Appellant sought, by the cross-examination of the State's witness, to secure the admission that the witness did not know the contents of the jar and was not certain that it contained whiskey. Without setting out the testimony as developed on cross-examination, we state our conclusion that the jury was fully warranted in finding that the jar contained whiskey and was delivered to the salesman, who paid appellant $5 therefor.

On direct examination of the State's witness, he was asked if he had seen appellant deliver any whiskey at any other time or place, and in overruling an objection to this question the court said the testimony was admissible "as a circumstance to show that he was probably engaged in the business of selling liquor at the time this occurred, if it did occur; it goes to the jury in that way and that way alone, and of the weight and effect thereof the jury is the sole and exclusive judge."

We think this remark of the court did not constitute a comment on the weight of the testimony. The testimony was in fact competent. *Casteel* v. *State,* 151 Ark. 69. We think, however, the better practice would have been for the court to have overruled appellant's objection without comment or explanation of the ruling.

Over appellant's objection the court gave an instruction numbered 2 reading as follows: "If you find that any witness has wilfully sworn falsely as to any material fact in issue in the case, then you may disregard all the testimony of such witness, or you may give regard to that portion which you believe to be true, and disregard that portion which you believe to be false."

We have here a record identical with that of the case of *Murchison* v. *State,* ante p. 300, where the same instruction was given. We there said a specific objection should have been made; and the general objection here made must be disposed of in the same manner.

On the hearing of the motion for new trial, counsel for appellant stated that he desired to introduce some evidence in support of his motion. The judge said: "If it isn't in the record, you have no right to prove it." Counsel then said: "The stenographer was not here at the time, your Honor, is the reason it wasn't taken. It was while the jury was deliberating, and I want now to offer proof that the court stated to the jury when they returned into open court, after several hours of consideration of their verdict in this case, and told the court that they were hopelessly hung and stood 10 to 2, and then the court stated to them that they had not considered the case long enough; that it was early in the week and that he was going to keep them together for the rest of the week and along toward the end of the week he would put them on bread and water." Thereupon the judge said: "All right, you don't have to put on your proof. I said that. Is there anything else?"

It is very earnestly insisted that this remark of the judge was improper and calls for the reversal of the judgment. But the majority of the court do not think so, for the reason that no objection was interposed when the remark was made. We are all of the opinion that the remark was highly improper and should not have been made; but the majority are of the opinion that the error was waived when appellant failed to object. In their opinion the attention of the court should have been called to the possible effect of the remark on the jury, thereby giving the judge an opportunity to withdraw it or to explain that it was not to be taken literally. It is the practice of this court to require an objection to be made in the trial below, and unless made there the error will be treated as waived; and this rule has been applied to remarks of the court as well as to other proceedings at the trial. 2 R. C. L. p. 92; *Southwestern Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254.

No error appearing, the judgment is affirmed.

RACHELS v. GARRETT.

Opinion delivered May 1, 1922.

1. FRAUDULENT CONVEYANCES—RIGHT OF CREDITORS TO QUESTION ATTORNEY'S FEE.—Where an insolvent debtor transferred to his attorney certain notes as payment for services, the creditors could question the reasonableness of the fee.
2. ATTORNEY AND CLIENT—ELEMENTS OF FEE.—In determining the reasonableness of an attorney's fee, the court may consider the relationship between the parties, the reasonableness of the employment, the amount or importance of the subject-matter of the suit, the degree of responsibility involved, and the time and labor bestowed.
3. ATTORNEY AND CLIENT—VALUE OF ATTORNEY'S SERVICES.—In fixing the value of legal services, there being no fixed standard, the court may apply to the testimony its own experience and knowledge of the character of the services.
4. APPEAL AND ERROR—FINDING AS TO ATTORNEY'S FEE—CONCLUSIVENESS.—A finding by a chancellor that the reasonable value of an attorney's services rendered to an insolvent debtor was only $3,840 was not against the weight of the testimony.
5. FRAUDULENT CONVEYANCES—LIABILITY OF ATTORNEY.—Where an insolvent debtor transferred to his attorney notes of the face value of $6,650 in payment of services of the reasonable value of $3,840, and the attorney settled with the maker of the note for a less sum than their face value, a decree for the creditors against the attorney for the difference between such face value and the reasonable value of the services was proper.

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

STATEMENT OF THE FACTS.

Robert D. Garrett, receiver of the First National Bank of Judsonia, Ark., brought suit in equity against C. M. Erganbright and others to cancel certain deeds and to recover judgment against them for an amount alleged to be due said bank. J. N. Rachels and others were made garnishees to the action.

C. M. Erganbright was president of said First National Bank when it closed its doors on the 3rd day of June, 1920. He had been the president for twenty years or more, and for the most of that time J. N. Rachels had been the attorney for both Erganbright and the bank.

In 1911 a tract of land was sold to satisfy a lien of $1,440 against it. Rachels became the purchaser at the sale. It was agreed between him and Erganbright that the latter should furnish the $1,440, and that the title should be taken in his name as security therefor. It was further understood between the parties that the land should be held until such time as they should agree upon a sale, and that Rachels was to have the profit arising from the sale as his fee for legal services performed for Erganbright and said bank.

No further action was taken in the matter until May, 1919, when Erganbright sold the land to his son. Erganbright reported the sale to Rachels at $5,280, and it was agreed between them that Rachels was entitled to $3,840 in payment of his fee. No payment, however, of any part of the amount was made to Rachels.

On the 26th day of April, 1920, Erganbright informed Rachels that certain persons were threatening to remove him from the board of directors of a levee and drainage district. After hearing his statement of the matter, Rachels demanded a fee of $5,000. While Erganbright was in the office, parties representing the other side of the question called Rachels to the telephone and offered him a fee of $5,000. Finally, on account of their former intimate relation, Rachels agreed to represent Erganbright for a fee of $2,500. He made a trip to St. Louis and several trips to Little Rock about the matter. He examined into the affairs of the district and represented Erganbright in the county court about the matter.

On May 29, 1920, Rachels went to Erganbright and reminded him that he owed him $3,840 for past services which had been fixed in the land deal above referred to, and also that he had contracted to pay him $2,500 for a fee in the levee and drainage matter. Rachels demanded payment of both these amounts. Erganbright told him that he did not have any money, but would give him some good notes. He told Rachels that he had the Walker Ladd notes, one for $3,000 due on the 12th of June, 1920,

and one for $3,650 due in about a year. Seeing that one of the notes matured soon, Rachels said to Erganbright, "This is about as good as money, is it not?" Erganbright replied in the affirmative, and assured Rachels that Ladd would pay him without a word. Rachels agreed to take the notes in settlement of what Erganbright owed him, and Erganbright indorsed the notes to him. The notes bore 8 per cent. interest. Rachels considered that Erganbright owed him $6,340. He considered the notes good for that amount. The face value of the notes was $6,650. After some negotiation with Ladd and his father, Rachels settled with them by receiving $3,000 in cash and taking Ladd's note for $1,500. Rachels made this kind of settlement because he needed the money, and was made to believe that Walker Ladd was not worth a great deal of money, and a great many threats and thrusts were brought to bear upon him to cause him to make this settlement.

The above facts were testified to in substance by Rachels, and his testimony was corroborated by that of Erganbright.

Erganbright disappeared on the night of June 2, 1920, and the bank closed its doors the next morning on this account. It turned out that Erganbright was a defaulter in such an amount as made the bank insolvent.

A receiver was appointed to take charge of its assets and wind up its business. The receiver obtained judgment against Erganbright in the sum of $52,615.82, and no part of this judgment has been paid by Erganbright.

The chancellor found the facts substantially as stated above and made a specific finding that Erganbright was indebted to Rachels on the 29th day of May, 1920, in the sum of $3,840. It was decreed that the receiver should recover from Rachels the sum of $2,810, being the difference between the face value of the notes which he had received from Erganbright and the amount that the court found that Erganbright was indebted to Rachels on May 29, 1920.

To reverse that decree Rachels has duly prosecuted an appeal to this court.

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

Brundidge & Neelly, for appellee.

HART, J. (after stating the facts). The chancellor found the facts to be that Erganbright owed Rachels $3,840 on account of the land deal and in payment of his legal services; but further found that there was no indebtedness for the $2,500 fee charged by Rachels for his services in a threatened suit against Erganbright to oust him from his position as director on a levee and drainage board.

It will be noted that the settlement between Erganbright and Rachels on the 29th day of May, 1920, was made on the basis that Erganbright owed the $2,500 fee. The face value of the Ladd notes was $6,650, and Rachels considered them good for his indebtedness, which he claimed to be $6,340. One of the Ladd notes was for $3,000 and was due within a few days after the settlement was made.

The chancellor did not allow Rachels any fee for his services in the threatened proceedings against Erganbright relative to his removal as a levee and drainage commissioner, and the correctness of the chancellor's decision depends largely upon the correctness of his finding in this matter. The reason is that Erganbright and Rachels both considered this fee as being due in making the transfer of the notes. At that time Erganbright was largely indebted to the bank, and he had no right to transfer his assets, except in payment of debts which he actually owed.

Of course, as between Erganbright and Rachels, they had a right to make a contract for the payment of whatever fee they might agree upon. We have no concern about that. But the rights of creditors have intervened, and they may question the reasonableness of the fee. If the fee was unreasonable or not due, this would to that

amount deprive them of assets of Erganbright which they might, through the receiver, subject to the payment of their claims.

It will be noted that Erganbright employed Rachels about the drainage matter on the 26th day of April, 1920, and that he disappeared on June 2, 1920. It is true that the record shows that Rachels represented Erganbright in the county court about the matter, but it does not disclose what proceedings were actually taken. The testimony is vague and indefinite about the whole matter. In making his finding the chancellor had a right to consider the relationship between the parties, the reasonableness of the employment, the amount or importance of the subject-matter of the suit, the degree of responsibility involved, and the time and labor bestowed. There is no fixed standard by which such services can be determined, and the court may apply to the testimony its own experience and knowledge of the character of such services. *Jacoway* v. *Hall,* 67 Ark. 340, and *Sain* v. *Bogle,* 122 Ark. 14, and cases cited.

The value of the plaintiff's services in the instant case is a matter with which the chancellor must necessarily have been familiar. The whole proceedings regarding the insolvent bank were before him. This included the relationship of Rachels to Erganbright as attorney and also their relationship to the bank. When the court is informed of the nature and extent of such services, its own experience furnishes it with an important element necessary to fix their value.

The amount fixed by the chancellor was deemed by him as sufficient payment for all the services rendered by the attorney. This was necessarily the result of his finding as a whole. The chancellor found that the attorney had, under all the facts and circumstances of the case, received adequate compensation, and when we consider his knowledge of the extent and character of such services, it can not be said that his finding of fact in this respect is against the preponderance of the evidence.

Therefore, under the settled rules of this court, the finding of fact cannot be disturbed on appeal.

Again it is insisted that the chancellor should only have charged Rachels with the difference between $3,840, the amount of fees allowed him, and $4,500, the amount which Rachels actually received on the Ladd notes. It will be remembered that the court charged him with the difference between $3,840 and the face value of the Ladd notes.

The creditors had nothing to do with Rachels settling with Ladd for $4,500. One of the notes for $3,000 was due at the time. It will be noted that Rachels only received this amount in cash and took a note for the remaining $1,500. The creditors had nothing to do with this transaction. This settlement between Erganbright and Rachels was on a basis that Erganbright owed Rachels $6,340 and the face value of the notes was $6,650. They bore 8 per cent. interest, and the parties settled on the basis that the notes were about worth their face value. Therefore, we do not think the court erred in charging Rachels with the difference between the amount allowed him and the face value of the notes. He can not escape liability on the ground that he settled with Ladd for the notes for a much less sum than their face value.

It follows that the decree must be affirmed.

BRUST v. STATE.

Opinion delivered May 1, 1922.

1. INDICTMENT AND INFORMATION—FELONIOUS NATURE.—In an indictment alleging that defendant did unlawfully, feloniously, etc., assault and carnally know," etc., both verbs were modified by the adverb, and the indictment charged a felony.
2. RAPE AND CARNAL ABUSE—JOINDER.—The offenses of rape and carnal abuse may be charged in the same count.
3. WITNESSES — CROSS-EXAMINATION — IMPEACHMENT.—In a rape prosecution where prosecutrix was asked about incidents tending to show that she had a lascivious mind, which she denied, it was not error to refuse to admit evidence of such misconduct.

4. JURY—REFUSAL TO PERMIT CHALLENGE.—It was not error to refuse to permit defendant to challenge a juror peremptorily after he had been accepted, where no reason therefor was given.
5. CRIMINAL LAW—SEPARATION OF JURY.—In a criminal case where the court ordered the jury to be kept together, the dividing of the jury into separate groups was improper, and the burden devolved upon the State to show that they had been subjected to noxious influences.
6. CRIMINAL LAW—SEPARATION OF JURY.—In a criminal prosecution where the court ordered the jury to be kept together, but they separated, and one juror went across the street to buy a cigar, testimony *held* to show that the jurors were not subjected to improper influence while so separated.
7. CRIMINAL LAW—SUSPENSION OF TRIAL.—In a prosecution for rape where a juror's father was injured, and with defendant's consent the trial was suspended for two months, and the jury separated, under instructions of the court, upon reconvening the refusal of defendant's motion to discharge the jury was not error.
8. CRIMINAL LAW—ADMISSION OF ACCUSED.—In a rape prosecution, where, during suspension of the trial, accused obtained a license to marry, evidence that he stated in his marriage affidavit that he was 21 was competent as an admission to rebut evidence that he was 18.

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

M. P. Huddleston, for appellant.

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

SMITH, J. Appellant was convicted of rape under an indictment, the charging part of which reads as follows: "In the county aforesaid, on the 24th day of November, 1921, the said Basil Brust did unlawfully, feloniously, violently, forcibly, and against her will, assault and carnally know one Irene Bobbitt, a female person under the age of sixteen years."

The insistence is that the adverbs, "unlawfully, feloniously, violently and forcibly," and the phrase, "and against her will," qualify only the word "assault," and charge only a misdemeanor, and that there are no adverbs in the indictment which qualify the verb "know" except the adverb "carnally."

We think this objection is not well taken. The charge is that the defendant did "assault" and "carnally know." The verbs "assault" and "know" are connected by the co-ordinate conjunction "and", and we think the adverbs employed limit and qualify both verbs.

It is also objected that the indictment charges two separate offenses. And so it does. But the offenses charged are rape and carnal abuse, and it is permissible to charge these offenses in a single count. *Powell* v. *State,* 149 Ark. 311, and cases there cited.

During the cross-examination of the girl assaulted she was asked about a number of incidents tending to show that she had a lascivious mind. She denied making the remarks or being guilty of the conduct inquired about. Thereafter the defendant offered to prove the specific instances of misconduct which she had denied committing. An objection to this testimony was sustained, and an exception saved. The defendant was permitted to offer testimony to the effect that the prosecutrix's reputation for truth and morality was bad.

No error was committed in the ruling just stated. The case of *Lockett* v. *State,* 136 Ark. 473, was a prosecution for an assault with intent to rape, and it was there said: "Now, it was competent, of course, to impeach the credibility of the prosecuting witness on cross-examination by interrogating her concerning particular instances of immorality on her part, but appellant was bound by her answers on that subject and could not introduce witnesses to contradict her. *McAlister* v. *State,* 99 Ark. 604." See also *Jackson* v. *State,* 92 Ark. 71; *Maxey* v. *State,* 66 Ark. 523; *Pleasant* v. *State,* 15 Ark. 624.

At a time when eleven jurors had been selected the State had two peremptory challenges left and the defendant had five. The defendant asked permission to challenge peremptorily one of the eleven jurors who had been accepted; but the request was denied. No reason was given to the court, and none appears in the record, why defendant desired to challenge the juror after hav-

ing previously accepted him. No error was committed in this ruling. In the case of *Allen* v. *State*, 70 Ark. 337, it was said: "Under the statutes of this State persons summoned as jurors, when called to serve in criminal cases, may be examined under oath touching their qualifications. As each one is called, he is first examined by the State, and then by the defendant, and, after such examination is completed, if the juror is found by the court to be competent, the State shall challenge him peremptorily or accept him; if accepted by the State, the defendant shall challenge him peremptorily or accept him. *Lackey* v. *State,* 67 Ark. 416. Each party must challenge or accept in the order named when the court declares him competent. After he is accepted by both parties, he cannot be challenged peremptorily without permission. The court, for good cause, may permit the challenge to be made at any time before the jury is completed. Sand. & H. Dig., §§ 2202-2217."

It was further said in the Allen case, *supra,* that, as the record failed to show any reason for challenging the juror after he had been selected and accepted, no error was committed in refusing to allow the defendant to challenge the juror. And, as the record now before us is in similar condition, the same rule must be applied. *Brown* v. *State,* 134 Ark. 597; *Temple* v. *State,* 126 Ark. 290.

The record shows that the court exercised its discretion to keep the jury together in charge of sworn officers from the time the jury was sworn on the 15th of December until it was discharged, as hereinafter stated, on December 17th, and that during the time the jury had been so ordered kept together, it had divided into two groups, and on more than one occasion these groups of jurors became widely separated.

It was also shown that George Taylor, a juror, left the group of which he was a member and went across the street to purchase a cigar, and that in doing so Taylor went out of the hearing of his fellow-jurors and that of the officer having the jurors in charge.

Permitting the jury to divide into two groups did not comply with the requirement that the jury should be kept together after the court had ordered that action taken. The entire jury should have been kept together; and, as this was not done, the burden then devolved on the State to show that the jury had not been subjected to any noxious influences. *Holt* v. *State,* 131 Ark. 391; *Armstrong* v. *State,* 102 Ark. 356.

We think, however, this burden was fully discharged. Every member of the jury was called and testified, not only as to communications or other improper influences during the time they were kept together, but also during the time they were permitted to separate, as hereinafter stated, and each juror testified that no one had attempted to communicate to him or with him anything concerning the case on trial. The affirmative showing was made that, while the jury did separate into two groups, a sworn officer accompanied each group and kept the members thereof together and suffered no person to speak to or communicate with them on any subject connected with the trial; nor did they do so themselves. Section 3187, C. & M. Digest.

As to the juror Taylor, the affirmative showing was made that he was away from his fellow-jurors only the length of time required to cross the street and buy a cigar, and during that time he was in the view of the officer having him in charge and that of his follow-jurors. He himself testified that no one mentioned the case in his presence or hearing while he was away from the group of jurors of which he was a member.

Error is assigned because of the refusal of the court to grant a new trial on account of alleged false answers given by a juror on his *voir dire* as to whether he had ever been interested in the trial of any "sex crime." The juror answered, on his *voir dire,* that he had not. We do not set out the examination of this juror conducted before the court on the hearing of the motion for a new trial; but we do not think it was made to appear that he had answered either falsely or evasively the questions

which had been asked him touching his qualifications to serve as a juror.

Before the taking of the testimony had been completed, the father of one of the jurors was shot and was brought to a hospital in the city of Paragould, where the court was in session. The attending surgeon was of the opinion that the patient would die, and the juror was advised of his father's condition. Thereupon defendant filed a motion to discharge the jury. This motion was overruled, but by consent it was agreed that the trial should be suspended and continued over until the 23rd of January, 1922, with the stipulation that during the interval the jury should be allowed to separate under strict instructions about receiving communications concerning the trial. This order of continuance recites that it was entered by consent of all parties, and that in consideration thereof it was agreed that, in the event the defendant was found guilty, the death penalty would be waived and the punishment should be fixed at imprisonment in the penitentiary for life, and the instructions, without reciting this agreement, told the jury the death penalty had been waived. During this suspension of the trial courts were held in other counties in the circuit. Upon the reconvening of the court the defendant filed a motion to discharge the jury. He insists that this should have been done, notwithstanding the fact that he had consented to the postponement of the trial and to the separation of the jury in the meantime. He insists that he should not be bound by his consent, because, to have done otherwise, would have incurred the displeasure of the jury, and especially would this have been the case had the jury been kept together during the period of adjournment. The further insistence is made that the protracted adjournment destroyed the integrity of the trial.

The holding of the court in the case of *McVay* v. *State,* 104 Ark. 629, is against the contention just stated. That case is not substantially different from the instant case, except that in the case now before us the period of

adjournment was for a somewhat longer time than was the adjournment in the McVay case. It is also true that the jury in the McVay case was kept together; while the jury in the instant case was allowed to separate; but in the opinion in the McVay case it was said: "The court could, in the exercise of its discretion, have permitted the jury to separate during the period of adjournment (Kirby's Digest, § 2390), and the fact that the court ordered the jury to be kept together did not affect its power to retain the jury during the period of adjournment."

It does not appear that the adjournment over in the McVay case, *supra,* was done by the consent of the defendant; while here express consent to that action was given; and we are of opinion no error was committed in so doing, even though the jury was allowed to separate and the adjournment was for a longer period of time than that in the McVay case. *Shinn* v. *State,* 150 Ark. 215.

During the period of adjournment the defendant was by consent admitted to bail; and while thus at liberty he obtained a license to marry a young lady not connected with the trial. The clerk of the county court was called and, over defendant's objection, was permitted to testify that when defendant applied for the license he made affidavit that he was then twenty-one years old. In admitting this testimony the court said: "It is not in the matter of considering whether the defendant did or did not commit perjury in making the affidavit before the clerk, or swear to an age which has formerly been maintained. Don't consider it from that point at all." The defendant did not testify, and it is very strenuously urged that the admission of this testimony was error calling for the reversal of the judgment.

It appears, however, that defendant's mother did testify in behalf of her son, and on her direct examination was asked defendant's age, and she stated that he was then eighteen years of age. This testimony was offered as substantive matter of defense, the theory being, no doubt, that the jury would not likely believe that a youth

of that age would be so amorously crazy as to commit the crime of rape; or it may have been offered to excite the sympathy of the jury on account of the youth of the accused; and it was not, therefore, improper to prove the affidavit of the defendant in obtaining the marriage license as a contradiction of the testimony of his mother and an admission by him that he had in fact attained a more advanced age than she had stated. This was not impeaching testimony, strictly speaking. The defendant saw proper to offer testimony that he was only eighteen years old; and the State met this testimony by proving his own admission that he was older. His declarations were, of course, admissible against him. He had stated to the clerk that he was twenty-one years old; at least the clerk so testified; and if it was proper for the jury to consider the age of the accused in making up their verdict, it was not improper to take into account defendant's own statement on that subject.

The girl assaulted testified unequivocally that the crime was committed forcibly and against her will; and there appears to be no error in the record, so the judgment must be affirmed. It is so ordered.

MUSGROVE v. HOLT.

Opinion delivered May 15, 1922.

1. WILLS—VALIDITY.—A will, in the handwriting of the testatrix, though partly written with pencil and partly with ink, and though long spaces intervened between paragraphs or sentences of the will, was not thereby rendered invalid; the names of the devisees and legatees being specifically mentioned and the bequests to them being set forth with sufficient clearness of description to identify the property which they were to receive.
2. WILLS—PLACE OF SIGNATURE.—Under Crawford & Moses' Dig., § 10494, providing that a will must be subscribed by the testatrix at the end thereof, where the body of a will was in the testatrix's handwriting and her signature appeared at the end thereof, a clause added by a third person after her signature, made without testator's knowledge, may be disregarded.

3. WILLS—ADDITION AND ERASURE.—Where an executor, without the knowledge of the testatrix, for the purpose of clarifying a will, erased a clause therein providing that the executors were to be paid $1000 for their services, and added, after the signature of the testatrix: "They are to receive $1000 in full for their services," the will was not invalidated thereby.

4. WILLS—HOLOGRAPH WILLS.—A will wholly written by the testatrix is valid, though it was written partly with ink and partly with pencil.

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

Gustave Jones, C. R. Leslie and *John W. Newman*, for appellants.

Every last will and testament must be subscribed by the testator at the end thereof, or by some person for him, at his request. C. & M. Digest, § 10494, first subdiv. See also 5th subdivision of same as to holographic wills.

The purpose of our statute in requiring wills to be signed at the end thereof is to provide against fraud, and this statutory requirement must not be frittered away by interpretation. 121 Ark. 448. The fraud to be prevented is the forging of inserted or additional provisions, the cutting off or erasure of provisions at the end, or the probate of an incomplete or deliberation, rather than a completed instrument.

The instrument, to be entitled to probate, must be the very paper intended by the testator to be his will. 28 R. C. L. 59; 1 Alexander on Wills, 569, § 420; 91 N. Y. 516, 520.

A holographic will must show on its face that it is final and complete and intended to be operative, just as it is when the testator subscribes his name. 126 N. Y. Suppl. 933; 146 Cal. 455, 106 Am. St. Rep. 53; 118 Penn. St. 37; Underwood on Wills, 252, § 186; 1 Alexander on Wills, 1917 Ed., 573; *Id.* 761, § 558; 40 Mont. 190, 26 L. R. A. (N. S.) 1145.

It is conceded that a will may be informal, not couched in any particular form of language, etc., and still

be valid, but it must, nevertheless, in order to be valid, meet the requirements of the statutes and the laws in regard to wills, and the statute requiring the will to be signed at the end must be strictly complied with. 224 S. W. (Ark.) 729.

In this instance, the presumption of law exists that the pencil writing was written after the writing and signature in ink. 1 Alexander on Wills 761, § 558; 126 N. Y. Suppl. 933. See also 6 Penn. 413.

John W. Moncrief, for executors.

This court is committed to the doctrine that no particular form is essential to the validity of a will. On the other hand, it has held that a will is sufficient, however irregular in form, or in expression, just so it discloses the intention of the testator touching the final disposition of his property. 80 Ark. 204; 144 Ark. 429; 122 Ark. 411; 116 *Id.* 565.

The blank spaces appearing in the body of the instrument do not affect its validity. 106 Am. St. Rep. 53, 59; 89 *Id.* 135, 139; 131 *Id.* 719, 80 Ohio St. 691; 10 A. L. R. 422.

The act of Holt in drawing the pencil mark through the words "consideration $1,000" and in writing the words following the signature of the testatrix cannot have the effect of revoking the will or of defeating its provisions.

Had the testatrix herself made these changes, that would not have invalidated the will. 36 L. R. A. (N. S.) 66, 79 Atl. 532; 98 Am. St. Rep. 808; 85 S. W. 179-181; 90 Am. St. Rep. 121; 57 *Id.* 135.

A will is not invalidated because blank spaces are left in the body of it, if the instrument itself be coherent and consistent. Schouler on Wills, 5th Ed., § 435, pp. 545-546. And an alteration appearing therein raises no presumption against it, but the question of the time of the alteration is one for the jury. 127 Am. St. Rep. 499.

The fact that a will was written partly with a pen and partly in pencil writing raises no presumption of

alteration. It merely raises a question of fact for the jury as to whether the part or parts written in pencil were so written before execution. 19 Am. St. Rep. 637; 95 N. Y. 145, 153. See also 129 N. Y. Suppl. 5; 1 Annotated Cases, 606-609.

As to whether this instrument is a will, or a mere suggestion for a will, was a question of fact, and the finding that it is a will is supported by the evidence. 1 Alexander on Wills, 58, § 52; 116 Ark. 565.

As to holographic wills see 59 N. E. 910; 14 L. R. A. (N. S.) 968-972; 1 Annotated Cases, 371-373; 37 N. E. 125, 128; 85 S. W. 179.

Botts & O'Daniel, for legatees.

WOOD, J. On the 26th of February, 1920, the probate court for the Southern District of Arkansas County, on the application of C. P. Chaney and Miss Myrtle Moon, admitted to probate a written instrument as the last will and testament of Mrs. P. D. Porter, deceased. Certain parts of the will are written in pencil, and other portions are written with ink. The will disposes of a large estate consisting of real and personal property. Several different parties are named as devisees and legatees in the will. The bulk of the estate was bequeathed to C. P. Chaney. The last clause of the will, as originally written in pencil, is as follows: "I appoint J. I. Porter and Earl Holt my executors of this, my last will and testament, without bond. Consideration $1,000 dollars. (Signed) P. D. Porter." Pencil marks were run through the words "Consideration $1,000 dollars" and after the signature was written the following: "They to receive $1,000 in full for their services."

William N. Musgrove, James L. Musgrove, Gilbert Musgrove and Lula Talbot objected to the probate of the will and were granted an appeal to the circuit court. In the circuit court they were named as parties contestants and filed their petition setting forth their grounds of contest, which are as follows: "(1). That the entire body of the will and the signature thereto are not writ-

ten in the proper handwriting of the testatrix. (2). That the said will is not subscribed to by the testatrix at the end thereof."

At the trial Myrtle Moon, Vida Hamilton and Mrs. Vida Hamilton, as guardian, were made parties proponents as beneficiaries under the will. The issue as to whether the instrument presented for probate was the will of Mrs. P. D. Porter was by consent of parties tried by the court.

The testimony tended to prove substantially the following: Three witnesses made affidavits in the probate court that for several years they had been familiar with the handwriting of Mrs. Porter; that the entire body of the proposed will and the signature thereto were in the proper handwriting of Mrs. P. D. Porter; that at the time of the execution of the alleged will she was more than twenty-one years of age and of sound and disposing mind and memory. Several other witnesses testified to the same effect. One of them stated that he had known Mrs. Porter all of his life and had made a study of handwriting for eight or ten years. This witness stated that the entire body of the will and the signature were written in the handwriting of Mrs. Porter. The words following the signature to-wit, "They to receive $1,000 in full for their services" were in the handwriting of Earl Holt.

The testimony of the county and probate clerk was to the same effect, and likewise that of J. L. Porter and R. F. Holt. Indeed, the testimony is undisputed that the entire body of the will and the signature were in the handwriting of Mrs. Porter, and that the words following her signature quoted above were written by Earl Holt.

Witnesses Porter and Holt testified concerning the erasure of the words, "Consideration $1,000 dollars" and the words written by Holt following her signature, substantially as follows: The pencil marks were run through the words, "consideration $1,000 dollars," after Mrs. Porter had signed and executed the will. This erasure was made and the words "They to receive $1,000 in full

for their services" were written by Holt in lieu thereof, or to explain the words through which the pencil marks had been drawn. This erasure was made and these words written after Mrs. Porter had left. J. I. Porter, a nephew by marriage of Mrs. Porter, had discussed with Mrs. Porter the making of her will. She wrote the same when she was on a visit to Hot Springs, and on her way from Hot Springs she stopped over in Stuttgart and talked with Porter about it. He read the will and sent word for Holt to come. Holt, who was a lawyer and a confidential friend of Mrs. Porter, took the will away to look it over carefully to see if any changes were needed. The next day or so he brought the will back to Porter's office, and they read it over carefully, and Holt stated that he thought the three words, "Consideration $1,000 dollars," should be a little clearer so that there would be no question among the heirs about it. Then at Porter's request Holt drew those lines through the words and added the words after the signature above indicated. This was all done after Mrs. Porter had gone home, and she had absolutely nothing to do with it. The matter came about, as explained, because Porter was a close kinsman of Mrs. Porter. The will, in this form, was sent to Mrs. Porter, and was not seen any more until it was taken out of the desk drawer in her office after her death.

It was shown that Mrs. Porter had some property in California and a one hundred dollar Liberty bond not included in the will.

Upon the above facts, the court found that the instrument proposed and admitted to probate by the probate court was the last will and testament of Mrs. P. D. Porter, and that the same had been properly proved and admitted to probate, and entered a judgment so declaring and dismissing the petition of the contestants, and for costs, from which judgment is this appeal.

1. The appellants contend, first, that, inasmuch as parts of the will were written with pencil and part with ink, the presumption is that those parts written

in pencil were written after Mrs. Porter had executed the will. They further contend that the parts written in pencil when read alone do not make sense, and that there were long blank spaces between paragraphs in the will, which show that the instrument on its face was merely "deliberative memoranda." It is impractical to set out the will in this opinion as it appears in the record. We have examined the same, however, and cannot sustain learned counsel in their above contentions. The undisputed testimony, as we have stated, shows that the entire body of the instrument and the signature thereto, as originally written, were in the proper handwriting of Mrs. Porter, and that the parts appearing in ink and in pencil were all written by her and were in the instrument when the will was left with Holt to see if it was in proper form and whether or not he had any changes to suggest.

The will, when read as a whole, is not unintelligible. The names of the devisees and legatees are specifically mentioned and the several bequests to them are set forth with sufficient clearness of description to identify the property which the testatrix intended the beneficiaries should receive. The fact that long spaces intervened between paragraphs or sentences of the will can make no difference where the testator by the language written makes a disposition of his property and the instrument is signed at the end thereof.

As was said by Judge RIDDICK in *Arendt* v. *Arendt*, 80 Ark. 204, quoting from Jarman on Wills: "The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded." The above was said concerning a document that took the

form of a letter which the court held to be a valid holographic will. See also *Murphy* v. *Murphy,* 144 Ark. 429.

The fact that there were blank spaces, some of them more or less lengthy, between paragraphs of the will or between the last writing and the signature can make no difference when it is clearly shown, as it is here, that nothing was inserted in the body of the will after the signature of the testatrix had been attached thereto. In other words, the body of this will, even if written at different times, was all written and signed by Mrs. Porter as her last will and testament and left with her kinsman and attorney as the instrument by which she intended to make the testamentary disposition of her property. It is not alleged and proved that there were any fraudulent insertions or interlineations in the instrument under review after the same had been signed by Mrs. Porter. Indeed, there is no pretense that the entire instrument, except the words, added after her signature and the erasure of the words preceding, was not the handiwork of Mrs. Porter. There is no room for the conclusion that this instrument was only intended by Mrs. Porter as merely "deliberative memoranda" as contended by the appellant, and not as her completed will. The instrument itself, as well as the evidence *aliunde,* proved clearly that same was her will. Sec. 10494, Crawford & Moses' Digest, provides as follows:

"Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: First. It must be subscribed by the testator at the end of the will, or by some person for him, at his request. * * * * * * Fifth. When the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of each testator or testatrix, notwithstanding there may be no attesting witnesses to such will * * * * * *."

In *Owens* v. *Douglas,* 121 Ark. 448, the court said: "The purpose of our statute in requiring wills to be signed at the end thereof is to provide against fraud, and this statutory requirement must not be frittered away by loose interpretation." When this will is scanned as a whole, there is no such intervening space between its provisions as to suggest that the will was not signed at the end of the testamentary dispositions and therefore at the end of the will. In the case of *Re Estate of Blake,* 136 Cal. 306, 68 Pa. 827, 89 Amer. St. Rep. 135-140, the will was written on a blank form, and after the end of the testamentary provisions there was a blank space with lines of more than half a page on which there was no writing or printing. On the following page under the heading, "Lastly," the provisions as to the appointment of the executrix is made; then follows the clause "In witness whereof," etc; and the name "Thomas M. Blake." The court said: "We think the will was signed at the end thereof within the meaning of the statute. There is no provision as to the disposition of property, or provision of any other kind, after the name of the testator. The name was signed at the end, but not immediately at the end of the testamentary provisions. It was not necessary for the signature to have been on the first or second line below the testamentary clauses." There is no testamentary disposition after the signature of Mrs. Porter. *Mader* v. *Apple,* 80 Ohio State 691, 89 N. E. 37, 131 Amer. St. Rep. 719; see also, *In re Moro,* 10 A. L. R. 422; *Estate of Seaman,* 146 Cal. 455; 80 Pa. 700, 106 Amer. St. Rep. 53, and authorities collated in case note to *Sears* v. *Sears,* 17 L. R. A. (N. S.) 353. The will under review was signed at the end thereof, was duly established, and meets every requirement of the above statute to constitute a valid holographic will.

2. The erasure made by Holt of the words, "Consideration $1,000 dollars" and the addition by him after the signature of the testatrix, were made after Mrs. Porter had signed the will, in her absence, and without

her knowledge. This erasure and this addition did not purport to affect any testamentary disposition. They were mere spoliations of the will by Holt, a stranger, and could have no effect whatever on the validity and probate of the will. Even if they had been made by Mrs. Porter herself, they would not have amounted to a revocation or cancellation of her will. They added nothing to it and took nothing from it. They were intended merely to clarify what appeared to Holt to be not clearly expressed; but, as they were made after Mrs. Porter had signed the will and without her knowledge, they did not affect the validity of the will. *Monrow* v. *Huddard,* 14 L. R. A. (N. S.) 259, 28 R. C. L. sec. 142, p. 183-186; *Hesterburg* v. *Clark,* 57 Amer. St. Rep. 135; *Re Kapen's Will,* 98 Amer. St. Rep. 808; *Howard* v. *Hunter,* 90 Amer. St. Rep. 121.

3. The statute does not require that a will shall be written in ink or pencil, or that it may not be written in both. Since the undisputed testimony shows that this entire will was written by Mrs. Porter herself, it was wholly immaterial whether pen and ink exclusively, or pencil, or both, were used. 28 R. C. L. sec. 62, p. 110. See, *In Re Estate of Tomlinson,* 19 Amer. St. Rep. 637; *Meyers* v. *Vanderbilt,* 24 Amer. St. Rep. 227; 40 Cyc. 1194; *LaRue* v. *Lee,* 14 L. R. A. (N. S.) 968. There is nothing either in the form of this will, the manner in which it was written (being partly with ink and partly with pencil) to indicate that the testatrix intended the same as mere deliberative memoranda. On the contrary, it occurs to us that the will itself and the evidence *aliunde* show that it was the intention of the testatrix to execute this instrument as her last will and testament. The decree of the trial court so holding, and directing that the judgment of the probate court admitting the will to probate be sustained, is in all things correct and is therefore affirmed.

McMURRAY v. McMURRAY.

Opinion delivered May 15, 1922.

1. DIVORCE—BILL OF REVIEW.—A bill to review a decree of divorce is insufficient where it does not allege any evidence discovered since the decree was entered and where the original divorce proceedings do not show any error of law upon their face.
2. DIVORCE—BILL OF REVIEW FOR ATTORNEY'S UNFAITHFULNESS.—A bill of review does not lie upon the ground that the original decree was rendered through the mistake, carelessness or unfaithfulness of her solicitor.
3. DIVORCE—BILL OF REVIEW FOR FAILURE TO GRANT ALIMONY.—Where a bill to review a decree of divorce for failure to grant alimony to petitioner fails to set forth that she was entitled to a division of property under Crawford & Moses' Dig., § 3511, and where the decree of divorce recited that she wilfully abandoned her husband for more than a year, the petition was properly dismissed.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

J. E. London, for appellant.

The decree is erroneous on its face. No provision is made for the restoration of property owned by either party at the time of marriage, and not disposed of at the time of decree. C. & M. Digest, sec. 3511.

A bill of review was the proper remedy to pursue, as relief could not be obtained in any other way. 84 Ark. 203.

The decree was rendered on the unsupported testimony of the plaintiff, and that, too, after it had been contradicted by the appellant, which is insufficient. 102 Ark. 54; 104 Ark. 381; 99 Ark. 94.

O. D. Thompson, for appellee.

A bill of review does not lie, except upon newly discovered evidence. None is shown here. Failure to elicit material facts in the examination of a witness is no ground. 26 Ark. 600.

Carelessness or unfaithfulness of solicitor is not ground to sustain a bill of review. 17 Ark. 45.

An appeal was granted and time allowed for filing bill of exceptions, but none was filed. There is no error on the face of the record, and the decree should be affirmed. 144 Ark. 436; 129 Ark. 193; 83 Ark. 124.

Wood, J. This appeal is from a decree of the chancery court of Crawford County dismissing the appellant's petition for bill of review. The record shows that the appellant filed her petition for bill of review in the chancery court on the 19th day of June, 1921, in which she alleged, among other things, that the decree of divorce granted at a former term of the chancery court was granted without the court being sufficiently advised in the premises. She alleged that she was greatly wronged by the decree and her rights taken away without just cause, the decree of divorce having been granted without sufficient testimony, without granting her any alimony or any relief except an attorney's fee; that when the suit for divorce was first called the plaintiff (appellee) and the defendant (appellant) testified. The court then refused to hear further testimony at that term and continued the cause for the term; that sometime in November the appellant received a notice from her attorney that the court would convene on the 20th of December, and for her to be on hand. She alleged that she appeared in court and waited all day expecting to be called, but late in the evening was informed by her attorney that she would not be needed, and sometime thereafter she learned that her husband had been granted a divorce. She alleged that no witness testified on behalf of the appellee except himself, and that she in her own behalf controverted all of his testimony with regard to her conduct toward him. She then set up that she had been compelled to leave her husband on account of unmerited abuse. She alleged that, if she be granted a bill of review, she will be able to prove the allegations of her complaint. She prayed for a bill of review and that the decree be set aside.

On the 20th of June, 1921, the appellee answered denying the allegations of appellant's petition, and alleged that the action for divorce was tried at the November term, 1920; that the court heard the testimony of the parties and one corroborating witness, which witness corroborated the testimony of the appellee; that the court at that term took the cause under advisement, and at the adjourned term December 14, 1920, entered a decree in favor of the appellee granting him a divorce. The court, after hearing the petition of the appellant and the response, dismissed the same for want of equity.

The appellant prayed and was granted an appeal and was given ninety days in which to prepare and file a bill of exceptions. No bill of exceptions was filed, and there is no error appearing on the face of the record. The allegations of the petition for the bill of review were denied by the appellee.

The grounds set up in appellant's petition for bill of review were not sufficient to entitle her to that relief. It does not allege any newly discovered evidence since that decree was rendered. The original divorce proceedings which the appellant seeks to have reviewed do not show on their face any errors of law. *White* v. *Holman,* 32 Ark. 753. The original decree of divorce recites, among other things, the following: "This case was tried upon the complaint and the exhibits thereto and the answer of defendant. After hearing of the oral testimony the court finds the issues in favor of the plaintiff and against the defendant." The appellant alleges in her petition that the cause was heard only upon the testimony of the plaintiff and the defendant, but the appellee denies this allegation and alleges that another witness was introduced in the original action besides the plaintiff and defendant. Another ground alleged is that her attorney informed her that she would not be needed. She left, went home, and afterwards learned that the decree of divorce had been granted. But a bill of review does not lie on the ground that

the original decree was rendered through the mistake, carelessness, or unfaithfulness of her solicitor. *Price* v. *Notrebe's Heir,* 17 Ark. 45.

The petition does not set forth facts sufficient to show that the appellant was entitled to a division of property. Sec. 3511, C. & M. Digest. The original decree recites that the court found "that the defendant, without fault on the part of the plaintiff, wilfully abandoned him for a space of more than one year." The court therefore did not err in entering its decree dismissing the appellant's petition for a bill of review. *Price* v. *Notrebe's Heir, supra; Evans* v. *Parrott,* 26 Ark. 600; *White* v. *Holman, supra,* and other cases collated in 2 Crawford's Digest—"Bill of Review," p. 1906—1910, inclusive.

The decree is correct, and it is therefore affirmed.

WILSON-WARD COMPANY *v.* FARMERS' BANK & TRUST COMPANY.

Opinion delivered May 15, 1922.

FACTORS—CONVERSION.—Where a cotton factor sold in Tennessee cotton covered by a chattel mortgage executed and recorded in Arkansas, where the cotton was grown and the mortgagor resided, and, without authority from the mortgagor, applied part of the proceeds on the mortgagor's indebtedness to the factor, the mortgagee was entitled to recover such amount from the factor.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. H. Dudley,* Judge; affirmed.

Little, Buck & Lasley and *Coleman, Robinson & House,* for appellant.

The conversion occurred in the State of Tennessee; therefore the liability, if any, as a result thereof, is governed by the laws of that State. 159 S. W. 221; 50 L. R. A. (N. S.) 51. Even if the conversion had occurred in Arkansas, the appellant would not have been liable. 132 Ark. 592.

Davis, Costen & Harrison, for appellee.

The fact that the purchaser was ignorant of the existence of the mortgage would not bar a recovery by the appellee. 11 S. J. 424; 56 Ark. 499; 137 S. W. 490.

WOOD, J. On the 15th of April, 1920, S. R. Swinney executed to the Farmers' Bank & Trust Company (hereafter called bank) a chattel mortgage on crops to be grown on 200 acres of land in Mississippi County to secure the payment of a debt to the bank in the sum of $29,368.05, evidenced by promissory notes. Between the 8th of October, 1920, and the 13th of January, 1921, Swinney, without the knowledge and consent of the bank, shipped fifty-nine bales of cotton covered by the mortgage to Wilson-Ward Company (hereafter called company), a cotton factor in Memphis, Tennessee. The company had no knowledge of the mortgage of the bank. It sold the cotton and out of the proceeds paid to Swinney the sum of $1,500 in cash, and, without any authority from Swinney to do so, applied the balance of $9,525 on his indebtedness to it, which amounted to more than $10,000.

This action was brought by the bank against the company to recover the sum of $11,025, the proceeds of the sale made by the company for Swinney. The company denied liability. By consent of parties the court sat as a jury to try the above issues and facts and rendered judgment in favor of the bank against the company in the sum of $9,525, from which judgment is this appeal.

The alleged conversion by the appellant took place in Tennessee, and the law of that State must govern. It is held by the Supreme Court of Tennessee that "when a chattel mortgage is executed in a foreign State where the property then is and where the mortgagor resides, and has been duly recorded in that State pursuant to its laws, and is valid under the laws of that State, the mortgagee, under the rule of comity between States, must be held to have the better right upon the subsequent removal of the property to another State as against * * *

an innocent purchaser from the mortgagor in such State into which the property has been so removed, although the mortgage is not recorded in the latter State." *Newsum* v. *Hoffman,* 137 S. W. 490.

In the case of *J. T. Fargason Co.* v. *Ball,* 159 S. W. 221, the facts were that William Ball & Co. were cotton factors in the city of Memphis, Tennessee. One W. H. Barnes purchased from the mortgagor seventy bales of cotton upon which J. T. Fargason Co. had a mortgage which had been duly recorded in Arkansas where the cotton was grown and the mortgagor and mortgagee resided. Barnes shipped the cotton to Ball & Co. in his own name. The cotton was received by the company in the usual way and sold in the regular course of business and the proceeds were paid over in good faith to Barnes —all before Ball & Co. had any notice that Fargason & Co. had any interest in the cotton. The Supreme Court of Tennessee, upon the above facts, held that Ball & Co., the factors, were not liable. After approving the above doctrine of *Newsum* v. *Hoffman,* the court said: "The analogy would be complete if defendants were in possession of the property at the time complainant made demand therefor, or if they were in possession of its proceeds. On such a state of facts there is no doubt the complainant would have the right to recover. But the contest here is not over the property or its proceeds."

In the case at the bar the contest is over the proceeds of the sale of the cotton while in the hands of the appellant at the time the appellee instituted this action. It is true that the appellant had credited the account of its principal, Swinney, with the balance of the proceeds after having paid him in cash the sum of $1,500, but this was done, as the testimony shows, without his consent or direction. The appellant advanced him on the sale only the sum of $1,500, and for that appellant is not held liable. The residue of the proceeds appellant appropriated to the payment of Swinney's pre-existing indebtedness to it, and this appropriation, having been made without his con-

sent or direction, it cannot be held that the appellant, as factor and agent, had settled with its principal, Swinney, and accounted to him for the entire proceeds of the sale before this action was instituted against it.

It occurs to us, therefore, that under the facts of this record the doctrine of *Newsum* v. *Hoffman,* and *Fargason Co.* v. *Ball & Co., supra,* entitles the appellee bank to recover of appellant company the sum of $9,525, the proceeds of the sale of the cotton in its hands at the time this action was instituted. Until these proceeds had been turned over by the appellant to its principal, Swinney, they remained the property of Swinney upon which the appellee held a mortgage. The company had no lien on the proceeds of the sale in its hands to secure it in the payment of Swinney's indebtedness to it.

Under the doctrine of the above cases, when the appellant, without the knowledge, consent, or direction of Swinney, passed the proceeds of the sale to the credit of his pre-existing indebtedness, it wrongfully converted the same to its own use and is liable therefor to the appellee. In addition to the above cases, see Words & Phrases, Vol. 1, second series, p. 1030; 11 C. J. 424; *Merchants & Planters Bank* v. *Meyers,* 56 Ark. 473.

The decree is in all things correct, and it is therefore affirmed.

A. L. GREENBERG IRON COMPANY *v.* WOOD.

Opinion delivered May 15, 1922.

1. COUNTIES—COUNTY ROAD WARRANTS SUBJECT TO CALL.—Crawford & Moses' Dig., § § 1994, 1995, authorizing the county court to call in outstanding warrants for cancellation and reissuance, apply to county road warrants, though the statute was passed before the constitutional amendment providing for a road tax was adopted.
2. COUNTIES—ORDER CALLING IN WARRANTS.—County warrants on their face redeemable in the future, where issued for supplies already furnished, are payable on demand, and are subject to an order calling in outstanding warrants for cancellation and reissuance.

Appeal from Calhoun Circuit Court; *C. W. Smith,* Judge; affirmed.

STATEMENT OF FACTS.

A. L. Greenberg Iron Company filed a petition in the circuit court against N. N. Wood, as treasurer of Calhoun County, Ark., to compel the payment of a warrant for the sum of $1,300.

It appears from the record that the A. L. Greenberg Iron Company furnished certain road drags and materials for culverts to Calhoun County, and on the 3rd day of August, 1914, the county court ordered warrants issued in payment of the same. One of these warrants was for $1,300 payable June 1, 1918, out of the money in the county treasury to the credit of the general road fund. The levying court at its October term, 1918, appropriated one mill on the dollar of the entire road tax for the general road fund. On August 21, 1919, when the warrant was presented to the county treasurer for payment, there were sufficient funds in the county treasury to the credit of the general road fund for the payment of the warrant, but payment was refused because the warrant had not been presented for cancellation and re-issuance as required by law. On the 17th day of October, 1917, the county court had made an order providing for the cancellation of all county and road warrants which should not be presented for re-issuance in the manner provided by the statute. The statute was in all things complied with, but said warrant was not presented to the county court for cancellation and re-issuance as required by said order.

The orders of the Calhoun County Court pertaining to the calling in of said warrants and the publication of the notice prescribed by the statute are regular on their face, and the statutory requirements were in all essential respects complied with.

The circuit court denied the writ of mandamus, and from the judgment rendered A. L. Greenberg Iron Company has duly prosecuted an appeal to this court.

J. S. McKnight and *Coleman, Robinson & House,* for appellant.

The authority to call in warrants for cancellation and reissuance (secs. 1994-1996, C. & M. Digest) applies only to warrants issued for county purposes, and does not include road funds, the levy for which was authorized long after authority to reissue warrants was given. See C. & M. Dig., § 5940. The warrant could not be barred until it became due and payable.

The county having accepted and used the machinery should be required to pay therefor under the doctrine in 136 Ark. 209; 87 Ark. 389; 72 Ark. 330.

A. D. Pope, for appellee.

The warrant was not drawn upon any road district but was payable out of the general road fund of the county, and was therefore a county warrant.

The statute was strictly complied with in the order calling in the warrants. 129 Ark. 207.

HART, J., (after stating the facts). Sec. 1994 of Crawford & Moses' Digest provides that whenever the county court may deem it expedient to call in the outstanding warrants of his county, in order to redeem, cancel, reissue or classify them, or for any lawful purpose whatever, it shall be the duty of said court to make an order for that purpose, fixing the time for presentation, etc.

Section 1995 provides for the giving of notice in such cases. It is conceded that the statute was complied with in making the order and giving the notice. The sole ground of reversal is that road warrants do not come within the provisions of the statute.

We cannot agree with counsel in this contention. As said in *Parsel* v. *Barnes & Bro.,* 25 Ark. 265, there can be no question but that the Legislature intended to give the county courts such control over the warrants of the county as would enable them to take such action as would be most advantageous to the public, and fully intended that

all county scrip issued thereafter should be subject to such conditions and restrictions.

The county road warrants come as clearly within the language used in the statute as any other county warrants. The language of the statute does not restrict the warrants to those payable out of the general revenue fund.

It is true that the statute providing for the calling in of the warrants by the county court was passed before the amendment of the Constitution providing for a road tax, if voted by a majority of the qualified electors of a county; but the language of the statute is broad enough to include county warrants which might come within its provisions any time in the future.

This construction has already been placed upon the statute by the court in *Monroe County* v. *Brown,* 118 Ark. 425, and *Izard County* v. *Vincennes Bridge Co.,* 122 Ark. 557. In each of these cases road warrants were recognized as coming within the provisions of the statute and as being subject to reissuance and cancellation under it.

Again, it is contended that the judgment of the circuit court is wrong because the warrants were not due at the time the order for calling in outstanding county warrants for cancellation and reissuance was made. The record shows that the "calling in" order of the county court was made on the 17th day of October, 1917, and the warrant provides on its face that it is to be redeemed July 10, 1918, but not before.

In *Gould* v. *Davis,* 133 Ark. 90, the court held unconstitutional a statute providing that Garland County might issue warrants payable in the future. The court said that county warrants are orders on the county treasurer to pay certain moneys on account of the county. The object of the statute in that case was to pay certain holders of county warrants a sum equal to a stipulated rate of interest for their forbearance in presenting the warrants for payment. The court held that this could not be done, and that the county court exceeds its power when

it undertakes to issue warrants payable in the future as a substitute for interest.

It does not appear whether or not the warrant in question was for a greater amount than the county owed and was made payable in the future so as to include interest, but this does not make any difference. The warrant in question was issued for supplies that had already been furnished, and indeed the warrant, being an order on the treasury to pay money on account of the county, could not be issued until the county owed the debt, and it was payable on demand.

It follows that the judgment should be affirmed.

DAVIS v. PORTER.

Opinion delivered May 15, 1922.

1. RAILROADS—KILLING OF ANIMALS.—SUFFICIENCY OF PROOF.—In an action for killing of a bull by defendant's train, evidence *held* insufficient to sustain a verdict for the plaintiff.
2. RAILROADS—PRESUMPTION OF NEGLIGENCE—WHEN OVERCOME.—In an action for the killing of a bull by defendant's train, testimony of fireman and conductor that the bull was hit by the rear coach after the engine had passed *held* sufficient to overcome the statutory presumption of negligence arising from proof of killing by a train.
3. RAILROADS—DUTY TO STOP TRAIN.—Where a bull was hit by defendant's train after the engine had passed him, and there was evidence that he struck the rear coach, there was no duty to stop the train or to slacken its speed.

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

STATEMENT OF FACTS.

Appellee sued appellant to recover damages for the alleged negligent killing of a Red Poll bull by one of appellant's passenger trains.

Upon the part of appellee it was shown that the body of the bull was found near the depot platform of the road at Jasamine, White County, Ark. The bull belonged to

appellee, and had been turned loose with a chain around its neck fastened to its left front foot. The lower jaw of the bull was knocked off and its hips were skinned up.

E. J. Spruell, a locomotive fireman, was the principal witness for the appellant. According to his testimony, he was fireman on the passenger train which struck the bull in question and killed it. While the train was running through Jasamine, which is a flag station, the fireman looked back to see if there were any signals given to stop the train. He saw the bull, which was walking toward the train. Just after he saw the bull it got close enough for the steps of the third coach to hit it. The animal was struck by the passenger steps on the fireman's side of the train. It would not have been possible to have stopped the train after the fireman first saw the bull. The train was running slowly at the time.

According to the testimony of the conductor of the train, he did not see the bull killed and first knew of the accident when he saw the steps on the front end of the rear coach broken and split up. This was on the fireman's side of the train. There was some hair and a little blood on the steps.

The jury returned a verdict for appellee, and to reverse that judgment appellant prosecutes this appeal.

Thos. S. Buzbee, H. T. Harrison and *C. L. Johnson,* for appellant.

The testimony of the fireman and engineer overcomes the statutory presumption of negligence, and the case should be reversed. The case is controlled by *Railway* v. *Landers*, 67 Ark. 514-516, and *Lane* v. *Railway,* 78 Ark. 234-237.

No brief for appellee.

HART, J. (after stating the facts). The only ground urged for a reversal of the judgment is that the evidence is not legally sufficient to support the verdict. In this contention we think counsel are correct. The statutory presumption of negligence arising from the killing of

the bull by the operation of the train was overcome by the evidence of the fireman and the conductor. It may be stated in this connection that the engineer was dead at the time of the trial.

According to the testimony of the fireman, the bull was killed by the front steps of the third coach striking him after the engine had passed by. The fireman was looking back to see if any signals should be given him to stop at the station. It appears that the bull had his head chained to his front foot. The fireman saw the bull struck by the steps of the coach and killed. He could not have stopped the train after he first saw it. His testimony is consistent in itself and not contradicted by any other testimony in the case. In fact, it is corroborated by that of the conductor, who testified that he discovered that the coach in question was broken and had blood and hair on it after the train had passed the station.

The public interest requires that trains be run on time and that railroads dispatch their business promptly. Under the circumstances it was not necessary to stop the train or to slacken its speed.

The case falls within the rule announced in *St. L. I. M. & So. Ry. Co.* v. *Landers,* 67 Ark. 514, and *Lane* v. *Kansas City Sou. Ry. Co.,* 78 Ark. 234.

It follows that the court erred in not directing a verdict for appellant, and for that error the judgment will be reversed, and the cause remanded for a new trial.

TURPIN v. ANTONIO.

Opinion delivered May 15, 1922.

1. PAYMENT—DECREES—RECOVERY.—Where, under a lease assignable only with the written consent of the lessor, which was not to be charged for, the lessee under protest gave the lessor a check to secure his written consent to assignment of the lease, with the intention, which failed, of stopping payment, he could not recover such payment, it being voluntary.
2. PAYMENT—WHEN INVOLUNTARY.—To constitute the coercion or duress which will be regarded as sufficient to make a payment

involuntary, there must be some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.

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

C. T. Cotham and *Houston Emory,* for appellant.

The complaint states a cause of action, 110 Ark. 578; 29 Minn. 238, 13 N. W. 42.

The payment of the money by appellant was not voluntary, but was extorted from him, and only made to save himself financial loss. Appellee's oral consent to transfer the lease was sufficient, although the lease required the transfer to be in writing. 130 Minn. 223; 65 Wash. 359; 148 Wis. 63.

Appellee is estopped because of the fraud perpetrated by him. 10 R. C. L. p. 691.

The demand by appellee amounted to duress, entitling appellant to relief. Elliott on Contracts, Vol. 2, pages 635-6; 41 L. R. A. 609.

Martin, Wootton & Martin, for appellee.

The payment by appellant was voluntary, and recovery can not be had by him. 49 Ark. 70; 74 Ark. 270; 143 Ark. 435; 145 Ark. 185.

SMITH, J. Appellant, who was the plaintiff below, filed a complaint containing substantially the following allegations: that on June 10, 1919, defendant Antonio, as lessor, executed to one Peter Brown a lease for the term of four and one-half years of the ground or first floor of a certain building in the city of Hot Springs. This lease contained a clause reading as follows: "And the said tenant covenants that he will not sell, assign, or underlet or relinquish said premises without the written consent of the lessor, the lessor agreeing not to make any charge for such consent." That, pursuant to said clause, the lease had been assigned a number of times, as shown by the indorsements on the original lease, and the defendant, in

each instance, gave his written consent to the assignment without making charge therefor, and through the last of such assignments plaintiff became the owner of the lease. That an opportunity offered for plaintiff to sell the lease at a profit; but, before closing the trade, he applied to defendant for his approval, and obtained from him his promise to give his written consent to said assignment, and in reliance upon that promise plaintiff closed the contract for the sale of the lease. Thereafter plaintiff requested defendant to indorse his written consent to the assignment of the lease, but defendant, in violation of his promise, and in violation of the covenant set out above, wrongfully refused to give such consent unless plaintiff would pay him the sum of $300. That plaintiff protested, but, in order to protect his deal, he gave defendant, on June 21, 1921, a check on a local bank for $300, but promptly notified the bank to stop payment of the check, but the defendant had caused the bank to guarantee the payment of the check, and the check was paid to defendant. After reciting these facts, plaintiff alleged that the money had been extorted from him wrongfully, and he prayed judgment therefor.

A demurrer to the complaint was sustained; and this appeal is prosecuted to review that order and judgment.

We think the demurrer to the complaint was properly sustained. There was no such compulsion as entitled the plaintiff to recover his money back. It appears, from the complaint itself, that plaintiff was endeavoring to obtain the written consent of defendant by pretending to acquiesce in his demand for the payment of the $300 without, in fact, doing so. He may have intended by this conduct to secure what he regarded as a plain legal right; but the fact remains that he voluntarily paid the money.

In 2 Elliott on Contracts, § 1384, it is said: "It is well settled, however, that money extorted or involuntarily paid under duress or unlawful compulsion may be recovered. To enable the party making the compulsory payment to recover it, the compulsion must have been il-

legal, unjust or oppressive. To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is, that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid'."

Here plaintiff alleges that he had a legal right which was denied him, and to secure its enforcement he made the payment demanded. The law of that situation is very tersely expressed by Chief Justice COCKRILL in the case of *Vick* v. *Shinn*, 49 Ark. 70, as follows: "One cannot be heard to say that he had the law with him, but feared to meet his adversary in court. It is only when he has no chance to be heard that he can pay under protest and afterwards recover." See also *Satchfield* v. *Laconia Levee Dist.*, 74 Ark. 270; *Odell & Kleiner* v. *Heinrich*, 143 Ark. 435; *Craig* v. *Frauenthal*, 145 Ark. 185.

Judgment affirmed.

RED BUD REALTY COMPANY v. SOUTH.

Opinion delivered May 1, 1922.

1. CORPORATIONS—VENUE OF ACTION AGAINST.—Under Crawford & Moses' Dig., § 1176, a minority stockholder's action against a corporation and the majority stockholder was properly brought in the county from which the corporation had moved its place of business where the codefendant resided and was served therein, regardless of whether the removal of the *situs* of the corporation was in compliance with § 1737, *Id.*
2. EQUITY—MULTIFARIOUSNESS.—A bill by a minority stockholder against the corporation and its principal stockholder, alleging that the latter had appropriated assets of the corporation, and

against a transferee to which the corporation had conveyed assets without consideration, seeking to set aside such conveyances and to require the principal stockholder to render an accounting, is not multifarious.

3. EQUITY—MULTIFARIOUSNESS.—The question whether a bill is multifarious is to be determined by the particular facts of the case, and is largely within the court's discretion.

4. EQUITY—MULTIPLICITY OF SUITS.—To prevent a multiplicity of suits is itself a distinct ground of equity jurisdiction.

5. CORPORATIONS—RIGHT OF MINORITY STOCKHOLDER TO SUE.—Where the president and majority stockholder transferred assets of the corporation to third persons without consideration, a minority stockholder could sue such majority stockholder, the corporation and transferees in the same suit to require an accounting and to ascertain the right of the corporation and transferee as to property so transferred.

6. CORPORATIONS—RIGHT TO SUE ON BEHALF OF.—As a rule a stockholder cannot maintain an action in his own name to enforce the rights of a corporation, and such action ordinarily can be maintained only by the corporation itself under authority of its board of directors.

7. CORPORATIONS—SUIT BY MINORITY STOCKHOLDER.—Where a majority of the managing board of a corporation have betrayed their trust, and are guilty of *ultra vires* or fraudulent acts, and are thus perverting the purposes of the corporation, or are diverting the assets to their own use in fraud of the rights of other stockholders, a minority stockholder may bring suit in his own name for the benefit of himself and other injured stockholders.

8. CORPORATIONS—NECESSARY PARTIES.—In a suit by a minority stockholder against the majority stockholder alleged to be diverting the corporate assets to his own personal use, the corporation is a necessary party.

9. CORPORATIONS—SUIT BY MINORITY STOCKHOLDER—NECESSITY OF PROTEST.—Where a majority stockholder controlled a majority of the directors, a minority stockholder suing the majority stockholder for diversion of the corporate assets was not required to allege and prove as a condition precedent to the action that he protested to the board of directors against their mismanagement and appealed to them for redress, since such a protest would have been futile.

10. ATTORNEY AND CLIENT—RIGHT OF CLIENT TO CONTROL SUIT.—Where an attorney of record undertook to dismiss his client's cross-bill, whereupon plaintiff's attorney represented to the court that he had consented to the judgment asked by the cross-bill

and showed a telegram from cross-complainant denying that any one had a right to dismiss its cross-bill, the court properly refused to dismiss the cross-bill.

11. INTEREST—INCREASED RATE AFTER MATURITY OF NOTE.—A provision in a note for a higher rate of interest after maturity *held* valid where increased rate did not exceed the maximum rate allowed by Const. art. 19, § 13.

12 EQUITY—SUPPRESSION OF DEPOSITIONS TAKEN AFTER TIME.—Depositions taken after announcement of parties that they had no further testimony to offer, after the master had filed his report, without application to the master to reopen the case for taking of further testimony, and without a showing that diligence had been exercised to discover and produce the testimony before the taking of testimony had been closed, were properly suppressed, though there was no chancellor to whom application could be made to reopen the case, as the master had discretion to reopen the case for the taking of further testimony.

13. CORPORATION—GOOD FAITH IN MANAGEMENT.—One who, as president and principal stockholder of a corporation, controlled its management, was a trustee of the funds of the corporation and required to exercise the utmost good faith in handling and accounting therefor.

14. CORPORATIONS—BURDEN OF PROOF.—In a suit against the president and acting manager of a corporation, who is alleged to have diverted its assets to his own use, the burden was on him to prove how the funds of the corporation had been expended.

15. CORPORATIONS—ACCOUNTING—ULTRA VIRES ACTS.—In a suit against the president and manager of a corporation for diverting its assets, he is not entitled to credit for an amount expended in the purchase of stock of another corporation; such purchase being *ultra vires*.

16. CORPORATIONS—CONVEYANCE IN PAYMENT OF DEBT.—In a suit against the president and manager of a corporation to compel an accounting for corporate assets and funds, proof that land had been conveyed in payment of a debt of the corporation *held* to relieve the president from liability.

17. CORPORATIONS—LIABILITY FOR NEGLIGENCE IN PAYING TAXES.—In a suit against the president and manager of a corporation to compel an accounting of corporate funds and assets, defendant is not entitled to credit for the amount of interest, penalties and costs which he was required to pay by reason of his negligence in failing to pay taxes when due.

18. CORPORATIONS—ACCOUNTING—CREDITS.—In a suit against the president and manager of a corporation for an accounting of

corporate funds and assets, defendant was not entitled to credit for an amount which he testified the directors had voted for salary of the secretary, in the absence of any proof that such salary was ever paid.

19. CORPORATIONS—DISSOLUTION.—Chancery has jurisdiction, without statutory authority and in the absence of corporate insolvency, to dissolve a corporation and order a sale of its assets, where the president and majority stockholder was not managing the corporation for the benefit of the other stockholders, but was merely using the corporation for his own private purposes and ignoring the rights of the other stockholders.

Appeal from Baxter Chancery Court; *Sam Williams,* special chancellor; modified.

Allyn Smith, for appellants.

1. The Red Bud Realty Company could not rightfully be sued in Baxter County. Conceding that the removal of the *situs* of this corporation was not in compliance with the requirements of C. & M. Digest, § 1737, yet its principal office was in fact removed. The residence of a corporation is where the management is carried on. 147 Ind. 292; 46 N. E. 641. Its principal office being in Little Rock, service of summons upon it in Pulaski County did not give the chancery court of Baxter County jurisdiction over it. 109 Ark. 77; C. & M. Dig., 1171. On the question of *de facto* removal, see 134 Ark. 23; 121 *Id.* 541; 1 Thompson on Corporations, 2nd Ed., § 234; 114 Ark. 344; 36 Kan. 128; 47 *Id.* 250; 10 Atl. 471; 47 N. J. L., 218; 126 Mass. 303; 51 Kan. 631; 159 S. W. 1143, 1144.

2. The motion to dismiss for multifariousness of the complaint should have been sustained. C. & M. Digest, §§ 1076, 1077, 1078, 1292, subdiv. 2; 74 Ark. 536; 19 N. W. 741; 21 Kan. 474; 30 Conn. 316-323; 104 U. S. 245; 59 Ill. 389-401; 9 Paige (N. Y.) 188-194; 44 Mo. 350; 9 Mich. 45; 104 U. S. 245; 11 Ark. 726. The principle of multifariousness applies "where two parties are attempted to be brought together by a bill in chancery who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his codefendant have no common in-

terest." 128 U. S. 315; 18 How. (U. S.) 253; 57 Fla. 489; 222 Fed. 142; 188 U. S. 56; 26 Kan. 47; 51 *Id.* 617; *Id.* 39; 25 *Id.* 665.

3. The complaint does not state, neither does the evidence prove, a cause of action. A necessary allegation, which should have been followed by proof, was that the plaintiff had demanded and endeavored to procure redress for his alleged wrongs by application to the company, and this demand is a condition precedent to the right to maintain the action. 104 U. S., 450; 134 Pac. 665; 110 U. S. 219. That a corporation has not been successful, and that a stockholder is dissatisfied, is no ground for equitable relief. 84 Kan. 828; 149 Pac. 879. See also 233 S. W. (Ark.) 713. Allyn Smith had never been dismissed as attorney for Missouri State Life Insurance Company, and was its sole attorney of record, Pettit & Pettit having withdrawn from the case long before the commencement of the trial. He had the right to withdraw the answer. 11 Ark. 230.

5. The provision in the notes for a greater rate of interest after maturity than was stipulated they should bear until maturity was in the nature of a penalty, and not enforcible in equity. 14 Ark. 329; 2 Minn. 352, 72 Am. Dec. 102; 6 Kan. 395; 18 John 223; 16 Ill. 400; 2 Aikens (Vt.) 106; 16 N. Y. 469, 1 Am. Rep. 329; 5 Cowan 569; 6 How. 154; 5 Sanford 192; 39 N. J. Eq. 590; 8 Blk. 140; 1 Yeager 602; 78 Ill. 53; 3 Iowa 244; 6 Mumf. 71; 15 Mass. 177; 112 *Id.* 204; 29 Conn. 268. See also 73 Ill. App. 691; 22 How. 118; 22 Wall. 170; 100 U. S. 72; 104 U. S. 771, 26 Law. Ed. 923; 38 Ark. 114; 36 *Id.* 355; 46 *Id.* 87; 54 *Id.* 437; 98 *Id.* 519.

6. The court erred in suppressing the depositions taken in February and March, 1921, both because there was no chancellor to whom to apply for leave to reopen the case and take the depositions, and because defendants had the right to rely on the rule established by the court in that circuit. 32 Ark. 721; 55 Ark. 163; 54 *Id.* 124; 15 S. W. 153; *Id.* 154.

7. There was no warrant of law for decreeing a dissolution of the corporation. The statutes of this State recognize only two grounds for the dissolution of a corporation, viz: insolvency, and ceasing to do business. 111 Ark. 238; 84 Kan. 828, and cases cited; 125 S. W. 184, 195; 135 S. W. 938; 10 Encl. of Law and Proc. 1035; High on Receivers, 289 § 288; 4 Thompson on Corp. § 438; 143 Ill. 197; 1 Edw. Ch. (N.Y.) 84; 44 Barb (N. Y.) 239; 99 Mass. 274; 1 Hopk. Ch. (N. Y.) 354; 80 N. Y. 605; 127 Ill. 257; 2 Johns. Ch. (N. Y.) 371; 5 *Id.* 366; 8 Humph. (Tenn.) 234; 3 N. J. Equity, 332; 55 Wis. 624, 13 N. W. 895; 16 Cal. 145.

W. C. Alley, John T. Castle and *Frank Pace,* for appellees.

1. The jurisdiction in the Baxter Chancery Court was complete, not only because the alleged removal of the *situs* of the corporation was void for failure to comply with the statute, C. & M. Digest, § 1737; 106 Ark. 552; 8 Thompson on Corporations, § 494; 96 U. S. 369; 24 Law Ed. 853; 104 N. E. 750. But also because, by virtue of the statute, C. & M. Digest, § 1176, that court acquired jurisdiction by reason of the fact that service was had upon one of the defendants in that county, being the domicile of that defendant, and that gave jurisdiction of the defendant served in Pulaski County. 122 Ark. 502; 4 Fletcher on Corporations, § 2975.

2. The complaint is not bad for multifariousness. The object of the suit is to recover corporate property fraudulently transferred by the managing officer of the corporation, and the cancellation of certain instruments executed by that officer in carrying out his fraudulent schemes, is incident to the relief sought. It is well settled that such matters can be litigated in one suit. 21 Corpus Juris, 416, § 435; *Id.* p. 420; 9 Minn. 183 and authorities cited; 104 N. W. (Minn.) 817; 136 N. W. 271; 91 Pac. 667; 147 Fed. 295; 128 U. S. 403; 182 Fed. 215.

3. Powell, owner of a majority of the capital stock of the corporation, gained and held complete control and dominated its affairs. It would have been useless to apply to the corporation for relief. It was therefore unnecessary for the plaintiff to make such demands before instituting the suit. 3 Cook on Corporations, § 741; 19 S. W. (Mo.) 82; 97 *Id.* 202; 59 Ore. 483; 188 Mass. 515; 104 Vt. 121; 156 Fed. 389; 91 Pac. 1091; 192 Iowa 733; 39 Minn. 1; 82 Ala. 437; 141 Ill. 320.

4. There was no error in refusing to permit Allyn Smith to withdraw the answer and cross-complaint of Missouri State Life Insurance Company. An attorney has no authority to dismiss a cause of action over the objection of his client. 6 C. J. 646, § 1511; 95 N. W. 684; 1 Thornton on Attorneys at Law, 458; *Id.* § 215; 2 Chit. P. (Vt.) 117; 2 Greenleaf, Evidence, 2nd Ed. 140, § 145; 11 Ark. 230; 6 C. J. 643; 200 Ill. 84; 65 N. E. 690; 117 Ark. 504; 140 *Id.* 587.

5. The provision in the notes for a higher rate of interest after maturity, was not a penalty, and the same was enforcible as written. Moreover this question was not raised in the lower court and should not be considered here. 3 C. J. 689; *Id.* 695; 106 Ark. 525; 29 *Id.* 500; 64 *Id.* 305; 74 *Id.* 241; 57 *Id.* 312; 101 *Id.* 22; 95 *Id.* 593; 89 *Id.* 300; 84 *Id.* 399; 80 *Id.* 476; 77 *Id.* 195; 76 *Id.* 551; 80 *Id.* 65. On the proposition that the provision is enforcible, see C. & M. Dig., § 7353; 22 Cyc. 1526; 32 Ark. 573; 33 *Id.* 416; 52 Kan. 579; 35 Pac. 201; 71 *Id.* 836; 130 *Id.* 665; 147 *Id.* 826; 154 *Id.* 1108 and authorities cited; 104 Fed. 584 and authorities cited; C. & M. Digest, § 7361.

6. The court properly suppressed the depositions taken in February and March, 1921. It was the master's duty, under the statute, to take all of the testimony in the matter submitted to him. C. & M. Dig., §§ 7154-7160. It is too late, after the evidence is concluded, the report filed, the decree rendered and the appeal perfected, to raise for the first time the question of irregularities on

the part of the master in taking the testimony. 52 Ark. 437. After the master had closed the taking of depositions, it was the duty of the defendants, on the discovery of new evidence they desired to submit, to apply to him to reopen the case and take the additional testimony. 23 Corpus Juris 613; 83 Fed. 772; 96 Ill. App. 323.

The suppression of depositions rests in the sound discretion of the court, and unless that discretion has been abused, it will not be disturbed on appeal. 56 So. 235; 91 S. C. 549; 88 S. C. 360; 56 Penn. Sup. Ct. 183; 18 Corpus Juris, 727, § 331.

7. The Red Bud Realty Company having ceased to transact the business for which it was chartered, the decree dissolving the corporation was right. C. & M. Dig., § 1820; 4 Pomeroy, Equity Jur. 4th Ed. § 1540; 53 N. W. 218; 162 N. W. 1056; 179 Pac. 608; Helliwell on Stock and Stockholders, 792; 60 So. 1918.

WOOD, J. The Red Bud Realty Company, hereinafter called corporation, is a domestic corporation having a capital stock of $50,000 divided into 2,000 shares, of the par value of $25 each. The corporation was organized in 1903 for the purpose of transacting a general real estate business. The assets of the corporation consisted originally of a tract of 202 acres of land situated along the White River branch of the St. Louis, Iron Mountain & Southern Railway Company in Baxter County, Arkansas. A townsite was established on this tract of land called Cotter, and the town was laid out into lots and blocks. The *situs* of the corporation was the town of Cotter, and its principal business was the sale and disposition of lots in that town. At the organization of the corporation W. V. Powell was elected president, J. C. South, secretary, and Thomas Combs, treasurer. In 1907 J. C. South, who was a minor stockholder, instituted an action against the corporation and the majority stockholders to require the president to account for large sums of money which it was alleged he had misappropriated. The litigation resulted in placing the corporation in the hands of a receiv-

er. At the end of this litigation in 1910 (see *Red Bud Realty Co.* v. *South,* 96 Ark. 281) the receivers made settlement of the affairs of the corporation and turned the assets in their hands over to the corporation.

On April 11, 1911, there was a regular meeting of the stockholders at Cotter. At this time Powell controlled three-fifths of the capital stock of the corporation, less one share; South owned one-fifth plus one share, and Judge J. B. Baker owned the balance. All of the stockholders were present at this meeting in person or by proxy. J. C. South was represented at the meeting by Z. M. Horton. At this meeting Powell was again elected president and John M. Rose, to whom Powell had given four shares of stock, was elected secretary and treasurer. At this meeting of the stockholders John M. Rose moved that the offices of the corporation be moved from Cotter to Little Rock, which motion was carried. At the April term, 1917, of the chancery court of Baxter County, South filed a complaint in which he named the corporation, W. V. Powell, the Missouri State Life Insurance Company (hereafter called insurance company), and the Dixie Power Company (hereafter called power company) as defendants. Among other things he alleged that Powell since the 10th of June, 1911, had fraudulently sold and appropriated to his own use more than $10,000 of the property of the corporation and had refused to account to the corporation or its minority stockholders, of whom plaintiff was the principal one; that he had without any consideration fraudulently sold lots to his wife, Kate V. Powell, of the value of $1,800; that he had fraudulently conveyed various tracts and lots, the property of the corporation, to other parties, without consideration and for secret consideration; that he had failed to pay the taxes on the property of the corporation for the year 1914, although he had ample funds in his hands belonging to the corporation, and allowed the lands to be forfeited and sold for taxes, costing the corporation the sum of $1,000 to redeem the lands from the tax sale; that, pretending to act as president of the corporation, he had borrowed

from W. F. Eatman in the year 1913 the sum of $1,250 and had fraudulently executed a promissory note for same, signed by the corporation; that he had fraudulently converted the money to his own use; that, as president of the corporation, he had borrowed the sum of $3,000 from the insurance company, and had fraudulently, and without authority from the corporation, executed a mortgage on the lands of the corporation to cover same, and had converted the proceeds to his own use; that he had fraudulently and without authority of the corporation attempted to convey to the power company ten acres of its lands.

He further alleged that the corporation, by reason of the above acts of its president, had ceased to transact the business for which it was chartered. He asked that Mrs. Kate V. Powell be made a party, and prayed that a receiver be appointed to take charge of the assets of the corporation; that an accounting be had between Powell and the corporation and its stockholders; that a lien be declared upon Powell's stock for the amount found to be due by him to the corporation; that the mortgage and various alleged fraudulent conveyances be set aside and title vested in the corporation; that the corporation be dissolved, its debts liquidated and its assets distributed to the stockholders according to their respective interests.

W. V. Powell and the corporation joined in an answer, in which they specifically denied all the material allegations of the complaint, and set up, among other things, that the suit was brought in Baxter County, where the corporation had no office and where none of its officers resided; that the principal office or place of business of the corporation was in Little Rock, Pulaski County, where process was served upon its officers; that therefore the Baxter Chancery Court had no jurisdiction. The answer detailed at length the transactions of the corporation and Powell, its president, and alleged that everything had been done regularly and according to the rules and by-laws of the corporation, and in good faith. It set up that South,

the plaintiff, from the organization of the corporation to 1915, had been a stockholder and member of the board of directors of the corporation, and had been notified to attend all of the meetings, both of the stockholders and directors; that he had persistently refused to attend the meetings except the one mentioned above, where he attended by proxy; that the membership of the board of directors was then reduced from five to three by proper amendment to the by-laws; that South had never protested to the directors or stockholders as to the policy of the corporation, and had never applied to them for relief from any of the wrongs of which he now complains. The answer further set up, among other things, that the by-laws of the corporation from the time of its organization provided for the payment of a secretary, and that after John M. Rose was elected secretary in 1911 the sum of $50 per month was paid him up to the time of his death, and that he had drawn a salary in excess of the sum of $3,000. The answer set up that the corporation, with the express consent of South, had purchased and had become a subscriber in the sum of $1,100 for the stock of the power company, which was paid out of the proceeds of the sale of the lots; that the corporation, for the purpose of aiding the power company to build a dam across White River at Cotter, entered into a contract to convey to it certain riparian rights.

The insurance company answered, and by way of cross-complaint set up its notes and deed of trust, and asked for judgment and foreclosure. This cross-action was answered by South. By agreement of the parties a master was appointed to take depositions and state an account, which he did, and made his report. Before the answer was filed, motions attacking the jurisdiction of the court were made, and these were reserved also in the answer.

The cause was heard upon the pleadings, the statements of the accounts of the master, the oral evidence of the parties, their witnesses, admissions, agreements and

exhibits. The court rendered judgment finding that Powell fraudulently managed the affairs of the corporation, substantially as alleged in the complaint, and that he was indebted to the corporation in the sum of $11,262.02; that the deed to the power company was fraudulent; that the deed to Mrs. Powell was fraudulent, and that Powell should be charged with the value of the lots deeded to her, which had passed into the hands of innocent purchasers; that the attempted removal of the *situs* of the corporation from Cotter to Little Rock was fraudulent and void; that the insurance company was entitled to judgment in the sum of $4,409.80 on its mortgage with ten per cent. interest from date thereof, which was a first lien on the property described therein, and directed that the property be sold to satisfy the same and execution had against the corporation to satisfy any residue. The court also rendered a decree in favor of South in the sum of $2,257.63 —his distributive share of the amount of the judgment against Powell and the corporation. The court, in its decree, directed that Powell's stock be sold to satisfy his debt to the corporation; that out of the proceeds the decree in favor of South should first be satisfied and the balance, if any, retained by the receivers and special master, subject to the further orders of the court. The court also entered a decree canceling the deeds from the corporation to the power company and dissolving the corporation, and directing that any assets remaining after the judgments mentioned were satisfied as ordered, be sold and the proceeds distributed among the stockholders according to their respective interests. From that judgment is this appeal. Other facts will be stated as we proceed.

1. Learned counsel for the appellants contend that the *situs* of the corporation was moved from Cotter to Little Rock by a resolution of its stockholders passed June 10, 1911, and that therefore the chancery court of Baxter County did not have jurisdiction of the corporation. He concedes that the alleged removal was not in compliance with our statute (sec. 1737, C. & M. Digest).

See also *Home Fire Ins. Co.* v. *Benton,* 106 Ark. 552. But, notwithstanding this fact, counsel insists that the resolution constituted a *de facto* removal binding upon the corporation, its stockholders, and all others except the State. This interesting question, which is so elaborately argued in the brief, pro and con, it is unnecessary to decide, and we do not decide, for the reason that, even though the domicile of the corporation was removed from Cotter to Little Rock, nevertheless the chancery court of Baxter County had jurisdiction in this action of the corporation. Under our statute, sec. 1176, C. & M. Digest, actions of this character "may be brought in any county in which the defendant or one of several defendants resides or is summoned." The corporation, Walker V. Powell, the insurance company, and the power company were named as the original defendants in the complaint filed by J. C. South in the chancery court of Baxter County. It was alleged in the complaint that Powell had fraudulently conveyed to the power company ten acres of the land which was the property of the corporation. South prayed that the deed be canceled. The power company is a domestic corporation having its *situs* at Cotter. Summons was issued and duly served upon it at Cotter. Therefore, if it be conceded that the domicile of the corporation was at Little Rock in Pulaski County, it was duly served with process in that county, which service gave the chancery court of Baxter County jurisdiction of the action against the corporation; because, as we have seen, the action had been properly instituted and service had upon one of its co-defendants, the power company, in the county of the latter's domicile. *Sallee* v. *Bank of Corning,* 122 Ark. 502.

2. The original complaint contained fifteen paragraphs. The first and second paragraphs, with the amendments thereto, allege the organization of the corporation, describe its assets, declare its purpose to be the selling of lots and blocks in the town of Cotter, and allege that Powell owned four-fifths of its capital stock and is its president.

The third, fourth, fifth and sixth paragraphs contain allegations charging Powell with fraudulently conducting the business of the corporation contrary to the laws of the State and the by-laws of the corporation in attempting to remove the *situs* of the corporation from Cotter to Little Rock; in removing South from the board of directors and denying him participation in the dividends; and in selling more than $10,000 worth of the property of the corporation and appropriating the proceeds to his own use without accounting therefor.

The seventh paragraph charges Powell with fraudulently conveying lots of the corporation of the value of $1,800 to his wife, Kate V. Powell.

The eighth paragraph charges that Powell fraudulently conveyed various lots of the corporation to other parties without consideration and for secret consideration.

The ninth paragraph charges him with failure to pay the taxes and allowing the property to be forfeited and sold for taxes, greatly to the damage of the corporation.

The tenth paragraph alleges that Powell fraudulently borrowed from one W. F. Eatman the sum of $1,250 and converted the same to his own use, and allowed judgment to go against the corporation and its property sold, to the damage of the corporation and plaintiff.

The eleventh paragraph charges that Powell fraudulently executed a mortgage to the insurance company for the sum of $3,000, and appropriated the proceeds to his own use, to the damage of the corporation and plaintiff.

The twelfth paragraph alleges that Powell fraudulently conveyed to the power company ten acres of the land of the corporation without consideration, to the damage of the corporation and its minority stockholders.

The thirteenth paragraph charges that the corporation had ceased to transact the business for which it was chartered.

The fourteenth paragraph states that Powell was indebted to the corporation in a large sum, for which the

corporation had a lien on his shares of the capital stock. The complaint concludes with prayer for an accounting and judgment against Powell, for sale of his shares of stock, and that he be restrained from further borrowing money in the name of the corporation and mortgaging or conveying its property; that a receiver be appointed to take charge of the assets; that all the alleged fraudulent conveyances mentioned be canceled, and, finally, that the corporation be dissolved, its debts liquidated, and its assets distributed to its stockholders.

Motions in apt time were made by the corporation and the power company to dismiss on the ground that the complaint was multifarious, in that it stated separate and independent causes of action in which they had no interest. Powell likewise in apt time moved to require the plaintiff to elect which cause of action he would prosecute and to strike out the causes of action improperly joined in the action against him. These motions were overruled.

The ruling of the court was correct. It will readily be seen from the above resume of the complaint that its predominant thought is that Powell, the president and majority stockholder of the corporation, had, without right and without authority, and illegally and fraudulently, sold real estate of the corporation and appropriated the proceeds of such sales to his own use, in fraud of the rights of the plaintiff, South, and other stockholders; that this alleged fraudulent conduct of Powell, in causing the property of the corporation to be conveyed and appropriating the proceeds to his own use without accounting to the other stockholders, had perverted the purpose for which the corporation was chartered. When the complaint is read as a whole, it will be observed that its primary purpose was to call Powell to an account for his alleged fraudulent conduct in the management of the affairs of the corporation, in the particulars specifically set forth therein, by setting aside as far as possible the alleged fraudulent conveyances, and, where such could not be done, to cause him to account for the proceeds of such

conveyances; and, in order to prevent and restrain him in the further alleged fraudulent use of the corporate entity to serve his own private gain in disregard of the rights of other stockholders, that the debts of the corporation be liquidated, the corporation dissolved, and its assets distributed to its stockholders.

Such being the main purpose of the action, the plaintiff had the right to ask that the corporation and all those who had acquired its property, or any interests therein, through the alleged fraudulent misconduct of its majority stockholder and managing officer, he brought in and their rights determined, even though they were not all affected alike, or in the same degree. If Powell "fraudulently, illegally, and without right, contrary to the laws of the State and the rules and by-laws of the corporation," as is charged, made the various conveyances set forth in the complaint, then all to whom these conveyances were made are affected in like manner, though in a different degree, and though their interests may be separate and independent of each other. The plaintiff set up these various conveyances, and alleged that they were fraudulent and asked for a cancellation only as incidents to the main purpose of his cause of action against Powell and the corporation for an accounting. It must be remembered that it is impossible to lay down an absolute rule that is of universal application in determining whether or not a complaint is multifarious. Each case must be governed by its own particular facts, and the question is always one largely within the discretion of the court. Here the plaintiff is proceeding upon the theory, whether right or wrong, that the conveyances of Powell to the parties mentioned were fraudulent and void, and that the property sought to be conveyed was the property of the corporation. To prevent a multiplicity of suits is of itself a distinct ground of equity jurisdiction. It follows, from what we have said, that the issues involved in this action can be, and it is most convenient and appropriate that they should be, disposed of together, thereby avoiding a multiplicity of actions. We therefore conclude

that the complaint is not multifarious. 21 C. J. 416, 434 *et seq.* to 440 inclusive; *Stewart* v. *Smith,* 91 Pa. 667; *Brown* v. *Guaranty & Trust Co.,* 128 U. S. 403; *Horner-Gaylord Co.* v. *Miller & Bennett,* 147 Fed. 295; *Venner* v. *Great Northern Ry. Co.,* 136 N. W. 271; *State ex rel. Lumber Co.* v. *Knife Falls Boom Corporation,* 104 N. W. 817; *North* v. *Broadway,* 9 Minn. 183; *Gartland* v. *Dunn,* 11 Ark. 720; *Winter* v. *Smith,* 45 Ark. 549; *Hill* v. *Dade,* 68 Ark. 409.

3. The complaint does not allege that South, before instituting this action, applied to the corporation for a redress of his wrongs. For this reason appellants contend that the complaint does not state a cause of action, and should have been dismissed. As a rule, a stockholder cannot maintain an action in his own name to enforce the rights of a corporation. Such an action cannot ordinarily be maintained except by the corporation itself in an action authorized by its board of directors. *Holmes* v. *Jewett,* 134 Pac. 665; *Dumpfel* v. *O. & M. R. Co.,* 110 U. S. 209; *Smith* v. *Okla. Supply Co.,* 149 Pac. 879. But, where a majority of the managing board of a corporation have betrayed their trust and are guilty of acts *ultra vires,* or fraudulent acts, and are thus perverting the purposes of the corporation; or where a majority of the stockholders and directors are diverting the assets of the corporation to their own personal use and benefit to the injury of the corporation and in fraud of the rights of the other stockholders, then any stockholder may maintain an action in a court of chancery in his own name against the delinquent officers and majority stockholders for his own and the benefit of other injured stockholders.

In such an evil case, the majority directors and stockholders, as between the corporation and its stockholders, no longer in reality represent the corporate entity. They are acting for only themselves, although using the corporate name. Under such circumstances, when an innocent stockholder enters a court of chancery seeking relief, that court does not treat him as some schoolmaster invoking its aid to enable him to rebuke faithless trustees for past delinquencies or to teach them sound morals and

to reform their future conduct. Not at all. Because of the exigency of such situation, the minor stockholder who brings the action in his own name is treated, for the time being, and for the purposes of the litigation, as the trustee and real representative of the corporation, instead of its offending directorate and majority stockholders. Through him, and against them, the corporation itself is granted genuine reparation by way of damages, restitution, or, if need be, dissolution of the corporation; in fact, all the relief to which the corporation would be entitled under the circumstances, were the action brought in its name. The corporation is a necessary party to such an action, and is named and brought in, that appropriate orders may be made not only to protect all the corporate rights, but also that through it the rights and equities of individual shareholders may be worked out and preserved.

The law does not require a futile ceremony. Therefore, where a majority of the directors are under the control of a majority of the stockholders, and an action is brought against them by an innocent shareholder in his own name, charging wrongdoing on their part in the manner above indicated, it is not necessary for him to allege and prove, as a condition precedent to the maintenance of the action, that, before instituting the same, he protested to the board of directors against their own mismanagement and appealed to them for redress. Such protest would fall upon deaf ears, because a majority of the directors could not be expected to authorize, or to institute, an action against themselves charging themselves with fraud. If they should do such an anomalous thing, in the language of the Supreme Court of Missouri, "the bad faith of their action would be so apparent that no court would entertain the suit." *Hingston* v. *Montgomery*, 97 S. W. 202. We conclude, therefore, that the complaint should not be dismissed because it fails to allege that the plaintiff, before instituting the action, applied to the board of directors for redress of the alleged injuries of which he complained. *Red Bud Realty Co.* v. *South*, 96 Ark. 281-

292. In addition to the authorities there cited, see also *Hingston* v. *Montgomery, supra; Hannity* v. *Theatre Co.* 19 S. W. 82; 3 Cook on Corporations, sec. 741; *Hawes* v. *Oakland,* 104 U. S. 450-460; *North* v. *Union Savings Association,* 59 Oregon, 483; *Von Arnim* v. *Amer. Tube Works,* 188 Mass. 515; *Virginia etc. Co.* v. *Fisher,* 104 Vt. 121; *Williams* v. *Erie Mt. Consol. Mining Co.,* 91 Pa. 1091; *Chicago Cab Co.* v. *Yerkes,* 141 Ill. 320; *Rothwell* v. *Robinson,* 39 Minn. 1; *Nathan* v. *Tompkins,* 82 Ala. 437.

4. The insurance company was named as a defendant in the original complaint, and it was alleged in paragraph 11 that the mortgage executed to it in the sum of $3,000 was fraudulent and void, and it was prayed that the mortgage be canceled. An answer and cross-complaint asking for foreclosure of the mortgage was filed by the insurance company signed by attorneys, Pettit & Pettit and Allyn Smith. During the progress of the trial Smith announced that he was the attorney of record for the insurance company; that its interest had ceased, and he desired to dismiss the cross-complaint and withdraw its answer. Whereupon, the attorney for the plaintiff announced that the insurance company had loaned the money in good faith to the corporation, and that on a former day plaintiff had agreed with an attorney from St. Louis, who claimed authority to represent the insurance company, that judgment might be rendered in favor of the insurance company and its mortgage foreclosed, and that the plaintiff desired to stand by that agreement, and challenged the right of Smith to dismiss the answer and cross-complaint of the insurance company.

To sustain his contention, the plaintiff filed an affidavit to the effect that he had sent a telegram to the insurance company to ascertain if any one had authority to dismiss its answer and cross-complaint and received in reply a telegram as follows: "Nobody has authority to withdraw our answer and cross-complaint against Red Bud Realty Company." (Signed) by the insurance company and by Jordan, Rasser & Pierce, counsel. The at-

torney Smith thereupon insisted that he was the attorney of record, that the record did not show he had ever been discharged, and that he had the right therefore to dismiss the answer and cross-complaint of the insurance company, and offered to make oath that he was still its attorney. Smith did not offer to testify himself or to prove that the telegram introduced was not genuine. The court thereupon found that the insurance company had indicated by its telegram that it did not want its answer and cross-complaint withdrawn, and ruled that it had the right to control its own case, and therefore overruled the motion of attorney Smith.

This ruling of the court was correct. Says Mr. Thornton: "The power of an attorney is not coequal with, coextensive with, or equivalent to that of the client. He is a special agent limited in duty and authority to the vigilant prosecution or defense of his client's rights.*** An attorney certainly cannot bind his client by any unauthorized act which amounts to a total or partial surrender of a substantial right." Thornton on Attorneys at Law, p. 382, sec. 215.

As early as *Pennington* v. *Yell,* 11 Ark. 212-229, we said: "When an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently that he must not only sue out the first process of execution, but also all such that may become necessary." The interest of his client is the polar star on which an attorney should and must keep his eye while directing a lawsuit from its inception to its close. 2 Greenleaf on Evidence, p. 128, § 145; *Crocker* v. *Hutchinson,* 2 D. Chipman (Vt. Rep.) 114-122. The nature of the relation is such that within this limitation the attorney is vested with a large and liberal share of discretion in conducting litigation. In the absence of a specific direction to the contrary from his client, an attorney, as stated in *Pennington* v. *Yell, supra,* "will always be justified in ceasing to proceed with his client's cause (unless especially instructed to go on) whenever he shall be *bona fide* influenced

to this course by a prudent regard for the interest of his client." A client, however, and not his attorney has the absolute control over the litigation instituted by him. Where an attorney is employed by a party to institute a cause of action, if the right of the attorney to dismiss the action is called in question by the client, then the law undoubtedly is that the attorney has no authority to dismiss the cause of action contrary to the wishes and over the objection of his client. See *St. L. I. M. & S. R. Co.* v. *Blaylock,* 117 Ark. 504-14; *Johnson* v. *Mo. Pac. Ry. Co.,* 140 Ark. 587; see also *Davis* v. *Webber,* 66 Ark. 190. Other authorities are collated in 6 C. J. 643, sec. 147.

It is quite unusual, to say the least, for an attorney of record to propose to withdraw his client's cause of action after there has been virtually a confession of judgment in his client's favor. Without any explanation by attorney Smith of the reason prompting him to move to dismiss the answer and cross-complaint of the insurance company at that juncture, the trial court, without questioning his motives, was nevertheless justified in treating the telegram from the insurance company as an expression of its wish not to have its cause dismissed, and as tantamount to a direction to its attorney of record not to pursue that course. There was at least a *prima facie* showing that the proposed action of the counsel, instead of being to the interest of the insurance company, was directly to the contrary.

5. The notes executed by the corporation to the insurance company bore interest on the principal sum at the rate of 7 per cent. per annum, and contained a provision that, if not paid at maturity, they were to bear interest at the rate of 10 per cent. per anum payable annually until paid. The coupon interest notes also contained a similar provision. Judgment was rendered in favor of the insurance company against the corporation for the principal sum with interest calculated as stipulated in the notes, the judgment to bear interest at the rate of 10 per cent. per annum from the date thereof. Parties may contract for the payment of interest in this State "not

exceeding 10 per cent. per annum on money due or to become due." Art. 19, § 13, Constitution. Sec. 7353, Crawford & Moses. So long as the parties contract for a rate of interest that does not exceed the maximum rate allowed by the law, their contracts will be enforced as written.

The contract under review plainly provides for a rate of interest after the maturity of the principal sum not in excess of ten per cent. per annum, the maximum sum permitted by our Constitution and statute. The parties, having stipulated that the loan should bear a higher rate of interest after maturity than before maturity, are bound by their written contract, and the courts must enforce the same so long as the higher rate does not exceed the maximum limit prescribed by the Constitution and the statute. The great weight of authority is to the effect that such contractual increased rate after maturity is regarded as a liquidation of damages for failure to promptly pay, and not as a penalty. 22 Cyc., sec. 1526.

Our own court as early as *Miller* v. *Kempner*, 32 Ark. 573, announced the law in harmony with this view, from which it has not since departed. *Portis* v. *Merrill,* 33 Ark. 416. See also *National Life Ins. Co.* v. *Hale,* 154 Pac. 536, where our own cases above and many others are quoted, and among them *Linton* v. *Vermont National Life Ins. Co.,* 104 Fed. 584, where Judge SANBORN, speaking for the Circuit Court of Appeals on precisely a similar state of facts, said: "A contract for a lawful rate of interest before the maturity of a promissory note, but for a higher, but lawful, rate after maturity, is valid and enforceable, and it entitled the holder of the note to the higher rate, before and after the judgment or decree thereon and until the debt is paid." The decree in favor of the insurance company was correct.

6. In April, 1918, by agreement of the parties, H. J. Denton was appointed master to state an account between them. Upon due notice to the parties the master began the taking of testimony on July 1, 1918. The parties appeared by their respective attorneys, and the tak-

ing of testimony on behalf of the plaintiff began on that day, and the hearing was continued until the 30th of July, 1918, when the taking of testimony for the plaintiff was completed, and the testimony on behalf of the defendants commenced. The hearings were continued from time to time on the application of the defendants until October 14, 1918, at which time the record recites that, "both the plaintiff and the defendant announcing that they had no further testimony to offer, the taking of evidence herein is by the master closed, subject, however, to the further orders of the court."

The defendants, upon notice, took further depositions of various witnesses on the 3rd of February, 1921, and the deposition of E. J. Loop on March 31, 1921. The court sustained a motion to suppress the depositions taken on the 3rd of February and the 31st of March 1921, on the ground that there was no showing that the "depositions could not have been taken within the time fixed for taking testimony of the witnesses in this case." From October 14, 1918, until January 1, 1919, there was a regular chancellor to whom the defendants could have applied for an order permitting them to take further testimony, but from the first of January, 1919, until the selection of the special chancellor who tried the cause, there was no regular chancellor to whom the defendants could apply for such an order. In 1908 the chancery court of Baxter County adopted a rule that in causes of action in which the proceedings were or should have been completed ninety days before the commencement of the term, depositions on behalf of the plaintiff must be taken and filed at least thirty days before the commencement of the term, and depositions on behalf of the defendant taken and filed at least ten days before the commencement of the term.

The master stated the account and filed his report on April 15, 1919. It will be observed that the master did not close the taking of testimony until the parties declared that they had no other testimony to introduce. Six months intervened before the master filed his report.

During this time no request was made of the master by the defendants to reopen the cause for the taking of further testimony. More than two years elapsed between the date when the master declared that the taking of testimony was closed and the taking of the suppressed depositions. No reason is given for the failure of the defendants to apply to the master to reopen the cause for the taking of further testimony before the filing of his report, other than that they, defendants, thought they had a right to rely on the rules of the court. But manifestly these rules could have no application where the parties by consent agree to submit the case to a master to take testimony and state an account. The announcement by the parties that they had no further testimony to offer on the 14th of October, 1918, was tantamount to an agreement that the taking of the testimony before the master should close on that day, but, notwithstanding such announcement or agreement, it was within the discretion of the master to reopen the case for further evidence at any time before drafting his report. If the defendants desired to take further testimony, it was their duty to apply to the master to reopen the cause for that purpose and give him an opportunity to exercise his discretion. 21 Cor. Jur. 613, § 772, and cases cited in notes. *Sands* v. *Greeley & Co.,* 83 Fed. 772.

The fact that there was no chancellor to whom the parties could apply for an order to reopen the case for taking of further testimony before the master could not excuse the defendants from applying to the master himself for permission to take further testimony. The master had discretion to grant such an order, and, for aught that appears to the contrary, might have done so, had the defendants applied therefor before the filing of his report. The taking of testimony before the master had to come to a close some time. The master certainly had given the defendants a reasonable time to produce their testimony, for he had continued the hearings eight different times at their instance, and only closed the taking of testimony after they had announced that they had no

further proof to offer. The defendants are in no attitude to complain that the testimony offered by them through the suppressed depositions would show that certain findings of fact by the master were erroneous. See *Gilliam* v. *Baldwin,* 96 Ill. App. 323. The defendants have wholly failed to show that they exercised any diligence whatever to discover and to produce before the master the testimony which they now assert would prove palpable errors in his report. It was within the sound discretion of the trial court to suppress the depositions taken after the filing of the master's report, and, under the circumstances, we do not find that there has been any abuse of that discretion. 18 C. J. 727, § 331; *Hall & Farley* v. *Ala. Terminal Imp. Co.,* 56 So. 235; *Little Bros.* v. *Brock,* 91 S. C. 549; *Gibson* v. *Atlantic Coast Lines Rd. Co.,* 88 S. C. 360; *Anderson* v. *Long,* 56 Pa. (Sup. Ct.) 183.

7. In stating the account between Powell and the corporation upon the theory that the mortgage to the insurance company was valid (which is correct), the master found that Powell was indebted to the corporation in the sum of $12,377.12. The trial court reduced the amount, by giving Powell certain credits, to the amount of $11,262.02. It would unduly extend this opinion to discuss in detail the various items that entered into the account as stated by the master and as restated by the trial court. It is only necessary for us to determine whether Powell is entitled to have the judgment against him reduced by further credits which he claims. Among these items are $600 paid out of the funds of the corporation for capital stock in the power company; $400 for lots deeded to Kate V. Powell; $500 for lots deeded to G. B. Ortman; $90 on lots deeded to Clarence Hopkins; $40 on lots deeded to Clara Sharpe; $125 on lots deeded to Routzong; $300 on lots deeded to J. B. Baker; $250 on lots deeded to the power company; rents received from property of the corporation in the sum of $1,319.31; interest, penalities and costs arising from tax sale in the sum of $535.95.

Powell contends that the above amounts were erroneously included in the judgment against him. He further claims that he should have credit on account of expenses paid in attempting to sell lots in the sum of $1,700; the sum of $656.22 paid out of the funds of the corporation as shown by the checks of John M. Rose, secretary and treasurer of the corporation, for various items of expense; the sum of $2,750 for the salary of John M. Rose as secretary and treasurer of the corporation.

Since Powell owned a large majority of the stock of the corporation, was a director, and its president, and the management of the affairs of the corporation was thus under his control, he was a trustee for the funds of the corporation, and in handling and accounting for these funds the utmost good faith was required of him, and the burden was upon him to prove how these funds were expended. Considering briefly the above items, the purchase of the stock of the power company was *ultra vires,* and Powell was not entitled to credit for that. The testimony of Powell, corroborated by that of Horton and Baker, shows that the lots deeded to Mrs. Kate V. Powell were as a donation to put the stockholders on an equality as to lots that had been given to South. The same is true as to the lots deeded to Baker.

As to the Ortman lots the testimony of Powell shows that by an ordinance of the town of Cotter the corporation was assessed the sum of $500 for the purpose of laying concrete sidewalks; that Ortman laid these walks for the corporation, and that the directors at the meeting in April, 1911, directed deeds to be made to Ortman to the lots in payment of this sum of $500. There is no testimony in the record to the contrary. This did not involve a transaction which was peculiarly within the knowledge of Powell, and, if not true, its falsity could have been shown. The explanation was reasonable and meets the burden of proof.

As to the items in the deed to Hopkins and Sharpe, the amounts mentioned, in the absence of any other evi-

dence to the contrary, must be taken as correct. Powell's own testimony does not meet the burden of proof as to the items.

As to the Routzong lots the testimony of Powell shows that these lots were deeded to Routzong in payment of a printer's bill against the corporation. This testimony was not peculiarly within the knowledge of Powell, and, if untrue, could have been rebutted by the appellees. Powell therefore should not be charged with the value of these lots.

Concerning the lots deeded to the power company, the trial court canceled this deed as a fraudulent conveyance. Therefore Powell should not be charged with the value of these lots.

Powell was charged with an estimated amount of rents in the sum of $1,800. There is no definite proof in the record as to the amount actually received. It is certain that in making the estimate the master included rents on what is designated as the "Johnson lots," which the trial court found had been sold on the day of the first meeting of the board of directors in April, 1911. The annual rental of this property was $120. The rental on this property for the six years amounted to $720. After the sale of this property the corporation, of course, did not receive the rental, and Powell should at least be credited with that amount.

The amount of the interest, penalties, and costs arising from the tax sale accrued through the negligence of Powell in failing to pay the taxes when due. Hence he is not entitled to credit for this amount.

As to the item of expense in the attempted sale of lots no vouchers are produced by Powell to show how this expense was incurred—for what, and to whom, the amounts were paid. The testimony given by him as to this item was peculiarly within his own knowledge, and the testimony was entirely too indefinite to meet the burden of proof.

As to the salary of John M. Rose, Powell testified that after the death of Rose in 1915 the books and papers in

his possession concerning the business of the corporation were lost. He further testified that when Rose was elected secretary and treasurer of the corporation the directors voted to allow him a salary of $50 per month, but there are no vouchers to show that Rose was ever paid this salary. In the absence of vouchers or other testimony in the record tending to show that Rose was actually paid a salary of $50 a month out of the funds of the corporation, Powell's testimony does not meet the requirement of the burden of proof as to this item.

As to the items of expense paid out of the funds of the corporation as evidenced by the vouchers of Rose, the testimony is sufficient to show that Powell should be credited with the amount of these vouchers.

Summing up, therefore, the items as above indicated which should be deducted from the judgment in favor of the corporation against Powell, they are as follows:

1. Lots deeded to Kate V. Powell	$400.00
2. Lots deeded to G. B. Ortman	500.00
3. Lots deeded to Routzong	125.00
4. Lots deeded to J. B. Baker	300.00
5. Lots deeded to Dixie Power Co.	250.00
6. Rents on property of corporation	720.00
7. Various items of expense shown by checks of John M. Rose, secretary and treasurer	656.22
Total	$2,951.22

The decree in favor of the corporation against Powell will therefore be modified by deducting therefrom the aggregate sum of the above amounts, towit, $2,951.22, and the judgment as thus modified will be affirmed. The judgment in favor of South against Powell and the corporation will likewise be modified so as to allow him his proportionate share of the amount due him under the above judgment against Powell, as modified and affirmed, and the decree in his favor as thus modified will be affirmed.

8. The trial court adjudged that "the affairs of the corporation under the management of the majority stock-

holders as now constituted, on account of the long misuser of its corporate powers and because of continued fraudulent mismanagement and its denial of the minority stockholders' right to participate in the benefits and profits of said corporation, should be dissolved, its affairs be wound up, and its property and assets be distributed to its stockholders."

The complaint does not allege that the corporation is insolvent, but it does allege fraud and mismanagement on the part of the majority stockholder and the directorate for the personal benefit of the majority stockholders in fraud of the rights of the plaintiff and other stockholders, to the great injury and damage of the corporation; that because of such mismanagement and fraud the corporation had ceased to transact the business for which it was chartered, and the charter of the corporation should be canceled and declared void.

Our statute gives the chancery court jurisdiction to dissolve the corporation "in all cases where it shall be made to appear that the corporation has ceased to transact business," meaning of course the business for which the corporation was chartered. C. & M. Digest, § 1820. If this had been an action to dissolve the corporation under the above statute, the allegations of the complaint were sufficient to give the chancery court jurisdiction for that purpose. However, the primary purpose of this action was not the dissolution of the corporation, and the procedure prescribed in § 1821 of Crawford & Moses' Digest was not followed. Nevertheless, the allegations of the complaint stated a cause of action in favor of the minority stockholders against Powell and the corporation for relief against the alleged fraud and mismanagement of the affairs of the corporation on the part of Powell to the injury of the corporation and its minority stockholders, which, as we have seen, as one of the incidents to the relief sought, drew to it the right to have the corporation dissolved. The proof in this case justifies the conclusion reached by the trial court that Powell was no longer managing the affairs of the corporation for the

benefit of the corporate entity and all its stockholders, but was merely using the corporation for his own private purposes and entirely ignoring the rights of the minority stockholders. The testimony shows that Powell owned practically all the stock in the corporation except what was owned by South. Although having considerable sums of money in his hands at different times, no dividends were declared, and South was completely ignored, all of the funds of the corporation being indiscriminately used by Powell for his own personal benefit. If the minority stockholder has no right to resort to a court of chancery for relief under such circumstances, then he is indeed without any adequate remedy to protect his rights. An appeal to the authors of his injury to redress his wrongs would be unavailing, for the majority stockholder and the directorate under his control would have it in their power to continue forever to ignore his appeal, and thus to perpetuate their fraudulent conduct. Such is not the law. On the contrary, where there is an abuse of trust by reason of the fraudulent mismanagement of those controlling the corporation which has resulted in substantial injury to the corporate entity and its minority stockholders, a court of equity, in the language of the Supreme Court of Minnesota, "may, without statutory authority and in the absence of corporate insolvency, intervene by way of receivership, require an accounting from the delinquent officers, order a sale of the corporate assets and a dissolution of the corporation." *Green* v. *National Adjustment Co.,* 162 N. W. 1056; *Warner* v. *Bonds,* 111 Ark. 238-47; *Miner* v. *Belle Isle Ice Co.,* 53 N. W. 218; 4 Pomeroy on Equity Jurisprudence, § 1540; Helliwell on Stock and Stockholders, 792; *Brent* v. *Brister Saw Mill Co.,* 60 So. 1018; *Dill* v. *Johnson,* 179 Pa. 608. We are aware that there is a conflict of authority on this issue. See cases cited in appellant's brief. But we adopt the above as the correct rule. Indeed, it is the only rule that will give the minority stockholders effectual protection against the recurrence and perpetua-

tion indefinitely of such wrongs and injuries by majority stockholders as are alleged and proved by the facts of this record.

The decree in favor of the insurance company is correct, and it is affirmed. The decree in favor of the corporation against Powell, and the decree in favor of South against Powell and the corporation, except in the particulars above mentioned, are likewise correct, and, after being modified as above indicated, they are affirmed.

DOLLAR v. STATE.

Opinion delivered May 8, 1922.

1. INTOXICATING LIQUORS—DENOMINATION OF OFFENSE IN INSTRUCTION.—Where an indictment charged the unlawful sale of alcoholic liquors a denomination of the crime in an instruction as a charge for selling Jamaica ginger was not prejudicial error where the uncontradicted evidence showed that accused sold Jamaica ginger containing 93 per cent. alcohol.
2. CRIMINAL LAW—INSTRUCTION—DISPUTED QUESTION.—In a prosecution for selling alcoholic liquors, an instruction describing the article sold as Jamaica ginger was not objectionable as taking from the jury a disputed question of fact where the uncontradicted evidence showed that accused sold Jamaica ginger containing 93 per cent. alcohol.
3. CRIMINAL LAW—INSTRUCTION—HARMLESS ERROR.—In a prosecution for selling "alcoholic, vinous, malt, spirituous and fermented liquors," an instruction that it was immaterial whether Jamaica ginger sold by defendant was intoxicating, if it contained alcohol and was sold as a beverage, if erroneous, was not prejudicial where the undisputed evidence showed that the liquor sold contained 93 per cent. of alcohol.
4. CRIMINAL LAW—REFUSAL OF REQUESTED INSTRUCTIONS—PREJUDICE.—Requested instructions were properly refused where the instructions given embraced everything of a material nature embraced in the request.

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

John D. DeBois, for appellant.

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

HUMPHREYS, J. Appellant was indicted in the White Circuit Court under section 6160 of Crawford & Moses' Digest for unlawfully and feloniously selling and being interested in the sale of alcoholic, vinous, malt, spirituous and fermented liquors and compounds and preparations thereof, commonly called tonics, bitters and medicated liquors. At the January, 1922, term of the court he was tried and convicted of the crime charged, and adjudged to serve a term of one year in the State Penitentiary as punishment therefor. From the judgment of conviction an appeal has been duly prosecuted to this court.

The undisputed testimony showed that appellant sold a great deal of Jamaica ginger containing 93 per cent. alcohol to various parties, who drank it as a beverage. He admitted on cross-examination that he thought the parties bought it from him to drink. The entire proof was directed to the sale of Jamaica ginger, and no other kind of liquors or preparation or compounds thereof.

Appellant first insists that the court committed reversible error in his instructions by denominating the crime alleged in the indictment as a charge for selling Jamaica ginger, when, in fact, the indictment did not specifically charge appellant with selling Jamaica ginger, but, on the contrary, charged him with selling alcoholic, vinous, malt, spirituous and fermented liquors and preparations and compounds thereof. The language of the indictment was broad enough to include any compound or preparation adapted to use as a beverage which contained any of said liquors, and as the undisputed proof showed that appellant sold Jamaica ginger containing 93 per cent. alcohol he was not prejudiced by the court's reference to the crime charged as being a charge for selling Jamaica ginger. In specifically denominating the charge as being one for selling Jamaica ginger the court did not inject into the indictment a different charge from

the one alleged, as the sale of Jamaica ginger containing 93 per cent. of alcohol was embraced in the general charge. Neither did the court, by the reference, take from the jury any disputed question of fact, as suggested by appellant. The fact was undisputed that appellant sold Jamaica ginger which contained 93 per cent of alcohol.

Appellant's next insistence is that the court committed reversible error in instructing the jury that it was immaterial whether the Jamaica ginger sold by appellant was intoxicating if it contained alcohol and was sold by him as a beverage. This instruction in nowise prejudiced the rights of appellant because, under any construction which might be given the statute under which appellant was indicted, a sale of a compound or preparation containing 93 per cent. of alcohol was unlawful.

Appellant's last insistence for reversal is that the court erred in refusing to give appellant's requested instructions 1, 2, 3, 4, 6, 7, 8 and 9. Appellant has not pointed out in his argument the particular errors claimed to have been committed by the court in refusing his requests. He contents himself with the suggestion that the court erred in not giving them. We are unable to discover any material matters contained in the requested instructions which were not covered in the instructions given by the court.

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

FITZHUGH v. NORWOOD.

Opinion delivered May 15, 1922.

1. TENANCY IN COMMON—LIABILITY FOR TREBLE DAMAGES.—Crawford & Moses' Dig., § 10320, providing for treble damages against any person cutting timber on the land of another person, has no application where a tenant in common in possession cuts timber on the land without the consent of his cotenants.
2. TENANCY IN COMMON—DAMAGES FOR WRONGFUL CUTTING OF TIMBER.—Where a tenant in common wrongfully commits waste by

cutting the timber on the land without the consent of his co tenants, they may recover the actual damages, or, where the removed timber is converted into finished product and sold, they may recover the value of the finished product, less the cost of manufacture.

3. APPEAL AND ERROR—PRESUMPTION WHERE MOTION FOR NEW TRIAL FILED OUT OF TIME.—Where a motion for new trial, filed after three days but during term, was considered by the court and overruled, it will be presumed that the motion was filed after time by permission of the court, as provided by Crawford & Moses' Dig., § 1314.

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed.

D. D. Glover, for appellant.

Sec. 10320, C. & M. Digest, providing for treble damages, has application only to a wilful trespass by one who has no interest in the lands. 132 Ark. 473; 116 Ark. 206. Appellant was the owner of a 6/8 interest in the land here, and therefore he could not a wilful trespasser, and is only liable for the actual damage to the other owners.

D. B. Sain, D. Ben Sain, for appellee.

The award of treble damages was justified.

There is no proper order of the court showing an extension of time to appellant in which to file a motion for new trial.

D. D. Glover, for appellant, in reply.

Where the court received and considered a motion for new trial filed more than three days after verdict was rendered, it will be presumed from the silence of the record that the delay was unavoidable. 54 Ark. 554.

McCULLOCH, C. J. This is an action instituted by appellees against appellant to recover treble damages for the cutting of timber on a certain tract of land in Hot Spring County, owned by all of the parties to the suit as tenants in common, appellees being the owners of an undivided one-eighth interest, and appellants being the owner of an undivided three-fourths interest. Appellant

was in possession of the land and cut the timber without obtaining the consent of the other owners.

Appellant testified that he cut the timber for the purpose of clearing the land for cultivation, and it was undisputed that the stumpage value of the timber cut and removed was six hundred dollars, the interest of appellees being seventy-five dollars.

The court instructed the jury, over the objections of appellant, that if the jury found that appellant "knew that the plaintiff owned an interest therein," then the verdict should be for the plaintiff for treble damages. The jury returned a verdict in favor of appellees, assessing damages in the sum of two hundred twenty-three dollars, which was three times the value of the timber cut and removed by appellant.

The court based its instruction allowing the recovery of treble damages on the following statute:

"If any person shall cut down, injure, destroy or carry away any tree placed or growing for use or shade, or any timber, rails, or wood, standing, being or growing on the land of another person, or shall dig up, quarry or carry away any stone, ground, clay, turf, mold, fruit or plants, or shall cut down or carry away any grass, grain, corn, cotton, tobacco, hemp or flax, in which he has no interest or right, standing or being on any land not his own, or shall wilfully break the glass, or any part of it, in any building not his own, every person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed or carried away, with costs." Crawford & Moses' Digest, § 10320.

We are of the opinion that the statute quoted above has no application to a case where timber is cut by the owner of an interest in the land. The statute authorizes the recovery of damages for trespass committed by a stranger. On land owned by several persons as tenants in common, neither of the owners is a trespasser. There is, of course, a remedy in the law for any wrongful act committed by either of the tenants against the rights and in-

terests of others. Where one of the owners wrongfully commits waste by cutting the timber, or otherwise, the other owners have a remedy for recovery of the actual damages; or where the removed timber is converted into finished product and sold, there may be a recovery for the value of such finished product, less the cost of manufacture.

In the present instance it is not contended that the net value of the commodities manufactured from the timber amounted to more than the stumpage, and, as before stated, it is undisputed that the stumpage was four dollars per acre, or seventy-five dollars for the interest of appellees. It is also conceded that appellant is entitled to a credit of two dollars as against appellees, and this credit was allowed in the verdict of the jury. According to the undisputed evidence, therefore, appellees were entitled to a judgment against appellant for the sum of seventy-three dollars, and no more.

Counsel for appellees contend that the motion for a new trial was not filed in time, and for that reason the assignments of error are not available on this appeal.

It appears from the record that this cause was tried and the judgment rendered on July 22, 1921, and that four days later a motion for a new trial was filed; that the court took the motion under advisement until an adjourned day of the same term, and that on November 4, 1921, the motion was overruled and an appeal was granted. The contention of appellees is that the motion was filed out of time and should therefore not be considered.

The statute (Crawford & Moses' Digest, § 1314) provides that applications for a new trial must be made within three days after the verdict, unless the court, for cause shown, permits the motion to be filed on a later day of the term.

Where a motion filed out of time is considered by the court and overruled, this court will indulge the presumption that the motion was filed with the permission of the court. *Fordyce* v. *Hardin,* 54 Ark. 554.

The court had the power to consider a motion at any time during the term, and the record shows that the court heard the motion at the same term and overruled it.

The judgment is therefore reversed, and judgment will be entered here in favor of appellees for the sum of seventy-three dollars and costs of the trial below.

YAFFEE v. FORT SMITH LIGHT & TRACTION COMPANY.

Opinion delivered May 8, 1922.

1. TRIAL—INSTRUCTION—JURY'S PROVINCE.—An instruction that the driver of an automobile was guilty of contributory negligence if he heard the approach of the street-car, or saw it approaching, or by the exercise of ordinary care could have seen or heard it in time to avoid the collision, was erroneous, as it was a question for the jury whether the driver was negligent in attempting to cross in front of the street-car, even if he did see it approaching.
2. STREET RAILROADS—RIGHT TO USE OF STREETS.—The driver of an automobile approaching street-car tracks and the street-car company have reciprocal obligations under the law, to observe the rights of each other in the streets and to exercise ordinary care to avoid collisions.
3. STREET RAILROADS—QUESTION FOR JURY.—There is no absolute duty on the part of automobile driver, on approaching a street-car crossing, to look and listen for the approach of cars; the extent of his duty being a question for the jury.
4. TRIAL—SUFFICIENCY OF OBJECTION TO INSTRUCTION.—An instruction that an automobile driver could not recover if he could have seen or heard the street-car approaching before he attempted to cross the track was so inherently erroneous that a general objection to it was sufficient.

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

Chew & Ford and *E. L. Matlock,* for appellant.

Hill & Fitzhugh, for appellee.

McCULLOCH, C. J. The plaintiff, Simon Yaffee, resides in the city of Fort Smith, and, while driving an automobile along one of the streets of the city, there was

a collision between the automobile and a street-car operated by servants of the Fort Smith Light & Traction Company. The automobile was demolished in the collision, and plaintiff claims to have sustained serious personal injuries. There is a conflict in the testimony as to the extent of the injuries.

This is an action instituted to recover damages, it being alleged in the complaint that the collision was caused by negligence of defendant's servants in the operation of the street-car.

The collision occured at the intersection of two streets, on one of which a street-car was being operated, and along the other the plaintiff was traveling in his automobile.

The acts of negligence set forth in the complaint are that the street-car was operated at an unusual and dangerous rate of speed; that the servants of defendant operating the car failed to give warning, by bell or otherwise, of the approach of the street-car to the crossing, and that they failed to exercise ordinary care on approaching the crossing to discover the presence of travelers about to cross. It is further alleged that, if such care had been observed by the motorman, plaintiff's presence at the crossing and on the track would have been discovered in time to avoid the collision.

All of the alleged acts of negligence are denied in the answer, and it is alleged that the collision occurred solely by reason of the negligence of plaintiff himself in attempting to cross the track while the street-car was at the crossing.

There was a trial of the issues, which resulted in a verdict in favor of the defendant.

The street-car track runs along Eleventh Street, and plaintiff attempted to cross at C Street. This is conceded to be a dangerous crossing on account of proximity of buildings to the line of the street, which obscure the view at the crossing.

Plaintiff was driving along the street with his family in the automobile, and he was doing the driving himself.

The testimony of plaintiff himself and that of witnesses introduced by him tended to show that the street-car approached without signal of any kind and at a high and unusual rate of speed—twenty to thirty-five miles an hour; that plaintiff was driving his automobile at a speed of four or five miles an hour after having slowed down for the crossing; that, while he was crossing the car track, the street-car struck the automobile about midway of the hood and demolished it, inflicting serious personal injury upon plaintiff, and that the street-car, after striking the automobile, ran about half a block before it was brought to a stop.

Plaintiff testified that as he approached the crossing he listened for an approaching street-car, but did not hear the noise of the car, and that it was too late to stop before driving across the track.

The evidence adduced by the defendant tended to show that the street-car was running at a very moderate rate of speed as it approached the crossing; that the gong on the car was being continuously sounded, and that the street-car did not strike the automobile, but that, on the other hand, plaintiff ran his automobile against the side of the street-car as the car was crossing C Street. In other words, the testimony adduced by defendant tended to show that the collision was caused solely by the negligent act of the plaintiff in driving his automobile against the street-car as it passed the crossing. The inference also might have been drawn from the testimony that, even though the automobile was struck by the street-car, as claimed by plaintiff, the collision was caused by the negligent act of the plaintiff himself in attempting to cross immediately in front of the approaching street-car after he had discovered the approach of the car, or could have discovered its approach by the exercise of ordinary care.

Among other instructions given at the request of the defendant, the following was given over the plaintiff's objection:

"Though you should believe from the evidence that the gong or other alarm was not given upon said street-car at said crossing, still, if you believe that the plaintiff heard the approach of said car or saw said car approaching, or by the exercise of ordinary care for his own safety could have seen or heard said approaching car in time to have avoided the collision, then the court instructs you that the plaintiff was guilty of contributory negligence, defeating recovery herein, and your verdict should be for the defendant."

This instruction was erroneous in telling the jury that if the plaintiff was aware of the approach of the street-car, or could, by the exercise of ordinary care, have discovered the approach of the car, he was guilty of contributory negligence and could not recover. This is not a correct statement of the law under the issues presented in this case.

The plaintiff and the defendant street-car company were both using the streets, with reciprocal obligations under the law to observe the rights of each other and to exercise ordinary care to obviate collisions. *Pankey* v. *Little Rock Ry. & Elec. Co.,* 117 Ark. 337.

There was no absolute duty on the part of plaintiff, while traveling the street and approaching a crossing of the street-car track, to look and listen for the approach of cars, but the extent of his duty in that respect was an issue for the determination of the jury. *Pankey* v. *Little Rock Ry. & Elec. Co., supra; Karnopp* v. *Fort Smith L. & T. Co.* 119 Ark. 295; *Pine Bluff Co.* v. *Webb*, 139 Ark. 251.

The charges of negligence set forth in the complaint and involved in the testimony adduced are that the servants of the defendant not only failed to give warning of the approach of the car, but were operating the car at a dangerous rate of speed, and failed to exercise ordinary care to discover the presence of travelers at the crossing. There was a conflict in the testimony upon this issue, and it was not correct to say that merely because the plaintiff had failed to exercise care to discover the

approach of the street-car he was barred from a recovery of damages, regardless of the negligent acts of the servants of defendant, and regardless of the distance of the car from the crossing when it could have been discovered by the plaintiff, and the speed of the car as it approached.

The jury might have found that, even though the plaintiff could, by the exercise of ordinary care, have discovered the approach of the car, under the circumstances he was not guilty of negligence in making the effort to cross ahead of the car, and that the collision was caused by the dangerous speed at which the car was being operated, and negligence on the part of the motorman in failing to discover plaintiff's approach and to take proper steps to avoid a collision.

It was a question of fact for the jury to determine what constituted due care or negligence in attempting to cross as the car approached. This, of course, depended upon the distance of the car from the crossing at the time the traveler attempted to cross, and the speed at which the car was being operated at the time.

There is no charge in the complaint of peril actually discovered by the motorman, but there is a charge that the motorman failed to keep a look-out for the approach of travelers, and that the collision could have been prevented if proper care in that respect had been observed by the motorman.

In the Pankey case, *supra,* we condemned a similar instruction—at least similar in principle, where the court told the jury that, if the plaintiff in that case knew that the car was approaching and undertook to cross the track in front of it, he assumed the risk and could not recover. In disposing of that feature of the case, we said:

"If the plaintiff's own negligence contributed directly to his injury, then he cannot recover; but that was a question for the jury, and it was improper to tell the jury that, because he attempted to cross in front of an approaching car, he assumed the risk or was guilty of contributory negligence. This instruction entirely ig-

nored the duty of the operatives of the street-car to exercise ordinary care to prevent injury to travelers, and only made the company liable for negligence after discovering their perilous position. It excluded from the jury all consideration of negligence in failing to sound the gong, or in failing to look for travelers on the track. In short, it excluded from the jury everything that would tend to place liability on the company except the fact of liability for discovered peril."

In the present case the instruction even excluded liability for discovered peril, because it told the jury, in so many words, that if the plaintiff could, by the exercise of ordinary care, have discovered the approach of the car, he was not entitled to recover under any circumstances.

It is contended on the part of counsel for defendant that the defects in the instruction called for a specific objection, but we are of the opinion that the instruction was inherently erroneous, and a general objection to it was sufficient.

On account of the error in giving this instruction, the judgment is reversed, and the cause remanded for a new trial.

LEFLORE v. HANDLIN.

Opinion delivered May 8, 1922.

1. WILLS—JURISDICTION OF EQUITY.—Where a will creates a trust estate, equity has jurisdiction to construe it.
2. WILLS—RULE OF CONSTRUCTION.—The first and great rule in exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law.
3. WILLS—MISTAKE OF FACT.—A will can be corrected on account of a mistake of fact only where the mistake and its correction is shown on the face of the will.
4. WILLS—MISTAKE—EVIDENCE.—Where a mother's will gave a small sum to a son and to each of his children, stating that the testatrix purposely made no further provision because the son

had received a larger share of his father's estate, evidence *aliunde* was inadmissible to prove that she was mistaken as to the amount received by the son from his father's estate.

5. WILLS—INTENTION OF TESTATRIX.—Where a will gave $100 to a son and to each of his children, and provided that testatrix purposely made no further provision for them, her intention to exclude them from any further participation in the estate must prevail, unless a contrary intention be expressed in some subsequent clause, in which case the subsequent clause would prevail.

6. WILLS—DESIGNATION OF CHILDREN.—A bequest to a son of testatrix and to his children sufficiently designated such children within Crawford & Moses' Dig., § 10507, relative to pretermitted children.

7. WILLS—CONSTRUCTION.—Where a will gave a son L. and each of his sons $100, and stated that the testatrix purposely made no further provision for them, and gave the residuary estate to two other sons and a named child of each of them, designated as her "grandsons," and provided that when each of her "said grandsons" arrived at the age of 21 years they should receive $5000, the children of L. were not included in such bequest; the word "said" referring to the last-mentioned grandsons.

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

James B. McDonough, for appellants.

The chancery court had jurisdiction to construe the will. 97 Ark. 588; 104 Ark. 439; 113 Ark. 404.

The appellants were grandsons of Ida L. Foucar and were each entitled to $5,000 under the will. There was a devise to each grandson of the testatrix.

In the construction of wills the rule is: It is the intention which the testator expressed in the will that controls, and not that which he may have had in mind. 110 Ga. 707; 36 S. E. 409; 50 L. R. A. 361; 107 Ill. App. 313; 204 Ill. 588; 68 N. E. 515; 110 La. 279; 34 So. 443; 66 Me. 360; 81 Md. 347; 32 Atl. 316; 126 N. Y. Supp. 277; 107 Va. 383; 59 S. E. 384; 91 Va. 286; 21 S. E. 464; 83 Va. 724; 3 S. E. 387; 61 W. Va. 262; 56 S. E. 473.

A will should be given such a construction as will dispose of the property in a just, natural and reasonable

manner. 27 Conn. 134; 26 Ind. 511; 97 Me. 449; 54 Atl. 1068; 97 Me. 449; 200 N. Y. 159; 93 N. E. 488; 48 Am. Rep. 364.

Where the meaning of a devise is uncertain, the law will adhere as closely as possible to the rules of inheritance. 26 Pa. Sup. Ct. 443. An heir is not to be disinherited except by express words or by necessary implication. 36 S. E. 364. The law does not give to one relative of the same degree an advantage over the other. 94 Ind. 359; 59 Atl. 731; 53 Mich. 10; 67 N. Y. Supp. 925.

The will must be considered as a whole. 11 Ark. 54.

In case of conflicting clauses, the last clause must control. 113 Ark. 497; 115 Ark. 400.

Warner, Hardin & Warner, for appellees.

The intention of the testatrix must be gathered from all parts of the will, and such construction given as best comports with the purpose and intention of the testatrix. 90 Ark. 152; 98 Ark. 553; 113 Ark. 414; 116 Ark. 332; 13 Ark. 513; 31 Ark. 580; 73 Ark. 56; 98 Ark. 561; 104 Ark. 439; 105 Ark. 448; 111 Ark. 54; *Gist* v. *Pettus,* ms. op.

A will is not affected by any mistake of law or fact which induced the testator to make it; and a court can not amend or modify it so as to conform to what the court imagines the testator would have done but for such mistake. 2 Pom. Eq. Jur. (3rd Ed.) § 871; 16 S. E. 489; 32 Ala. 551; 25 S. E. 590; Rood on Wills, § 165.

The intention of the testator as expressed in the will must prevail if consistent with the rules of law. 31 U. S. 68; 116 Ark. 537; 146 Ark. 193; 116 Ark. 573.

The word "said" is a word of reference to what has already been spoken or specified, and referred to the grandsons, Edouard LeFlore and Chester Harwood LeFlore. 122 Ark. 336; 50 N. E. 135; 8 N. J. L. 182; 49 N. E. 87; 97 Ind. 497.

WOOD, J. Mrs. Ida L. Foucar died testate at San Francisco, California, on February 1, 1920, having executed her will on the 27th day of February, 1918. The second clause of the will is as follows: "Second: I

give and bequeath unto my son Louis LeFlore, of Stigler, Oklahoma, and to his children living at the time of my death, the sum of one hundred ($100) dollars each. I purposely make no further provision for my said son Louis LeFlore, nor for any of his children, because my said son Louis enjoyed a larger share of his father's estate than either of my other two sons hereinafter mentioned and provided for, and because his present financial condition is materially better than that of either of his said two brothers." In the third clause the testatrix states the reason for not making any provision for her husband. In the fourth and fifth clauses she bequeaths to her two sons, Frank T. LeFlore and Chester H. LeFlore, the sum of $10,000 each, and provides for the manner of succession in case of their death before her own. In the sixth clause she bequeaths to Frank A. Handlin, trustee, all the residue of her estate to be held by him for certain uses and trusts, which we will specify in paragraphs or items numbered from one to nine inclusive.

(1) and (2) confer upon the trustee the power to handle the property bequeathed to him; to invest the income therefrom upon such terms as he thinks advisable, and to pay the taxes, insurance, etc.

(3) In this item the trustee is directed to use the income from the estate bequeathed to him, or such portions thereof as may be necessary, or even the *corpus* thereof, if required, for the maintenance and education of her grandson Edouard B. LeFlore, son of Frank T. LeFlore, and Chester Harwood LeFlore, son of Chester H. LeFlore, until they have reached their majority.

(4) This item directs that, five years after the death of the testatrix, the trust shall terminate as to one-half of the trust property and the "same shall go and belong equally to Frank T. LeFlore and Chester H. LeFlore," her sons.

(5) This item is as follows: "When each of my said grandsons arrives at the age of twenty-one years,

my said trustee shall pay to my said grandsons, out of said trust fund, the sum of five thousand ($5,000) dollars, and said trust shall end and terminate as to the sum of five thousand ($5,000) dollars when each of my said grandsons respectively reaches the age of twenty-one (21) years, and I do hereby give and bequeath unto each of my said grandsons, upon his arriving at the age of twenty-one (21) years, the sum of five thousand ($5,000) dollars."

(6) In this item the testatrix specifies that when her grandson, Chester Harwood LeFlore, reaches twenty-five years of age, the trust terminates as to one-half of the trust property then remaining after deducting therefrom the sum of $5,000 which is to be paid to her grandson, Edouard B. LeFlore, and her grandson Chester Harwood LeFlore then receives the remainder of the one-half of the trust property.

(7) In this item it is provided that, when her grandson Edouard B. LeFlore reaches the age of twenty-five years, the trust shall terminate as to all the balance of the property, and she bequeaths the same at that time to him.

(8) This item contains advice and suggestions to the trustee.

(9) This item of the sixth clause of the will is substantially as follows: "Upon the death of either of the sons of the testatrix, his share shall be held by the trustee, subject to the trust, and shall be paid to the son of such decedent when said grandson reaches the age of 25 years; provided, if said grandson dies before reaching 25 years of age, leaving issue, such issue shall take and receive said share when said grandson would havereached twenty-five; provided further that, should Edouard B. LeFlore die before he is 25 without issue, his mother, if living, shall succeed to his share, and the trust shall terminate thereto; but if Chester Harwood LeFlore should die before he is 25 without issue. his share shall be held by the trustee for the benefit of

Edouard B. LeFlore and shall be paid and delivered to him subject to the trust. If either of my said grandsons should die before becoming 21 or 25 years respectively, leaving issue him surviving, such issue shall take the share the parent would otherwise be entitled to, subject to the aforesaid trust, and at the time when the parent would have taken hereunder; provided, that if my said grandson Edouard B. LeFlore should die prior to reaching the age of 21 or 25 years, respectively, without issue him surviving, his father, if living, and if his father should have theretofore died, his mother, if living, shall succeed to the share or shares of my said grandson forthwith; and said trust shall terminate and end with respect thereto; provided, further, that if my said grandson Chester Harwood LeFlore should die prior to reaching the age of 21 or 25 respectively, without issue him surviving, his father, if living, shall succeed to the share or shares of my said grandson forthwith, and said trust shall terminate and end with respect thereto; but if his father shall have predeceased him, my said trustee shall succeed to the share or shares of my said grandson, to be held by my said trustee upon the uses and trusts aforesaid, and for the benefit of my grandson Edouard B. LeFlore, to be paid and delivered to him at the times and in the manner in said trust provided."

In the seventh and eighth clauses of the will the testatrix names Handlin as her executor, and, in the event of his death, she names whoever may be the president of the First National Bank of Fort Smith to succeed him, and directs that he may serve without bond, and confers upon him the power to handle the estate without obtaining an order of the court.

The concluding clause is a revocation of all other wills.

This action was instituted in the chancery court of Sebastian County by the appellants against the appellee as trustee and executor. The appellants contend, as shown by the allegations of their complaint, that under

the will they are each entitled to the sum of $5,000 when they become twenty-one years of age. They alleged that the trustee does not so construe the will, and they prayed that the will may be construed as they contend, and that the trustee be directed to adopt such construction.

The appellee, in his answer, denied that the will should be construed as contended by the appellants, and admitted that he contends that it was not the intention of the testatrix to bequeath to the appellants any other sum or amount than the sum of $100 mentioned in the second clause of the will.

In addition to the will, the testimony of Louis LeFlore, the father of appellants, was heard. It was stipulated that the estate of the testatrix was of the value of $83,000; that Chester Harwood LeFlore, son of Chester H. LeFlore, was nineteen years of age on July 20, 1921, and that Edouard B. LeFlore, son of Frank T. LeFlore, was ten years of age on July 28, 1921. The court made findings and rendered a decree adverse to appellants' contention and dismissing their complaint for want of equity. From that decree is this appeal.

The will created a trust estate and named the appellee as the trustee to administer the same. The court of equity therefore had jurisdiction to construe the trust. In seeking a construction of this will, the practice approved in the case of *Williamson* v. *Grider,* 97 Ark. 588, 607 *et seq.,* was followed. See also *Booe* v. *Vinson,* 104 Ark. 439-444; *Heiseman* v. *Lowenstein,* 113 Ark. 404.

"Over and over again we have said that the rule in the construction of wills is to give effect to what appears to be the intention of the testator in view of all the provisions of the will." *Cook* v. *Worthington,* 116 Ark. 332. See also *Eagle* v. *Oldham,* 116 Ark. 565-573.

In the case of *Eagle* v. *Oldham, supra,* we cited and quoted *Smith* v. *Bell,* 31 U. S. 68, where Chief Justice MARSHALL said: "The first and great rule in exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall pre-

vail, provided it be consistent with the rules of law." Other cases to the same effect are *Heiseman* v. *Lowenstein, supra; Union & Mercantile Trust Co.* v. *Hudson,* 143 Ark. 519; *Moore* v. *Avery,* 146 Ark. 193; *Finch* v. *Hunter,* 148 Ark. 482.

In *Taylor* v. *McClintock,* 87 Ark. 243-274, we said: "Every man has the untrammeled right to dispose of his property by will as he pleases, with only such limitations as the statute may impose. The 'English law', said Lord Chief Justice Cockburn, 'leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances caprice or passion or the power of new ties may lead to the neglect of claims that ought to be attended to, yet the instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a disposition prescribed by the stereotyped and inflexible rule of general law.' (*Banks* v. *Goodfellow,* L. R. 5 Q. B. 549)."

In the second clause of the will the testatrix bequeathed to her son, Louis LeFlore, and to his children the sum of only $100 each, and assigned as her reason for so doing that her son Louis enjoyed a larger share of his father's estate than her other two sons, and that his financial condition was materially better than theirs. Louis LeFlore was permitted to testify that he only received from his father's estate two horses which were worth about $12.50 each. This testimony shows that the testatrix was mistaken in the fact that he enjoyed a larger share of his father's estate than either of his two brothers. There is no ambiguity in the language of this will when its various provisions are read together. The above testimony therefore was wholly incompetent, because it cannot be proved that the testatrix was mistaken in a fact which she clearly stated in the will for the purpose of showing that her intention was really differ-

ent from that which her language plainly expresses. Nor is such proof competent for the purpose of showing that, but for the mistake of fact, her intention would have been different and expressed in a different manner. Where the intention is plainly expressed in the will, that intention must prevail and cannot be defeated by testimony *aliunde,* showing that the testator had in his mind a different intention from that expressed in his will, or that he would have expressed by his language a different intention if he had not been mistaken in some fact, financial or otherwise, connected with the beneficiaries mentioned in his will. *Booe* v. *Vinson,* 104 Ark. *supra; Webb* v. *Webb,* 111 Ark. 54; *Moore* v. *Avery, supra.*

"Equity," says Mr. Pomeroy, "has a very narrow jurisdiction to correct mistakes in wills, but only when the error appears upon the face of the will itself, so that both the mistake and the correction can be ascertained and supplied by the context, from a plain interpretation of the terms of the instrument as it stands. A resort to extrinsic evidence is never permitted, either to show a mistake or to ascertain the correction." 2 Pomeroy's Equity Juris., sec. 871.

The province of courts is to construe and interpret, but not to make or modify wills either to carry out their own ideas of equity and justice or to make a disposition of the property as they imagine the testator would have done if he had not made some mistake of law or fact. *Martin* v. *Thayer,* 16 S. E. 489; *Jones* v. *Crogan,* 25 S. E. 590; *Mosser* v. *Mosser,* 32 Ala. 551; Rood on Wills, sec. 165.

Now, applying the above rules, which are without exception and of universal application, to the will under review, it is impossible to escape the conclusion that by the second clause of the will the testatrix intended to give to the children of her son, Louis LeFlore, the sum of $100 and no more. The language of this clause of the will excludes them from any further participation in her estate. Whether she meant to do so or not, her

language is susceptible of no other interpretation. As we have seen, this meaning must prevail unless by the language of some subsequent clause the testatrix as plainly expresses the intention not to exclude them, but to allow them to further share in her estate. If there is a subsequent clause in the will wholly inconsistent with this second clause, then the last provision will overturn the former. *Little* v. *McGuire,* 113 Ark. 497; *Gist* v. *Pettus,* 115 Ark. 400.

The appellants contend that under the second clause of the will they are definitely included in the will under the language "unto my son, Louis LeFlore, and to his children"; that they are brought in under the designation "children" since they are the children of Louis LeFlore. Counsel is correct in this contention. Sec. 10507, C. & M. Digest; *Brown* v. *Nelms,* 86 Ark. 368-383. But, while the appellants are thus included in the will and bequeathed the sum of $100 each, they are likewise by the same clause excluded from any further provision.

The appellants contend that, having been brought into the will under the designation "the children of Louis LeFlore" in the second clause, they are not excluded by this or any subsequent clause in the will, but on the contrary are included in the 5th item of the sixth clause under the following language:

" * * * and I do hereby give and bequeath unto each of my said grandsons upon his arriving at the age of 21 years, the sum of $5,000." But, when the language thus quoted is taken in connection with all the language of the sixth clause preceding it, as well as with the language following, it is perfectly manifest that the testatrix intended to designate by the words, "said grandsons," her grandsons, Edouard B. LeFlore, son of Frank T. LeFlore, and Chester Harwood LeFlore, son of Chester H. LeFlore. In the third item of the sixth clause of the will, the word "grandsons" appears for the first time, and there the testatrix specifically designated her

grandsons, Edouard B. and Chester Harwood LeFlore, making provision for their education and maintenance.

In the second clause of the will the testatrix had bequeathed the sum of $100 to her son Louis, and the same amount to each of his children, and the sum of $10,000 to each of her two sons, Frank T. and Chester H. LeFlore. By the sixth clause, after the above bequests are taken out, the entire corpus of the estate remaining she bequeaths to Handlin, trustee, for the use and benefit of her two sons, Frank T. and Chester H. LeFlore, and their sons, her grandsons, Edouard B. and Chester Harwood LeFlore, and their lineal descendants. Throughout this entire sixth clause many references are made by name specifically to her grandsons, Edouard B. and Chester Harwood LeFlore, but nowhere are the names of appellants specifically mentioned, and no provision in this clause is made for them in the trust estate, unless they were intended to be included by the word "said" in the clause "to each of my *said* grandsons."

Appellant's contention would be more plausible, if they had been "before mentioned" by name in the second clause of the will. But, even if appellants had been designated and brought into the will by name, in the second clause instead of under the generic term "children," still the word "said" in the connection used in the sixth clause, could not be interpreted to mean, and to include, appellants. In *Moore* v. *Paving Imp. Dist. No. 20,* 122 Ark. 326-36 we defined the word "said" as follows: "It means aforesaid: before mentioned. It has also been defined as 'a word of reference to what has been already spoken of or specified, and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things." Citing *Hinrichsen* v. *Hinrichsen,* 172 Ill. 462-65; 50 N. E. 35, 34 Cyc. 1825. See also Webster's New Int. Dict., Funk & Wagnall's New Stand. Dict. "Said." *Church* v. *Mulford,* 8 N. J. L. 182; *Carver* v. *Carver*, 97 Ind. 497; Words & Phrases, Vol. 4, Second

Series, and Vol. 7, First Series "said." The term "said" being a relative word is understood as relating to the next antecedent. *Ellis* v. *Horine's Devisees*, 8 Ky. (1 A. K. Marsh) 417. The next "antecedent" of the word "said" in the clause "to each of my said grandsons" is found in the clause wherein the testatrix provides for the maintenance and education of her grandsons Edouard B. and Chester Harwood LeFlore. The word "said" unquestionably refers to them. The word "said" therefore cannot be construed to refer to appellants without ignoring its plain meaning and grammatical construction. We cannot do violence to the natural and logical use and meaning of words in order to iron out the seeming inequalities of Mrs. Foucar's will. A further analysis of the language of the will would discover still other reasons for the conclusion we have reached. But the above suffices to show that the only possible way to harmonize the second and sixth clauses of the will is to construe the second clause as expressing the intention of the testatrix to exclude the appellants from any further participation in her estate. That such was her intention we have no doubt, since it must be held that she meant what she said.

The decree of the trial court is correct, and it is therefore affirmed.

STEWART OIL COMPANY v. BRYANT.

Opinion delivered May 8, 1922.

1. TRUSTS—EVIDENCE TO SUSTAIN FINDING OF RESULTING TRUST.—Evidence *held* to sustain a finding that plaintiffs contributed certain sums in consideration of receiving an interest in an oil and gas lease proportioned to the agreed value of such lease; and where title thereto was taken in the name of a third person for the benefit of the plaintiffs and others, such person became a trustee for their benefit, and they in equity became the owners of the lease.
2. ESTOPPEL—ACQUIESCENCE.—Where plaintiffs, owning an equitable interest in a certain oil and gas lease, knew that the trustee holding the legal title had conveyed the lease to a corporation formed

to develop the lease, and that stock in such corporation was being sold to innocent purchasers, and that a part of the stock had been transferred to a driller who incurred large expense in reliance upon such transfer, and plaintiffs stood by in silence until their interest in the lease had been largely enhanced by such expenditures, plaintiffs were estopped to question the legality of the formation of the corporation and of the transfer of stock therein by reason of their failure to question same within a reasonable time.

Appeal from Union Chancery Court; *J. Y. Stevens,* Chancellor; reversed.

Marsh & Marlin, Jones & Head and *Powell & Smead,* for appellants.

Appellees having kept silent and permitted the organization of the corporation, the sale of stock to innocent parties, and the rights of others to intervene are now estopped from asserting any claim other than that of stockholders, or the right to have their money, with interest, returned to them. 131 Ark. 77; 2 Pom. Eq. Jur. § 804; 99 Ark. 260; 16 Cyc. 679; 64 Ark. 627; 147 Ark. 555; 21 C. J. p. 1216; § 221; 91 Ark. 141; 35 Ark. 377; 76 Ark. 67; 42 Ark. 473; 97 Ark. 588; 27 Ark. 371; 38 Ark. 419; 81 Ark. 269; 86 Ark. 284; 106 Ark. 568; 102 Ark. 146; 98 Ark. 581; 14 C. J. 630, § 920.

Appellees have not met the burden of proof to establish a resulting trust. 11 Ark. 82; 127 Ark. 302; 101 Ark. 451; 105 Ark. 318; 79 Ark. 425; 71 Ark. 373; 75 Ark. 451; 3 Pom. Eq. Jur. § 1040; 1 Perry on Trusts, § 139; 111 Ark. 45; 118 Ark. 146; 104 Ark. 303; 89 Ark. 182; 71 Ark. 277; 76 Ark. 14.

The corporation was an innocent purchaser of the lease. Sec. 1504, C. & M. Dig.

Patterson & Rector, for appellees.

A chancellor's findings of fact will not be disturbed upon appeal unless against the clear preponderance of the evidence. 132 Ark. 402; 136 Ark. 624; 129 Ark. 120; 138 Ark. 403.

The established facts show that the original transaction created a resulting trust. 40 Ark. 62; 64 Ark. 155;

Tiffany on Law of Real Estate (2nd Ed.) p. 397, 402-3; 30 Ark. 230; 89 Ark. 168; 118 Ark. 146; 137 Ark. 14; 132 Ark. 402; 147 Ark. 555; 109 Calif. 481; 17 Wall. 44; 138 U. S. 591; 147 Mass. 326; 23 N. J. Eq. 13; 184 Mass. 145; 141 Ill. 604; 106 Ill. 384; 107 Iowa 333; 103 Tenn. 324; 103 Mass. 484; 79 Ala. 351; 132 Ind. 58; 2 A. & E. Ann. Cas. 664, and note.

Appellant was not a *bona fide* purchaser for value of the lease. 79 Ark. 273; 78 Ark. 501; 77 Ark. 172; 107 Ark. 232; 118 Ark. 192; 14 C. J. 264; 14 A. C. J. 482, *et seq.*

Appellant did not succeed to the rights of the plaintiffs as tenants in common in the lease, because (1) it had no subscription from plaintiffs for its stock. Fletcher Law of Corporations, vol. 6, sec. 3952; 137 Minn. 213; 1 Thompson (2nd ed.) sec. 545 *et seq.*; 14 C. J., sec. 920; (2) the terms of offer were not complied with, and no contract resulting in membership in a corporation ever existed; 94 Ark. 354; Cook on Corp. (6th ed.) sec. 194; 10 Cyc. 405; (3) appellees are not barred by any act amounting to an equitable estoppel or ratification of the unauthorized conversion of their property; 44 Ark. 48; 101 Ark. 398; 27 R. C. L. 730; 147 U. S. 133; Ann. Cases 1914-A, 39; 65 A. D. 314; 120 S. W. 1065; 87 S. W. 740.

Appellant cannot successfully plead estoppel. 55 Ark. 423; 91 Ark. 141; 96 Ark. 609; 89 Ark. 19; 63 Ark. 289, etc.

WOOD, J. This action was instituted by the appellees (hereafter called plaintiffs) against the appellants (hereafter called defendants) to cancel the assignment by M. G. Wade, trustee, to the Stewart Oil Company, of a lease to forty acres of land in the oil and gas region near El Dorado, in Union County, Arkansas, and to cancel a certain drilling contract entered into with one J. W. Clark, and for an accounting, etc.

On the 31st day of January, 1921, W. J. Ward, party of the first part, representing himself and other owners of the lease of the land in controversy, entered into an escrow agreement with John A. Cobb, H. F. Stewart and B.

A. Hancock, parties of the second part. The agreement specified that the sum of $8,000 was to be placed in the bank together with the lease of the land in controversy and the assignment thereof. M. G. Wade was named as trustee in the lease. When the title to the lease was approved by the attorney of the parties of the second part, the escrow agent was to deliver to the party of the first part the $8,000, and to the parties of the second part the lease and assignment.

Gill Bros. and A. G. Griffin, real estate brokers at El Dorado, had an option on the lease. The Stewart Oil Company, a domestic corporation, (hereafter called corporation) was incorporated on the 7th of February, 1921, for the purpose of acquiring leases and royalties and drilling and maintaining wells for the production of oil and gas, etc. On the 10th of February, 1921, the owners of the land in controversy, for the consideration of $9,000, executed an oil and gas lease thereof to M. G. Wade, trustee. On the 21st of March, 1921, M. G. Wade, trustee, for the consideration of $1 executed an assignment of the lease to the corporation. On the 23rd of March, 1921, the corporation entered into a drilling contract with J. W. Clark, by which it conveyed to him a two-thirds interest in the lease in consideration that he drill at his own expense all wells necessary to properly develop the land for oil and gas production, and in case of production from any wells in excess of one hundred barrels he was to deliver one-third thereof to the corporation, and if the production was less than one hundred barrels then the corporation was to bear its proportion of the expense of operating the wells.

In their complaint against the corporation and Wade and Clark, the plaintiffs challenged the assignment of the lease from Wade to the corporation. They alleged that as trustee he had no authority to assign the lease, and that the corporation had no authority to execute the drilling contract with Clark; that the corporation and Clark knew at the time of the execution and delivery of the assignment and the drilling contract that Wade held the legal title for the benefit of the plaintiffs and others who were sub-

scribers to a fund in the sum of $11,000 to be raised for the purpose of purchasing the lease and defraying such expenses as might be necessary in developing the same.

They alleged, among other things, that Stewart, who promoted the project for purchasing the lease, solicited their subscription to a fund of $11,000, which he represented would be the amount necessary to purchase the lease and pay the commission of the brokers of $1,000, and defraying such other expenses as might be necessary to take over and develop the property; that the plaintiffs subscribed to this fund with the understanding that they should have an undivided interest in the lease in proportion that the amounts subscribed by them respectively bore to the sum of $11,000, and that Wade held legal title as trustee for them. They alleged that Stewart and others who were promoting the project organized a corporation with a capitalization of $50,000; that Stewart persuaded Wade, the trustee, in fraud of the rights of plaintiffs, to execute an assignment of the lease to the corporation, and the corporation in turn executed the drilling contract to Clark, both of which instruments were clouds on their title.

The corporation and M. G. Wade in a joint answer admitted that Wade, acting as trustee for plaintiffs and other parties, procured the oil and gas lease, and assigned the same to the corporation; that Stewart and others organized the corporation as alleged, and admitted the execution and delivery of the drilling contract to Clark on March 23, as alleged. They denied all the other allegations of the complaint, and set up that the funds were necessary to purchase the lease, and were subscribed with the understanding that the title should be taken in the name of the trustee, and that as soon as the title was obtained a corporation or syndicate was to be organized based upon the acreage contained in the lease; that certificates of shares of stock in the corporation were to be sold for the purpose of developing the property; that, pursuant to this plan, Stewart and his associates approached the plaintiffs and others and explained to them fully the

purpose of the promoters as above outlined in procuring the lease, and that the plaintiffs made their subscriptions with the understanding that the corporation or syndicate would be organized in which the shares of stock or certificates would be sold for the purpose of raising funds with which to develop the property for oil and gas and to defray the expense incident thereto; that, after sufficient subscriptions had been obtained to purchase the property and notice to all subscribers given, the corporation was organized pursuant to the above plan; that a majority in value of the subscribers to the original fund of $11,000 were present and took part in the organization of the corporation; that there were issued to the original subscribers to the stock of the corporation the number of shares of stock corresponding at par value to the amount of money they had actually subscribed to the original $11,000, which they accepted with full knowledge of all the facts and circumstances concerning the issuance thereof, and kept and retained the same; that they permitted Clark, under the contract, to expend large sums of money in developing the property, and never complained until Clark had proceeded with his drilling to a depth where he had reached pay sand and at about the time two other wells on adjoining property had been brought in as large producers. Not until then did the plaintiffs attempt to return the stock to the corporation and repudiate its right to hold the lease and to make the drilling contract with Clark. The defendants alleged that this conduct on the part of the plaintiffs should estop them from obtaining the relief for which they prayed.

Clark, in a separate answer, adopted the allegations of the answer of the corporation and Wade, and set up his drilling contract with the corporation and alleged that the same was made in good faith, believing at the time that the corporation had the title to the lease in controversy and without any information or knowledge of an adverse claim to the property. He set up that he had, in good faith, entered into the performance of his contract and had expended large sums of money in drilling the

well before he had any notice of the plaintiffs' claims; that by reason of these facts he was an innocent purchaser for value of a two-thirds interest in the lease under his drilling contract with the corporation. He also alleged that the plaintiffs knew that he was expending large sums of money in drilling the well, and that they stood by until the well was practically completed and had reached the pay sand before asserting any claim adverse to his claim and the claim of the corporation; that by such conduct they were estopped, and therefore not entitled to the relief prayed.

1. The first question is whether or not the money furnished by the plaintiffs was subscribed and paid by them for the purpose of contributing, *pro tanto,* to the common fund of $11,000 which was to be used in purchasing the lease in controversy, the title to which was to be taken in Wade, the trustee, to be held for the benefit of the plaintiffs and others, the equitable owners, who contributed to the fund in the proportion as the respective amounts paid by them bore to the $11,000? This is purely a question of fact, and it could serve no useful purpose to set out in detail the testimony bearing on this issue.

The testimony of the plaintiffs, in substance, was to the effect that the parties who solicited their subscriptions represented to them that the purchase price of the lease would be $11,000; that they had no knowledge at the time that a corporation was to be organized to take over the lease; that none of them at the time of making their subscriptions contemplated that they were subscribing to the capital stock of a corporation in the sum of $50,000, to be afterwards organized to take over the lease and develop the property. None of them had any notice of any meeting of the subscribers to the $11,000 fund of the promoters of the enterprise, for the purpose of organizing a corporation. Some of the plaintiffs testified that, after they had ascertained that a corporation had been formed and that it was the purpose of the trustee to convey the lease to the corporation, they objected to his doing so, and he promised that he would not do so, but afterwards

changed his mind and conveyed the lease to the corporation without the knowledge and consent of any of the plaintiffs, and when some of them were out of town.

All of the plaintiffs testified that it was their understanding that they each would acquire an interest in the lease in the proportion that the amounts of their subscriptions respectively bore to the sum of $11,000; that is, those subscribing $1,000 would acquire a one-eleventh interest, those subscribing $500 a one-twentysecond interest, and so on. The testimony of Stewart, who solicited the subscriptions on behalf of the defendants, was in substance to the effect that he represented to the subscribers that he was raising a fund for the purpose of purchasing the lease and developing the same. He represented to the subscribers that they were contributing to a fund which would be used by a syndicate or corporation, whichever plan was deemed best, for the purpose of taking over and developing the property. He did not represent to any of the subscribers that they were buying an interest in the lease itself. His plan from the beginning was to syndicate or incorporate as it might be deemed best; that it was ascertained that in order to sell the stock it was necessary to organize a corporation because the State bank examiner was against syndicates.

Two other parties, who were associated with Stewart in the enterprise, testified corroborating the testimony of Stewart to the effect that their first plan was to form a syndicate, but they afterwards changed to a corporation. It was understood that they were to sell shares in the syndicate or corporation as the case might be. One of these witnesses, however, after testifying as above, also testified that the promoters valued the lease for the purposes of the syndicate at the sum of $11,000.

M. G. Wade, who is named as the trustee in the lease, testified that it was his understanding that a company or syndicate was to be formed, and they changed it to a corporation because it would be more difficult to pass the blue-sky law. He understood that the money paid him by the subscribers was to buy stock in the Stewart syndicate.

This was evidenced by the receipt he issued, and no objection was made to the receipt by any of them. He further testified that he didn't assign the lease to the corporation until he was informed that all of the plaintiffs except Center were satisfied for him to do so, and did not assign the lease until two of the promoters assured him that it would be satisfactory with Center.

The chancellor found "that the plaintiffs herein and each of them furnished a part of the money with which the lease was purchased, and that as a result thereof the equitable title in and to said lease and all rights therein, thereto, and thereunder, vested in said plaintiffs to the extent of their respective interests;" that is, in proportion as the amounts subscribed and paid by them respectively bore to the purchase price of the lease, which was the sum of $11,000.

While there is a sharp conflict in the evidence, we are convinced that a preponderance of the evidence sustains the finding of the trial court that the several amounts subscribed and paid by the plaintiffs were to purchase the lease in controversy in which they would acquire an interest in proportion as the amount subscribed and paid by them bore to the sum of $11,000. The undisputed testimony shows that the purchase price of the lease was $8,000, and that the promoters and real estate brokers who had an option on the property, agreed among themselves that an additional sum of $3,000 would be added to cover their services, and that, for the purpose of ownership to those who wished to subscribe, the lease would be valued at the sum of $11,000. While the testimony of Stewart and other witnesses on behalf of the defendants tends to show that the subscriptions were taken for shares in a syndicate or corporation that was afterwards to be organized to buy the property and develop the same, yet it occurs to us that a clear preponderance of the evidence shows that Stewart, in soliciting the subscriptions of the plaintiffs to a fund to purchase the property, gave them to understand that they would own an interest in proportion as the amount subscribed and paid by them bore to

the sum of $11,000, the agreed value of the lease. In other words, whether the lease was to be purchased, owned and developed by a syndicate or corporation, the plaintiffs and others who contributed money for the purpose of purchasing the lease were to be owners in the syndicate or corporation in the proportion that their respective subscriptions bore to the purchase price of the lease, to-wit: $11,000. We are convinced that it was not contemplated by the plaintiffs, or Stewart, who solicited their subscriptions, that they were then subscribing to shares of capital stock of a corporation which was afterwards to be organized and capitalized at the sum of $50,000, and that the amounts subscribed by them would entitle them to shares in the corporation in proportion as the amount subscribed bore to the capital stock of $50,000. As we view it, the evidence does not at all justify such conclusion of fact. When, therefore, the trustee paid over the money subscribed by the plaintiffs and others to purchase the lease and a deed was executed and delivered to him, he thereby became a trustee for them, and they in equity became the owners of the lease—the plaintiffs in proportion as their respective subscriptions bore to the entire purchase price of the lease. The court did not err in its finding of fact and conclusion of law as above set forth. See *Camden* v. *Bennett,* 64 Ark. 155; *Miller* v. *Freeman,* 40 Ark. 62; *McNamara* v. *Garrity,* 106 Ill. 384; *Skeehill* v. *Abbott,* 184 Mass. 154; *Leary* v. *Corvin,* 2 A. & E. Ann. Cas. p. 664, and note 667, and authorities of other jurisdictions cited in appellee's brief.

2. The only other question necessary for our consideration is whether or not the plaintiffs are estopped by their conduct from challenging the deed of the trustee to the corporation and the contract of the corporation with J. W. Clark. The assignment of the lease by Wade to the corporation was executed on March 21, 1921, and on the 23rd of March, 1921, the corporation executed the drilling contract to J. W. Clark by which, for the consideration therein named, the corporation transferred to

Clark a two-thirds interest in the lease. The consideration for the transfer of the two-thirds interest to Clark was that he should properly develop the property and maintain the lease for oil production. He was to begin preparing for the drilling immediately and to begin actual drilling as quickly as possible. He was to assume all liability for the expense of drilling the first well and was to drill same to a depth of 2300 feet, unless oil and gas were found at a lesser depth. The deed and drilling contract were recorded on the days respectively of their execution.

The corporation was organized on the 7th of February, 1921, its articles of incorporation being filed at the office of the clerk of Union County on that day. The declared purpose of the corporation, among other things, was to drill, operate, and maintain wells for the purpose of producing oil and gas and to acquire leases in real estate. A circular was issued by the corporation showing that it was capitalized at $50,000 and offering to the investing public 1,000 shares of the par value of $50 each and specifying that it was "organized to drill on the Jeff Ward tract"—the land in controversy. It further stated: "The derrick is up and the well is to be drilled by H. F. Stewart, the man who drilled the Mitchell-Busey well;" that "operations would be started at once," and further requesting subscribers to make all checks payable to M. G. Wade, cashier of the First National Bank and the secretary and treasurer of the corporation. The above circular appeared in the papers at El Dorado February 14, 15, 16, 19, and 23rd. It is in evidence that the corporation sold from twenty to twenty-five thousand dollars worth of stock to about eighty stockholders in El Dorado, Hot Springs, Little Rock and other places from the time of its organization to March 17, 1921, after which time no stock was sold.

All of the plaintiffs testified that they had no notice that a corporation was to be organized; but all of them lived in El Dorado except Center and the Gills, and they saw the advertisement above set forth in the newspapers.

What is designated in the record as the "Keen-Wolf" well, located about three-quarters of a mile from the land in controversy, was brought in about the middle of March. Clark began drilling operations under his contract about the 25th of March and proceeded to drill the well down to the pay sand, reaching the same about the 25th of April. When pay sand is reached, the well is then only within a day or so of completion. During this time no complaints were made by any of the plantiffs to Stewart, the president of the corporation. Clark brought in an oil well on the 5th of May, 1921, which produced four or five thousand barrels of oil daily, worth 75 cts. per barrel.

The stock was issued and delivered to the plaintiffs, Bryant, the Pyes, and Johnson, about the 2nd of March, 1921, and to the Gills about the 21st of March, 1921. According to the testimony of the secretary and treasurer of the corporation, after the Keen-Wolf well came in, J. L. Center inquired of him to know if he could obtain $500 additional stock to the $500 he had already subscribed, and witness informed Center that he could. They discussed the drilling contract, and Center stated that he would let the witness know in a day or two whether he wanted the additional stock. Center went away and never came back. He refused to accept the tender of the stock or a tender of the money which he had subscribed and paid.

None of the stock that was issued and delivered to the plaintiffs was returned to the corporation until about the 10th or 11th of May. At the time of entering into the drilling contract with the corporation, Clark had no knowledge that any other parties were claiming to own the lease. He had not fully complied with the contract with the corporation, but had gone as far as he could.

It was shown on behalf of the defendants that, before the stock book was received, E. W. Bryant, one of the plaintiffs, was in the office of the secretary and treasurer of the corporation from February 25th, at different times until the stock was issued to him on the 2nd of March, 1921, wanting to know when he could get his stock. It was shown by three witnesses who testified on behalf of

the defendants that after the organization of the corporation there was a meeting of the stockholders in the office of the secretary and treasurer of the corporation at which M. B. Gill, one of the plaintiffs, proposed to sell stock for the corporation on a commisssion of 30%. M. B. Gill, in explanation of this conversation, stated that he said at this meeting if they wanted to give 30% he knew of two parties who could sell the stock. He was asked if he knew whom they could get to sell this stock. He did not know at the time what his interest would be—did not know at that time, if they increased the capital stock, whether his interest would be increased or not. He understood they were trying to sell stock to drill a well.

Bryant and Center both testified in rebuttal that when they were making inquiries about the stock they thought they were to have stock issued in the proportion that the amount paid by them bore to $11,000. Center stated that he never agreed to accept any stock from the secretary and treasurer except the stock representing a one-twentysecond interest. They proposed to give him $500 stock in a $50,000 corporation, and he refused to accept it.

This suit was instituted by the plaintiffs on the 22nd day of April, 1921.

We have reached the conclusion that under the facts as above set forth the plaintiffs are estopped by their conduct from maintaining this action. Stewart, who was an experienced driller of oil wells, was the leading promoter in the enterprise to acquire the lease in controversy and to develop the same. Plaintiffs and others who subscribed to the common fund to purchase the lease looked to him as the moving spirit in the project. It was shown that the circular above mentioned was widely distributed, and the plaintiffs at least certainly had notice as early as February 14th, when this circular was published in the papers at El Dorado, that the corporation had been organized, with Stewart as its president, to drill on the lease in controversy, and that the corporation was offering to sell 1,000 shares of stock for that purpose. The corporate

entity in this litigation stands for all of its eighty or more shareholders who purchased stock in the corporation. These shareholders had no knowledge of plaintiffs' adverse claim to the lease. The assignment of the lease to the land in controversy showing title in the corporation was duly recorded on March 21, 1921. Clark entered into a drilling contract with the corporation on March 23rd, 1921, and on that day had his contract recorded. He had no knowledge, as the proof shows, of any adverse claim of the plaintiffs to the lease. The plaintiffs were notified by the circular that "the rig was up on the ground," and that drilling would proceed. Clark entered upon the performance of his contract two days after the same was executed and continued drilling operations until he had reached the pay sand and was about to bring in his well when the plaintiffs instituted this action. In the meantime other wells in proximity to the land in controversy were being brought in. Stock in the corporation was issued and delivered to some of the plaintiffs as early as March 2, 1921, and to others by March 21, 1921, and would have been delivered to Center if, according to the secretary and treasurer of the corporation, he had not asked that the issuance and delivery be postponed for further investigation on his part. All of the plaintiffs received and retained the stock that had been delivered to them until after the well had been brought in.

Now, it occurs to us that, in justice to the corporation, the promoters and other shareholders, and in justice to Clark, who was necessarily expending large sums of money in the performance of his contract, the plaintiffs, if they intended to challenge the title of Clark and the corporation, could have acted more promptly. With a knowledge that others were buying stock up to March 17th, and that Clark, after March 23d, was expending large sums of money in the belief that the title to the lease was in the corporation, plaintiffs could not stand by in silence until their interest in the lease by these expenditures had been largely enhanced in value. The plaintiffs are not estopped by what they actually did,

but rather by what they failed to do, in view of the situation confronting them. Cognizant of the circumstances under which the stock was being sold, and that Clark was spending his money, the plaintiffs speculated on the chance of having the corporation, through its contract with Clark, greatly enhance the value of plaintiffs' interests before they elected to choose whether they would remain as stockholders in the corporation or would assert their rights as adverse claimants of the lease. The plaintiffs made no protests to the president or any officers or promoters of the corporation. We are convinced that a preponderance of the evidence shows that the trustee, Wade, acted in good faith in assigning the lease to the corporation. Certain it is that the plaintiffs knew that Stewart and those associated with him in the organization of the corporation and the furtherance of the enterprise, were acting upon the assumption that the corporation owned the lease. The plaintiffs, knowing that they and others were the owners, and that Clark, who had entered into a drilling contract with the corporation, would necessarily have to expend large sums of money in the performance of the contract, should have proceeded, at least, in a reasonable time to assert their adverse claim. What is a reasonable time must be determined by all the facts and circumstances surrounding the parties.

It is a matter of common knowledge that fortunes are made and lost in oil fields over night, so to speak. A month's delay on the part of the plaintiffs to institute their action may have meant financial disaster to Clark, who was making large investments under his contract, should he fail to discover oil. While on the other hand, the plaintiffs, without any further investment on their part, had the chance of having their fortunes increased by the expenditures made by Clark. The plaintiffs waited an unreasonable length of time. Under the circumstances they were called upon to speak, and by their silence and nonaction they must be held to have acquiesced in what was done by Wade, Stewart, the corporation, and Clark. The plaintiffs had no title of record. When Wade, the

trustee, assigned the lease to the corporation and this assignment was recorded, the corporation had the record title. Inquiry by prospective purchasers of stock and by one entering into a drilling contract with the corporation would have discovered that the corporation had the record title. Therefore, the plaintiffs, after they had knowledge that the corporation had been formed, and certainly after they knew that Wade, the trustee, had transferred the lease to the corporation and that the corporation had entered into a drilling contract with Clark, were called upon to act, and prompt action upon their part was imperative. Because, while they were hesitating as to what course they would pursue with reference to the corporation, people were purchasing stock and Clark, after he had entered into the drilling contract, was consuming his substance in drilling on the property. If he failed, plaintiffs could not lose anything, but if he succeeded plaintiffs would be made much richer at his expense. The plaintiffs were on the ground, and had full knowledge of what was being done. They had an unrecorded title in the lands of which purchasers of stock and those dealing with the corporation could not know until they had asserted the same. See *Gregg* v. *Von Pheel,* 1 Wall. 274, 17 L. E. 536; also *Veile* v. *Hudson,* 82 N. Y. 32, 40, cited in *Wiser* v. *Lawler,* 189 U. S. 260.

The facts of this case differentiate it from all those cases in which it is held that "mere silence or inactivity" does not constitute an estoppel. See *Bramble* v. *Kingsbury,* 39 Ark. 131; *Fox* v. *Drewry,* 62 Ark. 316; *Simpson* v. *Biffle,* 63 Ark. 289; *Waits* v. *Moore,* 89 Ark. 19; *Davis* v. *Neal,* 100 Ark. 399. It would have been a simple matter for the plaintiffs, after they found the corporation had been organized, at once to have notified its officers and also Clark after he entered upon the contract. They could have instituted just such an action as they did institute within a few days after they discovered that Wade had assigned the lease to the corporation and that Clark was drilling on their property. Their failure to do these things constitutes a "misleading reti

cence, and an apparent acquiescence" in, and ratification of, what the corporation, Wade and Clark had done. Their conduct places them in the attitude of saying, "We will wait and see whether the oil comes in before we disturb Clark and the corporation in their drilling operations."

This court, in the case of *Ford* v. *Abbott,* 35 Ark. 365-77, in commenting upon the doctrine of equitable estoppel, after giving certain examples of that doctrine, said: "These are but illustrations of an all-prevailing principle, extending through every branch of equity jurisprudence, which holds it fraudulent in any one to mislead another by acts, words, or *silence* when good faith and fair dealing require him to speak, to do acts, or invest money, and then assert rights with regard to the subject-matter which would be injurious to the person misled and leave him in a worse position than if he had never acted." And, in the case of *Brownfield* v. *Bookout,* 147 Ark. 555, speaking of estoppel by conduct, we said: "This doctrine rests upon the principle that if one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." See other authorities cited in the above cases, and *Baker-McGrew Co.* v. *Union S. & F. Co.,* 125 Ark. 146, 150. See also 10 R. C. L. p. 694, par. 22, and *Wiser* v. *Lawler, supra.*

Applying this doctrine to the facts above stated, we have reached the conclusion that the plaintiffs are not entitled to the relief for which they prayed. But, of course, it follows from what we have said that they must be treated as stockholders in the corporation, and have their rights protected as such. The decree is therefore reversed, and the cause is remanded, with directions to dismiss the complaint for want of equity.

McCULLOCH, C. J., (dissenting). All of us agree in the conclusion that the evidence is sufficient to support the

findings of the chancellor to the effect that the purchase of the oil lease by appellees and others, and the placing of the title in the name of Wade, as trustee, was for the purpose of holding the lease for their benefit, that Wade had no authority to transfer the lease without the consent of the beneficiaries, and that his assignment of the lease was wrongful and in violation of the trust.

It is clear that the rights of Clark are not involved in this controversy, and no act or conduct of appellees should be held to bar their right to seek, as against the appellants, a cancellation of the assignment of the lease because of the fact that Clark was an innocent purchaser in accepting a drilling contract from the corporation. The contract with Clark was wrongful, so far as the corporation itself is concerned, and the corporation should not be permitted to shield itself behind the rights of Clark as an innocent contractor.

The extent of the interest of appellees in the original lease is about twenty-four per centum of the whole, which leaves an interest in excess of a sufficiency to protect the interest of Clark, and since the corporation was a participant in the wrongdoing, the interests of appellants ought not to be affected by the rights of Clark, who, as before stated, can be protected out of the other interests.

This leaves for consideration only the question of estoppel. The majority have concluded, in the first place, that appellees are estopped to object to the assignment of the lease for the reason that they failed to protest against the organization of the corporation and the sale of stock therein for the purpose of purchasing and developing this lease.

It is not shown that any of the appellees did any affirmative act towards encouraging the sale or purchase of stock in the corporation. All that is shown is that the

corporation was organized, and that its plan for the purchase and development of this lease was advertised and stock was sold on the faith of it. The mere failure of appellees to hunt up and make protest to prospective purchasers of stock, or to publicly advertise their objections to the organization of the corporation for the purchase of the lease, did not constitute such silence or acquiescence as would amount to an estoppel.

I understand the established principles of equity to be merely that silence where one is called on to speak may work an estoppel, but before one is called on to speak there must be something done in his immediate presence which calls for action. Surely it cannot be within the principles of equity that a person is bound to run down and protest against every assertion of claim to his property made by persons not in his immediate presence. A person is not called on to speak unless he is confronted by the assertion of an adverse claim in the presence of some one who is misled by his silence in the acquisition of such claim.

In a similar case where it was sought to charge certain persons with estoppel by conduct similar to the circumstances in the present case, the Supreme Court of the United States said:

"Before holding that defendants are liable by reason of their silence, it ought to be made to appear what action they could have taken to prevent the perpetration of the fraud embodied in the prospectus and maps. If they had actually participated in it by circulating these documents, or representing them to be true, the case would have been different; but if they be held at all it must be by reason of their silence and inaction, when it is not even shown that they were cognizant of the statements contained in them. * * * But, conceding that they were fully apprised of their contents, what action were

they bound to have taken? They could not give notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names or addresses. A notice to the company not to send out these propectuses would have been equally futile, in case the directors chose to disregard it, since they could not control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters." *Wiser* v. *Lawler,* 189 U. S. 260.

In discussing the same principle this court, in the case of *Bramble* v. *Kingsbury,* 39 Ark. 131, said:

"If not already estopped, it would, perhaps, not have been required of appellant, upon being informed of the negotiations with Crapp, that he should seek him out and advise him of the encroachment. All that equity requires is, that a person shall do no act, nor be guilty of any misleading reticence, or apparent acquiescence, by which another may be entrapped into a transaction which he would have entered upon, if he had been advised of the objection. For instance, if one stands by, when he should assert his claim, and *by that* induces a purchaser to believe he has none, he will be estopped. But a mere knowledge that a third person is about to purchase does not of itself impose upon the owner of an equity the duty of seeking him out, and advising him against it."

The same rule has been announced in other decisions of this court. *Waits* v. *Moore,* 89 Ark. 19; *Westmoreland* v. *Plant,* 89 Ark. 147; *Davis* v. *Neal,* 100 Ark. 399; *Brownfield* v. *Brookout,* 147 Ark. 555; *Imboden* v. *Talley,* 150 Ark. 567.

Appellants had a right to organize a corporation for the purpose of taking over this particular lease or any other property, and to sell stock in the corporation upon representation of the intention to do so, but the mere

fact that it advertised the intention of acquiring the lease does not estop appellees from disputing the authority of Wade to assign the lease merely because they failed to take any action to prevent the consummation of this plan. They had no notice that Wade intended to assign the lease without obtaining their consent, and were given no opportunity to assent or dissent.

It is next insisted that appellees were estopped by accepting stock in the corporation. The answer to this is that they refused to accept the stock.

The majority conclude, finally, that appellees were also estopped by remaining inactive too long after the assignment of the lease by Wade before instituting the present action. It is remembered that the lease was transferred by Wade to the corporation on March 21, 1921, and two days later the corporation entered into the drilling contract with Clark. Some of the appellees were absent from El Dorado at that time, and one of them, Center, did not reside there at all. It was several days thereafter before they ascertained, or could have ascertained, that the lease had been wrongfully assigned by Wade to the corporation, and they at once began negotiations with the officers of the corporation looking to an adjustment of the controversy. The suit was instituted on April 22, 1921, so there was a delay of about three weeks in the commencement of the the action after it could have been commenced. In the meantime, the proof shows that there were negotiations pending between the parties for an adjustment of the controversy. There was not the slightest change in the attitude of any party to this controversy between the time of the assignment of the lease by Wade and the commencement of this action. There is no proof that a single dollar's worth of stock was sold during that time, nor did any of the appellees change their attitude in any respect whatever.

Mere delay in the assertion of a right never operates as an estoppel, but it is only unreasonable delay which works a disadvantage to some other person that can be pleaded in bar of the assertion of a right. This principle has been announced here so often that it is scarcely necessary to cite authorities in support of it, and only a few of the cases on that subject need be mentioned. *Fox* v. *Drewry,* 62 Ark. 316; *Rhodes* v. *Cissel,* 82 Ark. 367; *Jett* v. *Crittenden,* 89 Ark. 349; *Frazer* v. *State Bank of Decatur,* 101 Ark. 135; *Cook* v. *St. L. I. M. & So. Ry. Co.,* 103 Ark. 326.

It must be conceded that the business of prospecting for oil is highly speculative, and that things move very rapidly in the oil game, but it seems to me that it is carrying the doctrine of estoppel too far to say that a group of individuals against whom a wrongful act has been committed in the unauthorized assignment of an oil lease should be estopped by a delay of three weeks from the assertion of a remedy against such wrongful act, there being no change whatever in the attitude of any of the parties during the period of the delay, and there being negotiations, or, at least, efforts, pending for the adjustment of the controversy without a lawsuit.

It seems to me that the court has made a misapplication in the present case of the just and wholesome doctrine of estoppel, and my conclusion is that the decision of the chancellor is correct and that it ought to be affirmed.

I am authorized to say that Mr. Justice HUMPHREYS concurs in the views which I have expressed.

MISSOURI VALLEY BRIDGE & IRON COMPANY v. MALONE.

Opinion delivered May 8, 1922.

1. ADMIRALTY—INJURY ON VESSEL ENGAGED IN COMMERCE.—Under Federal Judicial Code, § 256, giving exclusive jurisdiction to the Federal courts in all civil causes of admiralty and maritime jurisdiction, to give such courts jurisdiction of an injury to an employee on a barge, it must be shown to be a vessel engaged in commerce and navigation, and hence such courts have no jurisdiction of an action for injuries on a barge in course of construction.
2. SEAMEN—FELLOW SERVANTS.—In a foreman's action for injury on a barge engaged in commerce and navigation, caused by a maul slipping from a workman's hand, the fellow-servant rule would not apply under U. S. Comp. Stat., § 8337a, providing that a seaman having command shall not be a fellow servant of those under his authority.
3. ADMIRALTY—COMMON-LAW REMEDY.—Under Federal Judicial Code, § 256, vesting in United States courts exclusive jurisdiction in admiralty and maritime causes, but in all cases "saving to suitors the right of a common-law remedy where the common law is competent to give it," an employee injured on a barge on the Arkansas River had a remedy in an Arkansas common-law court.
4. MASTER AND SERVANT—NEGLIGENCE OF SERVANT.—Under Crawford & Moses' Dig., § 7137, a corporation engaged in constructing a barge is liable for an injury to its foreman caused by the negligence of a workman in allowing a maul to slip from his hand.
5. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—INSTRUCTION.—In an action against a corporation for injury to a servant struck by a maul held by a fellow servant, an instruction permitting the jury to find defendant liable if the fellow servant let the maul lip from his hand was erroneous as authorizing a recovery whether the fellow servant was negligent or not.
6. TRIAL—GENERAL OBJECTION TO INSTRUCTION.—Where instructions were inherently erroneous, a general objection to them was sufficient.

Appealed from Perry Circuit Court; *John W. Wade*, Judge; reversed.

E. G. Shoffner, E. H. Heming and *Mehaffy, Donham & Mehaffy*, for appellant.

Both the pleadings and proof fix the place of the work on a barge or vessel on the Arkansas River, a navi-

gable stream. The plaintiff, therefore, might have brought his suit under the general maritime law; otherwise, he is bound to sue under the common law. Judicial Code, § 256. Jurisdiction depends upon whether the tort was committed on navigable waters. 1 R. C. L. 409-410; *Id.* 413, 414, 415; *Id.* 417, 118 U. S. 610, 30 L. Ed. 274; 119 U. S. 388, 30 L. Ed. 477; 195 U. S. 364, 49 L. Ed. 236; 221 Fed. 105; 223 Fed. 242; 259 Fed. 304; 244 U. S. 205; 1 Corpus Juris 1253; *Id.* 1256, 1257, 1264, 1265, 1285; 134 Fed. 749, 752; 141 *Id.* 270; 190 *Id.* 229; 71 *Id.* 712; 70 U. S. 20; 18 L. Ed. 125; 62 L. Ed. 1171; 63 L. Ed. 261.

Troy W. Lewis, J. H. Bowen and *Pace, Campbell & Davis,* for appellee.

Appellee's right to a recovery is not affected by the Federal statute with respect to jurisdiction. To allege that a barge was being constructed on the Arkansas River does not mean that it was on the waters of the river. 137 Ark. 6; 60 *Id.* 409; 134 *Id.* 273. But, aside from that, these maritime laws were not involved because the barge was not a vessel engaged in commerce and navigation. 38 Fed. 158; 34 Cal. 679; 1 Corpus Juris 1251, § 16.

If the barge be held to be such a vessel as is contemplated by the maritime law, then § 8337-A, U. S. Comp. Statutes, would apply.

The Federal statute in respect to maritime matters leave the victims of maritime torts free to bring and prosecute their causes of action in the State courts where the tort was committed, in accordance with the law existing in the State at the time it was committed, whether that law was the original common law or as amended by statute. 135 S. W. 425; 9 R. I. 419; 11 Am. Rep. 274; 83 U. S. 522, 21 L. Ed. 369; 56 N. Y. 1; 74 Ga. 18; 1 Corpus Juris, 1253, § 23; 77 N. Y. 546.

WOOD, J. This action was instituted by the appellee against the appellant, the Missouri Valley Bridge & Iron Company, a Kansas corporation. The appellee alleged that on the 13th day of January, 1921, the corpora-

tion was constructing a barge on the Arkansas River at the foot of North Commerce Street in the city of Little Rock, Arkansas; that the appellee was an employee of the corporation as foreman in charge of a crew of workmen upon said barge; that while so employed the appellee, on account of the carelessness and negligence of the corporation and one of its employees, a member of the crew, was struck on the right leg with a sledge-hammer and painfully and permanently injured; that the corporation's employees were engaged in constructing a deck or floor upon the corporation's barge out of heavy timbers or planks, which were being fastened down with spikes; that while appellee was directing the work one of the workmen, named Winkler, carelessly and negligently allowed the sledge-hammer to slip and fly from his hand and strike appellee on his right leg with great force. The appellee then alleges the nature of the injury and its effect upon him, and by reason thereof he alleges that he was damaged in the sum of $25,000, for which he prayed judgment.

The corporation answered, denying all the material allegations of the complaint, and set up the affirmative defenses of contributory negligence and assumed risk, and further alleged "that, if the plaintiff was injured at the time and in the manner alleged in his complaint, he was injured while working on the Arkansas River, a navigable stream, and doing work and labor on a barge in said stream, as was also Winkler, and this defendant says that it was in no way liable for an injury resulting as alleged in plaintiff's complaint."

The testimony on behalf of the appellee tended to prove that in January, 1921, the appellee was the foreman of a barge crew of six or eight men who were at work on a barge for the corporation in the Arkansas River. The appellee directed Winkler, one of the crew, to drive a plank end-ways in order to make the joint a little tighter. Winkler, while doing this, let the maul slip from his hand, which struck the appellee, and he went

off of the barge limping and said he was hurt. In order to drive up the plank, it was necessary for Winkler to strike pretty hard blows. Winkler, at the time, was standing astride the plank striking the end of the same between his legs. The appellee was standing at the other end of the plank right over the joint which he was having closed.

The appellee himself testified substantially to the same effect as the above. He stated that he was standing over the joint watching that all the time, and his attention for the moment was directed to another man of the crew to whom he had given some directions, and all of a sudden the hammer flew out of Winkler's hand and struck the appellee. He described where the hammer struck him and the nature of the injuries which it produced, and which it is unnecessary to detail.

Winkler testified on behalf of the appellant to the effect that he was employed by the appellant and working with the barge crew under the direction of the appellee. He hit the end of the plank to drive the same up. It was a cold morning and frosty, and the handle was slick, and witness' hands were numb. Witness did not have any gloves on, and the hammer slipped out of his hands. He was doing the work in the usual way except he was standing straddle of the maul striking with the same between his legs. Witness had been a carpenter for five years and was exercising the same care that he was in the habit of exercising in that sort of work—was trying to hit the plank, and missed it. He didn't intend to turn it loose. It was about noon, and the day was cloudy. It was an ordinary hammer in common everyday use—an eight-pound maul.

Among other instructions given at the request of the appellee the court gave the following:

"No. 1. If the plaintiff, L. V. Malone, was in the employ of the Missouri Valley Bridge & Iron Company, at work in the construction of a barge for the defendant, in the performance of his duty, and was using

due care for his own safety, and had not assumed the risk and was injured by want of ordinary care of the defendant, then the plaintiff is entitled to recover. It is for you to say, from all of the evidence in the case, whether plaintiff was injured by any failure on his part to perform his duty while at work on said barge, and whether he was exercising due care for his own safety or had assumed the risk at the time of the injury, also whether the defendant or its agents and servants failed to exercise ordinary care to protect him from danger alleged in the complaint while in the performance of his duty, and whether such want of ordinary care, if so shown, was the proximate cause of the injury."

"No. 2. While the servant assumes all the ordinary risks incident to his employment, yet a duty rests upon the company to commit no act of negligence whereby he may suffer injury and to exercise ordinary care to protect him from danger, and in this case, if you find from a preponderance of the evidence that the plaintiff was engaged in the performance of his duties at work in the construction of a barge for the defendant, and that one of the defendant's agents and servants, who was at work upon the floor of said barge, while driving a piece of the decking in place with a top maul, let the maul slip from his hand, and that said maul struck the plaintiff and injured him, and that the defendant thereby failed to exercise ordinary care to protect plaintiff from danger alleged in the complaint, and that the act of the said agent and servant of the defendant in letting said maul slip from his hand was the proximate cause of the injury, and that plaintiff at the time was exercising ordinary care for his own safety and had not assumed the risk, you will be authorized to find for the plaintiff and assess his damages at such a sum as will, from the evidence, fully compensate him for the injuries received."

The court gave the above and other instructions at the instance of the appellee, which authorized the appellee to recover if the jury found that the alleged injury was caused by the negligence of a fellow-servant.

At the instance of appellant the court granted, among others, the following prayer for instruction:

"No. 12. You are instructed that the master is not an insurer of the safety of the servant, and the mere fact that there was an accident, and that plaintiff was injured thereby, is not sufficient to justify a recovery, but, before you could find a verdict against the defendant, the plaintiff would have to show by a fair preponderance of the evidence not only that plaintiff was in the employ of defendant, and that he was injured by the act of another servant of defendant, but he must also show by a fair preponderance of the evidence that the injury was caused by the negligence of the fellow-servant; and if he fails to show any of these facts by a fair preponderance of the evidence, your verdict must be for the defendant."

The appellant asked the court to instruct the jury to the effect that if the appellee and Winkler were fellow-servants appellee could not recover for an injury to him caused by the alleged negligence of Winkler. The jury returned a verdict in favor of the appellee in the sum of $8,000. Judgment was rendered in favor of the appellee for that sum, from which is this appeal.

1. Section 256 of the Federal Judicial Code provides in part as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States * * * * of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

The appellant contends that under the above section appellee cannot maintain this suit because the injury occurred on a barge in the Arkansas River, a navigable stream, and because, under the rules of the common law, one servant cannot recover damages from the master for injuries done through the negligence of a fellow-servant. This contention cannot be sustained for several reasons.

First, the above section has no application. The barge on which the alleged injury occurred is not alleged and proved to be a vessel engaged in commerce and navigation. This was essential to bring the appellee's cause within the admiralty and maritime jurisdiction. See *Peoples* v. *Steamer America,* 34 Cal. 679; 1 C. J. p. 1251, § 16.

In the second place, if the appellant had alleged and proved that the barge, at the time of appellee's injury, was engaged in commerce and navigation on the waters of the United States, then sec. 8337 (a) of the United States Compiled Statutes, 1916, would apply. That section provides that "in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be fellow-servants with those under their authority."

In the third place, if the Federal court had jurisdiction of appellee's alleged cause of action under the above section, then under the same section the State court exercising common-law jurisdiction would also have jurisdiction of the cause, and such court should try the cause according to the rules of the State law applicable to such a tort at the time of its commission. The Judicial Code saves "to suitors in all cases the right of a common-law remedy." Suitors under this statute have a remedy for their rights in a common-law court of the State under the rules of law existing when those rights accrue. *Johnson* v. *Westfield,* 135 S. W. (Ky.) 425; *Walter* v. *Kierstead,* 74 Ga. 18; *Dougan* v. *Champlin Transportation Co.,* 56 N. Y. 1; *Chase* v. *Amer. Steamboat Co.,* 9 R. I. 419, 11 Am. Rep. 274. See also *Amer. Steamboat Co.* v. *Chase,* 83 U. S. 522, 21 L. Ed. 369; *McDonald* v. *Mallory,* 77 N. Y. 546; 1 C. J. p. 1253. There was no error in the rulings of the court on the above question.

2. The appellant contends that the court erred in giving appellee's prayers for instructions Nos. 1 and 2 set out above. Taken together, these instructions tell the

jury that the duty rested upon the company to commit no act of negligence whereby a servant may be injured and to exercise ordinary care to protect him from danger. No issue of negligence predicated upon the failure of the appellant, its agents or servants, to exercise ordinary care to protect the appellee from dangers incident to his employment, is raised in the pleadings. It is, of course, hornbrook law that the master owes his servants the duty of exercising ordinary care to furnish him a safe place in which to work and safe implements with which to perform his duties, and the further duty of exercising ordinary care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service. Nowhere is it alleged in the complaint that the appellant was negligent because it had failed to perform any of these duties. The only negligence alleged in the complaint is that "one of the defendant's employees named Winkler carelessly and negligently allowed the sledge-hammer or top maul which he was using to slip and fly from his hand and strike plaintiff on his right leg with great force," etc. If the servant was negligent in the manner alleged, to be sure the appellant would be liable for such negligence. Sec. 7137. *Ozan Lbr. Co.* v. *Biddie,* 87 Ark. 587; *Aluminum Co.* v. *Ramsey,* 89 Ark. 522; *Missouri & N. A. R. Co.* v. *Van Zandt,* 100 Ark. 462; *Board of Imp.* v. *Moreland,* 94 Ark. 380.

But the instructions broadly tell the jury that it was the duty of the appellant "to commit no act of negligence whereby he (appellee) may suffer injury and to exercise ordinary care to protect him from danger," and that, if appellant failed to exercise ordinary care to protect the appellee from the danger alleged in the complaint, appellant would be liable. Instruction No. 2 above also tells the jury that if "one of the defendant's servants * * * * let the maul slip from his hand and that said maul struck the plaintiff and injured him, and that the defendant thereby failed to exercise ordinary care to protect plaintiff from danger, to find for the plaintiff," etc. This part

of the instruction permitted the jury to find that the appellant had not exercised ordinary care to protect the appellee from danger if his fellow-servant, Winkler, let the maul slip from his hand, whether Winkler's act in so doing was a negligent act or not. In other words, under this part of the instruction the jury could return a verdict in favor of the appellee although it may have found that Winkler let the maul slip accidentally and without any negligence whatever. Such is not the law.

The instructions in the manner drawn were abstract, argumentative and misleading. These instructions were inherently erroneous, and a general objection to them was sufficient. However, if a specific objection were necessary, then instruction No. 12, *supra,* given at the instance of appellant, was tantamount to such objection. Instruction No. 12 is in conflict with instructions Nos. 1 and 2, and the charge as a whole was not consistent.

We find no other errors prejudicial to the appellant in the giving and refusing of prayers for instructions. In view of a new trial we deem it improper to set out and comment upon the testimony bearing upon the assignment that the verdict was excessive. For the error in granting appellee's prayers for instructions Nos. 1 and 2 the judgment is reversed, and the cause is remanded for a new trial.

MALONEY v. HALE.

Opinion delivered May 8, 1922.

HUSBAND AND WIFE—WIFE PERMITTING HUSBAND TO USE HER PROPERTY.—Where a wife permitted her husband to use her money and personal property as an apparent basis of credit, she is estopped from claiming the property as against one who extended credit to her husband on the faith thereof.

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

STATEMENT OF FACTS.

John Maloney brought this suit in equity against J. W. Hale and M. E. Hale, his wife, to subject certain property claimed by the wife to a judgment against her husband. On the 26th day of May, 1914, John Maloney obtained judgment before a justice of the peace against J. W. Hale for the sum of $100 and the accrued interest.

According to the testimony of C. F. Greenlee, he has been engaged in the practice of law in Brinkley, Ark., since August 21, 1891. He is well acquainted with J. W. Hale and M. E. Hale, his wife. J. W. Hale has been engaged in the grocery, furniture and hardware business in Brinkley, Ark., for the past twenty-eight years. Sometimes he has done business in the name of M. E. Hale & Co., and sometimes in the name of Hale & Co. J. W. Hale has given his entire time and attention to the business, and M. E. Hale has never even assisted in conducting the business. During this time J. W. Hale has acquired valuable real estate and has purchased and erected a brick store in which he now conducts the mercantile business. This building adjoins the office building of the witness. The stock of goods which J. W. Hale manages is worth at least $5,000, and the real estate which he controls is worth about $10,000. On December 15, 1917, J. W. Hale leased a store-room belonging to Jas. Gunn and C. F. Greenlee and directed Greenlee to make the lease in Hale's own name. Greenlee had made out the lease in Hale's wife's name because he understood that he was doing business in her name. Hale objected to the lease being in this form and directed Greenlee to change it to Hale himself. J. W. Hale has no property whatever in his own name, but the property in his wife's name has been accumulated entirely through his management and energy. Mrs. Hale has given no time or attention whatever to the business.

John Maloney was a witness for himself. According to his testimony he had been in the store of Hale & Co., and J. W. Hale was the only one conducting the business.

He had never been paid anything on the judgment which he obtained against J. W. Hale.

Two other witnesses testified that they had known J. W. Hale and his wife, M. E. Hale, for over twenty years, and that J. W. Hale had charge of the business and gave all of his time and attention to it. The witnesses were well acquainted with the parties, but never saw Mrs. Hale looking after the business in any way. They did business with Mr. Hale and the bills were always entered in the name of Hale & Co.

According to the testimony of J. W. Hale, he failed in business in Brinkley in the year 1892 or 1893. Since then he has not accumulated any property in his own right. His wife engaged in mercantile business about a year after his failure and he became the manager of her business. His wife's brother-in-law gave her the money with which she commenced the business. He gave the dates and amounts of these gifts. They ranged in amounts from $20 to $200 each, and amounted to about $1,950.

According to the testimony of M. E. Hale, she engaged in business with money furnished by her brother-in-law, and her husband conducted the business for her. All the property she now owns was acquired prior to the year 1909, while her husband managed her business. During the year 1909 her husband became mentally incompetent and was confined in a sanitarium for a while. Since then he has not superintended her business exclusively, and is not now mentally competent to conduct it. Her sons conduct her business for the most part. Her husband went back in the store when he returned from the sanitarium, and has been there ever since. Mrs. Hale further stated that she went to market sometimes and did part of the buying herself. Her testimony with regard to her husband's being confined in a sanitarium for mental unsoundness was corroborated.

The chancellor found the issue for the defendants, 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.

C. F. Greenlee, for appellant.

Where a married woman permits her husband to use her property as an apparent basis of credit, she will be estopped from claiming the property as against creditors who extend the credit to her husband. 84 Ark. 227; 126 Ark. 591; 136 Ark. 604; 147 Ark. 174.

Where, however, through the husband's skill in the management of a business, the capital being furnished by the wife, profits are made and invested in real estate in the name of the wife, the real estate has been held to be the property of the husband, and liable for his debts. 21 Cyc. 1392; 20 Cyc. 360; 56 L. R. A. 938; 85 Ky. 168; 35 S. W. 106; 12 Bush. 303; 53 S. W. 528.

Bogle & Sharp, for appellees.

Although the husband gives his time and attention the management of his wife's estate, the rents and profits arising therefrom cannot be subjected to the payment of his debts. 75 Ark. 562; 89 Ark. 77.

The husband had the right to give his personal service to the management of his wife's property. The result of his labor is not subject to his debts. 123 Mo. 450; 107 Ia. 649; 154 Mo. 415; 55 S. W. 441. His control was only that of agent, and did not affect her rights. 7 Vroom (N. J. Eq.) 481; 83 Mo. App. 151; 21 Ind. 115; 21 Ill. App. 282; 10 Mich. 333.

HART, J. (after stating the facts). Counsel for the plaintiff seeks to reverse the judgment upon the doctrine laid down in *Roberts* v. *Bodman-Pettit Lumber Co.,* 84 Ark. 227; *McClintock* v. *Skinner Co.,* 126 Ark. 591, and *Talley* v. *Davis,* 136 Ark. 604. In those cases, as well as other cases, this court has held that where a married woman permits her husband to hold her personal property out as his own and to use it as an apparent basis of credit, she will be estopped as against her husband's creditors to claim it as her own.

On the other hand, counsel for the defendants seek to uphold the decree on the doctrine of *Sharp* v. *Fitzhugh*, 75 Ark. 562. In that case it was held that the wife's property is not liable to her husband's creditors for its increase or enhancement in value on account of any reasonable contribution of his time, labor, or skill in the management of it. The reason is that creditors cannot compel the husband to work for them, and cannot command his skill or labor. The wife has the right to control the profits of her own property, and her husband may manage it for her. There is a marked distinction, however, between the wife's entrusting the entire management and control of her separate property or business to her husband when the business is openly conducted as her own, and in suffering her own money to be used in a business by her husband, and blended with his earnings so that it cannot be separated. Equity looks to the substance of a transaction and not its form. It disregards all matters of form and is governed by the facts. The substance of the present transaction is that the wife permitted her money to be used by her husband in carrying on a business under the name of Hale & Co. Her money and the business skill and industry of her husband cannot be separated. He used her money in building up the business and gained credit on the faith of it. A preponderance of the evidence shows that the husband devoted his whole time, energy and skill to the management and conduct of the mercantile business. The bills were sent out in the name of Hale & Co. The wife never gave any attention whatever to the business. Her husband obtained credit on the faith of its being his own business. Husband and wife occupy the most confidential relation in life, and it is well settled that the wife cannot give her money to her husband and permit him to use it for a long series of years in obtaining credit and then claim that the profit derived from the use by her husband is exempt from the claims of his creditors.

We are of the opinion that the course of conduct of Mrs. Hale in permitting her husband to use her money and property as an apparent basis of credit estops her from claiming the property against the plaintiff, who extended credit to her husband on the faith thereof.

Therefore the chancery court erred in dismissing the complaint of the plaintiff for want of equity, and for that error the decree will be reversed and the cause remanded, with directions to grant the prayer of the plaintiff's complaint, and for further proceedings in accordance with the principles of equity.

NICHOLS v. STATE.

Opinion delivered May 8, 1922.

1. CRIMINAL LAW—EVIDENCE OF ATTEMPT TO STEAL.—Under an indictment for stealing a cow, testimony of a witness that he and defendant with others had made an unsuccessful attempt to steal a yearling the night before the cow was stolen was admissible to show a plan or scheme, where the evidence showed that defendant and witness belonged to a band organized for theft.
2. LARCENY—PARTICIPATION IN ACT.—Defendant cannot be convicted of larceny unless he was present and assisted in its commission, even though the theft was in furtherance of a conspiracy into which he had entered.

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

Norwood & Alley, for appellant.

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

HART, J. Charlie Nichols prosecutes this appeal to reverse a judgment of conviction against him for grand larceny charged to have been committed by stealing a cow from Ira McCown in Polk County, Ark.

The first assignment of error is that the court erred in allowing Jim Murray to testify that he and the defendant with others had tried to steal a yearling the night

before the cow was stolen, but could not catch her. This assignment of error is not well taken.

On the part of the State it was shown that the defendant, Nichols, and Jim Murray belonged to a band organized for the purpose of stealing and committing other crimes and shielding each other from prosecution therefor. Under these circumstances the evidence was admissible for the purpose of showing a plan or scheme for stealing cows and other property and disposing of them. *Murphy* v. *State*, 130 Ark. 353.

The next assignment of error is that the court erred in giving instruction No. 3 at the request of the State. The instruction is as follows: "If you find from the testimony, beyond a reasonable doubt, that the defendant, Jim Murray, and others entered into a conspiracy to commit larceny and other crimes, and that in furtherance of such agreement or understanding, Jim Murray stole the McCown cow, you will convict the defendant, although you may further find that the defendant did not actually participate in the larceny."

The defendant was indicted for stealing a cow. On the part of the State it was shown that the cow was first placed in the defendant's lot, and that the defendant subsequently assisted his brother and Jim Murray in driving the cow out of the lot. The cow was driven out of the lot for the purpose of stealing her. She was carried to another place and killed and the meat divided between the defendant Nichols, Jim Murray and others.

On the part of the defendant it was shown that he was not at home the day that his brother and Murray placed the cow in his lot and did not know anything about it. He had nothing to do with stealing the cow or receiving a part of the meat after she was butchered. The defendant could not be convicted upon an indictment for larceny if he was not present aiding, abetting, and assisting in stealing the cow. He could not be convicted of the larceny of a cow by showing that he had entered into a conspiracy with other parties to commit larceny

and other crimes, and that the other parties had stolen a cow in furtherance of such crime. If he was not present, aiding and assisting in the taking and carrying away the cow, the defendant was not guilty of larceny and could not be convicted of the crime because he had entered into a conspiracy previously to commit that and other crimes. *Hughes* v. *State,* 109 Ark. 403.

Therefore the court erred in giving the instruction complained of, and for that error the judgment must be reversed and the cause remanded for a new trial.

WILLIAMS v. ARKANSAS COUNTY COURTHOUSE IMPROVEMENT DISTRICT.

Opinion delivered May 8, 1922.

1. IMPROVEMENT DISTRICTS—QUESTION FOR JURY.—The question of what constitutes a local improvement for assessment purposes is determined by the nature and character of the improvement itself.
2. IMPROVEMENT DISTRICTS—PUBLIC PURPOSE.—A local improvement for assessment purposes must be for a public purpose, and not for a mere private purpose.
3. IMPROVEMENT DISTRICT—BENEFIT TO PROPERTY ASSESSED.—Local assessments are a species of taxation, and there must be some special or peculiar benefit to the property on which the assessment of benefit is made.
4. IMPROVEMENT DISTRICTS—BENEFIT TO PROPERTY ASSESSED.—The fact that the improvement will benefit adjoining property more than property at a distance is not conclusive as to whether the improvement is a local improvement for purposes of assessment.
5. IMPROVEMENT DISTRICTS—PURPOSE OF IMPROVEMENT.—The primary purpose and effect of a local improvement must be to benefit the adjoining property, although it may incidentally benefit the public.
6. COUNTIES—STATUTE CREATING COURTHOUSE IMPROVEMENT DISTRICT.—Sp. Acts 1921, p. 914, creating an improvement district for constructing a courthouse at Stuttgart, and providing for assessment of benefits for purposes thereof, is unconstitutional, as the construction of a county courthouse does not constitute a public improvement.

Appeal from Arkansas Chancery Court, Northern District; *John M. Elliott,* Chancellor; reversed.

J. E. Ray, for appellants.

Act 442 is unconstitutional in that it gives immunity from taxation to the people of the Southern District by creating no lien on their property, for an undertaking which is strictly a county purpose. Art. 2, sec. 18, Const. The act also is in violation of art. 1, sec. 10, because it impairs the obligation of contracts, in that it provides for a first lien on the property of the Northern District, whereas such a lien was created by Acts 1919, vol. 1, p. 1071, creating a road district. See also 102 U. S. 203. The act is also in violation of art. 26, sec. 6, Constitution, in that there is no uniformity of taxation in the two districts. 57 Ark. 555; 48 Ark. 370. It violates art. 7, sec. 30, because it usurps the jurisdiction of the county court; and art. 12, sec. 5, because it makes the county loan its credit to an improvement district; and further it invades the jurisdiction of the county court. 92 Ark. 53.

John L. Ingram, Frauenthal & Johnson, for appellees.

The lands of the district are especially benefited and enhanced in value and are the subject of an improvement district for the purpose mentioned. The creation of the district by the Legislature was within its province. 71 Ark. 478; 80 Ark. 333; 141 Ark. 612; 81 Ark. 562; 103 Ark. 127; 107 Ark. 285; 146 Ark. 288; 147 Ark. 112.

The act does not invade the jurisdiction of the county court. 104 Ark. 425; 145 Ark. 279; 138 Ark. 549; 139 Ark. 153; *Id.* 595; 142 Ark. 73; *Id.* 439; 143 Ark. 228; 144 Ark. 632.

The legislative determination of an improvement as a local one is conclusive, unless arbitrary and unfounded in reason, and is not subject to judicial interference if there is only a difference of opinion as to the wisdom or expediency of making the improvement. 130 Ark. 507; 131 Ark. 59. See also 23 A. S. R. 742; 50 Mich. 7; 147 Ind. 476 and cases cited; 153 Ind. 204; 19 Pa. 258.

HART, J. B. L. Williams and other owners of real property in the Northern District of Arkansas County, Ark., filed their complaint against the board of commissioners of Arkansas County Courthouse Improvement District to restrain the issue of bonds and other action providing for the erection of a courthouse at Stuggart, in said district and county, and the payment thereof by local assessments on the real property in said district.

The complainants urge that the district is illegal on several grounds, but the main reliance is that the erection of a county courthouse cannot be made the subject of a local improvement.

The chancery court sustained a demurrer to the bill. The plaintiffs declining to plead further, their bill was dismissed for want of equity, and they have appealed to this court.

Arkansas County was divided into two judicial districts known as the Northern and Southern Districts of Arkansas County. DeWitt was the county seat of the county and was named as the seat of justice for the Southern District. Stuttgart was named as the seat of justice for the Northern District. Acts of 1913, p. 192.

Act 442 of the Legislature of 1921 creates the Arkansas County Courthouse Improvement District. Special Acts of Arkansas, 1921, p. 914.

Sec. 3 provides that the district is formed for the purpose of purchasing a building site and constructing and equipping a building in the city of Stuttgart to be occupied by the officials of Arkansas County as a county courthouse.

Sec. 12 provides that the commissioners shall make an assessment of benefits of all the lands within the Northern District of Arkansas County for the purpose of making said improvement.

Sec. 14 provides that said assessment shall be a charge against the real property of said district for such an amount as may be necessary to complete the improvement and pay all the expenses of the district.

Sec. 21 provides that in order to hasten the work the commissioners may borrow money, issue bonds, and pledge the assessment of benefits for the payment of the principal and interest.

Sec. 29 authorizes the commissioners and the county judge to enter into an agreement for the use and occupancy of the building by county officials. It provides that such rental shall not exceed two mills per annum of the assessed value of all the real and personal property in the county. The section further provides for setting aside two mills out of the county general tax for the payment of said rent, and that such tax shall be payable only in lawful money of the United States.

Under the act, the question arises whether the Northern District of Arkansas County can be organized into an improvement district for the purpose of erecting a courthouse for the use of said district.

Counsel for the commissioners of the district rely upon our cases holding that local improvement districts may be organized for the purpose of improving roads and building bridges and wharfs. *Sallee* v. *Dalton,* 138 Ark. 549, and cases cited; *Shibley* v. *Ft. Smith & Van Buren District,* 96 Ark. 410; *Com'rs. of Broadway-Main Street Bridge Dist.* v. *Quapaw Club,* 145 Ark. 279, and *Solomon* v. *Wharf Imp. Dist. No. 1,* 145 Ark. 126.

We do not think these cases are any authority for the organization of such a local improvement district as the one in question. The question of what shall be considered a local improvement is determined by the nature and character of the improvement itself. Of course every local improvement must be for a public and not for a mere private purpose. Moreover, local assessments are a species of taxation, and there must be some special or peculiar benefit to the property upon which the assessment of benefits is made. We have held that roads, bridges and wharfs may be the subjects of local improvements because the adjoining property will be especially and peculiarly benefited and that the benefit to the public

is merely incidental. That the improvement will benefit adjoining property more than that at a distance is not conclusive as to the nature of the improvement. The primary purpose and effect of a local improvement must be to benefit the adjoining property, although it may incidentally benefit the public.

The definition in *Crane* v. *Siloam Springs,* 67 Ark. 30, is, "if we look for the technical or legal meaning of the phrase 'local improvement,' we find it to be a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement."

The nature and character of the improvement in question shows that it is not a local improvement within the definition above given. This court has held that a county may be divided into judicial districts, but that the expense of maintaining two judicial districts in a county is necessarily a county expense, and that the revenue to pay it can be raised only by a county tax. The court further said that such a tax to be valid must be levied at a uniform rate upon all the taxable property of the county. *Hutchinson* v. *Ozark Land Co.,* 57 Ark. 554.

Again, the court said that all the affairs of the two districts are concerns of the county, and that the expenses incurred in both, whether in the holding of courts or otherwise, constitute demands against the county. So it was held that the expense of maintaining two judicial districts in a county is a county expense.

Carrying out this idea in the case of *Law* v. *Falls,* 109 Ark. 395, the court held that, a seat of justice having been established at Dardanelle and the courthouse having been destroyed by fire, the county court had the authority to direct the erection of a new building for the use of the courts of the district.

The Legislature of 1913 made the city of Stuttgart the seat of justice for the Northern District of Arkansas County. If the expense of holding the courts and otherwise maintaining two judicial districts in a county is a county expense, it would seem that it necessarily follows that the erection of a courthouse for the use of such district would also be a county expense. Of course the establishment of a seat of justice in a certain town adds to the material prosperity of the town and the surrounding country. This fact arises, however, because the seat of justice is established there and the kind and character of building to be used as a courthouse only incidentally adds to the value of the real property in the surrounding country. The establishment of a seat of justice is a governmental purpose, and the erection of a courthouse within which to carry it on also partakes of the same character.

In the case of building roads, bridges and wharfs, the primary object to be accomplished is the benefit of the adjoining property, and the benefit to the public is merely incidental. The establishment of a seat of justice and the erection of a courthouse within which to carry on governmental functions is essentially different. The primary object to be accomplished is to carry on the county government for the protection of the life, liberty, and property of the inhabitants, and the benefit to the property owners is merely incidental. Therefore the expense must be borne by the whole public and cannot be charged against the real property of a portion thereof.

In discussing what may be a local improvement in *Crane* v. *Siloam Springs,* 67 Ark. 30, Judge RIDDICK, speaking for the court, said: "In coming to this conclusion, we do not overlook or disregard the word 'local' in the phrase 'local improvements.' On the contrary, we attach much importance to it. The use of this phrase limits the power to authorize assessments in cities and towns to those public improvements which are local in their nature, and intended for the convenience and ac-

commodation of the local public, or some portion thereof, and which confer a special benefit upon the real property assessed. It distinguishes such improvements from those that are not local, but intended for the benefit of the general public. Not every improvement in a town or city is a local improvement. A county courthouse or capitol for the State might be an improvement in a town or city, and in some cases a very desirable improvement, but, being designed and intended for the use and convenience of the general public of the county or State, it would not be a 'local improvement,' within the meaning of our Constitution; or, if such a structure could in any sense be considered a local improvement, it would not be to the full extent of the cost. A town or city hall would probably come within the same category, for, while intended for the convenience of the local community, it would not usually be an improvement of such a nature as to confer a special benefit upon local real estate or the owners thereof, and therefore not a local improvement within the meaning of the law. A consideration of these and other illustrations which could be made, we think, clearly shows the meaning and purpose of the phrase 'local improvements' as used in our Constitution."

It is true that the precise question in that case was whether the whole area of a city could be laid off into an improvement district for the purpose of constructing and maintaining a general system of waterworks. The court held that this could be done, and the language just quoted was pertinent to a discussion of that question. It shows that the idea of the court was that where the primary purpose and effect is to benefit the public it is not a local improvement, although it may incidentally benefit property in a particular locality.

On the other hand, if the primary object of the local improvement is for the use and benefit of the property owners in the proposed district, it is a local improvement, although the public may be incidentally benefited. In the case of roads, bridges and wharfs the idea of first

importance is to benefit the property included in the proposed district, and the district is not formed for the purpose of benefiting the public.

On the other hand, in the case of the erection of a courthouse the idea of paramount importance is to provide offices for the county officers, a place for the public records to be kept, and where the courts may be held. Therefore, we think that the act creating the improvement district in question for the purpose of erecting a county courthouse is unconstitutional, and that the property owners might enjoin the assessment and collection of the tax against their real estate under its provisions.

It follows that the decree will be reversed and the cause will be remanded, with directions to the chancery court to overrule the demurrer and grant the injunction prayed for in the complaint.

McCULLOCH, C. J., (dissenting.) But for the language quoted by the majority from the opinion delivered by Judge RIDDICK in *Crane* v. *Siloam Springs,* 67 Ark. 30, the question involved in the present case would give me little pause in reaching a conclusion contrary to the views expressed by the majority. As much, however, as I hold in respect the great ability of the learned judge from whom the majority have quoted, I feel compelled to characterize the language as mere *dicta* and unnecessary to the decision of the case then in hand; and, as I think it was clearly erroneous, I do not feel bound to follow it.

The question in that case was narrowed to the power to create an improvement district coextensive with the boundaries of a municipality. It was held (correctly, I think) that there was nothing in the Constitution which, either expressly or impliedly, restricted the creation of improvement districts inside of municipalities to territory less in extent than the municipality itself.

The language quoted from Judge RIDDICK's opinion was used as a mere illustration in determining whether or not the construction and establishment of a system of waterworks could be made the subject of a local improve-

ment district. It was contended in that case that, because the district comprised the whole of the territorial limits of the municipality, the improvement was necessarily general in its nature and not local, but the court held to the contrary. The fallacy of the argument appears clear when we see the intimation in the opinion that because the statute authorizes the municipality itself to construct waterworks, the improvement would necessarily be general in its nature so as to exclude the power to create an an improvement district, except for the fact that the statute itself, in express terms, authorized the creation of that kind of improvement through the agency of a local improvement district.

That argument is obviously unsound, for it has never been considered in our decisions as a test of power in the creation of local improvement districts whether or not legal authority to make the improvement exists in the county or municipality in which the district is created. On the contrary, exclusive authority over roads and bridges is conferred upon the county court, and yet we have repeatedly held that, notwithstanding that fact, such improvement may be the subject of a local improvement.

In testing the question whether or not a given improvement is local or general, we have never been controlled by the fact that the authority to make such improvement is, or is not, vested in the county or municipality, and we have steadily adhered to the rule that, even though the improvement is general in its nature, if adjacent property receives special and peculiar benefits therefrom, it may be treated as a local improvement to that extent. The correct rule is, I think, stated in the case of *Shibley* v. *Fort Smith & Van Buren Bridge District,* 96 Ark. 410, as follows:

"Whilst it may be true that the benefits which flow from almost all local improvements, which are usually authorized to be constructed at the expense of local property-owners—street pavements, sewers, public parks, wa-

terworks, in cities and towns, levees built for the protection of overflowed lands—all inure to the benefit of the general public to a greater or less extent, yet it is not true that a bridge, any less than improvements of the other kinds mentioned above, does not produce special benefits to adjoining lands so as to justify special assessments to defray the expenses of such improvements. A bridge for the use of the public, like a street in a city or a highway in the country, is undoubtedly of great benefit and convenience to the traveling public; nevertheless, it may be also of special benefit to adjoining lands and a fit subject for construction from the proceeds of local assessments. It is settled that improvement districts 'are based and sustainable only upon the theory that the local assessments levied to sustain them are imposed upon the property of persons who are specially and peculiarly benefited in the enhancement of the value of their property by the expenditure of the money collected on the assessment.' * * * * * * * Note the words, 'specially and peculiarly benefited.' The benefits need not be exclusive. The general public may also derive benefits in more remote degree, yet, if there is a special and peculiar benefit inuring to the adjoining property, local assessments are justified."

The above was quoted with approval by this court in the recent case of *Solomon* v. *Wharf Improvement Dist. No. 1,* 145 Ark. 126, where we held that a floating wharf at the landing, on the Mississippi River, in the city of Helena, with the necessary approaches, warehouses, a loading barge and freight handling and loading machinery, was a local improvement within the meaning of the Constitution.

I can see no reason why a courthouse or any other public building may not be the subject of a local improvement, if, under the circumstances, a "special and peculiar benefit" inures to the adjoining property, even though it is a public building, and the general public also derives a benefit from its construction and maintenance.

The fact that the improvement is public and open to the use of the public does not prevent its being a local improvement, for all local improvements are of a public nature, like roads, bridges, parks, etc. The county-site is located by public authority, and of course the location of the site itself could not be controlled by an improvement district any more than the opening of a public road could be so controlled. But when the county-site is located under proper legal authority, the building of the courthouse may be a local improvement, just like a public road is improved after it has been laid out and established by the county court. The character of the building gives permanency and value to the location of the county-site, and thus the benefit to adjacent property is, to a great extent, enhanced. For this reason there accrues to the adjacent property a special and peculiar benefit.

Where the improvement district has been created by legislative authority, we should indulge the presumption that the facts have been ascertained and that it was found that special benefits would accrue. Courts should respect the legislative determination of the character of the improvement, unless the determination was arbitrarily and demonstrably erroneous. *Bennett* v. *Johnson,* 130 Ark. 507.

The following appropriate language is found in the opinion of the Supreme Court of Michigan in the case of *Callam* v. *Saginaw,* 50 Mich. 7:

"No one doubts the fact that the existence and occupation of good public buildings in a municipality is profitable and directly advantageous to it by making it a more important business and social center, and by stimulating private improvements which add directly to its revenues."

So it is that the construction of a handsome and pretentious public building at Stuttgart will confer peculiar benefits upon the real property inside of the district, at

least the Legislature so determined, and we should respect that determination.

My conclusion, therefore, is that the creation of the district was valid and should be upheld.

HARPER v. BROOKSHER.

Opinion delivered May 8, 1922.

1. CONSTITUTIONAL LAW—ROAD TAX—DUE PROCESS.—Acts Special Session 1920, No. 328, imposing a road tax in a certain district on persons between the ages of 21 and 45 years, without privilege of doing road work in lieu thereof, under Crawford & Moses' Dig., §§ 5314-5, *held* not to deprive persons of property without due process of law, in violation of the Fourteenth Amendment.
2. CONSTITUTIONAL LAW—SPECIAL ACT.—Special act of 1920, No. 328, imposing a road tax on persons between 21 and 45 years within a certain district, without the privilege of doing road work in lieu thereof, under Crawford & Moses' Dig., §§ 5314-5, *held* not to violate Const., art. 5, § 25, providing that no special act shall be passed where a general law can be made applicable; the question of whether a general law can be made applicable being a legislative and not a judicial question.
3. CONSTITUTIONAL LAW—EQUAL PRIVILEGES.—Special act of 1920, No. 328, imposing a road tax in a certain district on persons between the ages of 21 and 45 years, without privilege of doing work in lieu thereof under Crawford & Moses' Dig., §§ 5314-5, *held* not to confer any privileges or immunities upon any citizens or class of citizens which do not upon the same terms equally apply to all citizens, in violation of State Const., art. 2, § 18, and Const. U. S., Amendment 14.
4. HIGHWAYS—VALIDITY OF TAX.—Special act 1920, No. 328, imposing a road tax of $4 in a certain district on persons between 21 and 45 years old, without privilege of doing road work in lieu thereof, does not violate Const. Ark., Amendment 3, limiting the taxes which may be levied for road purposes to three mills, nor does it violate the equal and uniform requirement of such Constitution requiring the basis of taxation to be equal and uniform throughout the State.

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

J. Sam Wood and *Fadjo Cravens,* for appellant.

Section 25, art. 5 of the Constitution is merely cautionary, and the Legislature is the judge as to whether a general law can be made applicable.

The act in question does not confer privileges or immunities on any citizen or class of citizens which do not equally belong to all citizens residing in the district, and is therefore not violative of sec. 18, art. 2 of the Constitution. The Fort Smith District of Sebastian County is not a person within the meaning of the Constitution. 103 Ark. 127. Neither does it violate the uniformity clause of sec. 5, art. 16 of the Constitution. 37 Cyc. 731.

A. A. McDonald, for appellee.

The act is unconstitutional because a general law could be made applicable.

The act is void because the tax is not uniform throughout the State.

It violates sec. 18, art. 2 of the Constitution, by granting to a class of citizens privileges or immunities which are not upon the same terms granted to all other citizens. 117 Ark. 54; 110 Ark. 204.

SMITH, J. Appellee brought this suit against the collector of Sebastian County to restrain that officer from collecting the road tax of $4 assessed against appellee and all other male persons between the ages of 21 and 45 living in the Fort Smith District of Sebastian county pursuant to a special act of the General Assembly approved February 25, 1920, entitled "An act to fix the road tax in Fort Smith District of Sebastian County, Arkansas, and for other purposes." (Special Act No. 328, Special Session 1920). Appellee alleged in his complaint that the act was unconstitutional and void; and it was so declared by the court below on hearing a demurrer thereto, and the collection of the tax was enjoined, and this appeal is prosecuted to review that action.

The act is as follows: "Section 1. Free labor on the public highways as now provided by law, whereby all male persons between the ages of twenty-one and forty-five years are required to work four days per annum, with alternative of paying four dollars ($4), shall be and the same is hereby abolished. And all male persons between the ages of twenty-one and forty-five, in the Fort Smith District of Sebastian County, of Arkansas, shall hereafter annually pay an individual road tax of $4. Provided, that seventy-five per cent. of the funds collected under this act in the city of Fort Smith, Sebastian County, Arkansas, shall go to said city of Fort Smith." Section 2 provides for the extension of the tax by the county clerk and its collection by the collector, and contains the proviso that the act shall apply to the Fort Smith District of Sebastian County only.

It does not appear from the record before us upon what ground the act was declared unconstitutional; but it is alleged to be unconstitutional for the following reasons: That it violates the Fourteenth Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." That it violates section 5 of article 16 of the Constitution of this State, which provides that the basis of taxation in this State shall be equal and uniform throughout the State. That it is violative of section 21 of article 2 of the Constitution, which provides that "no person shall be taken or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed, or in any manner destroyed or deprived of his life, liberty or property, except by the judgment of his peers or the law of the land." That it violates section 25 of article 5, which provides that "in all cases where a general law can be made applicable no special law shall be enacted." That it is void because it contravenes a general

statute of the State which permits citizens between the ages of 21 and 45 years to either work upon the public highways or to pay, in lieu thereof, the sum of $1 for each day's labor; whereas the act in question deprives the citizens of the Fort Smith District of Sebastian County of the option to work, and requires them to pay money instead. It is also alleged that the act violates section 18 of article 2 of the Constitution of the State, which provides that "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." And it is finally alleged that the act is violative of Amendment No. 3 to the Constitution of the State, in that said amendment limits to three mills the taxes which may be levied for road purposes, and the $4 is an imposition in excess of that allowed by this amendment to the Constitution.

We think the act under review does not offend against any of the provisions of the Constitution of this State or of the United States.

This court has consistently and repeatedly held that the provision of section 25 of article 5 of the Constitution, providing that no special act shall be passed where a general law can be made applicable, is addressed to the General Assembly, and that the determination of that fact is legislative, and not judicial.

We think the act does not confer any privileges or immunities upon any citizen or class of citizens which do not, upon the same terms, equally apply to all citizens. All persons affected by the act at all are affected by it in like manner. *Caraway* v. *State,* 143 Ark. 48.

The act does not violate the third amendment to the Constitution; nor does it violate the provisions of the Constitution requiring uniformity in levying taxes. In a strict sense it is not a tax, although it is popularly spoken of as such. It is rather an exercise of the State's police power.

It has always been the policy of this State to exercise its police power in the matter of working public

roads. Indeed, such legislation goes back to the earliest territorial days. Territorial legislation required all free male inhabitants between the ages of 16 and 45, and all male slaves of the same age, to work on public roads; and there appears to have been no provision for the payment of money, except by way of penalty for failure to work, and this penalty was recovered by action of debt brought in the name of the overseer. Section 4 of the act approved November 16, 1833, Acts 1833, page 62. But this was not the earliest legislation on the subject. The General Assembly of 1836, which was the first to convene after the admission of the State into the Union, enacted what was then probably regarded as a comprehensive act on the subject of roads and highways. Acts 1836, page 186. This act made all free white male inhabitants between the ages of 16 and 45, except such persons as were exempt from militia duty, and all male slaves of the same age, subject to work on public roads; and the act appears to have contemplated that all persons subject to its provisions would discharge the burden imposed by it by working; and the provisions in regard to payment of money relate only to those who failed to work, against all of whom a forfeit of $2 for each day they failed to work was imposed, to be recovered in an action of debt in the name of the overseer, who was made a sufficient witness to establish such delinquency.

The only provision of this act which appears to provide for the commutation of labor is section 8, which provides that the overseer of every road district is authorized to commute personal labor for wagons, teams or any necessary implements which may be required on the roads.

There has been much legislation in regard to working and improving public roads, but it is unnecessary here to trace the history of our legislation on the subject. It suffices to say that at the present time the general statute on the subject makes all male persons between the ages of 18 and 45 subject to work on any public high-

ways within the respective townships in which they reside. Section 5314 C. & M. Digest.

Section 5315, C. & M. Digest, provides that, when a road tax shall have been voted by the electors of any county, in addition thereto male persons between the ages of 21 and 45 shall be required to work not exceeding four days, with the option of paying $1 for each day he is lawfully warned to work.

As has been said, this and similar legislation is older than the State itself, and our attention has not been called to any decision in which the validity of the legislation has heretofore been questioned.

Such legislation finds its origin, so far as we are concerned, in the earliest history of the common law. Blackstone says: "Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas,* to which every man's estate was subject; viz: *expeditio contra hostem, arcium constructio, et pontium reparatio.*" Book 1, Blackstone's Commentaries, page 357.

It thus appears that the threefold obligation—from which no man was exempt by the ancient laws of England—were expedition against the enemy; the construction of arsenals; and the repairing of bridges; the necessities therefor being such that all men were required to discharge these three imperative duties.

The same great expounder of the common law also says: "In case the personal labor of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9d. in the pound; for the due application of which they are to account upon oath." Book 1, Blackstone's Commentaries, page 359.

It thus appears that, while it was permissible at the common law both to require labor and to impose a tax, the tax was imposed in the event only that the personal labor of the parish was found not sufficient to maintain the roads.

In 1 Elliott on Roads and Streets (3rd Ed.) sec. 480, it is said: "Requiring persons to work on highways, even where they are partly kept up by taxation, is not double taxation, and statutes requiring such work are not unconstitutional. The theory is that requiring such labor is not taxation at all, but is the exaction of a public duty. The authorities are almost unanimous in upholding such statutes."

In 13 R. C. L., section 141 of the article on Highways, it is said: "Statutes requiring male citizens or inhabitants of a specified age to labor without compensation on the public roads for a certain number of days each year, or pay a certain sum in money for each day's labor thus required, and making it an indictable offense or a misdemeanor to refuse or fail after notice to comply with the requirements of the statute, are generally held to be constitutional and valid. Municipalities or quasi-municipalities have no power to require such labor in the absence of legislative authority, but may do so when authorized by their charters or by general laws. According to the weight of authority, such a requirement is not a tax, but rather a police regulation or a duty similar to jury service and the like, and hence is not affected by constitutional requirements of prescribed equation between poll and property taxes, or other constitutional provisions respecting taxation. There is some authority to the contrary, however."

Numerous cases are cited in the notes to the text in support thereof from Elliott on Roads and Streets and from 13 R. C. L. See also, 4 Dillon on Municipal Corporations (5th Ed.), page 2459; 37 Cyc. page 332; 74 Am. St. Reps. 633.

If the power inheres in the State, in the exercise of its police power, to compel her citizens to work the public roads or, in lieu thereof, to pay money, we perceive no reason why, in the exercise of the same power, the State may not elect which of the two burdens shall be imposed.

The Legislature has evidently determined that between the ages prescribed the average citizen enjoys his greatest capacity to earn money or to perform labor: and it is not a discrimination against any citizen to fix these ages as the time during which this burden shall be imposed.

In the development of the State the Legislature long found it sufficient and expedient to give the citizen the option to work or to pay; and, if the right existed to impose those duties with the option to the citizen to choose between them, we perceive no reason why, with the advancing development of the State, it might not become expedient and proper to give the option to the State of saying which service should be required of the citizen. The act treats a dollar as the equivalent of a day's work, and we see nothing arbitrary in the Legislature finding that a day's labor, by a man able to work the roads, is worth that sum, and in requiring the payment of the dollar rather than the performance of a day's work.

The decree of the court below is therefore reversed, and the bill seeking to enjoin the collection of the tax is dismissed.

McCULLOCH, C. J., (dissenting). There is no doubt about the Legislature having power to require citizens to contribute their personal labor in maintaining roads and to provide for a commutation on payment of money in lieu of performing labor. This power is of ancient origin and has always been exercised in this country.

The fullest latitude is also allowed to the lawmakers in prescribing the class of persons subject to this exaction. They may determine what classes of persons

shall be required to labor upon the public highways, and that classification should not be disturbed unless found to be obviously and demonstrably arbitrary and unreasonable.

The instance now before us is not one of allowing commutation, for no alternative is given to the taxpayer. It is nothing more nor less than a capitation tax, imposed without regard to labor upon the public highway. It stands, therefore, on the same ground as any other capitation tax and should be uniform in its application—that is to say, without arbitrary or unreasonable effect.

The fact that the tax is imposed for road purposes does not take it out of the general class of capitation taxation. Speaking of this class of taxation, Judge COOLEY, in his work on Taxation (vol. 1, p. 28), says: "As they regard only the person, they must be shared equally by all, except under governments where privileged orders are recognized and where they might be graded according to the orders to which the several persons taxed belong."

The statute now under consideration imposes the tax on male citizens between the ages of twenty-one and forty-five. This is not a reasonable classification of persons, for a mere tax payable only in money, not being a commutation, physical ability to labor has nothing to do with the reasonableness of the classification. Of course, women and persons under majority may reasonably be excluded, but there is no reason for excluding persons merely because they are over the age of forty-five years. Such a classification is arbitrary.

My conclusion is therefore that the chancellor was correct in declaring the statute to be void.

FORT SMITH & VAN BUREN DISTRICT v. KIDD.

Opinion delivered May 8, 1922.

1. MASTER AND SERVANT—WHEN RELATION EXISTS.—Where a contract between a bridge district and a traction company provided that the district employ collectors of the bridge fares for the benefit of both, the expenses to be divided, the collectors were the servants of the bridge district and the traction company.
2. BRIDGES—LIABILITY OF BRIDGE DISTRICT FOR FALSE ARREST.—In an action against a bridge district for false arrest and imprisonment of a passenger ejected from a trolley car, where the act creating the district made it an agent of the State, to which powers and duties of a public nature were delegated and which could exercise only the corporate functions which the State conferred, the district was not liable for the act of its servant in causing the arrest.
3. CARRIERS—RULE AS TO USE OF COUPONS.—A carrier has the right to use coupon books, and, in consideration of a reduced price, to provide that the coupons will not be accepted if detached.
4. CARRIERS—RIGHT TO EJECT PASSENGERS.—A carrier is authorized to eject a passenger who unlawfully presents a detached coupon and refuses to pay his fare.
5. FALSE IMPRISONMENT—FAILURE TO PAY FARE.—Where a failure to pay his fare on part of a passenger was not made a violation of law, though the carrier was authorized to eject a passenger who refused to pay, such failure did not authorize the passenger's arrest.
6. FALSE IMPRISONMENT—LIABILITY OF CARRIER.—Where a passenger who refuses to pay fare is ejected by being arrested, the carrier is liable for the act of its servant in procuring the arrest if the arrest itself is unauthorized.

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

James B. McDonough and *Hill & Fitzhugh*, for appellants.

No authority is conferred upon the commissioners of the district to authorize an arrest, and it had no power to do so. Improvement district cannot be made liable for a tort. 94 Ark. 380; 119 Ark. 166; 115 Ark. 88; 114 Ark. 366; 110 Ark. 416; 118 Ark. 1; 131 Ark. 286; 170 S. W. 1012; L. R. A. 1918-B, p. 1010; 104 S. E. 309.

The coupon ticket presented by plaintiff was void. Michie on Carriers, p. 1627, sec. 2224.

Neither the district nor Taylor, its servant, who furnished the information upon which the arrest was made, was liable. No false imprisonment was proved. 95 Ark. 227; 12 A. & E. Enc. of L. p. 739; 9 Cyc. p. 330. Before false imprisonment can be made out it must be proved that the arrest was without legal authority. 92 Ark. 128; 143 Ark. 394. The act being committed in the presence of the officer, he was authorized to make the arrest without a warrant. C. & M. Dig. sec. 2904. There is no liability on the officer. 34 Ark. 105. He was not acting for either appellant, hence no liability. 106 Ark. 109. There can be no presumption of authority from the district or the company. 65 Ark. 144; 79 Ark. 85. A carrier is not liable for false imprisonment, even if a special agent exceeded his authority. 84 Ark. 193; 87 Ark. 524; 119 Ark. 28; 135 Ark. 76; 218 S. W. (Ark.) 678; 126 Ark. 260.

The relation of master and servant did not exist between the company and the bridge collector, who caused the arrest, and the doctrine of *respondeat superior* could not apply. 1 Labatt, Master & Servant, sec. 2-20; L. R. 6 Q. B. Div. 532; 22 Sou. 403; 52 Am. Rep. 129. A distinguishing feature of the relation of master and servant is that the employer retains the control over the mode and manner of doing the work under the contract of living. 38 Pac. 320. The contract between the district and the company provides that the company shall have no control over the collectors; their services were performed for the district. Therefore the company was not liable for the act of the commissioners. 28 L. R. A. 552; 38 L. R. A. (N. S.) 379; 57 Ark. 615; 98 Ark. 399; 87 Ark. 524. Conceding, for the sake of argument, that the collector was in the employ of the company, it would still not be liable, as the arrest was not shown to have been within the scope of his employment. 87 Ark. 524; 65 Ark. 144; 135 Ark. 76.

Webb Covington, for appellee.

The arrest of appellee having been made by an employee of the district and company, it was incumbent on them to show justification. 105 Ark. 619. The agent was acting within the apparent scope of his authority and the principals were liable for his wrongdoing. 97 Ark. 24; 135 Ark. 80; 78 Ark. 553. The business of collecting fares was a joint undertaking, and both appellants were liable.

SMITH, J. Appellee sued the Fort Smith & Van Buren District, hereinafter referred to as the district, and the Fort Smith Light and Traction Company, hereinafter referred to as the company, to recover damages for false arrest and imprisonment. He recovered judgment in the sum of $1 against both defendants, and both have appealed.

Appellee took passage in Fort Smith for Van Buren on one of the company's cars, and paid the fare, which is collected before crossing the bridge over the Arkansas River connecting the two cities. A different collector collects the fare over the bridge, and it is the custom for this officer to ride over the bridge on each car crossing it and to collect the fare from the passenger while doing so. This fare, if paid in cash, is five cents; but books are sold containing coupons, each of which is good for one passage across the bridge, at a cost of one and one-fourth cents for each coupon. These coupons are void if detached, and the collectors are forbidden to accept them for fares if detached. Plaintiff, in crossing the bridge, tendered a detached coupon, which Taylor, the collector, refused to accept, and as plaintiff declined to pay the cash fare he was ejected and arrested when the car reached the Van Buren side of the river.

The plaintiff testified that, upon reaching the opposite side of the river, the car was stopped and Taylor called to one Arnold, a deputy sheriff, who appears to have been stationed on the bridge for the purpose of assisting in the collection of fares. Taylor called Arnold into the car, where plaintiff was arrested by Arnold and

carried to the end of the line, and from there Arnold carried plaintiff before a justice of the peace, after having held him in custody for about two hours, and a charge of disturbing the peace by refusing to pay fare was preferred. No contention is made that plaintiff disturbed the peace or did anything else to be ejected for except to refuse to pay the bridge fare; and the charge preferred before the justice of the peace was later dismissed. When Arnold took plaintiff into custody, he asked him pleasantly if he was about to make a test case, and plaintiff disclaimed any such purpose.

The bridge over which the company operates its cars was built by an improvement district under an act of the General Assembly, which has been construed by this court in the cases of *Shibley* v. *Ft. Smith & Van Buren District,* 96 Ark. 410; *Nakdimen* v. *Ft. Smith & Van Buren Bridge District,* 115 Ark. 194; *Ft. Smith Light & Traction Co.* v. *Williams,* 149 Ark. 159.

There was offered in evidence the contract under which the company acquired the right to use the bridge in crossing the river. The principal provisions of this contract are set out in the case of *Ft. Smith Light & Traction Co.* v. *Williams, supra,* and need not be repeated here. In construing the contract in that case we said:

"We shall not undertake to analyze and comment upon the various provisions of the contract. It evidenced an agreement by which the bridge district is to receive a certain sum of money from the traction company for the right granted the latter to run its cars for the transportation of passengers over the bridge. The original act expressly authorized the bridge district to charge the traction company for its right-of-way over the bridge. *Nakdimen* v. *Ft. Smith & Van Buren Bridge District,* 115 Ark. 194. By the same token the traction company, having thus acquired the right-of-way over the bridge, could exercise it with all of its privileges, one of which was to charge passengers who used its facilities. The amount charged the traction company by the district is

a definite and fixed sum ascertained and measured by the number of passengers which the traction company transports in its cars over the bridge and the amount which the traction company charges each passenger for such transportation. The traction company is a common carrier, and had a right to charge those whom it transported on its cars across the bridge according to the tariff of rates filed with the Corporation Commission. Act 571 of the Acts of 1919, p. 411, secs. 5, 6 and 7. See *Helena Water Co.* v. *Helena,* 140 Ark. 597. The money derived from this source, through the sale and use of tickets, and by the payment and collection of the cash fares in the absence of tickets, was primarily the property of the traction company and not of the bridge district. It became the property of the bridge district only because under the terms of the contract the traction company agreed to let the bridge district collect and use it in payment for the right-of-way privilege granted the traction company by the bridge district, and because the bridge district agreed to accept it as such."

It is true the contract provides that the district shall employ and control and discharge the officers who collect the bridge fares; but this is done for the benefit of both defendants. In fact, the contract requires the traction company to assist in the collection of the bridge fares, and to furnish free transportation to the officers collecting them, and to pay $50 per month when only one collector is employed and to pay $100 per month when two are employed. In other words, the traction company is the carrier which renders the service for which the charge is made, and it makes the charge; but the fare is collected by the district for its use and benefit and as rental for the use of the bridge.

Under these facts we are of opinion that the officers engaged in collecting the fares are the servants of both defendants, and ordinarily each defendant would be liable for the conduct of these agents while acting within the line of their duty and within the scope of their authority. But it appears from the decisions of this court above cited,

construing the act creating the bridge district, that the district is one of those agents of the State to which certain powers and duties of a public nature have been delegated and which can exercise only the corporate functions which the State has expressly conferred upon them. Of such district it was said in the case of *Board of Improvement Sewer District No. 2* v. *Moreland,* 94 Ark. 380: "Public *quasi* corporations are created with limited statutory powers, and the general rule, as respects the question of liability to individuals for the negligence of their officers or agents, is that no such liability attaches unless expressly provided by statute. 1 Beach on Public Corporations, §§ 4, 262, 263; *Mahoney* v. *Boston,* 171 Mass. 427." Other cases to the same effect are: *Jones* v. *Sewer Imp. Dist.,* 119 Ark. 166; *Harnwell* v. *White,* 115 Ark. 88; *Wood* v. *Drainage Dist.,* 110 Ark. 416; *Eickhoff* v. *Street Imp. Dist.,* 120 Ark. 212; *Browne* v. *Bentonville,* 94 Ark. 80.

On behalf of the company it is not only insisted that the officers making the arrest were not its employees, but that, even if they were, such action was beyond the scope of their authority.

It may be first said that the defendants had the right to use the coupon books and, in consideration of the reduced rate at which they were sold, to provide that the coupons would not be accepted if detached. 2 Michie on Carriers, § 2224. The opinion in the Williams case, *supra,* recognizes that right.

It may also be said that, as an incident to the right to collect fares, the right existed to eject a passenger who refused to pay. The plaintiff had no right to use the detached coupon which he presented in payment of his fare, and as he refused to pay the cash fare the defendants had the right to eject him from the car. But the failure to pay the fare is not made a violation of the law, and there was no authority to arrest plaintiff. In other words, plaintiff's cause of action must be predicated upon the arrest, and not upon the ejection.

The liability of a carrier for the act of its employee in causing the arrest of the passenger has been several times considered by this court. See *Dickinson* v. *Muse,* 135 Ark. 76, and the cases there cited. In both the Muse case, *supra,* and the case of *St. L. I. M. & S. R. Co.* v. *Waters,* 105 Ark. 619, this court quoted as a correct declaration of the law a syllabus from the case of *Little Rock Ry. & Elec. Co.* v. *Dobbins,* 78 Ark. 553, which reads as follows: "A street railway company is liable for the wrongful acts of its conductor in ordering a policeman to arrest one of its passengers and remove him from the car in which he was riding; but not for such conductor's subseqent acts in prosecuting the passenger for a breach of the peace, such prosecution not being within the scope of the conductor's authority."

In the Dobbins case, as well as in the later cases which cite and follow it, it is made clear that a carrier is not liable for the action of its employees in authorizing arrests and prosecutions of persons who have been ejected or refused passage. But, if the passenger is ejected by being arrested, then the carrier is liable for that action if the arrest itself is unauthorized. It was so expressly held in the Dobbins case, *supra,* where it was said: "The evidence, so far as it related to the arrest of the appellee on the car by the policeman at the request and direction of the conductor, was proper, for this was the method adopted by the conductor for the ejectment of appellee from the car, and was therefore an act in the scope of the conductor's employment."

Plaintiff in the instant case was ejected by being arrested. It was within the scope of the collector's authority to eject him, and the company is therefore liable for the improper method employed in discharging the duty of ejecting the passenger.

The judgment against the district is reversed and dismissed. The judgment against the company is affirmed.

The chief justice dissents as to the order affirming the judgment against the defendant Fort Smith Light and Traction Company.

McCULLOCH, C. J., (dissenting). It has been definitely decided by repeated decisions of this court that it is not within the scope of authority of a conductor on a railroad train or street-car to cause the arrest of a passenger or to place one under arrest, unless it be done in the course of ejection from the car, and that even then the authority ends with the ejection, and the carrier is no further responsible for the act of its servant. *Little Rock Traction & Electric Co.* v. *Walker,* 65 Ark. 144; *Little Rock Ry. & Elec. Co.* v. *Dobbins,* 78 Ark. 553; *Dickinson* v. *Muse,* 135 Ark. 76.

In each of the cases cited the ejection from the car was wrongful, and therefore the carrier was held liable for the arrest to the extent that it was embraced within the ejection from the train. In the present case, however, it is conceded that the ejection from the car was rightful, for the reason that the passenger had refused to pay the fare, and since the arrest in connection with the ejection and during its progress inflicted no injury, the carrier is not liable, even for nominal damages.

Of course, if excessive force was used in rightfully ejecting the passenger from the car, or if he was unnecessarily humiliated by the arrest in the presence of other passengers, he might recover for injuries inflicted by the excessive force, or unnecessary arrest; but in the present instance it is not shown that there was any humiliation resulting from the arrest. Appellee does not make any such claim, and there were no damages allowed him for humiliation or any other character of actual injury. The court only allowed nominal damages, and appellee does not complain.

So it seems clear to me that, if there were no actual damages resulting from the arrest in connection with the ejection from the train and as a part of the act of ejection, then the carrier is not liable.

My conclusion is that, on the undisputed testimony, the judgment against both of the appellants should be reversed and the action as to each of them dismissed.

WARREN v. STATE.

Opinion delivered May 15, 1922.

1. PERJURY—INDICTMENT—FAILURE TO ALLEGE THAT DEFENDANT TESTIFIED VOLUNTARILY.—In a prosecution for perjury before a grand jury, an indictment alleging that defendant was sworn to tell the truth on examination of a charge for violating the liquor law against certain parties whose names were unknown to the grand jury and that defendant falsely swore that when arrested he had no intoxicating liquor, was not defective in failing to allege that defendant voluntarily appeared as a witness, since the indictment did not show that defendant was testifiying as a witness on a charge against himself.
2. PERJURY—INDICTMENT—DEFENSE.—An indictment for perjury alleging that, during investigation by the grand jury of violations of the liquor law by unknown persons, defendant falsely swore that, when arrested, he did not have liquor in his possession, was not defective on the ground that defendant was indicted for testifying about himself, since his testimony could not be used against him on a prosecution for violating the liquor law, under Acts 1917, No. 13, § 14.
3. PERJURY—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of perjury in swearing before the grand jury that defendant did not have liquor when arrested; such testimony being material and false.
4. PERJURY—SUFFICIENCY OF EVIDENCE.—A conviction on a charge of perjury cannot be had on the evidence of one witness unless the material testimony of such witness, tending to prove the crime charged, is corroborated by direct testimony of other witnesses or by circumstances.
5. PERJURY—CORROBORATION OF WITNESS—INSTRUCTION.—In a prosecution of defendant for falsely swearing, as witness before the grand jury, that he had no liquor in his possession when arrested, a requested instruction that defendant could not be convicted on the evidence of a certain witness unless the witness' evidence was corroborated by other evidence, "showing that the defendant had whiskey at the time he was arrested" was properly modified by striking out the quoted words, since, as requested, the instruction was argumentative and misleading.

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

Norwood & Alley, for appellant.

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

WOOD, J. The appellant was convicted on an indictment which charged him as follows:

"The said Crock Warren, in the county and State aforesaid, on the 19th day of October, 1921, on his examination as a witness before the grand jury duly selected, impaneled, sworn and charged to inquire in and for the body of the county of Polk at the October term of the circuit court of said county, of which said grand jury J. E. Williams was duly appointed foreman, and thereby duly authorized and empowered to administer oaths to witnesses before said grand jury; the said Crock Warren was duly sworn to testify the truth, the whole truth and nothing but the truth by the said J. E. Williams as foreman of said grand jury aforesaid, on the examination of a certain matter and charge by the State of Arkansas against certain parties whose names were to the grand jury unknown, for violating the liquor law during the year 1921, then pending before the grand jury aforesaid, the said Crock Warren feloniously, wilfully, falsely and corruptly testified that he did not have any intoxicating liquors on his person or in his possession at the time he was arrested in said county on or about the 13th of October, 1921, and that he had not had any whiskey in Polk County in the last twelve months; that the matter so testified was material, and said testimony was wilfully and corruptly false; the truth being that the said Crock Warren did have on his person and in his possession intoxicating liquors at the time he was arrested by Doug Walker as aforesaid, and had on various occasions drunk intoxicating liquors in this county within the last twelve months," etc.

The appellant demurred to the indictment, and the demurrer was overrruled. Appellant also moved to

arrest the judgment, which motion was overruled. He duly saved his exceptions to these rulings of the court.

Doug Walker testified that he was deputy sheriff. He arrested Crock Warren and some others for some disturbance. At the time Warren had in his possession a soda-pop bottle of whiskey. Witness could smell whiskey on his breath. This was about the 12th of October, 1921. Witness asked Warren where he got the whiskey and he replied: "I got it from a fellow down here a while ago about like you." Warren was coming up the road at the time he was arrested.

J. E. Williams testified that he was foreman of the grand jury, and as such administered the oath to Crock Warren, who was called as a witness before the grand jury. The grand jury was investigating certain violations of the liquor law in the settlement where Warren lived. The grand jury had information that Warren had whiskey in his possession when arrested and that he had drunk some whiskey the last year. He was asked where he got the whiskey he had on him, and he stated that he had not had any whiskey in twelve months, and did not have any when he was arrested. Warren was informed that he could not be indicted on his own statement. The grand jury was trying to find out from whom Warren bought the whiskey. It had no information that any particular person had sold Warren whiskey. Warren was asked whether he had bought whiskey from anybody within the last three years. They had information at the time that considerable whiskey was being drunk in the settlement where Warren lived, and Warren was the man they were investigating when they had him under oath. They were attempting to learn from whom he had bought the whiskey and where he got it. They were asking him concerning himself and others. Witness was asked this question: "You were not then in fact investigating any certain parties when you had him in the grand jury room with reference to selling whiskey, were you?" and answered, "None but him."

Warren testified that when Doug Walker arrested him he did not have any whiskey and Walker did not take any whiskey from him.

Amos Musgrove testified that he got in the car about three-quarters of an hour after Warren was arrested and at that time he smelled whiskey on Warren's breath.

Among other prayers for instructions, the appellant asked the following: "You are instructed that you cannot convict the defendant upon the evidence of the witness Doug Walker, unless you believe his evidence is corroborated by other evidence showing that the defendant had whiskey in his possession at the time he was arrested." The court refused to grant the prayer as offered, but modified it by striking out the following words, "showing that the defendant had whiskey in his possession at the time he was arrested." The instruction as thus modified was given. The appellant duly objected and excepted to the ruling of the court. Other prayers of appellant for instructions were refused. These instructions it is unnecessary to set forth. The court also gave certain instructions at the instance of the State which it is unnecessary to set out. The trial resulted in a judgment sentencing the appellant to imprisonment in the State Penitentiary for the period of one year, from which judgment is this appeal.

1. The first ground of appellant's demurrer to the indictment is "that the indictment on the face of it shows that the defendant was indicted for alleged false swearing before the grand jury upon a matter that the grand jury was investigating with reference to the defendant, and the indictment fails to allege that the defendant voluntarily appeared and offered his evidence on this question that is alleged to be false." To sustain his contention the appellant relies upon the case of *Claborn* v. *State,* 115 Ark. 387-391, where we said: "An indictment for perjury based upon alleged false swearing in a criminal proceeding pending before the grand jury against the person himself giving the alleged false testimony is fatally defective

unless it alleges that the accused voluntarily appeared before the grand jury to give the testimony upon which the indictment for perjury is predicated." But the above case has no application here, for the reason that the indictment in the present case does not show that appellant was called to testify as a witness before the grand jury on a charge against appellant himself then pending before and under investigation by the grand jury. On the contrary, the allegation is that the appellant was sworn "to testify the truth, the whole truth and nothing but the truth * * * on the examination of a certain matter and charge by the State of Arkansas against certain parties whose names were to the grand jury unknown, for violating the liquor law during the year 1921, then pending before the grand jury," etc.

The allegations of this indictment show that the grand jury had under consideration the investigation of charges against certain parties whose names were to it unknown, for violating the liquor law during the year 1921. This allegation could not have had reference to the appellant, for he was called as a witness and his name was known to the grand jury. *State* v. *Roberts,* 148 Ark. 328.

The second ground of the demurrer is "that the indictment contained matter which is a legal defense or bar to the prosecution, in that defendant is indicted for testifying falsely about himself." The allegations of the indictment show that the grand jury had under investigation, as we have stated, charges against certain persons whose names were to the grand jury unknown for violations of the liquor law during the year 1921. Section 14 of act 13 of the Acts of 1917, commonly known as the "bone dry" statute, provides as follows: "That no person shall be excused from testifying before the grand jury, or on the trial in any prosecution for any violation of this act; but no disclosure or discovery made by such person is to be used against him in any criminal or penal prosecution for or on behalf of the matters disclosed."

Under the above statute the appellant could not refuse to answer questions concerning the violation of the liquor law during the year 1921, giving as his reason for such refusal that the answers to the questions propounded to him would show that he himself had violated the liquor law during that year. The statute above quoted gives him complete immunity from prosecution for any offenses in violation of the liquor law which his own testimony might disclose.

In *State* v. *Roberts, supra,* we said: "Under our statutes the grand jury has general inquisitorial powers without being confined to any particular matters submitted for investigation, and, according to the allegations of the complaint (indictment) in this case, the grand jury was pursuing such investigations in propounding the inquiry to the defendant. The question propounded might or might not have elicited information incriminating the defendant himself. But he could not refuse to answer on that ground, for the reason that the statute protects him from the use of his own testimony in the prosecution of a charge against himself." Citing Crawford & Moses' Digest, § 3122; *State* v. *Bach Liquor Co.,* 67 Ark. 163; *Ex parte Butt,* 78 Ark. 262. § 3122, C. & M. Digest, is analogous to § 14 of act 1, Acts 1917, *supra.*

It follows that the indictment is not defective because it alleged that the appellant "feloniously, wilfully, falsely and corruptly testified that he did not have intoxicating liquor on his person or in his possession at the time he was arrested in said county on or about the 13th of October, 1921, and that he had not had any whiskey in Polk County in the last 12 months," without alleging further that appellant voluntarily so testified.

The above allegations were sufficiently definite, and if appellant's testimony was false, as alleged, and truthful answers would have disclosed that he did have liquor in his possession and on his person at the time alleged, then the grand jury by further questions, if truthfully answered by appellant, might have elicited facts showing

violation of the liquor law by certain other parties during the year 1921 whose names were unknown to the grand jury. A truthful answer to the question propounded might have led to a disclosure of these names and to facts showing violations by them of the liquor law during the period mentioned.

2. The appellant contends that the verdict is contrary to the evidence and to the law. The testimony, giving it its strongest probative force in favor of the State, only tends to prove that appellant himself was in possession of intoxicating liquor on the highway. Appellant contends that such testimony does not prove that the alleged false testimony given by the appellant before the grand jury to the contrary was material, because under the law the alleged false testimony involved only an offense committed by himself, and it is not alleged and proved that such testimony was given voluntarily. In *State* v. *Roberts, supra,* the court said: "Of course, on a trial of the case it would devolve on the State to show the materiality; and if it appears from such proof that the accused himself was the sole offender in the transaction under inquiry, then his false testimony would not constitute perjury under the statute, unless it further appears that he waived his privilege by voluntarily giving the testimony." That was an appeal by the State from the judgment of the trial court sustaining a demurrer to the indictment. One of the grounds of the demurrer was that the indictment failed to charge that the accused appeared before the grand jury and voluntarily gave the testimony set forth in the indictment. We held that the indictment was not defective because it failed to contain such allegation. Therefore, what the court said, *supra,* as to the necessity of proving the materiality, although germane to the discussion, was unnecessary to the decision. Moreover, our attention was not directed in the case of *State* v. *Roberts* to § 14 of act 13 of the Acts of 1917, *supra.*

It follows from what we have already said concerning this statute that it was unnecessary to allege and prove

that the appellant voluntarily appeared before the grand jury and gave his testimony, because it was alleged in the indictment that the grand jury had under investigation charges concerning the violation of the liquor law during the year 1921 by parties whose names were unknown to the grand jury, and under the above statute the appellant could not refuse to testify before the grand jury because the statute gives him complete immunity from prosecution for offenses discovered through his own testimony. Furthermore, as we have seen, the testimony was material because, if the appellant did have in his possession intoxicating liquor at the time of his arrest and had testified to that effect before the grand jury, such testimony would have provoked further questions which doubtless would have discovered the names of those from whom appellant obtained the whiskey, and in what manner, and for what purpose he obtained the same, etc. The testimony was very material to the investigation which the inquisitorial body was making as to the alleged violations of the liquor law during the year 1921 by certain parties whose names to it were unknown and whose names they were endeavoring to ascertain.

The evidence was sufficient to sustain the verdict, and the court did not err in refusing any of appellant's prayers for instructions. In view of the above discussion, it becomes unnecessary to set out in detail and comment upon the various prayers of appellant for instructions which the court refused to grant. Such of these prayers as were correct were covered by the instructions which the court gave.

3. The court did not err in refusing to grant appellant's prayer for instruction No. 6, nor in modifying and giving the same as modified. It is a well established doctrine in this State that a conviction on a charge of perjury cannot be had on the evidence of one witness unless the material testimony of such witness tending to prove the crime charged is corroborated by direct testi-

mony of other witnesses, or by circumstances. *Lamb* v. *State,* 135 Ark. 275, and other cases there cited.

The witness Doug Walker testified that the appellant, when arrested, had in his possession a soda-pop bottle of whiskey; that he asked the appellant where he got the whiskey and appellant replied, "I got it from a fellow down here a while ago about like you." Bud Nichols and Joe Reynolds were present at the time. The bottle of whiskey which Walker took from the appellant was identified and exhibited to the jury.

Joe Reynolds testified that he was present when the appellant was arrested about ten feet from the officer. He never saw the officer take any whiskey off of appellant —was not where he could see. He heard the officer say. "What is this?" and heard appellant say, "I got it off of a fellow that looked just like you," or something like that.

Witness Musgrove testified that in about three-quarters of an hour after appellant was arrested he got in the car and smelled whiskey on appellant's breath, and that he did not smell whiskey on any one else's breath.

The above testimony tended to corroborate the testimony of the witness Walker to the effect that the appellant was in possession of whiskey at the time of his arrest. The appellant's prayer for instruction No. 6 was therefore abstract because it made an issue as to whether there was any evidence corroborating the testimony of witness Walker. To be sure, the appellant had the right to challenge the weight and sufficiency of the evidence; but if his prayer for instruction No. 6 had been granted, appellant could have argued to the jury that there was no testimony at all tending to corroborate the testimony of Walker, towit: that the appellant at the time of his arrest was in possession of whiskey. Furthermore, the prayer for instruction No. 6 as asked by the appellant was argumentative and calculated to mislead the jury, because, if the prayer had been granted as asked, the appellant would have been justified in arguing to the

jury that some witness besides Walker would have had to testify affirmatively that appellant had whiskey in his possession at the time of his arrest. Whereas, the corroboration was sufficient if there was any other evidence, direct or circumstantial, tending to prove that appellant had whiskey in his possession when he was arrested. The prayer for instruction as modified and given was more favorable to the appellant than he had the right to ask or expect. If counsel for appellant conceived that the instruction as modified and given was calculated to mislead the jury by causing them to believe that it was sufficient if the testimony of Walker was corroborated in immaterial matters, such as they here argue in their brief, then it was their duty to direct the attention of the trial court to these immaterial matters by a specific objection, which they did not do. The instruction, while abstract, was not inherently erroneous.

The record presents no reversible errors, and the judgment is therefore affirmed.

WARD v. McMATH.

Opinion delivered May 15, 1922.

1. PERPETUITIES—DEED TO UNINCORPORATED ASSOCIATION.—A deed conveying land to certain individuals as trustees of a camp of United Confederate Veterans, and their successors and assigns, such camp being an unincorporated voluntary association of ex-Confederate Veterans, having a constitution and by-laws for their government, *held* not obnoxious to the rule against perpetuities.
2. TRUSTS—REFORMATION OF DEED—JURISDICTION OF CHANCERY.—Where a trust deed conveying land was executed to certain trustees to hold for a certain camp of Confederate Veterans, chancery may properly assume jurisdiction of a suit between members of the camp to reform such deed so as to enlarge the trust so as to include other beneficiaries than members of the camp.
3. REFORMATION OF INSTRUMENTS—PARTIES.—The widow and heirs of a deceased grantor in a deed were necessary parties to a suit to reform the deed, though the dispute arose between members of the grantee, an unincorporated association.

Appeal from Franklin Chancery Court; *J. V. Bourland,* Chancellor; reversed.

Chew & Ford and *A. A. McDonald,* for appellants.

An incorporated association held its property subject to a majority vote of its members. 46 Ark. 291; 122 Ark. 7; 98 Pac. 897.

Property owned by an unincorporated voluntary association belongs to the association. 98 Pac. 897.

A body indefinite as to members may act by a majority of the members present at any legal meeting, no matter how small a proportion they may constitute of the whole number entitled to be present. 23 Am. & Eng. Ency. of Law, p. 589.

A quorum is, to all intents and purposes, as much the body to which it pertains as if every member were present. 25 Am. & Eng. Ency. of Law, p. 1132, p. 2.

The action of a majority of the church members at a regular meeting is the action of the church. 122 Ark. 7. Especially where they adhere to the doctrine of the church. 46 Ark. 291. They are entitled to the control of its property. 43 Am. St. Rep. 798; 25 Am. & Eng. Ency. of Law, p. 1135, sec. 3; 98 Pac. 903.

T. A. Pettigrew, for appellees.

The court properly enjoined the parties from interfering with the trustees in the discharge of their duties, and had jurisdiction to instruct the trustees as to the performance of their duties. 4 Ark. 302; 60 Ark. 503; C. & M. Dig., sec. 1098.

A resulting trust should have been declared in favor of those who subscribed the money. 40 Ark. 62; 200 S. W. 1029.

WOOD, J. The appellees, plaintiffs below (hereafter called plaintiffs), instituted this action against the appellants, defendants below (hereafter called defendants). The complaint alleged in substance that the plaintiffs and defendants were members of Pat Cleburne Camp of Confederate Veterans No. 191 of Charleston, Arkansas, (hereafter called camp) and the only members of the

camp; that in conferences between representative of the people in the vicinity of Charleston who were interested in Fourth of July celebrations, and representatives of the camp (who, respectively, had been holding their celebrations and annual reunions at different points in the vicinity of Charleston prior to the year 1907), it was decided that the camp and the people generally, not members of the camp, should jointly purchase, for the benefit of the camp and the people, in order to enable them, respectively, to hold their reunions and Fourth of July celebrations, the west half (W1/2) of the southwest quarter (SW 1/4) of section 8 in township 7 north, range 28 west, in Franklin County, Arkansas, to be used as a public park by the camp and the people generally for the purposes above set forth; that it was agreed and understood that the deed should be executed to certain parties, members of the camp, and their successors in trust for the use and benefit of the camp, in holding their annual reunions, and for the benefit of the public in the vicinity generally in holding their celebrations, it being understood that the dates of the reunions and celebrations should in no manner conflict. It is further alleged that funds were solicited, subscribed, and paid by various persons for the purchase money of the land, upon the representation that the land would be purchased, held and used for the above purposes. It was alleged that the funds raised by such subscriptions, and from the holding of celebrations and reunions, were used in the purchase of the above described land; that it was agreed and understood by all parties in interest that when the members of the camp, because of the infirmities of old age, or otherwise, were unable to further execute the trust, the Sons of Veterans should be made trustees, and when there were no longer any Sons of Veterans, or when such Sons were unable from any cause to execute the trust, then the town of Charleston should be named as trustee to hold the land in trust for a public park, in order to effectuate the purposes above designated.

It is further alleged that it was agreed and understood by all parties in interest that when J. P. Falconer, the owner of the land, and his wife executed their deed to the same, the purposes of the trust as above mentioned should be expressly stated in the deed; that through mistake and oversight of the draftsman of the deed the lands above described were conveyed to J. K. P. Holt, Tom McFerran, Webster Flannagan, Geo. W. Hill and W. P. McMath, trustees of the camp, and to their successors and assigns, to have and to hold the same to said trustees for said camp and their successors and assigns forever. It is alleged that certain of the trustees originally named in the deed had died, and others had been appointed by the chancery court to succeed them; and since their appointment another one of the original trustees had died and his successor has not been named; that the plaintiffs were now the only trustees of the property.

The complaint further set forth that "there had been a dissension among the members of the camp, and that some of the defendants had ignored the rights and privileges of all the beneficiaries in the deed of trust except the members of the camp, and claim that the members of the camp have the exclusive right to the possession of the land;" that they were denying the plaintiffs and the other beneficiaries in the deed of trust the rights thereby secured to them, all to their great and irreparable injury. The complaint concludes with a prayer that the deed be reformed so as to read and state the purposes of the trust and the beneficiaries thereof, as above stated, and that the trust as thus expressed be perpetuated, and for an order restraining the defendants from interfering with the execution of the trust as thus expressed; and that a trustee be appointed to fill the now existing vacancy, and for all relief.

The defendants, in their answer, after denying all the material allegations of the complaint, set up that the camp was duly organized as such and had adopted a con-

stitution and by-laws for the government of its organization; that the property described in the complaint belonged to the camp; that it is the sole and exclusive owner thereof under a deed executed September 12, 1907, from J. P. Falconer and Fannie T. Falconer, his wife, which was duly recorded on the 21st day of November, 1908. The deed is set out *in haec verba* in the answer. The defendants then further allege that upon the execution of the deed the camp took charge of the property and made improvements thereon, which they set forth; that the camp had been in the open, notorious, adverse, and continuous possession of the land since the 12th of September, 1907. The defendants therefore pleaded the seven years statute of limitations.

The defendants averred that J. P. Falconer, the grantor in the deed, was dead; that T. P. Winchester, the draftsman of the deed, was dead; that J. K. P. Holt, Confederate Veteran and one of the trustees, who procured the services of T. P. Winchester to write the deed, was dead. The defendants alleged that the plaintiffs had delayed bringing their suit to reform the deed for thirteen years, and that under the circumstances they were barred by laches from maintaining the suit. They alleged that the deed was drawn as directed and was executed as intended by the parties who donated the fund to purchase the lands, and by the vendor who executed the same, to establish a Confederate park for the use and benefit of Confederate Veterans, and not for the public. The answer concluded with a prayer that the complaint be dismissed for want of equity.

The deed in controversy, a copy of which was made an exhibit to the answer, was in evidence before the court, and much testimony taken by the respective parties to sustain the allegations of their pleadings and their respective contentions as set up therein. The court found the facts to be as substantially set forth in the allegations of the complaint, that the words "their successors" were intended by all parties thereto to mean, "said organiza-

tions of Sons and Daughters of ex-Confederate veterans, and, in default of such organizations, the incorporated town of Charleston; * * * and that the term 'assigns' was intended to impart a right of sale in the trustees by resolution of the camp so directing, only, however, in the event and for the purpose of securing a more desirable park by exchange or sale and repurchase."

After making its findings, the court refused to enter a decree reforming the deed, for the above reasons, and for the further reason that the widow and heirs of Col. J. P. Falconer were not made parties. The court further found as follows: "Because all members of the said Pat Cleburne Camp being parties, as are also all of the trustees in the said deed, or their successors, duly constituted and appointed; accordingly, under the evidence, the equity of all parties hereto is to have decreed a construction of said deed, along with decretal instruction to said trustees by way of declaring the full and true nature of said trust." The court also found a vacancy existing in the board of trustees, and appointed Captain M. D. Brown, a member of the camp, to fill the vacancy. After finding and declaring the purposes of the trust to be substantially as set forth in the complaint of the plaintiffs, and charging the trustees that certain duties were incumbent upon them as such, and directing them to perform these duties, the court concluded its decree as follows: "It is therefore considered, ordered and decreed as hereinbefore recited and found, specifically and generally in all respects. It is further decreed that the complaint of the plaintiffs, so far as it prays reformation of the said deed, is dismissed, for the reasons stated in the findings. The defendants and each of them are enjoined from in any way interfering with the trustees in the discharge of their duties as such and in the collecting of any funds derived from concessions at any time whatever," etc.

The defendants objected to all the findings and decree of the court except that which denied to the plaintiffs

a reformation of the deed and dismissing their complaint as to this for want of equity. From the decree of the court adverse to their contention the defendants prayed and were granted an appeal.

1. While much phraseology and unusual verbiage is indulged in by the parties in their pleadings as well as by the court in its findings and decree, yet when the pleadings are analyzed, this lawsuit resolves itself into these simple issues, namely: whether or not the appellees are entitled to have a reformation of the deed in controversy, and whether or not the court should appoint a trustee as the successor to D. Rogers, deceased, who had been previously appointed by the chancery court of Franklin County as a trustee, and who had accepted such appointment and had been serving in that capacity.

The pleadings and testimony, which are exceedingly voluminous, show that the cause progressed to a hearing upon the above issues. The complaint does not allege the form of the organization of the camp, but the allegations of the answer and the undisputed testimony show that the camp is an unincorporated voluntary association of persons composed exclusively of ex-Confederate veterans, which adopted a constitution and by-laws for its government. The constitution sets forth the name of the camp, designates the officers thereof, prescribes their duties, and the objects of the organization. The testimony shows that the camp was in existence before the purchase of the park. By the terms of the deed the grantor expressly conveys to the parties named therein, designated "trustees of Pat Cleburne Camp United Confederate Veterans No. 191, and unto their successors and assigns forever," for the consideration named therein, the land in controversy, describing it. The *habendum* clause of the deed is as follows: "To have and to hold the same unto the said trustees for said Pat Cleburne Camp United Confederate Veterans No. 191, their successors and assigns, forever."

The above language of the deed shows clearly that the land conveyed was trust property to be held in trust by the trustees, their successors and assigns, for the use and benefit of the camp. The legal title was thus vested, by the unmistakable language of the deed, in the trustees as individuals, while the equitable title was vested in, and held by, those who then constituted the members of the camp, and who could be readily ascertained according to the constitution and by-laws of the association governing its membership. The deed was thus not obnoxious to the rule against perpetuities which prevents alienation. *Old Society* v. *Crocker,* 119 Mass. 1-23; Wrightington on Unincorporated Associations, § 60, p. 240; Devlin on Real Estate, § 190, p. 258, and cases cited.

In the case of *Monk* v. *Little,* 122 Ark. 7, we held, quoting syllabus, that "courts of chancery may properly assume jurisdiction of a dispute between different factions of a church organization where property rights are involved." In the case at bar the plaintiffs and the defendants, as the allegations of the complaint and the undisputed testimony show, are members of the camp. The complaint alleged that "there had been an unfortunate dissension among the members of the camp. Some of the defendants have ignored the rights and privileges of all the beneficiaries of said deed of trust and claim that the members of said camp have the exclusive right to said land and the exclusive right to possession thereof." Inasmuch as some of the members of the camp are suing other members of the camp to have the deed reformed so as to enlarge the trust to include other beneficiaries than members of the camp, it is manifest that property rights are involved. By analogy to the doctrine announced in *Monk* v. *Little, supra,* it occurs to us that the facts alleged in the complaint clearly state a cause of action giving the chancery court jurisdiction of the subject-matter in controversy between the parties; that is, as to whether or not the deed should be reformed. The trial court ruled correctly that the widow and heirs of

the grantor in the deed were necessary parties to the action for reformation. Having so ruled, the court should have proceeded no further until the necessary parties were brought in. All the further findings and the decree of the court based thereon, were beyond the legitimate scope of the pleadings and beyond the jurisdiction of the court. For, if the court had no jurisdiction to reform the deed and declare a resulting trust because the necessary parties were not before it, then obviously it could not retain jurisdiction and enter a decree construing the deed, declaring the trust, and giving directions to the trustees, just as if the necessary parties had been before the court, and as if the deed had been in fact reformed by the plaintiffs. The decree of the court expressly declares "that the complaint of the plaintiffs, so far as it prays reformation of said deed, is dismissed," yet the decree also recites: "It is therefore considered, ordered, and decreed as hereinbefore recited and found specially and generally in all respects." The "hereinbefore" findings and recitals show that the court had as effectually granted the plaintiffs all the relief they prayed as if it had formally and technically declared the reformation of the deed as prayed by them. While ostensibly denying the plaintiffs the relief of reformation sought by them, nevertheless the decree, as a whole, in reality does grant them such relief. This the court could not do with the parties then before the court.

Inasmuch as the cause must be reversed and remanded, we will not, in advance of the determination of the issue as to whether the deed shall be reformed, decide whether the chancery court should have appointed a trustee to fill the vacancy caused by the death of trustee Rogers. For the error in proceeding to construe the deed in the manner shown before the issue as to the reformation thereof is determined, the decree is reversed, and the cause will be remanded with directions, if the parties so desire, to make the widow and heirs of Colonel Falconer, and others if necessary, parties, to take proof, and for

such other and further proceedings herein as the parties may elect to adopt, according to law and not inconsistent with this opinion.

MITCHELL v. HOPPER.

Opinion delivered May 15, 1922.

1. COURTS—ADOPTED CONSTRUCTION OF CONSTITUTIONAL PROVISION.—Const. 1874, art. 6, § 16, concerning the power of the Governor to veto concurrent orders or resolutions of the General Assembly, having been borrowed from Const. U. S., art. 1, § 7, the decisions of the Supreme Court of the United States with reference to the latter section apply with peculiar effect in interpreting the former section.
2. CONSTITUTIONAL LAW — PROPOSED AMENDMENTS — LEGISLATIVE POWER.—In proposing constitutional amendments under Const. 1874, art. 19, § 22, the General Assembly is not exercising its legislative power, but is acting in the capacity of a convention expressing the will of the sovereign people.
3. CONSTITUTIONAL LAW—LEGISLATIVE CONSTRUCTION.—Acts 1879, p. 128, § 3, (Crawford & Moses' Dig., § 1469), providing that the Governor may veto a concurrent resolution of the General Assembly submitting to the vote of the electors an amendment to the Constitution, is invalid as being in conflict with the Constitution.
4. CONSTITUTIONAL LAW—LEGISLATIVE CONSTRUCTION OF CONSTITUTION.—Legislative construction of constitutional provisions may be looked to by the courts only in cases of doubt as to their meaning.
5. CONSTITUTIONAL LAW—VETO OF RESOLUTION FOR AMENDMENT.—A concurrent resolution of both houses of the Legislature for submission of a constitutional amendment is not within the purview of art. 6, § 16, requiring the submission of orders and resolutions to the Governor before they shall take effect.

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

Chas. T. Coleman, T. M. Mehaffy, J. F. Loughborough and *J. H. Carmichael,* for appellant.

Only three amendments may be submitted at an election. Art. 19, § 22, Constitution. The provision for

amendments is not self-executing, but needs legislation. 78 Ark. 468, 472; 106 Ark. 67.

That legislation was supplied by the act of 1879, which is found, with amendments, in chap. 33, C. & M. Digest, and chap. 32, Kirby's Digest. See §§ 1, 2, 3 and 4 of the original act, Acts 1879 p. 128. In conferring upon the Governor power to approve or disapprove resolutions for constitutional amendments, that Legislature, many members of which were also members of the Constitutional Convention, was carrying out what the framers of the Constitution understood to be its proper construction; and that act has been continuously in force since that time.

The exception of questions of adjournment in § 16 art. 6, Const., left no other exceptions from the provision that every order or resolution must be submitted to the Governor. 37 Ark. 374.

Adjudications in other States holding that the veto power under the particular Constitution considered did not apply to resolutions submitting constitutional amendments, but in each of them the provisions differed from ours in the matter of submitting amendments in this: It required as large a vote to pass the resolution submitting the amendment in the first place as it would take to pass the amendment over the veto of the executive. Moreover, in all these cases there was no mention of provisions for an amendment that were not self-executing, or of a Constitution where the construction by the legislative and executive branches had been uniform over a long period of time that approval or disapproval by the executive was necessary. See 3 Dall. 378; 101 Md. 117, 60 Atl. 540; 6 N. D. 81, 68 N. W. 418; 43 La. Ann. 655, 6 So. 798; 196 Pa. 396; 66 Cal. 632, 6 Pac. 734. The act of 1879 should be regarded as a contemporaneous construction of this Constitutional provision, in that it was passed at a time when it was desired to submit amendment number one, and should be given great weight on that account. 51 Ark. 559; 54 *Id.* 364, 370; 62 *Id.* 339.

The constitutionality of the act of 1879 has never been questioned by this court. On the contrary it has been upheld as necessary in carrying out § 22, art. 19 of the Constitution. 78 Ark. 472; 106 *Id.* 67.

Since the adoption of amendment No. 10 and the enabling act to carry it into effect, this court has always held that the enabling act was valid, and was necessary to carry it into effect. See 106 Ark. 506; 117 *Id.* 465.

Every Legislature since the adoption of the Constitution, and all the executives likewise since that time, have construed it to mean that the Governor must approve a joint resolution submitting an amendment before it can be submitted to the people. Black's Constitutional Law, 3rd. Ed. 51; *Id.* 326.

J. S. Utley, Attorney General, *Wm. T. Hammock,* and *Elbert Godwin,* Assistants, for appellee; *R. W. Robins, Geo. F. Hartje* and *J. C. Marshall,* of counsel.

There is no mention of any veto power on the part of the Governor appearing in art. 19, § 22, Constitution. His veto power is limited by art. 6, § 15 *Id.,* to *bills* which have passed both houses of the General Assembly, and does not extend to any kind of resolution. The requirement of art. 6, § 16, *Id.,* to the effect that orders and resolutions in which the concurrence of both houses may be necessary (except on questions of adjournment) shall be presented to the Governor, etc., does not embrace resolutions proposing amendments to the Constitution.

Art. 5, Constitution, U. S. is no more silent as to the power of the President over proposed Constitutional amendments than is art. 19, § 22, of our Constitution, while § 16, art. 6 of our Constitution it is patent was adopted from the later part of § 7, art. 1 of U. S. Constitution; yet it has been held that the President's approval of a resolution of Congress submitting an amendment to the Constitution was not necessary. 3 Dall. 378; 253 U. S. 229; 253 U. S. 232. The Congress itself once voted that the sending of a resolution proposing an amendment

to the President was an inadvertent act and that his approval was unnecessary. 34 L. R. A. 97.

Section 22, art. 19, Constitution, nowhere hints at executive action, but on the contrary evinces a positive intention to send proposed amendments direct from the General Assembly to the Secretary of State for publication and submission, and a reading of that section will dispel any belief that § 16, art. 6, embraces resolutions proposing Constitutional amendments. 43 La. Ann. 655.

The General Assembly in proposing amendments to the Constitution does not act in its ordinary legislative capacity, but acts in the capacity of a convention expressing the supreme will of the people. 8 Ark. 445. The Hartje resolution, therefore, is not a legislative matter, and was not subject to executive action. *Supra;* 49 Ark. 554; 140 *Id.* 493; 253 U. S. 350; 42 S. C. 217; 117 Ark. 582. The Governor, in approving or disapproving bills or resolutions, is acting as a part of the legislative power and not as an executive. The power of veto is inherently a legislative and not an executive power, and must be found in the Constitution as a part of the legislative power or it does not exist. 36 L. R. A. (N. S.) 244; 153 Pac. (Wash.) 594; 140 S. W. (Tex.) 405. See also 72 Ark. 94.

On the proposition that the Governor has no power to veto resolutions proposing constitutional amendments see the following decisions from the various States:

Alabama: 87 So. 375; 24 Ala. 108. California: 6 Pac. 734; 4 L. R. A. 429. Colorado: 36 Pac. 221; 160 Pac. 1032. Illinois: 281 Ill. 17. Iowa: 14 N. W. 748. Kentucky: 47 S. W. 779. Louisiana: 43 La. Ann. 647; 9 So. 776. Maryland: 60 Atl. 538, 539. Michigan: 115 N. W. 429, 446. Missouri: 31 L. R. A. 815. Nebraska: 41 N. W. 981. Nevada: 12 Pac. 838. North Dakota: 34 L. R. A. 97. Pennsylvania: 196 Pa. 396, 50 L. R. A. 568. Tennessee: 122 Tenn. 471. Wisconsin: 152 N. W. 419.

The rule that where a clause in a Constitution which has received a settled judicial construction is adopted in

the same words by the framers of another Constitution, it will be presumed that the construction thereof was likewise adopted, applies not only to adoption by one State from another, but also to the adoption in the same State of clauses or provisions in an older Constitution that have received judicial construction into a later Constitution. Black, Constitutional Law, par. 43; 11 Ark. 594; 68 *Id.* 433; 78 *Id.* 346; 82 *Id.* 334; 96 *Id.* 316; 98 *Id.* 125; 104 *Id.* 417; 109 *Id.* 479; 113 *Id.* 552; 117 *Id.* 465; 120 *Id.* 389.

It is the duty of this court to construe the Constitution according to its terms and provisions whenever its construction is called for and without reference to the length of time others may have misconstrued it; nor is it in any manner bound by any such misconstruction. Where there is great doubt, legislative construction may be resorted to for aid, but even then it is not binding upon the courts. 85 Ark. 89, 94; 52 *Id.* 330; Cooley on Constitutional Limitations, 71.

SMITH, J. Senate joint resolution No. 1, passed at the 1921 session of the General Assembly, proposed an amendment to the Constitution of the State. The resolution was agreed to by a majority of all the members elected to each House, and this assent was regularly entered on the journals of the Senate and of the House. The resolution was transmitted to the Governor, and by him disapproved. The General Assembly adjourned before the Governor acted on the resolution, and there was therefore no action by the General Assembly after the attempted veto.

Appellant, who is a citizen and taxpayer of the State, brought this suit to enjoin the Secretary of State from incurring the expense of publishing the proposed amendment and from submitting the same to the vote of the people.

In his answer the Secretary of State denied the authority of the Governor to veto a resolution of the General Assembly proposing an amendment to the Consti-

tution, and alleged that the Governor's attempt to do so was futile. The court below accepted that view and dismissed the complaint, and by this appeal we are asked to determine whether the Governor had that authority. No other question is presented.

Section 22 of article 19 of the Constitution reads as follows: "Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each House, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and, if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately."

Article 19 is designated "Miscellaneous Provisions," and received this designation, no doubt, because of the variety of subjects covered by it. It is significant that the section quoted does not appear in article 5 of the Constitution, which deals with the legislative department. When analyzed, it appears that the constitutional requirements for amending the Constitution are that either house of the General Assembly may propose amendments if the proposed amendment is agreed to by a majority of all the members elected to each house.

The section on that subject is silent as to how the amendment may be proposed; but this is ordinarily done by resolution. The proposed amendment, in whatever manner offered, shall be entered on the journals with the yeas and nays, and, having received the requisite vote, it is then published and submitted to the electors

for approval or rejection, and, if a majority of the electors voting at such election adopt such amendment, the same becomes a part of the Constitution. It appears therefore that the General Assembly proposes, while the electors approve or reject. No mention of the Governor is made; and if there is any function for him to perform, other provisions of the Constitution must be looked to to ascertain what duty he is called upon to discharge.

Article 6 of the Constitution deals with the executive department of the Government, and section 15 thereof defines the veto power of the Governor. It reads as follows: "Every bill which shall have passed both houses of the General Assembly shall be presented to the Governor; if he approves it, he shall sign it; but if he shall not approve it, he shall return it, with his objections, to the house in which it originated, which house shall enter the objections at large upon their journal and proceed to reconsider it. If, after such reconsideration, a majority of the whole number elected to that house shall agree to pass the bill, it shall be sent with the objections to the other house, by which likewise it shall be reconsidered; and, if approved by a majority of the whole number elected to that house, it shall be a law; but in such cases the vote of both houses shall be determined by 'yeas and nays', and the names of the members voting for or against the bill shall be entered on the journals. If any bill shall not be returned by the Governor within five days, Sundays excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall become a law, unless he shall file the same, with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment."

It is quite obvious that this section has no relation to proposals for amending the Constitution. The veto power there referred to relates expressly and solely to

bills which become laws when approved by the Governor, or when retained by him without action beyond the time there limited for his action, or when passed by the two houses over his veto. It may be here noted that the vote essential to pass a bill over the Governor's veto—a majority of all the members elected to each house—is the vote required by section 22 of article 19 for proposing an amendment to the Constitution for the action of the electors.

We must therefore look further for some provision of the Constitution defining the duty of the Governor in regard to submitting amendments to the Constitution, if that instrument imposes any duty upon him. The only other provision of the Constitution which may, with any plausibility, be said to impose some duty on the Governor in this behalf is section 16 of article 6, which reads as follows: "Every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment, shall be presented to the Governor, and, before it shall take effect, be approved by him; or, being disapproved, shall be repassed by both houses, according to the rules and limitations prescribed in the case of a bill."

There is, however, a statute which does confer the veto power upon the Governor, of which we shall later have more to say. This is section 3 of an act approved April 2, 1879 (Acts 1879, p. 128), and appearing in C. & M. Digest as § 1469.

Article 5 of the Constitution of the United States deals with proposed amendments to that instrument. In that respect it corresponds to section 22 of article 19 of our Constitution. It imposes no duty upon the President in regard to such proposals.

The second paragraph of section 7 of article 1 of the Constitution of the United States deals with the President's power of veto. It is very similar to section 15 of article 6 of our Constitution dealing with the same subject. The principal point of difference is that a two-

thirds vote is required to pass a bill over the President's veto; whereas a majority of all the members elected to each house of the General Assembly suffices to pass a bill over the veto of the Governor. The phraseology and structural similarity between the two section is very striking.

The last paragraph of this section of the Federal Constitution is so nearly identical with section 16 of article 6 of our Constitution as to leave no doubt that our section is a borrowed one, taken almost literally from the Federal Constitution, except as to the vote required to pass an order or resolution over the veto of the President in the one case and that of the Governor in the other.

It also appears that the sections of the Federal Constitution above referred to have served as patterns for numerous other State Constitutions, the relevant portions of which are quoted in the brief of counsel for the State, and in numerous instances those sections have been copied into the Constitutions of other States as literally as is the case in our own Constitution.

Section 16 of article 6 of our Constitution, being, in effect and in fact, borrowed law, the decisions of the Supreme Court of the United States apply with peculiar effect in its interpretation, according to a well known canon of construction. *Hildreth* v. *Taylor,* 117 Ark. 465; *Hanson* v. *Hodges,* 109 Ark. 479.

In the case of *Hollingsworth* v. *Virginia,* 3 Dall. 378, the question was raised that the Eleventh Amendment to the Federal Constitution had not been properly submitted because the resolution of Congress proposing the amendment was never submitted to the President for his approval. Of that case the Supreme Court of the United States, in the case *Hawke* v. *Smith,* 253 U. S. 221, had this to say: "At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollings-*

worth v. *Virginia,* 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice CHASE said: 'There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution.' The court by a unanimous judgment held that the amendment was constitutionally adopted."

It appears that in only one instance has a proposed amendment to the Federal Constitution ever been submitted to the President for his approval, and some interesting history in regard to that occurrence is recited in the opinion of the Supreme Court of North Dakota in the case of *State ex rel. Wineman* v. *Dahl,* 34 L. R. A. 97, 6 N. D. 81, 68 N. W. 418, as follows: "The amendments (to the Federal Constitution) which were made in 1789, 1803, and 1866 were carried through without the action of the President. In 1865 the slavery amendments were inadvertently submitted to the Executive, and approved by him. On discovering this fact, Senator Trumbull of Illinois, chairman of the judiciary committee, introduced a resolution declaring its submission to him to have been an inadvertent act, and that his approval was unnecessary and of no effect. The resolution also asserted that that case should not constitute a precedent for the future. It was adopted without division."

Counsel for the Secretary of State cite the decisions of the courts of last resort of a number of States holding that the Governor has no function to perform in the matter of submitting constitutional amendments to the people for their action. There are points of similarity, and of difference as well, between the Constitutions of those States and the Constitution of our own which we will not stop to point out. A case typical of numerous others is that of *Warfield* v. *Vandiver,* 101 Maryland 78, 60 Atl. 538. This case is annotated in 4 A. & E. Ann. Cas. 692. The thought running through all these cases, and controlling in each of them, is that, in proposing amendments to the Constitution, the Legislature is not exercising its legislative power. We have been cited to no case holding to the contrary. The editor's note to the annotated case of *Warfield* v. *Vandiver, supra,* is that "the rule announced in the reported case, that proposed constitutional amendments need not be submitted to the Governor for his approval, has been followed by the courts of the various States apparently without dissent." (Citing numerous cases).

The decisions of this court accord with the rule announced in the note quoted. The decision of this court in the case of the *State* v. *Cox,* 8 Ark. 436, was handed down at a time when the General Assembly had the power to propose and to adopt amendments to the Constitution, but the court there said: "The General Assembly, in amending the Constitution, does not act in the exercise of its ordinary legislative authority of its general powers; but it possesses and acts in the character and capacity of a convention, and is, *quoad hoc,* a convention expressing the supreme will of the sovereign people, and is unlimited in its power save by the Constitution of the United States." In the recent case of *Whittemore* v. *Terral,* 140 Ark. 493, the court held that the action of the Legislature, pursuant to the power conferred by the Federal Constitution, ratifying a proposed amendment to that Constitution, was not the enactment of a law.

Much reliance is placed by counsel for appellant on the act of 1879 hereinabove referred to. It is pointed out that this act was passed at the session of the General Assembly which convened just five years after the adoption of the Constitution, and that seven members of this session of the General Assembly had been members of the Constitutional Convention. It is said, therefore, that great weight should be given to the construction which the General Assembly gave the Constitution by the passage of this act. It is also pointed out that the invariable custom since the adoption of the Constitution has been to submit to the Governor for his action all legislative proposals to amend the Constitution; and it is insisted that this long-continued and practical construction of the Constitution should be given great weight in its construction.

In answer to all this, it may first be said that the Constitution cannot be thus amended.

In reply to this practical construction of the Constitution which we are asked to follow, it is pointed out, through reference to the various published acts of the General Assembly, that, although section 16 of article 6 expressly excepts resolutions pertaining to adjournment from submission to the Governor, the practice has been to so submit them. Citation is also made to numerous non-legislative resolutions which have been customarily submitted to the Governor for his approval.

Further answering the argument in regard to the effect to be given to the construction of the Constitution by the General Assembly of 1879 by the passage of the act regulating the mode of proposing and voting upon amendments to the Constitution, and the acts of the officers of the State who have proceeded under that act, it is pointed out that the same General Assembly proposed the first amendment to the Constitution, and it did so in a resolution which has since been followed. It is as follows:

"Resolved, by the House of Representatives of the General Assembly of the State of Arkansas (a majority of all the members elected to each house agreeing thereto):

"That the following article shall be proposed as an amendment to the Constitution of the State of Arkansas, which, when agreed to by a majority of all the members elected to each house and adopted by a majority of the electors of the State voting at the next general election for Senators and Representatives, shall become a part of the said Constitution, namely:"

This resolution properly construes the Constitution and meets its requirements. It became a proposal when agreed to by a majority of all the members elected to each house of the General Assembly, and was to become a part of the Constitution if adopted by a majority of the electors of the State voting at the ensuing general election for Senators and Representatives.

The legislative act was ministerial. It authorized the submission of the proposal to the only body having authority to adopt or reject it. That was the electors voting at the next ensuing general election for Senators and Representatives. However, the insistence in regard to the effect to be given this act of 1879 as a practical construction of the Constitution by a Legislature composed in part of members who sat in the Constitutional Convention, may be disposed of here, as was a similar contention in the case of *Griffin* v. *Rhoton*, 85 Ark. 89, where it was said: "It is insisted that the first Legislature which convened after the adoption of the Constitution of 1874, and which was composed of many members of the convention who dominated its purposes, by passing a statute (act February 1, 1875) carrying out this provision as to other officers, construed it as not including the office of prosecuting attorney, and that we should follow that legislative construction. The rule permitting the consideration by the courts, in construing constitutional provisions, of legislative constructions of the same provisions has

been frequently approved by this court. *State* v. *Sorrels,* 15 Ark. 675; *Vahlberg* v. *Keaton,* 51 Ark. 534; *Ex parte Reynolds,* 52 Ark. 330; *Sumpter* v. *Duffie,* 80 Ark. 369. But, as was said by Chief Justice COCKRILL in *Ex parte Reynolds, supra,* such matters are not entitled to controlling weight. It is only when an examination of the Constitution leaves a doubt that the judges are warranted in looking to these extraneous matters for aid."

It would be entirely superfluous to have the Governor to act in approving proposals for constitutional amendments. His action in so doing could not be anything more than a mere recommendation to the electors and would not render less necessary their approval at the ensuing election.

This quite obvious statement emphasizes the fact that the proposals for constitutional amendments are not within the purview of section 16 of article 6 of the Constitution, because the orders and resolutions there contemplated are those which "shall take effect" when approved by the Governor or, being disapproved, shall not take effect unless repassed by both houses according to the rules and limitations prescribed in the case of a bill.

This subject has been considered in opinions of such erudition that the temptation to quote from them is resisted only because of the great length to which it would protract this opinion. The reasoning of the Court of Appeals of Maryland in the case of *Warfield* v. *Vandiver, supra,* is in line with that of the numerous decisions from other States cited in the briefs of counsel, and we quote only a short excerpt from that opinion as follows: "The people are the source of power. It is *they* who make and abrogate written Constitutions, and when in the organic law which they have chosen for themselves they have designated the General Assembly, consisting of a Senate and a House of Delegates, and nothing more, to be the agency for propounding amendments to the Constitution, no executive has the right to step in between that agency and the people themselves and to say that without

his approval *they* shall not be permitted to express *their* views on measures amendatory of the organic law. Unless the express language of the Constitution has unequivocally clothed the Governor with such an authority, in relation to proposed constitutional amendments, as is the case in Delaware, but in no other State, it cannot be borrowed from some other provision pertaining to a wholly different subject."

We conclude that the veto of the Governor was ineffective, and the decree of the court below dismissing appellant's complaint is affirmed.

WESLEY v. BAKER.

Opinion delivered May 15, 1922.

1. MANDAMUS—DEFENSE—PENDENCY OF ANOTHER PROCEEDING.—In a proceeding for mandamus to compel school directors to maintain a separate school for the education of white children in the district, it is no defense that there is pending before the county board of education a petition by the board of directors to transfer the white children to an adjoining school district.
2. SCHOOLS AND SCHOOL DISTRICTS—PROCEEDINGS OF COUNTY BOARD—REVIEW.—The acts of a county board of education are *quasi* judicial, and the only method of reviewing such proceedings is by certiorari.
3. SCHOOLS AND SCHOOL DISTRICTS—RE-TRANSFER OF PUPILS—VALIDITY.—An order of the county board of education re-transferring four white children to the district of their residence is not invalid, though made for the purpose of augmenting the number of white children in the district so as to require the directors to maintain a separate school for their education.

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

Bush & Bush, for appellants.

Randolph P. Hamby, for appellees.

HUMPHREYS, J. This is an appeal from the judgment of the circuit court of Nevada County, coercing the directors of School District No. 61 to provide a separate

school for twelve white children residing in said district. The record reveals that the lands in the district are largely owned by the white people, and most of the school tax paid by them; that there are about one hundred negro and twelve white children of school age residing in the district; that the directors of the school district are negroes, and in the past have maintained a school for the negro children in the district, but none for the white children; that the white children have been in the habit of going to a separate white school about three miles distant and inconveniently situated with reference to their homes; that four of the white children who had been transferred into another district had been transferred back to District No. 61 by the county board of education, over the objection of the directors of said school district, who took an appeal from the order to the circuit court, where same was pending at the time this cause was tried; that, prior to the institution of this proceeding in mandamus, the directors of School District No. 61 had applied to the county board of education for the transfer of the other eight white children residing in the district to another district, and at the time of the trial of this cause the petition for their transfer was pending before said board; that the parents of the white children residing in the district had almost completed a school building without expense to the district; that a separate school for the negro children in the district was maintained for a period of five months each year, and was taught by a principal and one assistant whose salaries were respectively $60 and $30 per month; that the funds were insufficient to maintain two schools for three months in the year upon the same basis of expense incident to maintaining a school for the negro children. There is a suggestion in the argument of appellants for reversal of the judgment that this action to compel the directors to maintain a separate school for the white children was prematurely instituted for the reason that the application of the board of directors to transfer eight of the white children to an

adjoining district was pending before the county board of education, and because the petition to transfer four of the white children into District No. 61 over the protest of the directors was pending in the circuit court on appeal from said board. We do not understand that the pendency of either proceeding could prevent the parents of the white children, ten in number or over, from petitioning for a writ of mandamus to compel school directors to maintain a separate school for the education of white children in the district. The appeal to the circuit court from the order transferring the four white children into District No. 61 did not supersede the order transferring them into the district. In fact, this court very recently ruled that the acts of the county board of education were *quasi* judicial, from which no appeal is given by the statutes, holding that the only method for reviewing the proceedings was by certiorari. *Mitchell* v. *Directors of School Dist. No. 15, ante* p. 50; *Acree* v. *Patterson, ante* p. 188.

Appellants' only other insistence for reversal is that the court committed reversible error in upholding the order of the county board of education in transferring the four white children into District No. 61. Prior to the transfer of the white children into the district, the number of white children therein was not sufficient to require the establishment of a separate school for the whites. The transfer of the four white children into the district had the effect of making the requisite number of white children to compel the establishment of a separate school for their education. Appellants' contention is that the transfer of the four white children into the district is illegal because it is apparent that it was done for the purpose of augmenting the number of white children so as to require the directors to maintain a separate school for their education. In other words, that it is illegal to transfer children from one district into another where there is no established school which they can attend. We deem it unnecessary to decide the question presented by the argument, as the facts in the instant case show that the

four children transferred into District No. 61 from another district were *bona fide* residents of District No. 61, and had theretofore been transferred into another district for school purposes because there were not sufficient white children in District No. 61 to require the board to maintain a separate school for their education. The real purpose of the transfer was to return four white children to their home district, where they had a right to be educated in a separate school for whites, as soon as there were enough white children resident therein to command the maintenance of a separate school for their education. We are unable to find anything in the statutes which supports the contention of appellants or militates against the judgment of the lower court.

The judgment is therefore affirmed.

GRINNELL COMPANY, INC., v. BREWER.

Opinion delivered May 8, 1922.

1. APPEAL AND ERROR—FINALITY OF DECREE.—Where, in a receivership proceeding against an insolvent corporation, an injunction against the enforcement of an execution was granted, and the execution creditor intervened and moved to dissolve the injunction, the decree refusing to dissolve it was final on that branch of the case and appealable, though the proceeding in insolvency had not been finally adjudicated.
2. CORPORATIONS—JUDGMENT AGAINST INSOLVENT CORPORATION.—Under Crawford & Moses' Dig., § 1800, relative to preferences by insolvent corporations, a judgment and execution may be set aside on complaint made within 90 days, though the judgment was obtained and the execution issued before the corporation was declared insolvent, and was not in contemplation of insolvency.

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

A. D. Whitehead, for appellant.

Before the enactment of sections 1798 to 1801, C. & M. Dig., *bona fide* preferences in favor of creditors were valid, 57 Ark. 22; and since those sections were

enacted the preferences that are inhibited are made in contemplation of insolvency. 114 Ark. 31.

Meaning of the term "in contemplation of insolvency." 114 Ark. 31; 22 Cyc. p. 1290.

Receiver took the property subject to all the equities existing against it in the hands of the debtor. 97 Ark. 536. The judgment was taken against the debtor in good faith (98 Ark. 298), and does not operate as a preference within the meaning of the statute. 98 W. S. 512; 59 Ark. 582. The statute does not apply to a seizure of property to enforce execution. 89 Ark. 213; 87 Ark. 521; 75 Me. 396; 6 H. & J. 454; 53 Vt. 447.

The judgment lien, 47 Conn. 408; 146 W. S. 499; 91 Tenn. 336; 114 Mo. 651. Object of insolvency statutes, 98 W. S. 512.

Jacob Fink, for appellee.

The appeal should be dismissed because it is premature. 89 Ark. 162. The right of appeal is limited to final judgments and decrees, 39 Ark. 82; 52 Ark. 227; but it may be prosecuted where a distinct and severable branch of the cause is finally determined. 23 Ark. 421; 25 Ark. 129. The order is not final unless it concludes the rights of the parties. 5 Ark. 398; *Id.* 409; 100 Ark. 500.

The statute, except as to instances mentioned therein, contemplates an equal division of the insolvent's property among its creditors. 67 Ark. 11. A conveyance that has the effect of giving a preference is void as to other creditors. 124 Ark. 431. The receiver takes the property subject to contract liens, and not execution liens, 97 Ark. 537; *Id.* 61. It is only in the absence of a statute that a levy by attachment or execution creates an interest superior to that of an assignee in insolvency. 122 Cal. 632; 117 Cal. 473; 99 Cal. 579.

HUMPHREYS, J. This is an appeal from a decree of the Phillips Chancery Court refusing to set aside an injunction against appellant prohibiting it from enforcing an execution and levy upon the property of the

Thale Mill & Box Company, obtained by appellant against said company in the circuit court of said county on the 25th day of October, 1921. O. C. Brewer, the appellee herein, was appointed receiver of the said Thale Mill & Box Company on November 28, 1921, upon the application of C. S. Fitzpatrick, one of the stockholders in said Thale Mill & Box Company, in a receivership proceeding under sections 1798 to 1801, inclusive, of Crawford & Moses' Digest. The petition for the receivership alleged, in substance, that the Thale Mill & Box Company was unable to pay its indebtedness and has ceased to function; that its stockholders and directors had adopted a resolution directing that the affairs of the corporation be placed in the hands of a receiver; that in October, 1921, appellant had obtained a judgment against the insolvent corporation and procured an execution and levied the same upon its property. The prayer of the petition was that all the property of the defunct concern be placed in the hands of a receiver and converted into money for the payment of its creditors, that all creditors be required to file their claims within the time provided by the statute, and that appellant be restrained from enforcing its execution and levy against the property of the insolvent corporation.

The Thale Mill & Box Company, through its president and secretary, filed an answer admitting its insolvency, and joined in the prayer of the petition of C. S. Patrick for a distribution of the assets of said company among its creditors. Thereupon the court appointed O. C. Brewer receiver of said insolvent corporation and directed him to take charge of its assets, and to distribute the proceeds thereof among the creditors who filed their claims with the receiver within ninety days, as provided by the insolvency act aforesaid. The court also enjoined appellant from enforcing its execution and levy against the property of the insolvent corporation. On the following day appellant filed a motion praying that the injunction against it be dissolved and that it be permitted to pro-

ceed to enforce its execution and levy against the property of said corporation. The court entered a decree refusing to dissolve the injunction, from which is this appeal.

Appellee has filed a motion in this court to dismiss the appeal upon the ground that the decree refusing to dissolve the injunction was interlocutory and not final. The decree of injunction, which the court refused to set aside, in effect finally decided the title and right to the possession of the property which had been levied upon under appellant's execution as between the receiver of the defunct corporation and appellant. It is true the proceeding in insolvency had not been finally adjudicated, but the title and the right to the possession of the property in question was a separate branch of the case. The appellant claimed it under an execution lien, and the receiver by virtue of the proceedings in insolvency. Appellant intervened in the suit for it, and the issue joined upon the intervention was adjudicated against him. The decree upon this distinct and several branch of the case was final and appealable. *Davie* v. *Davie,* 52 Ark. 224; *Seitz* v. *Meriwether,* 114 Ark. 289.

Appellant's contention for reversal is that its judgment was obtained and execution issued thereon before the Thale Mill & Box Company was declared an insolvent corporation and was not acquired in contemplation of the insolvency of said corporation, and for that reason its lien is prior and paramount to the claim of the other creditors of said corporation. While there is nothing in the evidence to indicate that appellant acquired its judgment and execution lien in contemplation of the insolvency of said corporation, yet the judgment was obtained and the execution thereon issued and levied within ninety days before the proceeding in insolvency was instituted. Appellant bases its contention upon section 1800 of Crawford & Moses' Digest, which it interprets to mean that only preferences obtained by judgment, execution and levy acquired in contemplation of insolvency shall be set aside at the instance of proper parties within ninety days after same were obtained. This is not the

correct construction of section 1800. It was otherwise interpreted by this court in the case of *Miners' & Citizens' Bank v. Maxine Mining Co.*, 150 Ark. 653. The court said in that case: "Section 1800 (referring to Crawford & Moses' Digest) 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 decree is therefore affirmed.

FRANKLIN v. STATE.

Opinion delivered May 8, 1922.

1. HOMICIDE—INDICTMENT.—Where a murder resulted from several acts consistent with each other, all the acts may be charged in the conjunctive and embraced in one count.
2. HOMICIDE—ELECTION BETWEEN METHODS OF KILLING RELIED ON.—Where an indictment for murder charged a killing by shooting and striking deceased, and the evidence tended to show that either wound would have been fatal, it was not error to refuse to require the State to elect whether it would prosecute for murder in shooting or in striking the deceased.
3. CONTINUANCE—ABSENCE OF MATERIAL WITNESS.—It was not error to refuse a continuance for the absence of a material witness where the witness was out of the State and not amenable to its process, and no showing was made that he would return to the State within a reasonable time, and no effort made to procure his deposition.
4. CRIMINAL LAW—INSTRUCTION AS TO REACHING VERDICT.—Where a jury had deliberated for several days, an instruction admonishing the jury as to the importance of deciding the case, and directing them to go back into the jury room and consider their verdict further was not erroneous.

5. CRIMINAL LAW—DEMONSTRATIVE EVIDENCE.—Where defendant in a murder case called for deceased's hat and introduced it in evidence, he was not entitled to object to its introduction because it had been in possession of deceased's family and had been tampered with after the killing by being torn in several places.

6. CRIMINAL LAW—DEMONSTRATIVE EVIDENCE.—Where the bullet which killed deceased was extracted in a *post mortem* examination and sealed and delivered to the circuit clerk, the identification of such bullet was sufficient to justify its introduction.

7. CRIMINAL LAW—NECESSITY OF MOTION FOR NEW TRIAL.—Assignments of error not appearing on the face of the record will not be considered unless the alleged errors are preserved in the motion for new trial.

8. HOMICIDE—EVIDENCE.—Evidence held to justify a finding of involuntary manslaughter.

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

G. P. George, Frank Strangways and *U. J. Cone*, for appellant.

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

HUMPHREYS, J. Appellant was indicted for the crime of murder in the first degree in the Ashley Circuit Court at the October term, 1921, for killing Thomas N. Mann in said county on or about the 25th day of December, 1918. At the January, 1922, term of said court appellant was tried upon the indictment and convicted of involuntary manslaughter, his punishment being fixed at imprisonment in the State Penitentiary for a period of one year. From the judgment of conviction an appeal has been duly prosecuted to this court.

Omitting formal parts, the indictment is as follows: "The said R.E.L.Franklin, in the county and State aforesaid, on or about the 25th day of December, 1918, did unlawfully, wilfully, feloniously and of his malice aforethought, and after deliberation and premeditation, kill and murder one Thomas N. Mann, then and there being, by striking him, the said Thomas N. Mann, on the head with a certain blunt instrument, a more particular de-

scription of which is to the grand jury unknown, the said blunt instrument being then and there had and held in the hands of him, the said R. E. L. Franklin, and by shooting him, the said Thomas N. Mann, with a certain gun which the said R. E. L. Frankin then and there had and held in his hands, the said gun being then and there loaded with gunpowder and leaden bullets, contrary to the statutes in such cases made and provided," etc.

Appellant contends for a reversal of the judgment upon the ground embraced in his demurrer, filed below, to the effect that the crime of murder in the first degree was not sufficiently charged in the indictment. Under our law murder is a single crime and must be so charged, but if committed in different modes or by different means it is permissible to allege the different modes or means in the alternative. Crawford & Moses' Digest, § 3015. This statute, in so far as it relates to the method of killing, has reference to modes or means inconsistent with each other. For example, it means that the modes and means by which a single murder was committed may be charged in the alternative in the same indictment. In other words, the same murder may be charged in the same indictment either by poisoning or by force in the alternative, the means or modes being inconsistent. There is nothing in the statute indicating that this could not be done in one count, nor is there anything in the statute indicating that if the modes or methods by which the murder was accomplished were consistent they could not be alleged in the conjunctive. The trend of appellant's argument is that, because the modes or methods appear to have been charged in the indictment in the conjunctive, two offenses are charged. The indictment only charges one offense, committed in two different modes, one by striking, the other by shooting. It is true the methods are charged in the conjunctive, but there is nothing in our statutes prohibiting them being charged in the conjunctive if consistent. In other words, if the murder resulted from several acts consistent with each other, all the acts might be charged in the conjunctive and embraced in one

count. Mr. Bishop, in his work on New Criminal Procedure, vol. 1, sec. 434, enunciates the doctrine in the following language: "Some single offenses are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader chooses, if not repugnant; and, at the trial, it will be established by proof of its commission by any one of them." The same rule of procedure is announced in Joyce on Indictments, § 401, and in the Standard Enc. of Procedure, vol. 12, p. 516. The trial court did not err in overruling the demurrer to the indictment.

Appellant's next insistence for reversal is that the court erred in overruling his motion to require the State to elect which mode or method of killing it would rely upon for a conviction. The proof on the part of the State tended to show that the murder was committed both by shooting and striking the deceased. When found, the top of deceased's head was crushed in as if a blow from a bludgeon, and there was a gunshot wound from a bullet which entered above and back of his right ear and lodged in the skull on the opposite side of the head. The evidence also showed that either wound would have produced instantaneous death. The authorities cited above are to the effect that proof of any one of the alleged methods of committing an offense, when not repugnant, is sufficient to sustain the charge. Directly upon this point, Mr. Wharton, in his work on Homicide, at page 563, uses the following language: "Where the means by which the murder was committed are uncertain, its commission by different means may be charged in a count of the information, and proof of any one will sustain the allegation, but the means so charged in the same count must not be repugnant. And an allegation of killing by shooting, and by cutting, bruising, and striking, charges that the accused inflicted two mortal wounds upon the deceased, one by shooting, and one by striking, and is not bad for repugnancy." The court did not err in overruling appellant's motion to

require the State to elect whether it would prosecute appellant for the murder in shooting or whether by striking the deceased.

Appellant's next insistence for reversal is that the court erred in overruling his motion for a continuance on account of the absence of Henry Ray Croswell, who, if present, would testify that he appeared on the scene of the tragedy soon after the killing and saw the sheriff, Dr. W. M. Chavis, extract the shells from deceased's pistol, which was picked up near the body; that one of the shells was empty and thrown on the ground by the sheriff; that witness picked up and saved the empty shell, and may have it yet; that the shell was a .32 Winchester. The sheriff had testified that the gun belonging to the deceased would fire a .32 caliber Winchester, although a .38 caliber Smith & Wesson pistol; and another witness had testified that the deceased usually carried a pistol loaded partly with .32 caliber Winchester cartridges. Appellant's theory was that the deceased, in a drunken frenzy, while playing with his own gun, accidentally killed himself, and that the crashing of the bullet through the head fractured the skull on top. Based upon this theory, there could be no question but what the evidence of the absent witness would have been material, as tending to support the theory of an accidental killing. It appears from the record, however, that the cause was continued from the August, 1921, term of the court until the following January term thereof; that at the time of the continuance it was known that the witness was in the military service in the Canal Zone, and that, in the interim, no effort was made to procure the deposition of the witness, and no effort to obtain the presence of the witness except to mail a subpoena for him to the Adjutant General of the United States army at Washington, D. C. Appellant failed to show that he used diligence to obtain the testimony or presence of the witness. The witness was out of the jurisdiction of the court and not amenable to its processes, and no showing was made that he would return

to the State within a reasonable time. The court did not abuse its discretion in refusing to continue the case for the attendance of the witness. *Puckett* v. *State,* 71 Ark. 62; *Turner* v. *State,* 135 Ark. 381; *Metropolitan Cas. Ins. Co.* v. *Chambers,* 136 Ark. 84.

Appellant's next insistence for reversal is that the court erred in admonishing the jury, after several days' deliberation, concerning the importance of coming to an agreement. The admonition complained of is as follows: "I would not ask any man on this jury to violate his conscience, and yet it has been my observation and experience that, although men partly disagree and don't agree for a time, some taking one question one way and others taking it the other, yet, after taking into consideration all the circumstances, they are finally able to agree. I don't have to tell you that you are men of common-sense, and I don't have to tell you that this is a case that has consumed a great lot of time and energy. You saw the great number of witnesses that were brought here, and you heard the testimony of those witnesses, and you know the importance of deciding this case, that this case be decided. It would be a bad thing if a verdict were not reached now; some jury will have to try this cause and settle it. There is no way that I know of, and there is no other way known to law, by which it can be decided. Considering all those things, gentlemen, I will have to ask you to go back into your jury room and consider of your verdict further."

We find nothing in the admonition indicating the court's opinion upon any disputed fact in the case, or upon the guilt or innocence of appellant, nor anything indicating that jurors should yield their honest convictions in order to reach a verdict. The admonition did not transcend the license accorded trial judges in *Johnson* v. *State,* 60 Ark. 45; *St. L. I. M. & S. R. Co.* v. *Carter,* 111 Ark. 272; *Reed* v. *Rogers,* 134 Ark. 528.

Appellant's next insistence for reversal is that the court erred in permitting the hat of deceased and the bullets found in deceased's pistol and in his head to be

introduced in evidence. The objection made to the introduction of the hat was that it had remained in possession of the family of the deceased and had been tampered with after the killing. Appellant himself called for the hat, and it was introduced at his instance. After being introduced, it was discovered that it not only had a bullet hole in it, but was torn in several places. After having introduced the hat, appellant was in no position to have it excluded. It was his privilege to prove that it had been torn after the death of deceased and while in the possession of the family of the deceased, if he chose to do so, but not his privilege to have it excluded over the objection of the State after requesting and obtaining its introduction himself. The objection made to the introduction of the bullets is that they were not properly identified. There was a *post mortem* examination of the deceased, and the bullet, which entered his head on the right side and lodged in the left side, was extracted. This bullet, as well as some Smith & Wesson .38 caliber bullets, were weighed by Dr. George, and the weights taken down, which weights, together with the bullets, were sealed in an envelope and placed in charge of the circuit clerk, where they remained until introduced and identified by Dr. George. We think the identification of the bullets sufficiently definite to justify their introduction.

The next insistence of appellant is that the court erred in giving and refusing certain instructions to the jury. None of the objections and exceptions to the instructions were preserved in appellant's motion for a new trial, except to appellee's requested instruction No. 1, which was a correct definition of murder. It was as follows: "Murder is the unlawful killing of a human being in the peace of the State with malice aforethought, either expressed or implied." Under the repeated rulings of this court, assignments of error not appearing on the face of the record will not be considered unless the alleged errors are preserved in the motion for a new trial. *Thielman* v. *Reinsch*, 103 Ark. 307; *Thomas* v. *Jackson*,

105 Ark. 353; *Railway Ice Co.* v. *Howell,* 117 Ark. 198; *Sublett* v. *Sublett,* 133 Ark. 196. Under the record presented we are not called upon to determine whether the court erred in giving or refusing instructions.

Appellant's last insistence for reversal is that the evidence is insufficient to support the verdict of the jury and judgment of the court. Deceased was killed in the afternoon of December 25, 1918, on the front walk between appellant's house and gate. The testimony introduced on the part of the State tended to show that deceased had been invited to take dinner with appellant, who stated that he had plenty of eggnog, but that he took dinner with his sister, Mrs. J. Q. Pilgrim, and remained there until about 3 o'clock, when he started home in the direction of Hamburg. In going toward Hamburg he had to pass appellant's house. The sheriff was called between 4 and 5 o'clock by appellant's wife, who requested him to ask the deceased's father to come and get him, as he was in a bad fix. In a short time thereafter the sheriff was notified to come himself, and when he arrived he found the dead body of the deceased on the walk with a bullet hole in his head; his pistol was near his side, and his hat on the ground near by. His pistol was a .38 caliber Smith & Wesson, and one chamber had been fired. Appellant's statement concerning the killing to different parties was somewhat conflicting. After the burial of deceased, suspicion was aroused against appellant, and the body was disinterred and a *post mortem* examination made. It was discovered that a bullet had entered on the right side of the head a little above and back of the right ear and lodged on the opposite side in front of the left ear. The bullet was about the same weight of a .32 caliber Winchester bullet. It was also discovered that the top part of his head, towards the back, had been fractured as if done with a blunt instrument. Appellant owned a .32 caliber Winchester rifle. Deceased's coat sleeve was torn, and when his hat was introduced in evidence there were several torn places in it. Later the grand jury investigated the killing and returned an indict-

ment against appellant. At the time the grand jury was conducting the investigation appellant was serving on the petit jury. When a warrant was issued upon the indictment, appellant could not be found, having disappeared. He went to Greenwood, S. C., where he lived until he was found and arrested, under the name of Robert E. Lee. The State's theory, based upon the facts just detailed, was that appellant killed the deceased in a drunken brawl by first shooting him with a .32 caliber Winchester rifle and then striking him in the top of the head with some blunt instrument. Appellant's theory was that the deceased shot himself with his own pistol while playing with it, and that the shattering of the skull in the top of the head was done by the bullet as it ranged upward through the head. It is unnecessary to set out the facts and circumstances introduced by appellant in support of this theory, as the judgment must be affirmed if there is any substantial evidence in the record to support the verdict of the jury. It was next to impossible for the two wounds, as discovered in the deceased's head, to have been self-inflicted. We think the most reasonable inference to be drawn from the character of the two wounds is that they were not self-inflicted, but were inflicted by another. After drawing this inference, there is ample testimony in the record to connect appellant with the crime. The fact that he possessed a .32 caliber Winchester rifle tends strongly to connect him with the crime, as the bullet extracted from the deceased's head was about the same weight of a .32 Winchester bullet. Appellant's conflicting statements, and the fact that he fled and lived under an assumed name until arrested, are circumstances tending to connect him with the crime. The evidence was legally sufficient to sustain the verdict and judgment.

No error appearing, the judgment is affirmed.

BROWN v. WILKES.

Opinion delivered May 15, 1922.

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—GENERAL ASSIGNMENT.—A conveyance to trustees for the payment of the grantor's debts, without a defeasance in the event of payment by the grantor, constituted a general assignment for the benefit of creditors.
2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY.—A general assignment for the benefit of creditors, purporting to authorize the trustees to carry out the assignor's contract and to make new contracts and to incur expenses not warranted under our statute, and providing that all the property should be sold at the end of 14 months, and the surplus returned to the grantor, was void as being inconsistent with Crawford & Moses' Dig., §§ 486-493.
3. ASSIGNMENTS FOR BENEFIT OF CREDITORS—EFFECT OF INVALIDITY.—Under Crawford & Moses' Dig., § 489, where an assignment for the benefit of creditors is declared void, it will be treated as a general assignment for the benefit of creditors *pro rata*.
4. ASSIGNMENTS FOR BENEFIT OF CREDITORS—REMEDY OF CREDITOR.—A creditor seeking to realize on his claim against an assignor must resort to the remedy afforded by the statute relating to assignments for creditors.
5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—RIGHT OF ASSIGNEES TO RECOVER PROPERTY.—Where the "trustees" in a deed which was in effect a general assignment for creditors have not taken possession of the property, made an inventory or given bond as required by Crawford & Moses' Dig., § 486, they cannot recover the debtor's property which was taken on execution in a suit by a creditor.
6. ASSIGNMENTS FOR BENEFIT OF CREDITORS—JUDGMENT AGAINST ASSIGNEES.—Where assignees brought suit as individuals to recover possession of the property assigned, and set forth the assignment as the basis of their claim, a judgment against them as individuals, and not as assignees, was proper.
7. APPEAL AND ERROR—ISSUES PRESENTED.—An appellate court will not take notice of its judgment in another cause, which was not pleaded below.
8. APPEAL AND ERROR—MODIFICATION OF JUDGMENT.—Where the assignees in a general assignment for the benefit of creditors have not qualified as such after an unsuccessful appeal from a judgment in an action by them against a sheriff to recover possession of the property assigned, an order in an action at law

preserving their right to maintain a suit in equity was unnecessary, the possession of the sheriff not putting the property beyond the jurisdiction of the chancery court.

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

Hughes & Hughes, for appellants.

The evidence was not sufficient to support the judgment.

If the instrument in question was a mortgage, the personal property was not subject to execution. 94 Ark. 296.

The instrument in question was an assignment for the benefit of creditors. 52 Ark. 43.

The court erred in adjudging that appellees were entitled to satisfaction out of the trust property in priority to other creditors. C. & M. Dig., § 489. The policy of the statute is to assure equality to all creditors. 83 Ark. 182; 133 Ark. 554.

Bogle & Sharp, for appellees.

The evidence was sufficient to sustain the judgment of the court.

In any action for the recovery of specific personal property, the jury must assess its value, and also the damages for the taking and detention of same. C. & M. Dig., sec. 8654; 104 Ark. 375.

In the absence of a demand for a separate valuation before the verdict or of objection to the verdict, the presumption is that the right is waived. 53 Ark. 411; 26 Kan. 320; 49 Ala. 134.

Objections to deviations from the strict line of procedure which do not vitiate the judgment must be made in apt time. 51 Ark. 126; 51 Ark. 130; 1 Thompson's Trials, sec. 113.

The judgment of a court of competent jurisdiction is presumed to be right, unless the record of the court will make it appear affirmatively that it is erroneous. 124 Ark. 388; 44 Ark. 744; 94 Ark. 115.

Replevin cannot be maintained against an officer who has the custody and possession of property under a valid execution. 4 Ark. 525; 8 Ark. 563; 11 Ark. 658; 94 Ark. 384.

Replevin cannot be successfully maintained where the title rests on a void instrument. 10 Ark. 53; 19 Ark. 659; 26 Ark. 33; 69 Ark. 11.

Mathis & Trice, for appellees.

A mortgage is the conveyance of an estate or a pledge of property as security for the payment of money or the performance of some act, and conditioned to become void upon such payment or performance. An assignment is an absolute conveyance of title for the purpose of raising funds to pay the debts of the grantor. 2 Ruling Case Law, p. 662.

Where an instrument clearly indicates on its face that it is executed, not to secure *bona fide* creditors, but to enable the debtor to carry on his business under cover of another's name, the instrument is void. 152 U. S. 527. No general rule can be established by which conveyances can certainly be adjudged to be fraudulent or not. 22 Ark. 184; 53 N. Y. Supp. 513; 58 N. E. 773; 49 N. Y. Supp. 111.

McCULLOCH, C. J. Certain creditors of J. A. Burt recovered separate judgments against him in the circuit court of Woodruff County and caused executions to be issued on the judgments and delivered to appellee, as sheriff of the county, who levied the writs on a lot of chattels as the property of Burt.

Appellants, R. G. Brown and R. T. H. Chambers, instituted the present action against the sheriff to recover possession of the property seized under execution, and they assert title to the property under a deed executed to them by Burt.

The property described in the deed executed by Burt to appellants is mentioned as road construction equipment, and consists of sixty-eight horses and mules, a lot of wagons, tractors, scrapers, shovels, crane, truck,

graders, steam-rollers, and other equipment and tools used in road construction work. The names of Burt's creditors are mentioned in the deed, and the amount of the indebtedness, aggregating about $70,000, and there is a general provision in the deed that if there are found to be other creditors who have been omitted they shall be treated as beneficiaries under the deed.

Appellants are mentioned in the deed as trustees, and the instrument is designated by name as a mortgage. The deed contains the following clauses:

"Now, therefore, said mortgagor does hereby bargain, sell, convey, assign, transfer and deliver unto the trustees, their successors and assigns, his entire interest in all the described property, including all the road equipment aforesaid; all his right to collect retained percentage from any and all of said road improvement districts, and to all sums of money that may be due him upon his contracts with any and all of said road districts now or upon completion of the work, excepting, however, such part of the retained percentage in Road Improvement District No. 7, White County, as may be necessary to protect R. T. H. Chambers as indorser on notes of the mortgagor for $15,000, which retained percentage has already been assigned to him for that purpose.

"In trust, however, to collect the said debts due to the mortgagor, or to become due, to cause all of said contracts to be completed and performed as far as the same remains yet to be performed by the mortgagor, to incur whatever expense is necessary in employing agents for that purpose, or otherwise, to collect the proceeds thereof, to sublet said contracts, or any of them, or any part thereof, to sell and dispose (after the completion of the work) of all of said road equipment and material, and, after paying the expense of completing said contracts, to pay the remainder to the creditors of the mortgagor above-named *pro rata.*"

"The said trustees are fully authorized and empowered by the mortgagor to execute any contract, or con-

tracts, assignments, releases, vouchers, and any and all other papers, contracts, or vouchers, necessary to be executed in connection with the carrying out of said contract. They are authorized to receive and receipt for all moneys due the mortgagor under any and all of said contracts, or under any contract the mortgagor has heretofore made in respect of said operation, or any of them, and to receipt for the same, and their receipt shall be a full acquittance in the same manner as if signed by the mortgagor. And said trustee shall have the power also to compromise claims and to release, stipulate, or otherwise dispose of any controversies connected with said contracts, or any of them, or any part thereof, to purchase and contract for supplies, and to act as fully in the matter as the mortgagor might do if personally present.

"All sums of money due to the mortgagor in Arkansas under said contracts, or otherwise, shall be paid to said trustees. As soon as said trustees shall have collected a sufficient amount to pay ten (10%) per cent. or more of the debts hereby secured, a distribution shall be made by them of the moneys then on hand, and at every period thereafter when such accumulations amount to as much as 10% additional, a like distribution shall be made until all of said debts shall have been paid in full, or the properties hereby conveyed are fully liquidated.

"As fast as any contract shall have been completed or fully sublet to other parties, the said trustees shall sell and dispose at public or private sale any such part of the equipment and material belonging to the mortgagors as shall have been employed in that particular operation, and which has not been included in the subletting contract."

There is a clause near the end of the deed which provides, in substance, that at the expiration of fourteen months the trustees shall proceed to terminate the trust and sell all of the remainder of the property not otherwise disposed of, and that if, after paying all of the debts,

there be a surplus, it shall be returned to "the mortgagor, his executors, administrators or assigns."

The trial of the cause resulted in a verdict in favor of appellee.

The bill of exceptions recites that the testimony adduced at the trial was confined to the record evidence of the judgments against Burt, the writs issued thereunder, and evidence of the value of the property seized by the sheriff, and the aforesaid deed under which appellants claim title.

The only question presented for our decision is, whether or not the evidence is sufficient to sustain the verdict.

Appellants were the plaintiffs below, and the burden was upon them to establish their right to recover possession of the property, and they rely solely upon the instrument executed to them by Burt, which is set forth in the bill of exceptions. The question of sufficiency of the evidence calls for an interpretation of the instrument.

While the language of the instrument characterizes it as a mortgage, it is, in fact, not that kind of an instrument, for it does not contain a defeasance clause, which is one of the essentials of a mortgage. The instrument is, in effect, a conveyance to trustees for the payment of a debt to creditors. It is an absolute appropriation of the property for that purpose, without a defeasance, in the event of the payment of the debts by the grantor, and it therefore constitutes a general assignment for the benefit of creditors. *Turner* v. *Watkins,* 31 Ark. 429; *Richmond* v. *Mississippi Mills,* 52 Ark. 30; *State* v. *Dupuy,* 52 Ark. 48; *Fecheimer* v. *Robertson,* 53 Ark. 101.

The deed of assignment is, however, in conflict with the statutes of this State regulating general assignments for the benefit of creditors, and is therefore void. Crawford & Moses' Digest, chap. IX. In the deed the grantor appropriated the property to the payment of all of his creditors, but he went further than that and

undertook to clothe the trustees with authority to carry out his contract and to make new contracts with reference thereto and to incur expenses not warranted under our statute. It also prescribed a limitation upon the disposition of the property, which is not authorized by statute. Other reasons might be given why the deed is rendered void, but these two features of the deed are sufficient for that purpose.

It does not follow, however, that because the deed is void it is rendered ineffectual as a general assignment for the benefit of creditors. On the contrary, the statute (Crawford & Moses' Digest, sec. 489) provides that if such an assignment be declared void, the same shall be treated as a general assignment for the benefit of creditors *pro rata,* and that "said property shall be disposed of and distributed for their benefit under the orders and direction of said court, and the assignee shall become subject to the control and direction of said chancery court in the same manner as if he had been appointed a receiver to take charge of said fund in court."

We have given effect to this provision by holding that under a void assignment general creditors have no right to seize the property under writs of garnishment, attachment, or execution. *Moore* v. *Goodbar,* 66 Ark. 161; *Phelps* v. *Wyler,* 67 Ark. 97; *Tapp* v. *Williams,* 83 Ark. 182; *State National Bank* v. *Wheeler-Motter Merc. Co.* 104 Ark. 222.

The creditors must resort to the remedy afforded by the statute, but the present case is an instance where appellants are the plaintiffs seeking to recover possession of the property in controversy, and they must rely upon the strength of their own title, and the burden rests upon them to prove their own case.

There is no evidence tending to show that appellants have ever taken possession of the property, or that they have made an inventory or given bond as required by the terms of the statute. Crawford & Moses' Digest, sec. 486.

In *Phelps* v. *Wyler, supra,* Judge BATTLE, speaking for the court, with reference to the provisions of the statute now under consideration, said:

"The assignee is then required to take immediate possession of the property, and to file an inventory of the same and a bond with the clerk of the court having equity jurisdiction within ten days thereafter. He is impliedly authorized to enforce such right by legal proceedings, if necessary. In the event the assignment shall be declared void, the title and right to possession shall remain in him in his fiduciary capacity, and the assignment becomes a general assignment for the benefit of all the creditors of the assignor *pro rata,* and the assignee becomes subject to the control and direction of the chancery court in the same manner he would be had he been appointed a receiver to take charge of the property. No creditor can defeat his title. He cannot, in the discharge of his duties, remain passive, and wait until the assignor delivers possession, but he is required to assert his right to the same immediately, and he is liable for the damages occasioned by his failure to do so."

That case, however, was one where the creditors sued in chancery court to set aside the deed of assignment, or to purge it of alleged fraudulent debts. The trustee was not, as in the present case, the plaintiff seeking to obtain possession without having complied with the terms of the statute with respect to giving bond. The two cases are thus distinguished, and we hold that appellants are not entitled to recover possession under a deed containing terms in conflict with the statute on the subject.

Appellants, as the trustees, or any of the creditors to be benefited by the assignment, had a remedy in the chancery court for the administration of the assignment and the distribution of the proceeds of the assigned property, but, as before stated, appellants could not recover possession under the deed unless the statute had been complied with.

Finally, it is contended that judgment is erroneous as being against appellants personally instead of against them as trustees.

Appellants sued as individuals, but set forth the deeds of assignment as the basis of their claim of title to the property in controversy. The deed was mere evidence of title, and not their authority to maintain a suit, and the judgment, therefore, was properly against them as individuals for the return of the property.

Affirmed.

OPINION ON REHEARING.

McCULLOCH, C. J. Appellants now ask that the judgment of this court be modified in two particulars: First, that the judgment of Henderson against Burt be excluded from the alternative judgment for recovery of the value of the property in controversy, for the reason that the Henderson judgment has been reversed by this court since the judgment in the present case was rendered below; second, that an order be made preserving the right of appellants, as trustees under the void assignment, and also the right of creditors of Burt, to maintain a suit in chancery under the statute referred to in the original opinion for the distribution of the assigned property.

Attention is called now, for the first time, to the fact that the Henderson judgment was reversed by this court, also that the jurisdiction of the chancery court has already been invoked for relief in the administration of the void assignment.

It is sufficient answer to the first request to say that we cannot take notice of the judgment of this court in another cause. The judgment should have been pleaded below (*Gibson* v. *Buckner,* 65 Ark. 84; *Hall* v. *Cole,* 71 Ark. 601; *Murphy* v. *Citizens Bank,* 82 Ark. 131); or further steps must be there taken to suspend enforcement of the reversed judgment.

The answer to the second request is that the right to maintain an action in chancery under the statute is un-

affected by the judgment in the present case. It is within the right of appellants to satisfy the judgment appealed from by returning the property to the sheriff, so as to escape the effect of the alternative judgment, and the possession of that officer will not put the property beyond the jurisdiction of the chancery court. That is, however, a matter of original jurisdiction of the chancery court, and an order here in relation to the matter is not appropriate.

The motion to modify the judgment of this court is therefore denied.

TALLMAN v. STATE.

Opinion delivered May 15, 1922.

1. CRIMINAL LAW—CHANGE OF VENUE.—Where, on a petition for a change of venue, two witnesses swore that they were acquainted with inhabitants in all parts of the district and had heard a great many of them talk about the case, but, on cross-examination, they stated that they paid no attention to the townships from which such inhabitants came, and did not remember where they resided, there was no abuse of discretion in denying the motion.
2. CRIMINAL LAW—REASONS FOR DENYING CHANGE OF VENUE.—On hearing a motion for change of venue, notwithstanding the court improperly asked the supporting witnesses if they believed that it would be impossible to find 12 men in the district who would not deliberately perjure themselves in order to sit on a jury, the reasons of the trial judge, being no part of the judgment, are not open to attack, the only question being whether the court erred in denying the motion.
3. CRIMINAL LAW—DENIAL OF CHANGE OF VENUE.—Where the record showed that the judgment denying defendant's motion for a change of venue was based on legal testimony, it is not subject to reversal.
4. ANIMALS—CONVICTION FOR MALICIOUS MISCHIEF.—In a prosecution for malicious mischief, charged to have been committed by killing a dog belonging to another, evidence held to warrant a conviction.
5. CRIMINAL LAW—MULTIPLICATION OF INSTRUCTIONS.—In a prosecution for malicious mischief, it was not error to refuse an instruction merely multiplying the instructions given.

6. ANIMALS—INSTRUCTION AS TO TREBLE DAMAGES.—In a prosecution for maliciously killing a dog, where the jury were instructed, if they found defendant guilty, to find the value of the dog, refusal to instruct that treble damages would be assessed under the statute was not error, the jury having nothing to do with the penalty.

Appeal from Arkansas Circuit Court, Northern District, *George W. Clark,* Judge; affirmed.

Geo. C. Lewis, for appellant.

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

HART, J. Elliott Tallman prosecutes this appeal to reverse a judgment of conviction against him of malicious mischief charged to have been committed by killing a dog belonging to Roger Crowe.

This is the second appeal of this case, and the opinion on the former appeal is reported in 151 Ark. 438, under the style of *Tallman* v. *State.*

Upon the remand of the case for a new trial, Tallman filed a petition for a change of venue, supported by the affidavits of two witnesses in the manner prescribed by the statute. Both of the witnesses testified that they were well acquainted with the inhabitants in all parts of the northern district of Arkansas County, and had heard a great many of them talk about the case. Each of the affiants testified that the minds of the inhabitants of said district and county were so prejudiced against Tallman that he could not obtain a fair and impartial trial therein.

On cross-examination each of the affiants stated that, while he had talked with a good many of the inhabitants of said district and county, he did not pay any attention to the township or townships that such inhabitants came from, and did not remember where they resided. It may have been that the persons with whom the affiants talked lived in one part of the district and that the affiants did not know whether or not the minds of the inhabitants of the remaining part of the district were so prejudiced against Tallman that he could not get a fair and impartial trial therein.

The court found this issue against the defendant, and made an order denying his motion for a change of venue. There was no error in this respect. The trial court has a large discretion in a matter of this kind, and its judgment refusing a change of venue will not be disturbed unless there is an abuse of the court's discretion. The court might have found from the examination of the supporting witnesses that they did not have sufficient knowledge of the state of mind of the inhabitants throughout the whole northern district of Arkansas County to know whether the defendant could obtain a fair and impartial trial therein and were not credible persons within the meaning of the statute. *Dewein* v. *State,* 120 Ark. 302, and *Jordan* v. *State,* 141 Ark. 504.

But it is insisted that the judgment of the court denying the defendant a change of venue is reversible error because he asked the supporting witnesses if they believed that it would be impossible to find twelve men in the northern district of Arkansas County who would not deliberately perjure themselves in order to sit on a jury to try this defendant.

The court should not have asked this question. This was not the test. The question was whether or not the minds of the inhabitants of the northern district of Arkansas County were so prejudiced against the defendant that he could not obtain a fair and impartial trial therein before a jury selected in the usual way.

It does not follow, however, that the action of the court constitutes reversible error. It is well established in this court that error cannot be assigned upon mere reasons given by the trial judge for the judgment rendered. The judgment may be right and the reasoning wrong. The reasons of the trial judge are no part of the judgment, and consequently are not open to attack by assigning them as error. The only reversible action of the court in deciding the motion for a change of venue is the judgment which the court rendered.

The record of the proceedings in the trial court showed that the judgment denying the defendant's motion for a change of venue was based upon legal testimony, and it is therefore not subject to reversal. *Merritt* v. *Hinton,* 55 Ark. 12; *Wilmans* v. *Bordwell,* 73 Ark. 418, and *Polk* v. *Stephens,* 126 Ark. 159.

It is also insisted that the evidence is not sufficient to warrant a conviction. We cannot agree with counsel in this contention. On the former appeal it was held that, under our statute, in order to constitute malicious mischief by killing a dog, it need not be shown that the act was done with malice against its owner, but that it was sufficient to constitute the offense to show malice against the animal itself. The court said that the gist of the offense in this State is the killing of the animal wilfully, maliciously or wantonly.

The testimony on the part of the State shows that the defendant was afflicted with insomnia and got up before daylight to take a walk near his home in the city of Stuttgart. Crowe was his neighbor and owned several dogs. The dogs came out and barked at the defendant. The defendant went back into his house and came back with his shotgun. The dogs barked at him again, and he shot and killed one of them. This evidence warranted the jury in finding a verdict of guilty.

It is true that the defendant himself testified that the dogs came toward him in a threatening manner, and that he believed that they were going to bite him. He went back and got his shotgun so that he might be prepared to defend himself in case they renewed their attack, and shot into the bunch and killed one of them, when they again attacked him.

The testimony of the defendant, however, did not as a matter of law overcome the evidence for the State. The jury might not have accepted his testimony as altogether true. The dog killed was a bird-dog belonging to his neighbor, and the jury might have found that the defendant in his nervous condition was irritated at the dogs

barking at him, and that he went back and got his shotgun for the purpose of shooting them if they barked at him again. Hence the jury might have inferred malice towards the dog from the circumstances of the killing.

The next assignment of error is that the court refused to give the defendant's instruction No. 3, which is as follows:

"You are instructed that, while a negligent or careless killing of the dog would be unlawful, no inference or presumption in law can be indulged that such careless or negligent killing was either wilful, malicious or wanton, even though the killing was done with a deadly weapon, but that the State must prove, beyond a reasonable doubt, that appellant killed the dog either wilfully, maliciously or wantonly."

There was no error in refusing to give this instruction. The court read to the jury the statute on malicious mischief. He then told the jury that before it could convict the defendant the State must prove beyond a reasonable doubt that the killing was malicious, that is, that it was done needlessly, wantonly and in a spirit of malice, which denotes an act done cruelly, wickedly, or one prompted by a wicked and corrupt motive and indicates a mind fatally bent on mischief. It is well settled in this State that a court need not multiply instructions on the same point, and the matters embraced in the refused instruction were covered by the instruction given as indicated above.

Error is also assigned upon the refusal of the court to give other instructions asked by the defendant. We do not deem it necessary to set out these instructions. We have carefully examined them and find them completely covered by the instructions given by the court. The instructions given by the court were full and complete, and were in accordance with the construction of the statute by this court in the opinion on the former appeal.

The court, in express terms, told the jury that the defendant is presumed to be innocent, and that, before it could find him guilty, the State must prove beyond a reasonable doubt that the defendant shot the dog wilfully, maliciously and wantonly. In addition the court told the jury that these words meant that the act was committed not merely voluntarily, but with a bad purpose and an evil intent, recklessly and unnecessarily.

The court further instructed the jury that the defendant had a right to pass over his own premises and the streets and sidewalks adjacent thereto at all times, freely and without molestation, and that if the defendant had reasonable grounds to apprehend an attack from the dog he had a right to protect himself and kill the dog if necessary to prevent the attack. Thus it will be seen that the instructions were as fair to the defendant as he could ask, and the court was not required to repeat the substance of instructions given in varying forms.

Finally, it is insisted that the court erred in refusing to read the entire section of the statute with regard to the malicious killing of a domestic animal.

Sec. 2511 of Crawford & Moses' Digest, after defining malicious mischief and the punishment therefor in a criminal prosecution, provides that the accused so convicted shall be liable in damages for the animal so killed or wounded as in the preceding section.

Sec. 2509 provides that the jury trying the case shall assess the amount of damages, if any actual damage has occurred, and that the court shall render judgment in favor of the party injured for threefold of the amount so assessed by the jury.

The court instructed the jury that if it should find the defendant guilty it must also find the value of the dog he was charged with killing. The error complained of is that the court refused to tell the jury that treble damages would be assessed under the statute.

There was no error in this respect. This is a statutory offense, and it provides a statutory remedy, and that

when a defendant is found guilty the court shall render judgment for treble damages. Under the provisions of the statute the jury has nothing to do with the penalty. Its duty is confined by the statute to the finding of the damages actually suffered by the owner of the animal, and it is made the duty of the court to render judgment in favor of the party injured for threefold the amount so assessed by the jury.

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

GOODMAN v. STATE.

Opinion delivered May 15, 1922.

CRIMINAL LAW—JURISDICTION OVER ISLAND IN ANOTHER STATE.—Though the enabling acts under which Missouri and Arkansas were admitted into the Union and Acts of Arkansas, 1911, p. 46, and Laws of Missouri, 1911, p. 202, provide for concurrent criminal jurisdiction on the St. Francis River where it is the boundary line between the two States, such acts do not extend the jurisdiction of the criminal courts of this State over islands which are situated on the Missouri side of the main channel.

Appeal from Greene Circuit Court, Second Division; *R. E. L. Johnson,* Judge; reversed.

M. P. Huddleston, for appellant.

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

HART, J. Bill Goodman was indicted, tried, and convicted in the circuit court of Greene County, Ark., of the crime of having in his possession a still without registering the same with the proper United States officer, in violation of act 324, approved March 23, 1921. General Acts of 1921, p. 372.

The evidence showed that the offense was committed on Indian Hill Island, which is situated in St. Francis River where that river is the dividing line between the States of Arkansas and Missouri, and that Indian Hill

Island is in the State of Missouri in that part of St. Francis River opposite Greene County, Arkansas.

The defendant relies for a reversal of the judgment and sentence of conviction on the ground that the offense was committed on an island within the boundaries of the State of Missouri, and that the circuit court of Greene County, Ark., had no jurisdiction.

It is the contention of the State that the Arkansas circuit court had concurrent jurisdiction of the crime with the criminal courts of the State of Missouri, on the ground that the alleged crime was committed at a place on the St. Francis River opposite Greene County, Ark., although it was within the boundaries of the State of Missouri.

The enabling acts under which the States of Missouri and Arkansas were admitted each contain a provision that they may have concurrent jurisdiction on the rivers forming a common boundary line between said States.

In 1911 the Legislatures of both the States of Missouri and Arkansas passed acts which gave their respective courts concurrent criminal jurisdiction on the St. Francis River where it is the boundary line between the two States. The terms of these acts are set out in *Brown v. State,* 109 Ark. 373. There, in construing these acts, the court held that, although the actual physical boundary line between Greene County, Arkansas, and Dunklin County, Missouri, is the middle of the main channel of the river, yet the courts of each State have concurrent jurisdiction over crimes committed on the St. Francis River, and upheld the conviction of Brown for gaming on a boat two or three hundred feet east of the middle of the main channel of the St. Francis River, which was within the territorial limits of the State of Missouri.

In *Wedding* v. *Meyler,* 192 U. S. 573, the court, with reference to such enabling acts of Congress, said that when it is enacted by the sovereign power that new States, when formed by that power, shall have a certain juris-

diction, those States as they come into existence fall within the range of the enactment and have the jurisdiction.

It is the contention of the Attorney General that this doctrine applies to permanent objects or places on the Missouri side of the main channel of the St. Francis River. This contention is contrary to the text-writers and adjudicated cases on the question.

In Rorer on Interstate Law, 2 Ed. p. 437, it is said that when by the Constitutions and laws of two adjoining States they have for a boundary between them the main channel of a navigable river, and also have concurrent jurisdiction over the whole river in its entire width from shore to shore, yet their courts have no jurisdiction over objects of a fixed and permanent nature situated beyond the main channel and within the territorial boundary of the other State. Continuing, the learned author said:

"But in the very nature of things jurisdiction of permanent objects is exclusive in the State on whose side of the main channel they are situated. Concurrent jurisdiction of the abutting States over permanent objects, as islands situated in the river, or permanent erections at either shore, would be utterly impracticable in the administrative affairs of the State, as rendering owners and residents of such property liable to taxation, and other liabilities and duties of citizenship and ownership, to each of the States. Hence it can never be intended in law that jurisdiction which is concurrent over a river is concurrent also over islands and other permanently fixed objects therein. Nor does the reason of the law of concurrent jurisdiction apply to such objects whose true location in reference to the center of the main channel can always be known or ascertained; but it was to obviate the difficulty of showing on which side thereof occurrences of judicial cognizance had taken place that concurrent jurisdiction was resorted to in law."

In *Roberts* v. *Fullerton,* 117 Wis. 222, 65 L. R. A. 953, Judge MARSHALL, a great and distinguished judge, in discussing the question, said:

"It was competent for the national Legislature, in the formation of the States, to extend the laws of each for certain purposes over territory of the other. That was done, the jurisdiction on boundary waters being extended as to each State from shore to shore, while the boundary line between them was placed at the main channel of the river. That necessarily forms the boundary between them as to sovereign rights of ownership. Sovereign rights as regards ownership of the bed of the Mississippi river or anything permanently affixed thereto coincides with territorial boundaries. Therein, as to everything of a tangible character forming a part of the land, whether above the water or below the water, the jurisdiction of each State is exclusive. It would seem that its authority must be the same as regards sovereign property rights incident to sovereign ownership of the land covered by water."

Again, the learned judge said:

"It has been decided in many jurisdictions, including that of the Supreme Court of the United States, that 'concurrent jurisdiction on the river' extends only to the water and to floatable objects therein, not to bridges, dams on any other objects of a permanent nature. If any such object be located upon the Wisconsin side of the main channel of a boundary river so as to constitute a nuisance, it must, accordingly, be deemed not only wholly within the territorial limits of Wisconsin, but within its exclusive jurisdiction. *Mississippi & M. R. Co.* v. *Ward,* 2 Black 485, 17 L. Ed. 311; *Gilbert* v. *Moline Water Power & Mfg. Co.,* 19 Iowa 319; *Dunleith & D. Bridge Co.* v. *Dubuque County,* 55 Iowa 558, 8 N. W. 443; *Buck* v. *Ellenbolt,* 84 Iowa 394, 15 L. R. A. 187, 51 N. W. 22; *Iowa* v. *Illinois,* 147 U. S. 1, 37 L. Ed. 55, 13 Sup. Ct. Rep. 239. The rule laid down in those cases has been uniformly accepted by all courts as sound. The effect thereof is that there is no such thing as concurrent ownership, so to speak, of territory, or incidents thereof,

between the shores of a river divided by the boundary line between this State and the State of Minnesota."

In discussing the question in *Wedding* v. *Meyler*, 192 U. S. 573, the court said:

"The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one of the other States."

Having reached the conclusion that the acts in question do not, for any purpose, extend the jurisdiction of the criminal courts of the State of Arkansas on the Missouri side of the main channel of the St. Francis River over islands which are of a permanent nature and part of the land of the State of Missouri, it follows that the circuit court of Greene County, Ark., had no jurisdiction to try the defendant for an offense committed on an island within the territorial limits of the State of Missouri.

Therefore the judgment will be reversed and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

WIEGEL v. MORENO-BURKHAM CONSTRUCTION COMPANY.

Opinion delivered May 15, 1922.

1. APPEAL AND ERROR—STENOGRAPHER'S NOTES AS DEPOSITION.—Under Acts 1917, No. 81, the chancery court could not, at a subsequent term, adopt a transcription of the notes of the official stenographer made by another stenographer and order it filed as depositions in a case which had been determined at a previous term, and oral testimony so preserved is not a part of the record on appeal.

2. REFORMATION OF INSTRUMENTS—TRANSFER OF CAUSE.—Reformation of a contract for fraud or mistake is a proper matter for

equitable jurisdiction, and may be set up by way of cross-bill in a suit at law based upon the contract, in which case the pleader is entitled to have the cause transferred to equity.

3. APPEAL AND ERROR—PRESUMPTION.—In the absence of the evidence properly preserved, the Supreme Court must indulge the presumption that there was ample evidence to sustain the decree of the lower court, where the decree rendered was within the issues joined.

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

James A. Comer, for appellant.

No showing of fraud or mistake in the execution of the contract having been made, the case was improperly transferred to the chancery court. It should have been sent back to the circuit court. 93 Ark. 376; 65 *Id.* 503.

All conversations leading up to the execution of the contract are merged in the written contract, and that must govern. 99 Ark. 218-222; 21 *Id.* 69; 83 *Id.* 163. Parol evidence is inadmissible to alter, vary or contradict the written contract. 4 Ark. 179; 5 *Id.* 708; 35 *Id.* 156; 50 *Id.* 397; 54 *Id.* 97; 55 *Id.* 112; 58 *Id.* 277; 62 *Id.* 43; 102 *Id.* 428; 24 *Id.* 210.

Appellee, having read the contract before signing it, will be estopped from saying that it did not know what the contract contained or what it meant. 71 Ark. 185.

Marvin Harris, for appellee.

The oral testimony was not preserved. There was no authority in law to order the filing of the transcription, by another stenographer, of the stenographic notes of the testimony taken down by the official court stenographer, after the latter's death, at a succeeding term, and over the objections of the appellee. Act 81, Acts 1917, applicable to the Pulaski Chancery Court, does not authorize any such dangerous procedure, nor the practice recognized by this court. 144 Ark. 436, 439; 80 *Id.* 579; 83 *Id.* 424; 114 *Id.* 167; 117 *Id.* 221; 136 *Id.* 376.

There is, therefore, left for the court to pass upon only the one question: Was it possible for the decree

based upon the pleadings to be sustained by the evidence? The presumption is conclusive that it was. 144 Ark. 440.

Chancery jurisdiction was invoked by the allegations of the cross-complaint showing grounds and prayer for reformation, and was rightfully retained by the chancery court. 22 Standard Encyc. of Procedure, 626, 627, and authorities cited; 84 Ark. 349; 98 *Id.* 23; 108 *Id.* 147; 71 *Id.* 614; 135 *Id.* 293; 132 *Id.* 227; 134 *Id.* 152.

HUMPHREYS, J. This is an appeal from a decree of the Pulaski Chancery Court, reforming a rental contract for a steam shovel, entered into between appellant and appellee on the 8th day of May, 1920, so as to provide for the termination thereof when appellee ceased to need the shovel in the construction of the Nineteenth Street pike, in said county, and adjudging $240, with costs, against appellee, in favor of appellant. Suit was originally instituted by appellant against appellee in the circuit court of said county for $5,305.05 for the rental of the steam shovel and repairs on same upon the written contract sought to be reformed, which provided for the rental of the steam shovel at $40 per day for every working day during a period lasting as long as the Nineteenth Street pike was in course of construction. It was alleged in the complaint that appellee paid the rental until October 1, 1920, but failed to pay it after that time; that appellee did not complete the construction of the Nineteenth Street pike until the 24th day of February, 1921; that the rental for the use of the steam shovel during that time amounted, under the contract, to the sum of $5,240; that under the provisions of the contract appellee was to keep the shovel in repair, which it failed to do, to appellant's damage in the sum of $65.65. To this complaint appellee filed an answer, cross-complaint and a motion to transfer the case to the chancery court. In addition to denying the material allegations in the complaint, appellee alleged that the written contract made the basis of the suit did not express the intention of the parties, or, if it expressed the intention of appellant, appellee's signature thereto

was procured upon the fraudulent representations that the clause in the contract relating to the termination thereof meant that rent should be paid on the steam shovel only as long as it was needed by appellee in the construction of the Nineteenth Street pike.

Over the objection of appellant, the cause was transferred to and tried in the chancery court upon the pleadings and testimony of witnesses taken in open court at the April, 1921, term thereof. The official stenographer, Gardner K. Oliphint, took the testimony of the witnesses in shorthand and filed his notes with the clerk of the Pulaski Chancery Court. W. W. Shepherd transcribed the stenographic notes, and, at a subsequent term, was ordered by the court to file his transcription as depositions in the case. This was done without appellee's consent. No other method was adopted to preserve the testimony taken *ore tenus* at the bar of the court. Appellee moves an affirmance of the decree of the lower court on the ground that the evidence was not preserved in the manner required by special act No. 81 of the Acts of 1917, applying to the Pulaski Chancery Court, and for that reason has been improperly included in the transcript as a part of the record in the case. We find no provision in the special act authorizing the court, at a subsequent term, to adopt the transcription by another stenographer of the notes of the official stenographer and to order the same filed as depositions in a case tried at a former term. For this reason the oral testimony preserved and brought into the record in this manner cannot be regarded as a record of the evidence in the case. Holding this view, the only errors which this court could consider on appeal would be errors appearing on the face of the record, without reference to the evidence improperly incorporated in the transcript.

Appellant insists that the court committed reversible error in transferring the cause to the chancery court. We think not. A reformation of the contract was sought on allegations which, if true, authorized a reformation

thereof. It was alleged in the cross-complaint that the written contract did not express the intention of the parties, or if it did express the intention of appellant, she procured the execution thereof through fraudulent representations as to the meaning of the termination clause of the contract. Reformation of a contract for fraud or mistake is a proper matter for equitable jurisdiction, and may be set up by way of cross-bill in a suit at law based upon the contract sought to be reformed, and when so pleaded entitles the pleader to transfer the cause from a law court to a chancery court. *Augusta Cooperage Co.* v. *Bloch, ante* p. 133. The court did not, therefore, commit error in transferring the cause from the law to the chancery court.

The judgment rendered in this cause recites that it was heard upon oral evidence taken before the court. The evidence was not preserved in the manner required by law, and in the absence of the evidence this court must indulge the presumption that there was ample evidence to sustain the decree of the lower court, as the decree rendered was within the issues joined in the pleadings. *Rowe* v. *Allison,* 87 Ark. 206; *Fletcher* v. *Simpson,* 144 Ark. 436.

No error appearing, the decree is affirmed.

MOSAIC TEMPLARS OF AMERICA *v.* HEARON.

Opinion delivered May 22, 1922.

1. INSURANCE—DESIGNATION OF BENEFICIARY.—Where the by-laws of a beneficiary association were part of a contract of insurance, a provision that there should be no payment of benefits unless the beneficiary should be designated in writing by the insured, attested by a local officer of insurer, or by will attested by the same officer, *held* valid and binding.
2. INSURANCE—ASSIGNMENT OF POLICY.—Unless a contract of insurance contains a restriction concerning assignments, an insurance policy may ordinarily be assigned in any form recognized by law, even by oral assignment.

3. INSURANCE—WAIVER OF PROVISION AS TO DESIGNATION OF BENEFICIARY.—Where the by-laws of a beneficiary association provided that the assignment of a policy should not be valid unless attested by a local officer of insurer, the receipt of dues by such officer from one to whom the policy had been assigned without its being properly witnessed did not amount to a waiver of the above provision; such officer having no authority to waive the provision.

Appeal from Nevada Circuit Court; *J. H. McCollum,* special judge; reversed.

Scipio A. Jones, for appellant, Mosaic Templars.

The constitution and by-laws of a fraternal beneficiary association are part of the contract between the member and the association. 109 Ark. 400; 113 Ark. 400; 174 S. W. (Ark.) 1197; 105 Ark. 140; 135 Ark. 65. The policy in suit was not "willed or assigned" according to the by-laws, and there is no liability on appellant.

H. E. Rouse, for appellant, Rowton.

The association knew the relationship existing between the insured and this appellant; knew that he had willed the insurance to Rowton, and demanded the payment of premiums from Rowton, and it cannot now be permitted to take advantage of its own wrong to claim that there is no beneficiary named. 99 Ark. 204; 67 Ark. 506; 71 Ark. 242; 52 Ark. 11; 111 Ark. 435; 142 Ark. 132; 132 Iowa 513. The association having knowledge of facts which would avoid the policy, in justice to the assured and the honest conduct of its business, should have notified the assured of the facts. 127 Ark. 133. By its failure to notify the insured, and the acceptance of the premiums, under the conditions, the association is estopped to claim a forfeiture. 85 Mo. 302; 66 N. Y. 23; 82 N. E. 692; 147 N. C. 339; 74 N. H. 334; 57 Ga. 469; 116 Mass. 321. Forfeitures are not favored. 2 May on Ins., sec. 361; 96 U. S. 577; 53 Ark. 499; 206 S. W. 970; 103 Ark. 171; 107 Ark. 102; 130 Ark. 12.

McCULLOCH, C. J. Appellant Mosaic Templars of America is an incorporated fraternal society, which is-

sues benefit certificates, or policies of insurance, to its members in accordance with the terms of its constitution and by-laws.

The certificate, or policy, issued to members of the society does not designate the beneficiary, but merely states that the amount stipulated in the policy will be paid at the death of the member named, if in good standing financially at that time, to the "widow, widower, mother, father, sister, brother or relative by blood to fourth degree ascending or descending, to whom this policy may be willed or assigned."

The by-laws, which are made a part of the contract, contain the following provisions:

"Section 2. Members holding certificates in this order and dying without designating in their own writing or mark thereof, attested by the worthy scribe of their temple, or chamber, to whom the benefits shall be payable, then in such event the benefits provided in their certificates or polices will not be paid, under any condition or circumstances."

"Section 7. Members holding policies in this order and dying without making some disposition of the same by will or assignment, will not, under any consideration, be paid; and said will or assignment must be made in their own writing, or mark thereof, attested by the scribe of their temple, chamber or palace, and must be sent to the National Grand Scribe on final proof of death."

B. G. Bryant became a member of said society, through its local organization at McNeil, Arkansas, and a certificate or policy was issued to him on February 6, 1913, and he died while in good standing financially on September 13, 1919.

Bryant executed his last will and testament on July 21, 1916, whereby he bequeathed his policy in appellant society to his daughter, Minnie L. Hearon, the appellee, who was the plaintiff below. Bryant's will was duly attested by two witnesses in accordance with the laws of

this State and was duly probated, but the instrument was not attested by the local scribe of appellant society as provided in the by-laws.

Subsequent to the execution of his said will, Bryant executed an assignment of the policy to his illegitimate daughter, Frances Rowton, who is one of the appellants here. The instrument was signed by Bryant and witnessed by two persons, but not by the local scribe as provided in the by-laws.

This action was instituted on the policy by appellee, claiming to be the designated beneficiary under the last will and testament of Bryant.

Appellant Frances Rowton was made a party defendant in the action on the allegation that she was claiming some interest in the policy as beneficiary, and she filed her answer and cross-complaint against the Mosaic Templars of America, asking for recovery of the amount of the policy under the assignment to her by Bryant.

Appellant Mosaic Templars of America answered, denying liability to either of the parties.

The cause was tried before a jury, but the court gave a peremptory instruction in favor of appellee.

Each of the appellants filed a separate motion for a new trial, which was overruled, and each has duly prosecuted an appeal to this court.

The by-laws of the society constitute a part of the contract, and there was no liability for the payment of benefits unless there was a designation in the manner prescribed. *Baker* v. *Mosaic Templars of America,* 135 Ark. 65. In the case just cited, we said:

"It is insisted by appellant that the failure to designate a beneficiary by will or assignment in the manner provided in the policy cannot prevent a recovery. The policy specifically provides that the laws of the order shall become a part of the contract. The clause in question is law No. 7 of the organization. It was there-

fore necessary for the insured to comply with it before any liability would accrue on the contract."

The words "will or assign" in by-law No. 7 were manifestly used synonymously as meaning the designation of the beneficiary under the policy, and the requirement was for the purpose of certainty and to prevent conflicts, and required that such designation should be in writing, signed by the assured, either in his own handwriting or by mark and attested by the scribe of the local society. No particular form was prescribed for the designation, except, as before stated, that it must be in writing and attested by the scribe. The designation could be by a last will and testament, executed in accordance with the laws of the State, or by a written instrument of assignment, but in either event the instrument must be attested by the local scribe.

In the present instance there was no attestation by the local scribe, either to the last will of Bryant, under which appellee claims, or to the written instrument under which appellant Frances Rowton claims.

The assignment to Frances Rowton does not bear date on its face, but there was proof tending to show that it was executed a short time before Bryant died. Frances Rowton testified herself that the assignment was executed in the year 1918, which was perhaps a year before Bryant died. At any rate, the proof shows that the written assignment to Frances Rowton was executed by Bryant several years after he executed his last will and testament in which he bequeathed this policy to his daughter, Minnie L. Hearon.

This conflict demonstrates the importance of giving effect to the provision of the by-laws which prescribes that the designation of a beneficiary must be attested by the local scribe. The by-law is mandatory in its terms, and to disregard it would be to set aside the plain contract between the parties, which we are not at liberty to do.

Ordinarily, an assignment of an insurance policy may be accomplished in any form recognized under the law, unless the contract itself contains a restriction in that respect. There may be even an oral assignment of a policy (*Citizens Bank* v. *Moore, Admr.* 134 Ark. 554), but in the present instance we have a plain restriction in the contract prescribing the only method by which the beneficiary may be designated.

It is claimed that there was a waiver of this defect by the conduct of the local scribe in accepting dues and assessments from Frances Rowton with knowledge that there had been an assignment of the certificate to her.

There is proof to the effect that the local scribe, whose duty it was to collect assessments and dues, was informed by Bryant a few months before his death that he had assigned the policy to Frances Rowton and payment of dues and assessments would thereafter be made by her. There was no authority on the part of the local scribe to waive this provision of the by-laws, nor was the society estopped by the conduct of its local officer in so doing. This is not a case of a waiver of forfeiture which may be brought about by the acceptance of payments of dues and assessments, which were payable whether there had been a proper designation of beneficiary or not. A member might continue to pay up to his death, but, as before stated, there was no liability unless there was a proper designation in accordance with the by-laws. The following decisions of this court are in point on that question: *Clinton* v. *Modern Woodmen of America,* 125 Ark. 115; *Grand Lodge* v. *Davidson,* 127 Ark. 133; *Pate* v. *Modern Woodmen of America,* 129 Ark. 159; *Miller* v. *Illinois Bankers Life Assn.* 138 Ark. 442; *Sovereign Camp Woodmen of the World* v. *Newsom,* 142 Ark. 132; *Sovereign Camp Woodmen of the World* v. *Peaugh,* 150 Ark. 176.

There having been no designation of beneficiary, there is no liability, and the peremptory instruction in favor of appellee was erroneous.

There is no liability to either party. Therefore the judgment must be reversed, and the judgment will be entered here in favor of appellant, Mosaic Templars of America, dismissing the action.

It is so ordered.

DISSENTING OPINION.

HART, J. I think the judgment should be affirmed. I do not think *Baker* v. *Mosaic Templars of America,* 135 Ark. 65, sustains the doctrine of the majority opinion. In that case the insured made no attempt to comply with the by-laws by naming a beneficiary.

In this case the insured named Minnie Hearon, his legitimate daughter, as the beneficiary. She was a blood relation within the meaning of the by-laws, and therefore eligible to be made a beneficiary.

It is true that the appointment was defective in that the will was not attested by the scribe of the Templars; but this was a matter which the insured could waive, and did waive, by accepting the dues of the insured until his death.

The attempt to appoint as the beneficiary Frances Rowton, his illegitimate daughter, was ineffectual for any purpose for the reason that she was not eligible under the rules of the order.

FORT SMITH LIGHT & TRACTION COMPANY *v.* BAILEY.

Opinion delivered May 22, 1922.

1. ACTIONS—JOINDER—ELECTION.—Where causes of action against several defendants were improperly joined, but the actions were such that they might properly have been consolidated, it was not error to refuse to require plaintiff to elect upon which cause of action he would proceed.
2. JURY—CONSOLIDATION OF CAUSES—NUMBER OF CHALLENGES.—Where causes of action against several defendants were improperly joined, all of the defendants were entitled jointly to the statutory number of challenges.
3. ELECTRICITY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where plaintiff's decedent, a lineman employed by defendant

electric company, while making repairs, requested the person in charge of defendant's plant to turn off the current and leave it off until instructed to turn it on, to which the person called acquiesced and turned off the current, contributory negligence of defendant in failing to observe safety rules prescribed by defendant *held* for the jury.

4. TRIAL—INSTRUCTION ON MATTERS NOT PROVED.—In an action for negligence causing decedent's death by coming in contact with live wires, an instruction that, if decedent was killed by a stroke of lightning or by static electricity, etc., was properly refused where there was no evidence on these points.

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

Hill & Fitzhugh, for appellant.

The deceased was guilty of contributory negligence which would preclude a recovery, even though the defendant is likewise guilty of negligence. 36 Ark. 371; 63 Ark. 65; 76 Ark. 436; 77 Ark. 458; 96 Ark. 394.

J. E. London, Dave Partain, A. M. Dobbs and *G. L. Grant,* for appellee.

Appellant's motion to require appellee to elect was properly overruled under the following decisions: 86 Ark. 130; 87 Ark. 303; 88 Ark. 124; 113 Ark. 6.

The court properly refused to allow each defendant three peremptory challenges. 117 Ark. 71.

The question of negligence was one properly for the jury. 98 Ark. 347. The doctrine of *res ipsa loquitur* applies. 86 Ark. 75.

McCULLOCH, C. J. This is an action instituted by appellee as administrator of the estate of Macey Bailey, deceased, to recover damages sustained by the reason of the death of said decedent, which is alleged to have been caused by the negligent act of appellant. The action was originally instituted against appellant and two other parties—the Commonwealth Public Service Corporation and Light Improvement District No. 2 of Clarksville.

The causes of action against the defendants were set forth in separate paragraphs, and the death of said

decedent in each count is alleged to have occurred in the same manner, but separate acts of negligence charged against each of the defendants.

There was a motion filed by the defendants to require appellee to elect upon which cause of action he would proceed, but this motion was overruled, and in impaneling the jury the defendants each demanded the right to exercise three peremptory challenges, and this demand was overruled by the court.

After the testimony had been adduced, appellee dismissed against the other two defendants, and the issues were submitted to the jury as to the liability of appellant alone. A verdict was rendered in appellee's favor against appellant for the recovery of the sum of $5,000 as damages.

Macey Bailey was a lineman employed by the Commonwealth Public Service Corporation, which was engaged in the business of generating electric current and delivering such current for lighting purposes in the town of Alma and in other towns along the line of the Missouri Pacific railroad.

Light Improvement District No. 2 of Clarksville owned an electric light plant at Clarksville, Arkansas, and generated current for lighting purposes, and at times purchased current from the Commonwealth Public Service Corporation.

Appellant, a corporation, which was engaged, among other things, in generating and selling electric current in Fort Smith, sold current to the Commonwealth Public Service Corporation and delivered same to that company at or near the town of Alma, where it was furnished to consumers.

On April 25, 1920, deceased was directed by his employer to go upon an electric tower at Alma and make repairs, and early in the morning of that day, in discharge of this duty, he came in contact with a live wire and received injuries from which he suffered great pain, and later died.

It is charged in the complaint against appellant that its servants were guilty of negligence in turning on the current which caused the death of Macey Bailey after the latter had given instructions to appellant's engineer to turn the current off and not to turn it on again until further notice.

It is alleged that Bailey, about 7 o'clock, went to the telephone at Alma, and that in conversation with appellant's engineer at the plant in Fort Smith he directed the engineer to turn on the current for the purpose of testing the wires at the tower, and that a few minutes later he notified the engineer at the plant that he was going on the tower to work, and directed the engineer to turn the electricity off and not to turn it on again until notice was given, but that the engineer, in violation of the instructions, turned the current back on while Bailey was at work with the wires on the tower, and that in that manner Bailey come in contact with the current and was wounded and killed.

In the other paragraph of the complaint it is alleged that the wires of the other two defendants were connected at Clarksville, and that current generated by the Light Improvement District at Clarksville escaped, through negligence of said defendants, over the wires of the Commonwealth Public Service Corporation to the connecting wires at Alma, and thus was permitted to pass along the wires where Bailey received his injury.

Appellant, in its answer, denied all acts of negligence charged against its servants, and alleged that Bailey's death was caused by his own negligence in failing to observe the precautions prescribed by his employer for his own safety while engaged in the work of repairing wires.

Appellant adduced proof tending to show that Bailey's employer, the Commonwealth Public Service Corporation, issued safety instructions to its employees, which were brought to Bailey's notice, directing them to use ground chains as a means of protection while at work

on the wires, and that the death of Bailey was caused by his failing to observe these directions; that there were switches which he could have used in turning off the current, and that his death was caused by his own negligence in failing to turn off the current before coming in contact with the wires.

The cause was submitted to the jury on instructions relating to the issue as to directions given by Bailey to the engineer not to turn the current on until further notice, and on the question of Bailey's own negligence in failing to observe the precautions for his own safety which had been prescribed by his employer. There was evidence to sustain the verdict in appellee's favor on these issues.

Two witnesses—one of them an employee of the telephone company at Alma, and the other an associate of his who was in the room with him at the time—each testified that about 7 o'clock on the morning in question Bailey came to the telephone office, and after getting connection with some one claiming to be in charge of appellant's generating plant at Fort Smith, Bailey told the one in charge of the plant that he had been working on the line and was going to test the wires, and directed the person to turn on the current; that after a few moments he then told the person at the plant to cut the power off and leave it off until further notice. The testimony tends to show that a few minutes after this time, while Bailey was on the tower working with the wires, he came in contact with the current which injured him.

Appellant introduced its fireman, who was in charge at the power-house on the morning in question, and testified that the Alma line ceased to hold the current during the night before, and he was given directions over the telephone by some one in regard to turning on and off the current, and that he received directions about 2 o'clock that morning to leave the current off until he received directions the next morning; that about 7 o'clock the next morning the same voice called him over the telephone

and gave directions to turn the current on, and that he received no further directions to turn the current off.

Appellant also introduced testimony showing the directions given by the Commonwealth Public Service Corporation to Bailey and other employees in regard to safety methods to be adopted, and also in regard to the safe method in which Bailey may have pursued his work by turning off the current.

The evidence was, as before stated, sufficient to sustain a verdict either way as to the cause of Bailey's death.

It is contended, in the first place, that the court erred in refusing to require appellee to elect upon which causes of action set forth in the complaint he would proceed, and in refusing to allow each of the defendants the statutory number of peremptory challenges, but these questions have already been settled by this court against the contention of appellant.

We have held that since cases of like nature, pending in the same court, may be consolidated for the purpose of trial, there is no error in refusing to require an election where actions have been improperly joined, and that where there is such a consolidation of causes all of the parties arrayed on each side are only entitled jointly to the statutory number of challenges. *Mahoney* v. *Roberts,* 86 Ark. 130; *Weigel* v. *McCloskey,* 113 Ark. 1; *Fidelity-Phoenix Ins. Co.* v. *Friedman,* 117 Ark. 71.

It is next insisted that, according to the undisputed evidence, Bailey violated the instructions of his employer and failed to exercise ordinary care for his own protection, and that for this reason there should have been a peremptory instruction in favor of appellant.

Bailey was not the employee of appellant, and received no instructions from appellant in regard to the method of carrying on his work. According to the testimony adduced by appellee, Bailey gave instructions to the man in charge of the generating plant to turn the electricity off and not to turn it on again until further no-

tice, and these directions were acquiesced in by the man in charge of the plant so as to constitute an assurance to Bailey that his directions would be complied with.

Under these circumstances it cannot be said, as a matter of law, that Bailey was guilty of negligence in failing to observe other precautions for his safety. That was a question for the jury to determine under the circumstances, and it was properly submitted to the jury.

Appellant requested the court to give instructions which would have told the jury that if the deceased could have used ground chains for the purpose of preventing the electric current from passing over the wires, he was guilty of negligence and there could be no recovery, but the court properly refused to give the instructions, which was tantamount to telling the jury that Bailey's failing to do so constituted negligence. This question should, as before stated, have been left to the jury, and not taken away from the jury by a peremptory instruction.

The court gave numerous instructions at the request of appellant, among which was one stating that if Bailey was killed "on account of an accident, but not on account of the negligence of the defendant, Fort Smith Light & Traction Company," the verdict should be in the latter's favor.

Other instructions were asked by appellant, which the court refused, telling the jury that if the death of Bailey was caused by a stroke of lightning or by static electricity, there could be no recovery, but there was no evidence to justify these instructions, and they were properly refused.

It is believed that the views we have already expressed dispose of all of the other assignments of error with respect to rulings of the court in giving and refusing instructions.

We find that the case was properly submitted to the jury, and that there is no error in the record.

The judgment is therefore affirmed.

WHITE-JACKSON ROAD IMPROVEMENT DISTRICT NO. 1 *v.* BLACKSHIRE.

Opinion delivered May 22, 1922.

1. HIGHWAYS—COMPENSATION OF ENGINEERS.—Where engineers were employed by a road improvement district to make preliminary plans and estimates and to supervise the construction of improvements, and a specified percentage was agreed upon as their compensation, the agreement was premature because entered into before an assessment was made to determine whether the cost of the improvement would exceed the benefits, and compensation of the engineers must be determined on the *quantum meruit;* there being no separate contract for the preliminary work.
2. HIGHWAYS—COMPENSATION OF ENGINEERS.—Where the engineers for a road improvement district made preliminary plans and estimates, but the improvement scheme was subsequently abandoned, failure of the engineers to keep a separate account of the amounts paid by them as expenses, except as to the amount of time and number of men used in the work, did not defeat their right to compensation for such expenses.
3. HIGHWAYS—COMPENSATION OF ENGINEERS—SUFFICIENCY OF EVIDENCE.—Evidence as to the amount of compensation earned in preliminary work by engineers *held* sufficient to sustain a finding in their favor.

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

Cul L. Pearce and *Brundidge & Neelly,* for appellant.

A material factor in determining services of this kind is the actual cost and expense of doing the work. *Carter v. Franklin County Road Improvement District,* 152 Ark. 302.

A person asserting a claim should be required to produce evidence of such cost and expense, it being a matter within his knowledge and keeping. 32 Ark. 337.

The question of the reasonableness of the fee is one of fact to be determined from the weight of the evidence. 122 Ark. 21; 106 Ark. 571; 38 Ark. 139.

Coleman, Robinson & House, for appellee.

This case is controlled by the following decisions of this court: 235 S. W. 403; 119 Ark. 188; 177 S. W. 877; 127 Ark. 1; 232 S. W. 434; *Carter v. Franklin County Road Improvement District,* 152 Ark. 302.

McCULLOCH, C. J. Appellant is a road improvement district created by a special statute enacted at the extraordinary session of the General Assembly of 1920, and the statute was repealed by a later one passed at the regular legislative session of 1921.

Appellees are professional engineers, engaged especially in road construction, and they were employed by this road district as engineers to make preliminary plans and estimates and supervise the construction of the improvement.

The contract was for the whole of the work, both preliminary and supervisory, and a specified percentage was agreed upon as compensation of the engineers, but the contract was premature because it was entered into before an assessment of benefits was made to determine whether or not the cost of the improvement would exceed the benefits. There was no separate contract for the preliminary work, therefore the compensation of the engineers is to be determined upon the *quantum meruit. Bowman Engineering Co.* v. *Arkansas-Missouri Highway District,* 151 Ark. 47.

The preliminary work was done by appellees, and the plans and estimates were presented to the commissioners, but further proceedings were suspended because it was found that the cost of the construction would exceed the benefits.

The repealing act provides for the payment of the preliminary expenses by taxation of the lands in the district. Appellees thereupon presented their claim in the sum of $8,338.37 for allowance. The commissioners had previously issued certificates to appellees aggregating $2,500, which constituted a part of the total claim presented by appellees. The commissioners refused to al-

low the claim as presented, and this action was instituted in the chancery court to recover the amount claimed.

The repealing statute provides that, if the commissioners reject the claim in whole or in part, the claim shall be barred unless suit is instituted within ninety days after notice of the rejection of the claim. The present action was instituted within apt time.

The claim of appellees specified the sum of $4,838.43 as actual expenses, and the further sum of $3,500 as compensation to the engineers, and profits.

The chancery court, after hearing the evidence, allowed the claim in the sum of $7,348.52, which was $4,348.52 for expenses and $3,000 for compensation.

The items of expense allowed by the chancellor are as follows:

For expenses field party	$2,135.00
For expenses of draftsmen	1,137.50
For expenses of office help	170.00
For expenses of drafting and blue-print paper	78.24
For expenses of stakes	37.48
For expenses of railroad fare, telephone bills and other incidentals	86.95
For expenses of automobile hire, gasoline and repairs	353.35
For overhead expenses	100.00
For depreciation on automobiles and instruments	250.00
Being a total of	$4,348.52

The plans prepared by appellees in accordance with the terms of the statute contemplated the construction of a road 37.5 miles in length, at an estimated aggregate cost of about $600,000.

There is a conflict in the testimony as to the amount of time spent in making the preliminary surveys and plans, and also as to the cost thereof. The evidence shows that the field work covered a period of about thirty-five days, and that there were eight men in the party engaged in the survey, consisting of two instrument

men, two chainmen, a stickman, an axman, a flagman and a rodman.

Appellees testified that the actual cost of the field work was $2,135, and this item was allowed by the chancellor as claimed by appellees.

The commissioners testified that when they issued the certificates to appellees the latter claimed that the total expense of the preliminary work, which included the office work in making the plans, amounted to about $2,300. Appellees denied that they made any such admission, but that they stated that amount as an estimate of the cost of the field work, which they now claim amounted to the sum specified above.

The evidence adduced by appellees, not only their own personal testimony but that of other witnesses, tended to show that the cost of the field work amounted to the sum now specified by them, exclusive of the office work. There is a conflict in the testimony, but the finding of the chancellor on this issue is not, we think, against the preponderance of the evidence.

Appellees, in their testimony, go into details as to the amount of work involved, both in the field work and office work, and amount of time expended, and we are of the opinion that the testimony is sufficient to support the finding of the chancellor.

Appellees testified that they kept no separate account as to the cost of this work, except as to the amount of time and the number of men used in the work. They are not, however, to be denied compensation merely because they failed to keep a separate account of the amounts paid out as expenses.

A further analysis of the testimony would serve no useful purposes, and it is sufficient to say that, after careful consideration, the conclusion is reached that the evidence as to the amount of compensation earned in the preliminary work is not against the finding of the chancellor.

The decree is therefore affirmed.

DISSENTING OPINION.

HART, J. I dissent. There were three commissioners in this road district. Each of them testified that, after the preliminary survey had been made and the plans and specifications of the cost of building the road, together with the blue-prints, had been furnished to the commissioners, it was decided that the road would cost too much, and no further effort was made towards its construction; that the engineer appeared before the board and asked the commissioners to issue him warrants for the amounts expended by him in making the preliminary survey, preparing the estimates, and making the blue-prints, and that he said $2,200 or $2,300 would cover all of his expenses. The commissioners issued him a warrant for $2,500. This was shortly after the work had been done, and the engineer certainly knew what it cost him. He now claims that the commissioners misunderstood him, and that he was only referring to the cost of the field work. The commissioners testify that he was referring to the whole expense, and there seems to be no good reason why he should wish to pay for the expense of the field work rather than for the cost of the office work. There is nothing in the record to indicate that the engineer's testimony is entitled to more weight than that of the commissioners. Their testimony is in direct and irreconcilable conflict, and I am of the opinion that the testimony of the commissioners is corroborated by other facts and circumstances in the record.

To illustrate; in making up his items of the cost of the survey, the engineer charges the district with the expense of two instruments men for thirty-five days at $10 per day, or a total of $700. He admits that he only paid one of them $175 per month and the other $125. They cost him then approximately $350 or $400, and the district should not be charged with more than that sum. He charges the other four men at $4 per day when they were not paid more than $80 per month each. He then

charged the district $853.35 for gasoline, repairs, depreciation on a Ford and second-hand Overland car used by him in carrying his employees to and from the work while making the preliminary survey of the road. This, to my mind, is a very extravagant charge. It is true, the chancellor did not allow this much, but the fact that the engineer charged it shows the extravagance of his charges.

The engineer admits that he did not keep book accounts, and his claim is based upon estimates made more than a year after the work was finished. The only corroboration of his testimony is that of other engineers that his estimates are reasonable. I do not think this had the effect to overcome the positive evidence of the three commissioners as above stated.

I am of the opinion that the court should only have allowed him what the commissioners testify he told them at the time had been the actual cost of making the survey and preparing the estimates and blue-prints from the field notes and in addition a reasonable amount for his supervision of the work.

While preliminary work must be done, and its cost must be met by landowners, I am of the opinion that the courts should strictly limit it to the actual cost of doing the work with a reasonable allowance to the engineer for his supervision. He should not be allowed to claim that he has kept no books and by a system of estimates charge the district with extravagant sums far beyond that which he has expended.

It is true that the sums claimed by the engineer in this case are more reasonable than the amounts claimed by engineers in some other cases which have come before us, but courts should require claimants for preliminary expenses to make proof of the amounts actually expended by them, and should not allow them extravagant estimates on the specious plea that they have not kept an account of their expenses.

Judge WOOD concurs in this dissent.

DESHA ROAD IMPROVEMENT DISTRICT NO. 2 *v.* STROUD.

Opinion delivered May 22, 1922.

1. HIGHWAYS—ACT CREATING ROAD IMPROVEMENT DISTRICT UPHELD.—Road Acts 1919, vol. 1, p. 613, creating a certain road improvement district, *held* a valid act.
2. HIGHWAYS—RIGHT TO ATTACK ASSESSMENTS.—Owners of land in Desha Road Improvement District No. 2, created by Road Acts 1919, vol. 1, p. 613, cannot attack the validity of assessments of their property by joining in a suit attacking same after 30 days from the completion of the assessments, though such suit was instituted within such period.
3. HIGHWAYS—ASSESSMENT ON WRONG BASIS—REMEDY.—Road Acts 1919, vol. 1, p. 613, giving owners of property in a road improvement district 30 days after completion of assessments to commence an action challenging the correctness thereof, is primarily for the benefit of the individual owners in the correction of their own assessments, but, where the whole assessment is on the wrong basis, each owner may have it canceled if his complaint is filed in time, as an assessment made on the wrong basis is tantamount to no assessment.
4. HIGHWAYS—CORRECTION OF INDIVIDUAL ASSESSMENTS.—If a road improvement district as a whole is made on a correct basis, individual assessments may be corrected without declaring the whole assessment void.
5. APPEAL AND ERROR—ORAL TESTIMONY.—Oral testimony in a chancery case will not be considered on appeal unless reduced to writing and filed during the term or unless further time for filing is given by consent.
6. HIGHWAYS—ZONE SYSTEM OF ASSESSMENTS.—The zone system of assessments is not an improper method if it is determined upon by the commissioners in the exercise of judgment, after considering all the elements affecting the benefits.
7. APPEAL AND ERROR—PRESUMPTION WHERE EVIDENCE LACKING.—Where a substantial portion of the testimony is not properly in the record, it will be presumed that the court's finding as to the mode in which road improvement assessments were made is sustained by the evidence.

Appeal from Desha Chancery Court; *E. G. Hammock,* Chancellor; reversed in part.

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

1. The assessment is not illegal for having been made in an arbitrary manner, and the evidence would have to show that it was so made, in order to invalidate the assessments of benefits as a whole in the district.

Since the plaintiffs did not resist the assessments on the ground of excessiveness before the commissioners and the county court, they cannot in this suit raise that question, and the only question properly before the court is whether or not there has been a discrimination against the plaintiffs themselves, which has resulted in a confiscation of their property. 251 U. S. 189; 135 Ark. 155; 110 U. S. 347; 164 U. S. 112; 191 U. S. 310; 214 U. S. 359 and cases cited; 181 U. S. 340, 341; 172 U. S. 269; 221 U. S. 550, 553; 139 Ark. 325; 121 Ark. 109; 139 Ark. 322. Under these authorities, it is immaterial that the evidence may show that the taxes assessed are onerous, and higher than the witness thinks they should be, or that inequalities are shown to exist here and there. The question to be decided is whether or not there is such a gross and palpable discrimination as would result in confiscation; and, before an assessment of this kind can be set aside, it must clearly appear that the assessment is invalid as a whole, the burden being on the plaintiffs to establish that fact.

2. The assessment does not amount to confiscation. The court is not justified in substituting its judgment for that of the commissioners, except for some palpable or clearly shown reason. The fact that dissatisfied property owners are of the opinion that the benefits will amount to confiscation will not justify the court in setting aside the assessment. Opinions and speculative testimony of interested witnesses, plaintiffs in the case, should have been excluded. *Road Imp. Dists. 1, 2 & 3* v. *Crary*, 151 Ark. 484. There is no evidence except opinions of interested parties that the assessment would amount to confiscation, and that is overcome by positive testimony on the part of the appellants, by detailed statements of witnesses and the reasons given as to

why the county must necessarily have the improvements. 110 U. S. 347; 154 U. S. 112; 191 U. S. 310; 214 U. S. 359, and cases cited; 172 U. S. 269; 221 U. S. 550, 553

3. The act is not unconstitutional because it includes 98 per cent. of the land in the county. 139 Ark. 168.

4. It is not unconstitutional in delegating to the commissioners the power to issue bonds.

X. O. Pindall, DeWitt Poe and *Williamson & Williamson,* for appellees.

1. The decree should be affirmed, because oral and documentary evidence taken in open court was not preserved and incorporated in the transcription in the manner provided by law. Transcribed stenographic notes taken under order of the court, without consent of parties, must be filed during the term. *McGraw v. Berry,* 152 Ark. 452. Where the recitals of a decree show that there was evidence considered which is not contained in the transcript, it will be presumed that the omitted evidence sustains the decree.

2. The Desha Road Improvement District No. 2 is one district under the act creating it, and not six separate districts, and, as is stated in the decree, embraces 98 per cent. of Desha County. The entire act is therefore unconstitutional and void. 89 Ark. 513; 118 *Id.* 296, 302.

3. Appellants' own statement of facts concedes that some of the plaintiffs filed suit in apt time. It is immaterial whether the act and entire assessment be declared void at the instance of one taxpayer or many. There is no legal proof that the statutory notice was given or the necessary hearing afforded the taxpayers. The assessment of benefits has been made in an illegal and unconstitutional manner, the enforcement thereof would amount to confiscation, and it is void. 64 Ark. 558; 239 U. S. 478, 60 Law. Ed. 392. Proof of publication of the notice and hearing cannot be made by any other testimony than the record. 55 Ark. 218, 221; 127 *Id.* 155,

168. Statutory notices against landowners must scrupulously conform to the statute. 135 Ark. 528; 64 Ark. 556.

4. The entire assessment of benefits is illegal and void, because made in an arbitrary manner and without regard to benefits received by each tract of land. 127 Ark. 315, 316, 119 *Id.* 196; *Whaley* v. *Northern Road Imp. Dist.,* 152 Ark. 573; *Johnson* v. *Conway,* 151 Ark. 398; 86 Ark. 1, 14; 86 *Id.* 16; 55 N. Y. 604; 48 L. R. A. 851; 50 Ark. 129. The assessment is void because buildings and other improvements were not assessed. 86 Ark. 14-15. The act itself contemplates the assessment of improvements. §§ 1, 2, 14, 16, 17, 27, 30; C. & M. Dig., §§ 9792; 13 N. Y. 126; 86 Ark. 1; 1 N. Y. 569; 52 Tenn. 473; 152 Mo. 421; 240 U. S. 55. The assessment is void because of illegal classification of property. 86 Ark. 14. The assessment of benefits is confiscatory and therefore unconstitutional. 50 Ark. 116; 86 *Id.* 1; 98 *Id.* 543; 68 *Id.* 376; 119 *Id.* 254; 118 *Id.* 303; 147 *Id.* 181-4; 81 *Id.* 562; 83 *Id.* 54; 98 *Id.* 113. See also 32 Ark. 31; 39 *Id.* 202; 84 *Id.* 390; 86 *Id.* 231.

McCULLOCH, C. J. Appellant is a road improvement district which was created by special statute. Road acts, 1919, vol. 1, p. 613. The territory covered is that part of Desha County lying south of the Arkansas River and situated within five miles of either of the respective roads to be improved. It is shown in the present litigation that the territory comprises about ninety-eight per centum of the whole of the county. The roads to be improved are described, and the district is divided into six sections, numbered, respectively, 1 to 6, inclusive, and the lands within five miles of each road are to be assessed for the improvement in that section.

The statute provides for one organization of commissioners of the district, but it is tantamount to the formation of six separate districts with distinct assessments of benefits and levy of taxes to pay for the several improvements. The statute contains the customary pro-

visions for the assessment of benefits and reporting the same to the county court. It provides that the commissioners, after completing the assessments, shall give notice to the property owners by publication in a newspaper for two weeks, and on the day named the complaints of the property owners shall be heard, and the assessments shall be equalized by increasing or diminishing, according to the proof adduced. It further provides that after completing the equalization of the assessments the list shall be filed with the county clerk as the completed assessment.

The following provision is found in the statute with reference to further remedy of the property owners:

"Any person not beginning legal proceedings to contest any of said assessments of benefits within thirty days after the completion of said assessments, and the filing of the copies thereof with the county clerk, shall be deemed to have waived any objection he may have thereto, and shall not thereafter be heard in any court of law or equity to question any of said assessments, the plans on which they were made, or any other action of the commissioners. The term 'persons' wherever used in this act shall include corporations, associations and partnerships." Road Acts, 1919, vol. 1, p. 624.

The commissioners of this district completed the assessment of benefits by filing a list with the county clerk as provided by statute, and within thirty days thereafter the present action was instituted by some of the appellees—G. W. Stroud, G. K. Morley, D. Morley and Will Roan—who are the owners of land in the district.

In the complaint filed there is an attack upon the validity of the statute creating the district, and also an attack upon the validity of the assessments.

It is alleged that the assessments were not made by the commissioners in accordance with the statute, but were arbitrarily made on the wrong basis and without regard to the proper elements to be considered in determining the benefits.

After the expiration of thirty days from the completion of the assessments, numerous other landowners were made parties plaintiff in the action and joined in the prayer for relief in the original complaint. The commissioners of the district appeared and answered, and the cause was heard by the chancery court on depositions of witnesses, oral testimony and documentary evidence, and a decree was rendered holding that the statute creating the district is unconstitutional and void, and that the assessments are invalid, and the commissioners were enjoined from all further proceedings toward the enforcement of the assessments or from issuing bonds or constructing the improvement.

We are of the opinion that the decree was erroneous to the extent that it declared the statute creating the district to be void and enjoined the commissioners of the district from further proceedings. The questions involved fall clearly within repeated decisions of this court. *Bennett* v. *Johnson,* 130 Ark. 507; *Cumnock* v. *Alexander,* 139 Ark. 153; *Reitzammer* v. *Desha Road Imp. Dist. No.* 2, 139 Ark. 168; *Hamby* v. *Pittman,* 139 Ark. 341; *Johns* v. *Road Imp. Dist. of Bradley Co.,* 142 Ark. 73; *Van Hook* v. *Wallace,* 143 Ark. 203; *Road Imp. Dist. of Dallas County* v. *Crary,* 151 Ark. 484.

The case of *Reitzammer* v. *Desha Road Improvement District, supra,* involved the validity of this identical organization, and we held that the statute was valid. Further discussion of this part of the case is unnecessary.

This suit constitutes a direct attack upon the validity of the assessments of benefits so far as concerns the original complaint filed within thirty days after the completion of the assessments. The plaintiffs who subsequently joined in the action came in too late to join in the direct attack, and so far as they are concerned the case is controlled by the recent decision of this court in *Road Improvement District of Dallas County* v. *Crary, supra.*

The statute giving the owners of property a specified time after the completion of the assessments of benefits to commence an action challenging the correctness of the assessment is primarily for the benefit of the individual property owners in the correction of their own assessments; but where the whole assessment is on the wrong basis, each property owner has his remedy to have it canceled if the complaint is filed within apt time. In other words, the remedy of the property owner is not confined necessarily to the correction of his own assessment, if the assessments as a whole have been made on the wrong basis, for in a direct attack upon the validity of assessments, one made on the wrong basis is tantamount to no assessment at all. *Kirst* v. *Street Imp. Dist.* 86 Ark. 1; *Lee Wilson Co.* v. *Road Imp. Dist.,* 127 Ark. 310.

If the assessments as a whole are made on a correct basis, individual assessments may be corrected without declaring the whole assessment void.

The present case was heard partly on oral testimony, which has not been properly brought into the record. It was not reduced to writing and filed during the term by a stenographer previously designated by the court. It is essential that oral testimony be reduced to writing and filed during the term, unless further time is given by consent. *McGraw* v. *Berry,* 152 Ark. 452.

The testimony which appears in the record by deposition of witnesses, duly taken and filed, is conflicting; some of it tends to sustain the allegation that the assessment was made principally by one of the commissioners without participation by the others, and that the zone system was arbitrarily adopted without due consideration by all of the commissioners and in total disregard of all the elements which go to make up the benefits from a local improvement.

We have often decided that the zone system is not an improper method, if it is determined upon by the commissioners in the exercise of judgment, after con-

sidering all of the elements affecting the benefits. *Board of Improvement* v. *S. W. Gas & Elec. Co.*, 121 Ark. 105; *Missouri Pacific R. R. Co.* v. *Conway County Bridge Dist.*, 134 Ark. 292.

In the absence, however, of a substantial portion of the testimony, which has not been properly brought into the record, we must indulge the presumption that the finding of the court with respect to the method in which the assessments were made is sustained by the evidence.

That portion of the decree which declares the assessments void and restrains the commissioners from enforcing the collection of the same is affirmed, but that portion of the decree which declares the statute creating the district to be void and restraining the commissioners from further proceeding is reversed, and the cause is remanded, with directions to enter a decree dismissing the complaint to that extent.

MITCHELL v. CONWAY COTTON OIL GIN COMPANY.

Opinion delivered May 22, 1922.

1. APPEAL AND ERROR.—Where there is a decided conflict in the evidence, the Supreme Court will not disturb the trial court's ruling in sustaining a motion for new trial.
2. APPEAL AND ERROR—ORDER GRANTING NEW TRIAL—AFFIRMANCE.—Where the evidence was conflicting, and the jury returned a verdict for defendant, but the trial court granted a new trial, from which order defendant appealed, on affirming the order appealed from an absolute judgment for plaintiff will be entered, under Crawford & Moses' Dig., § 2179.

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

Edward Gordon, for appellant.

The court erred in setting aside the judgment and granting a new trial. 6 Ark. 86; 6 Ark. 428; 2 Ark. 360; 10 Ark. 138; 5 Ark. 407; 26 Ark. 609; 39 Ark. 461.

J. C. & Wm. J. Clark, for appellee.

The action of a trial court in granting a new trial is not reviewable, where the evidence is conflicting. 120 Ark. 99; 179 S. W. 175. Neither is it invading the province of the jury to set the verdict aside, where there is conflict in the evidence. 98 Ark. 334; 135 S. W. 925; 100 Ark. 596; 141 S. W. 196.

The trial judge has control of the verdict of the jury after and during the term it is rendered. 94 Ark. 566; 127 S. W. 962.

Trial courts have a large discretion in the matter of granting new trials, especially upon the weight of the evidence. 139 Mo. 557; 41 S. W. 215; 98 Ark. 304; 135 S. W. 922.

WOOD, J. The appellee instituted this action against the appellant upon a promissory note for $159.50 and on an account in the sum of $649.69. The appellant in his answer denied that he was indebted to the appellee, and he set up by way of cross-complaint that the appellee was indebted to him in the sum of $1,812.15 on an account growing out of a contract between appellee and appellant, and that appellee was also indebted to the appellant in the sum of $400 damages for an alleged breach of contract. The appellee and the appellant filed their respective accounts and made them exhibits to their pleadings. The original note was identified by a witness, the manager of the appellee, at the time the same was executed, and introduced in evidence.

The answer of the appellant admitted the execution of the note, and admitted that he was a member of the firm of Mitchell & Sons, but denied that the note was his individual obligation. A contract was introduced in evidence which showed that the appellant had been appointed agent for the appellee for the years 1919 and 1920 to buy cotton seed. The appellant was to receive a commission of $3 per car f. o. b. Menifee. The contract further provided that the appellant should keep an accurate record of the seed purchased by him for the ap-

pellee. The note and account on which the appellee grounded its alleged cause of action and the account on which appellant based his cross-action grew out of the transactions covered by the above contract. A comparison of the items of the accounts between the respective parties shows that, aside from the note, there were eight items in dispute, as follows:

Oct. 6, 1919,	300 yds. bagging, F. & S.	$ 73.50
Nov. 20, 1919,	300 yds. bagging, F. & S.	73.50
Oct. 2, 1919,	Cash advanced to buy seed	200.00
Oct. 3, 1919,	" " " " "	300.00
Oct. 24, 1919,	" " " " "	250.00
Nov. 6, 1919,	" " " " "	300.00
Nov. 8, 1919,	" " " " "	200.00
Nov. 12, 1919,	" " " " "	200.00

On the first two items the appellant contended that he was entitled to a reduction of $12, which the appellee conceded. On the next two items the appellee introduced a receipt signed by the appellant, and the appellant thereupon admitted that he had received the items of $200 and $300 in cash charged to the appellant as of October 2d and 3d, respectively. That left in controversy the remaining four items. Concerning these, P. F. Cleaver, manager of the Cotton Oil & Gin Co., testified that these items of cash were furnished to the appellant by the Bank of Conway upon telephone orders from the appellee. Witness stated that, on account of the location of the seed business at Menifee, Mitchell would come to Conway on the southbound train. He would go to the Bank of Conway, and from there telephone that he wanted more money to buy seed, and that he wished to return on the next train. There were only five or ten minutes between the trains that he came and returned on. Appellee, upon receiving appellant's telephone message, would order the bank to pay the money to appellant and charge the same to appellee's account, and later in the day the appellee would send to the bank a check to cover the amount advanced. The business was handled in this way

to enable the appellant to catch the returning train to his place of business without loss of time.

The two items of cash, which appellant admits, were handled in the same way as the remaining four items of cash which he disputed. The vice-president of the bank also testified that the four remaining items in controversy were paid to Mitchell by the Bank of Conway; that Mitchell did not have time to get checks from the appellee, and that payments were made on telephone orders from the appellee in order that Mitchell might catch his train back to Menifee, and that later in the day the appellee would send down checks to cover the payments advanced.

The appellant in his testimony denied that he had received these items of cash. The above shows the respective contentions of the parties as to the debit items of the account upon which appellee bases its action. The appellant testified, among other things, that he never received credit for a certain car of seed which he purchased for the appellee amounting to the sum of $1,176. He stated that this car was shipped to appellee about the 19th of October. He further testified that the appellee gave him no written notice of its intention to terminate the contract, and that he was damaged by reason of their breach of the contract, in the sum of $400. He further stated that he was entitled to an allowance of one per cent. on one hundred and thirty tons of seed for shrinkage; that the car of seed for which he had not received credit, his commission, and the shrinkage, and damages for breach of contract aggregated the sum of $2,212.15, due him by the appellee.

Witnesses for the appellee in their testimony denied that the appellee had received any car of seed purchased for the appellee by the appellant for which the appellant had not received credit.

The issues were sent to the jury upon substantially the above testimony tending to support the respective contentions of the parties. The jury returned a verdict in

favor of the appellant. Upon motion of the appellee the court granted a new trial, and appellant appealed from this order.

We have set forth the issues and substance of the testimony tending to support the respective contentions of the parties. The testimony shows that there was a substantial conflict in the evidence on the issues of fact submitted to the jury. We have often held that "where there is decided conflict in the evidence this court will leave the question of determining the preponderance with the trial court and will not disturb its rulings in either sustaining a motion for new trial or overruling same." *Blackwood* v. *Eades,* 98 Ark. 304-311; and in addition to the cases there cited, see also *McDonnell* v. *St. Louis Southwestern Ry. Co.,* 98 Ark. 334-336; *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 596-599; *Johnson* v. *Mantooth,* 120 Ark. 99; *Spadra Creek Coal Co.* v. *Callahan,* 129 Ark. 448; *Spadra Creek Coal Co.* v. *Harger,* 130 Ark. 374; *Mueller* v. *Coffman,* 132 Ark. 45; *Wilhelm* v. *Collison,* 133 Ark. 166.

It is likewise the well established doctrine in this State that this court will not reverse the ruling of the trial court in refusing to set aside the verdict and overruling the motion for new trial, where there is any evidence legally sufficient to sustain the verdict; or, as is often stated, where there is substantial testimony to sustain the verdict. See *Drennen* v. *Brown,* 10 Ark. 138, and other cases cited in the brief of counsel for the appellant. In addition thereto, see *Hill* v. *Jayne,* 18 Ark. 396; *Harris* v. *Bush,* 129 Ark. 369; *Childs* v. *Neal,* 138 Ark. 578, and other cases cited in Cumulative Supplement to Crawford's Arkansas Digest. Appeal and Error, § 369, subdiv. 5.

There is no conflict in the decisions of this court declaring the rules of practice governing trial courts in granting and refusing to grant motions for new trial on the ground that the verdict is contrary to the evidence. There was a decided conflict in the testimony on the issues

involved in this cause, and the circuit court therefore did not abuse its discretion in concluding that the verdict was against the preponderance of the evidence. Under the evidence adduced it was strictly within the province of the court to determine whether the verdict was sustained by a preponderance of the evidence. The ruling of the trial court was correct, and under § 2179, C. & M. Digest, a judgment absolute will therefore be entered here against the appellant in favor of the appellee. It is so ordered.

WALKER v. ROSE.

Opinion delivered May 22, 1922.

1. LANDLORD AND TENANT—LIEN FOR ADVANCES.—Where a landlord directed a merchant to furnish supplies to the tenant, for which the landlord agreed to pay and subsequently did pay, the landlord in effect furnished the supplies to the tenant, and is entitled to a preference lien therefor, under Crawford & Moses' Dig., § 6890.
2. LANDLORD AND TENANT—INNOCENT PURCHASERS OF CROP.—Purchasers of cotton who bought it in the market near where it was grown without making inquiry as to where it was grown or whether there was an outstanding landlord's lien, were not innocent purchasers.
3. LANDLORD AND TENANT—CONVERSION OF CROP SUBJECT TO LIEN.—Testimony that the officers of a bank knew that landlord had a lien on his tenant's crop, and directed the tenant to sell his cotton in another State, credited drafts drawn on the purchaser to the tenant's account, and accepted from him checks on that account for the satisfaction of his indebtedness to the bank, *held* to show a conversion of the proceeds of the cotton to the bank's own use, rendering the bank liable to the landlord for the amount so converted.

Appeal from Mississippi Chancery Court, Osceola District; *Archer Wheatley,* Chancellor; modified.

J. T. Coston, for appellant.

Driver & Simpson, for appellee.

WOOD, J. R. C. Rose rented to J. A. Walker a certain tract of land in Mississippi County, Arkansas, for the

year 1919. On February 16, 1919, Walker executed his note to the Bank of Osceola (hereafter called bank) for the sum of $1,600, which was due November 15, 1915. Walker and Rose also executed a note to the bank on April 12, 1919, in the sum of $400, payable November 15, 1919, and Walker, on the 17th of September, executed a note to the bank in the sum of $50. The note for $1,600 was secured by a mortgage on certain personal property and the crops to be grown by Walker on the lands rented from Rose. At the close of the crop season Walker sold two bales of the cotton raised on the land to J. R. Miller for $351.12, and to the Hale Bros. other cotton grown on the lands for the sum of $1,455.95. The purchasers gave Walker checks for the respective amounts of the purchase price of the cotton, and he deposited these checks to his individual credit in the bank. Walker also shipped seven bales of the cotton to the J. T. Fargason Company, cotton factors at Memphis, Tennessee, which it sold for the sum of $311.11, for which Walker drew drafts and deposited the same in the bank to his credit.

This action was instituted by Rose against Walker, Miller, Hale Bros. and the bank to enforce a landlord's lien for rents and supplies amounting in the aggregate to the sum of $1,626.76. Rose prayed judgment against Walker for the amount alleged to be due him for rents and supplies, and alleged that the bank had received proceeds from the sale of cotton on which he had a lien for more than the amount due by Walker to Rose, and that the bank at the time it received the proceeds had knowledge that same were from the sale of cotton on which Rose had a lien. He also alleged that Miller and Hale Bros. had knowledge of the fact that Rose had a lien on the same for rents and supplies at the time they purchased the cotton from Walker.

The bank and Walker answered, denying the allegations of the complaint and denying liability. They set up also the mortgage of Walker to the bank, and that the amount advanced by the bank to Walker under the mort-

gage was used by Walker in making his crops. They further set up that the bank had advanced to Walker the sum of $400 upon a note which was endorsed by Rose, for which he was liable to the bank and estopped from claiming the bank was indebted to him for such amount.

Miller and Hale Bros. filed separate answers, in which they denied the allegations of the complaint, but set up that, if they purchased the cotton from Walker, they did so in the usual course of business and had no notice that Rose had any lien on the same. They therefore denied that they were indebted to Rose in any amount and prayed that the complaint as to them be dismissed. They also set up that the bank received the proceeds of the cotton purchased by them from Walker, and prayed that, in the event the court should find against them, or either of them, in favor of Rose, they in turn should have judgment against the bank.

Walker made default. The court found that he was indebted to Rose in the sum of $1,468.04, made up of the following sums:

Cash rent	$200.00
1/4 of the cotton	485.00
1/4 rebate	45.74
Supplies	113.85
Brickey account	223.35
Bank of Osceola	400.00

The court also found that the bank had furnished Walker the sum of $400 evidenced by a note on which Rose was the surety, and that Rose had not paid this note. The court further found that Walker had sold to Miller cotton raised on Rose's land during the year 1919 in the sum of $351.12; and had sold cotton to Hale Bros. for the sum of $1,455.94; that these purchases were made with full knowledge of the fact that plaintiff had a lien on the cotton for rents and supplies; that the proceeds were deposited by Walker in the bank, and that the bank had full knowledge that Rose had a lien on the proceeds for his rents and supplies; that the bank converted to its

own use a part of such proceeds amounting to more than Walker's indebtedness to Rose. The court further found that neither Miller nor Hale Bros. were innocent purchasers, and that the bank was liable as for conversion. The court gave the bank credit for the sum of $400, the amount of Walker's note on which Rose was surety. A decree was rendered in favor of Rose against Walker, the bank, and Hale Bros. in the sum of $1,068.04, with six per cent. interest thereon from December 1, 1919, and against Miller in the sum of $351.12. The court also decreed that Walker was primarily liable, and that Rose should proceed first against Walker and then against the bank before issuing execution against Hale Bros. and J. R. Miller, whose liability it adjudged to be inferior to that of the bank. From that decree is this appeal.

1. The court found that the appellee was entitled to a lien on the crops for the item of $223.35, the amount paid by him to Brickey Mercantile Company for supplies furnished Walker. (The undisputed proof shows that this item should be $233.35). E. E. Driver, the cashier of the bank, testified, among other things, that when Walker executed the note and mortgage to the bank, he showed Driver the lease contract agreement he had with Rose for the rent of the land. The cashier therefore knew that Walker was the tenant of Rose. The bank took the mortgage upon Walker's chattels and the crops to be grown on Rose's land and made advances to him under that mortgage. Rose testified that he talked with one of the directors of the bank, and that he understood from him that the bank, in addition to what Walker already owed it, furnished Walker about $600; that amount was not sufficient to complete the cultivation of Walker's crops. The bank refused to furnish Walker any more money. The appellee became responsible to the Brickey Mercantile Company in the sum of $335.35, advances made by it of money and supplies and used by Walker in the cultivation of his crops on appellee's land. The appellee paid this amount to the Brickey Mercantile Company.

The facts justified a finding that the money and supplies furnished through the Brickey Mercantile Company were in reality furnished by the appellee. The statute, in such cases, expressly gives the landlord "preference over any mortgage or other conveyance of such crop made by such tenant." Sec. 6890, C. & M. Digest. This is not a case of a landlord becoming a mere surety for his tenant, as was the case in *Coffman & Wilson* v. *Underwood,* 83 Ark. 118, upon which counsel for appellants relies; but the facts here warrant the conclusion that appellee himself was responsible primarily to the Brickey Mercantile Company for the advances and supplies made by it to Walker to make his crop.

In *Forster* v. *Bradney,* 143 Ark. 320, we held: "A landlord has a lien on his tenant's crop for the purchase price of supplies, the payment of which he had guaranteed, though he had not actually paid for them." Under the facts it is precisely the same as if the appellee had furnished the money and supplies himself. Under such a state of facts no contractual rights of a mortgagee under a mortgage executed to him by a tenant on crops can intervene to deprive a landlord of his lien under the above statute. Where the landlord, through another, furnishes the tenant supplies to make the crop, it is the same as if he furnished them directly, and he brings himself by such proof within the terms of the above statute.

2. It is not contended by the appellants that Miller and Hale Bros. were innocent purchasers. It could serve no useful purpose therefore to set forth and discuss in detail the testimony bearing upon this issue. Let it suffice to say that, while the testimony of one of the Hales and Miller was to the effect that when they bought the cotton from Walker they did not know that Walker was renting from Rose and that the cotton was grown on Rose's land, that they did not know that Rose had a claim on the cotton until after they bought the same; nevertheless they admitted that they made no inquiry of Walker as to

where the cotton was grown or whether there was any outstanding landlord's lien against the same. They purchased the cotton by sample and from ginner's receipts, and made no further investigation. They were cotton buyers of experience and were buying cotton at Osceola, where Rose resided, and in the Osceola district where the land was situated. Therefore the court correctly ruled that Miller and Hale Bros. were not innocent purchasers, and the decree against them in favor of the appellee for the value of the cotton purchased by them from Walker was correct. *Hunter* v. *Matthews,* 67 Ark. 364; *Noe* v. *Layton,* 69 Ark. 551; *Jacobson* v. *Atkins,* 103 Ark. 91; see also, *Lynch* v. *Mackey,* 151 Ark. 145.

3. The court found that the bank knew that the cotton was subject to a landlord's lien, and that in effect Walker had no right to the funds deposited; that he was, to the extent of appellee's lien, a trustee of such funds. These findings of the court are supported by a decided preponderance of the evidence. The cashier of the bank himself testified that, after Walker made the contract to move on Rose's land, the bank took a mortgage upon his chattels and the crops to be made on that land. He further testified that when Walker drew drafts on the Fargason Company, or sold cotton to Hale Bros. and Miller, and the checks came to the bank, witness presumed that they were the proceeds of the sales of the cotton raised by Walker that year. When the checks of Miller and Hale Bros. were brought to the bank, and Walker gave the bank checks on his account to pay the mortgage to the bank, witness believed that they were the proceeds of the cotton that he had raised that year on Rose's land. The bank got practically all of the proceeds of the checks of Hale Bros. and Miller. This witness further testified as follows: "It was my fault that Walker did ship the cotton. I instructed him to ship the cotton. I know that some of it was shipped. I know that J. T. Fargason Co. was shipped several bales. Mr. Walker drew various drafts on J. T. Fargason Co., to whom he had shipped

cotton, and we received those drafts. The bank had nothing to do with Walker's shipment (to Fargason Co.) more than to advise him that we thought it was the best thing to do. We accepted the drafts that he drew and gave him credit on his deposit for the same. The shipping of the cotton was left to Mr. Walker. I would not have been willing for him to ship it to Rose's credit."

The testimony further shows that, after the checks and the drafts were deposited to Walker's credit in the bank, he then drew checks on his account in favor of the bank to pay his preexisting indebtedness to the bank. The above testimony comes from the bank's own agents, its cashier and assistant cashier. Such being their testimony, the court was clearly correct in the above findings. When the bank, through its cashier, advised Walker to ship cotton to a cotton factor out of the State, the cashier knowing at the time that the appellee had a lien on such cotton for rents and supplies, and when the cashier received from Walker a draft on the factor for the proceeds of such cotton and used such drafts in paying Walker's indebtedness, the bank by these acts converted to its own use the proceeds of the cotton with full knowledge of the fact that the appellee had a lien upon such cotton, or its proceeds, for rents and supplies. The decree of the court holding the bank liable to the appellee for such proceeds under the circumstances was correct as disclosed by the above proof. Having knowledge of the appellee's lien, it must be held that the conduct of the bank was tantamount to a destruction by it of such lien. *Merchants' & Planters' Bank* v. *Meyer,* 56 Ark. 499, 505; *Carroll County Bank* v. *Rhodes,* 69 Ark. 43-48; *Boone County Bank* v. *Byrum,* 68 Ark. 71-74; *Blanton* v. *First National Bank of Forrest City,* 136 Ark. 441.

It follows from what we have already said that the court ruled correctly in holding that the note of $400 executed by Walker and Rose to the bank should be considered as paid and canceled as of the date of the conversion by the bank of the proceeds of sales of the cotton

upon which the appellee had a lien. The undisputed testimony shows that, by a misprision, the Brickey item which entered into the decree should have been $233.35 instead of $223.35 as found by the court.

We therefore treat the decree as if it had been corrected by stipulation of the parties in the trial court and rendered for the sum of $1,078.04. The decree for this amount is in all things correct, and hence it is affirmed.

BROWN & FROLEY v. MONROE COUNTY ROAD IMPROVEMENT DISTRICT.

Opinion delivered May 22, 1922.

1. HIGHWAYS—SUFFICIENCY OF EVIDENCE.—In a contractor's action against a road improvement district for compensation for grading, evidence *held* to sustain finding that there was no error in the engineer's estimates of the quantities of grading to be done.
2. CONTRACTS—DECISION OF ENGINEER—CONCLUSIVENESS.—A decision of the engineer of a road improvement district as to the quantity of grading done by contractors is conclusive, in the absence of fraud, where the parties stipulated to that effect.
3. HIGHWAYS—GRADING CONTRACT—OBLIGATION TO SUPPLY GRAVEL.—A grading contract did not require a road improvement district to supply contractors with a sufficient quantity of gravel to keep the contractor's employees steadily employed where the contract did not expressly so provide.
4. HIGHWAYS—SUFFICIENCY OF EVIDENCE.—In a grading contractor's action against a road district for damages for loss of time caused by failure of district's engineers to set grade stakes, evidence *held* to sustain finding of chancellor that the grade stakes were set.
5. HIGHWAYS—LIQUIDATED DAMAGES—WAIVER.—Where the engineer of a road improvement district acquiesced in the suspension of grading because of unfavorable weather conditions, the district will be *held* to have waived a provision for liquidated damages on failure to complete the contract within a certain time.

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

Mehaffy, Donham & Mehaffy, for appellant.

C. F. Greenlee, for appellee.

WOOD, J. Brown & Froley (hereinafter called appellants) are partners engaged in the business of constructing roads in the State of Arkansas. On the 12th of February, 1919, they entered into a contract with the Monroe County Road Improvement District, through its commissioners, to construct a certain road in Monroe County. They alleged that the district is indebted to them in the sum of $14,805.35 for grading; that under the contract the district was to supply appellants with sufficient gravel to keep appellants' employees steadily employed in hauling and placing the same upon the road; that the district breached its contract in this respect, to the damage of the appellants in the sum of $4,872.64; that it was the duty of the district to set grade stakes and at all times to have sufficient work laid out to keep the grading force of the appellant steadily employed; that the district failed to comply with its contract in this respect, to appellants' damage in the sum of $5,056.

The above allegations were contained in the complaint and amended complaint of appellants, and judgment is prayed for the above amounts.

The district, through its commissioners, answered, denying that the appellees were indebted to the appellants in the above amounts, and set up by way of cross-complaint that under the contract the appellants should have completed the work before May 1, 1920; that on account of their failure to comply with the contract in this respect they were indebted to the appellees in the sum of $4,695, liquidated damages, for which they prayed judgment. The appellees further set up that in June, 1919, the appellants became dissatisfied with the estimates of the quantities of grading allowed appellants by the engineers of the district; that thereupon the appellants and appellees agreed to submit the matter to arbitration, which was done; that the appellants agreed with the appellees that the finding of this board should be binding, and that the board of arbitration found that there had

been no error in the estimate of the engineers of the district in quantities of grading allowed appellants, and that appellants were bound by such finding.

The trial court, after hearing the testimony adduced on the above issues, dismissed the complaint and also the cross-complaint for want of equity. From the decree against them the appellants prosecute this appeal, and appellees cross-appeal.

1. The decree of the court is correct. Under the terms of the contract the appellants agreed to construct the improvement "in exact accord with the plans and specifications, copies of which were attached to and made a part of the contract." Among other provisions in these specifications, is the following: "The engineer shall furnish monthly estimates of the work done upon which partial payments to the contractor shall be based, and, in the absence of fraud or error, his decision as to the value and quantity of work or material shall be final and conclusive." It will be observed that it is not alleged in the complaint that the engineer was guilty of any fraud. The undisputed testimony shows that, after the controversy arose between the appellants and the engineers of the district in regard to the estimate of grading quantities allowed by the engineers to the appellants, the appellants agreed with the engineers of the district that the controversy should be submitted to a board of arbitration, the appellants selecting one, the engineers selecting one, and the State Highway Department selecting the third member of the board. The report of this board in part is as follows: "We visited the work in person and examined both the field and office work, making numerous measurements of the completed work in order to check the cross-sections. The engineer's notes were gone over carefully and the calculations checked in the office. Our investigation has disclosed no error in the engineer's work." This report was signed by all the members of the board of arbitration.

In regard to the estimate of the engineer of the district of the quantity of grading of which the appellants complain, the trial court found as follows:

"A number of witnesses testified on behalf of the plaintiffs as to the number of yards of earth removed, but the testimony of these witnesses is not specific enough to overturn the estimate of the engineers of the district on which the commissioners made settlement. Witness Conley, for the plaintiff, merely gives an estimate of the yardage moved. He does not state he made any measurements of the number of yards, and does not claim to be competent to make a measurement. Witness Dickinson, it seems, made an estimate, but the value of his testimony is considerably diminished by reason of the fact that he, together with two other gentlemen, all claiming to be engineers, signed a written statement in which they said, among other things: 'The investigation has disclosed no error in the engineer's work.' In this statement they also state that they visited the work in person, and examined both field and office work, making numerous measurements, etc. They also state that they went over the engineer's notes carefully," etc.

The above findings of the court we approve. The issue is purely one of fact. The testimony bearing on the issue is voluminous, and it could serve no useful purpose to set it out and discuss it in detail. After a careful examination of the record, we have reached the conclusion that the decided preponderance of the evidence shows that the board of arbitration found and reported correctly that there was no error in the engineer's work. The testimony of the engineer who made the estimates of the work as it progressed and who made a monthly report, and the testimony of three other competent engineers, tended to prove that the estimates of the grading made by the engineer who did the work were correct. The testimony tending to prove otherwise, as the trial court found, was not sufficient to overcome the findings of the engineer who made the estimates and the board of

arbitration. True, the testimony of Dickinson, one of the engineers, who was a member of the board of arbitration, tended to show that the report of the board of arbitration was not really correct, but was made only for the purpose of giving the engineers a "clean bill of health," and that he made a supplementary or second report at the same time in which he stated as follows: "As engineers familiar with this class of work, we are unanimous in the opinion that the circumstances surrounding this work are such that the contractor has necessarily moved more material than is shown by the cross-sections, and that he has not been sufficiently compensated for the actual labor performed." This witness further testified that at the suggestion of Bennett, one of the arbitrators for the engineering firm, the report was divided into two parts; one part wholly clearing the engineering company from any mistakes, and the other a recommendation to the board for relief to the contractors. He further testified there was no doubt in the minds of the arbitrators that the work would cost the contractors approximately twice as much as the estimates amounted to. "There was no doubt in our minds," says the witness, "that the contractors had moved more yardage than was given by the engineering company." This witness, by testifying to matters directly contradicting matters set forth in the report signed by him in connection with the arbitration, places himself in the unenviable attitude of challenging his own report as a member of the board of arbitration. His testimony is not entitled to as much consideration as the testimony of other arbitrators who did not sign his individual report and who flatly contradicted him as to the correctness of such report.

Bennett, one of the other arbitrators, who was selected by the engineering firm, categorically denied that he had requested Dickinson to divide the report into two sections in order to give the engineers of the district a "clean bill of health." He testified that the arbitrators were appointed because of a difference as to quantities al-

lowed by the engineer of the district, and the board was selected to determine whether the engineer's estimates were correct, and in witness' opinion the estimates were correct.

Major Parkes, of the engineering firm, also positively denied that he requested Bennett to sign a report giving his company "a clean bill of health."

The other arbitrator testified that he signed the report. He saw Dickinson's statement. The report was intended to cover all the work done to date. The arbitrators were of the opinion that the contractors had not been sufficiently compensated, and therefore they made a recommendation to the board of commissioners that they should be allowed additional compensation.

The decided preponderance of the evidence shows, however, that the arbitrators were willing to make this recommendation, not because there was any error in the estimates of the grading, but because appellants were victims of weather conditions and other unfortunate circumstances which caused them to lose money in performing their contract. It occurs to us that the trial court was correct, in the conflict between the testimony of Dickinson and his own report and the testimony of another commissioner and other witnesses, in finding that the value of Dickinson's testimony was "considerably diminished." After a careful review of the entire testimony, we conclude that there was no error in the estimates of the quantities of grading given by the engineer of the district to the appellants. Although this arbitration was not binding upon the appellees, nevertheless we are convinced that a decided preponderance of the evidence shows that the finding of the board of arbitration was correct. The decision of the engineer as to the quantity of this work under the terms of the contract was therefore final and conclusive and binding on the appellants. The court ruled correctly in so holding.

2. As to the item of $4,872.64, growing out of the alleged failure of the appellees to supply appellants with a sufficient quantity of gravel to keep appellants' employees

steadily employed, let it suffice to say that the contract does not provide that the appellees shall furnish gravel to the appellants to keep appellants' forces steadily employed, and that a failure upon the part of the appellees to furnish gravel so as to keep appellants' forces from being idle would render the appellees liable in damages for such failure. It must be presumed that the parties were contracting with reference to all the conditions confronting them at the time, such as weather conditions and the difficulties to be encountered in obtaining gravel in sufficient quantities to keep appellants' forces steadily employed. Since the contract does not contain any such provision, liability of appellees predicated upon breach of such provision cannot be maintained. If the appellants contemplated that such a duty and obligation should rest upon the appellees, then they should have seen to it that the contract contained such a provision. In the absence of such contractual duty and obligation, no damages can be recovered by the appellants as for as a breach of contract in this respect. Furthermore, even if the contract had contained such provision, the court found as follows: "Not only is the evidence sufficient to sustain the plaintiffs' contention, but there is testimony tending to show that there was gravel on the siding at Keevil and Overholt." On this issue of fact we are convinced that a preponderance of the evidence sustains the finding of the trial court.

3. In regard to the claim of appellants for damages on account of the loss of time caused by reason of the failure of the appellees' engineers to set grade stakes, the court found "that the plaintiffs' proof going to sustain the same was positively disputed by the defendants and by the engineers who had charge of the work. Furthermore, this item does not seem to have been considered seriously at the time the original complaint was filed."

The original complaint was filed January 15, 1920, and the appellants at that time sought to recover only for alleged damages growing out of the failure of the ap-

pellees' engineers to give appellants correct grading estimates and the failure of the appellees to furnish gravel in sufficient quantities to keep appellants' forces steadily employed. About eighteen months thereafter an amended complaint was filed alleging damages on account of the failure of appellees' engineers to set grade stakes. It occurs to us that if the appellees' engineers failed to set grade stakes, appellants would have been fully advised of this fact when they instituted their action to recover damages on account of erroneous grading estimates. Be this as it may, the testimony on behalf of the appellants tending to prove that their forces were idle because of the failure of the appellees' engineers to set grade stakes was overcome by the testimony of the local engineer in charge of the work to the effect that grade stakes were set. We are convinced that the finding of the chancellor on this item is correct.

4. The trial court refused to award the appellees damages on their cross-complaint. The contract provides that the appellants agreed to begin work on the 25th of February, 1919, and to complete the same before the 1st of May, 1920, and upon failure to complete the work in time it was specified that the appellants should pay to the appellees the sum of $15 for each day delayed as liquidated damages. The appellees, in their cross-complaint, prayed for damages in the sum of $4,695, damages for delaying to complete the work for the period of one year. On account of unfavorable weather conditions and the obstacles because thereof, which appellants had to overcome in the performance of their contract, it was not the intention of the appellees to enforce the above provision of the contract as to liquidated damages. No claim was made for such damages in the original answer of the appellants to the appellees' complaint, and not until the appellant had filed an amended complaint asking for damages on account of the alleged failure of appellees' engineers to set grade stakes did the appellees set up any claim for liquidated damages. It does not appear

that the commissioners at any time previous to this had notified the appellants that they were going to insist on such damages. On the contrary, the testimony tends to prove that the appellees have waived the above provision of the contract as to liquidated damages. One of the appellants testified that they suspended work in November, and that the engineers released their outfit over there until appellants were notified by them to return, and that appellants had not been so notified.

The appellants introduced in evidence a letter from the supervising engineer of the appellees, which it is unnecessary to set forth, but this letter clearly indicates that the appellees through this conduct of the supervising engineer had acquiesced in the suspension of the work by appellants on account of unfavorable weather conditions. This letter shows that the appellees were not going to insist on appellants continuing their full force on the work during the winter, but consented to the use of "two teams and a man to run the grader and haul gravel and keep the road perfect during the winter, or until such time as the engineer shall direct their return of their full force to the work." Under all the circumstances the appellees must be held to have waived the provision of the contract as to liquidated damages.

We find no error in the decree, and the same is therefore affirmed.

FARMERS' CLUB COMPANY v. EMMERSON MERCANTILE COMPANY.

Opinion delivered May 22, 1922.

1. SALES—EVIDENCE.—Evidence *held* to sustain a verdict finding that a certain oil engine was in first-class condition when sold, with the exception of missing parts to be furnished by seller.
2. APPEAL AND ERROR—CREDIBILITY OF WITNESSES A JURY QUESTION.—The jury, and not the Supreme Court, are the judges of the credibility of the witnesses.
3. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The Supreme Court cannot review the finding of a jury where there is evidence of a substantial character to support it.

4. EVIDENCE—ADMISSION OF AGENT.—Where the authority of the seller's agent was limited to the installation of an oil engine, he could not bind the seller by an *ex parte* affidavit, though such affidavit could be used to contradict his testimony given at the trial.

5. SALES—INSTRUCTION.—Where seller furnished missing parts for an oil engine and sent an experienced man to attach them to the engine within a short time after the engine was sold, but the buyer refused to receive the parts or to permit them to be attached, it was proper to refuse to instruct the jury to find for buyer if the repair was not made within a reasonable time.

Appeal from Fulton Circuit Court, *Archie House,* Judge, on exchange; affirmed.

STATEMENT OF FACTS.

Appellant sued appellees to recover damages for a breach of contract in the sale of an engine for its gin plant. Appellee denied any breach of contract and asked judgment against appellant for $1,000, balance due on the purchase money.

According to the evidence of appellant, on the 6th day of August, 1918, appellant's manager wrote to the Emmerson Mercantile Company asking for the condition and price of a fifty-horse power International Harvester oil engine which appellant had been informed had only been run one season and was for sale. On the 13th day of August, 1918, the manager of the Emmerson Mercantile Company wrote appellant that said company had a fifty-horse power International Harvester Company engine which had been run altogether less than three months; that it was a cylinder latest model engine and was in first-class condition; that said company had installed a sawmill in connection with its gin and this necessitated the use of steam power to consume the waste from the sawmill. A price of $1,600 cash was made on the engine, which included oil tanks, water tanks, and all equipment of the engine. Sometime later Thad W. Rowden, appellant's manager, went to Emmerson, Ark., and bought the engine in question from W. D. Wingfield, manager of appellees, for the price of

$1,600; $500 of which was paid in cash and the balance to be paid in deferred payments. Rowden told Wingfield that appellant wanted the engine for immediate use in running its gin plant, and Wingfield represented to him that the engine was in first-class condition. There were some missing parts which Wingfield said that he could get from the International Harvester Company for appellant and put them in at once. When the engine was installed, it was ascertained that it would develop but little horse-power and would not run the gin plant of appellant as represented. The engine was discovered to be in very bad condition and could not have been put in shape for that season's ginning. The various defects in the engine were pointed out by appellant's witnesses, but it is not necessary to state them in detail in order to present the issues raised by the appeal. On account of these defects appellant refused to pay for the engine, or to receive the parts necessary for its repair. Hence this lawsuit.

According to the evidence of appellees, after they had written to appellant stating the condition of the engine and its price, it was about two months before anything further was heard from appellant. About the first of October, Rowden, appellant's manager, came down to examine the engine, and in the meantime some of the parts had been taken off of it for use by appellees. Rowden examined the engine thoroughly for appellant and was told by Wingfield, who was representing appellees, that some of the parts were missing, but that otherwise the engine was in first-class condition. Wingfield said that he could supply the missing parts from the International Harvester Company and would have them attached to the engine as soon as it was set up. The missing parts were ordered from the International Harvester Company and the bill therefor amounted to something over $400. A representative of the International Harvester Company went up to appellant's place of business for the purpose of attaching

the missing parts. He found that the engine had not been properly set on its foundation, and returned home. Subsequently he went back for the purpose of attaching the parts, and appellant refused to take the parts out of the railroad office or have them attached to the engine.

It was also shown in evidence by appellant that the agent of the International Harvester Company had made an affidavit, at the request of the appellant, in which he stated that the engine was not in first-class condition and was so defective and worn that it could not have been repaired except for temporary use. This agent testified at the trial that the engine was in good condition except for the missing parts, and that, after being repaired, it would last for some years, dependent upon the use of it.

The jury returned a verdict for appellees, and from the judgment rendered appellant has duly prosecuted an appeal to this court.

Geo. T. Humphries and *C. E. Elmore,* for appellants.

Where there is a false warranty which contains the elements of fraud and deceit in it, the party has his election to affirm the contract and sue upon the breach of warranty, or repudiate it. 100 Ark. 17; 88 Ark. 422; 93 Ark. 454; 22 Ark. 454; 53 Ark. 155; 81 Ark. 549; 110 Ark. 215.

H. A. Northcutt, P. C. Goodwin, and *Oscar E. Ellis,* for appellees.

HART, J. (after stating the facts). It is earnestly insisted by counsel for appellant that the evidence is not legally sufficient to sustain the verdict. At the request of appellant, the court instructed the jury that if it believed from the evidence that the contract was that the engine should be in first-class condition except the missing parts, and that the evidence showed it was not in first-class condition, appellant would have a right not to accept it, and might recover the amount it had paid on the purchase price together with the freight.

On the part of appellees the jury was instructed that if it believed from the evidence that the contract was, that appellees would furnish whatever parts that were missing, and which were necessary to put the engine in first-class condition, and that appellees stood ready to carry out the contract on their part, and appellant refused to allow them to do so, then the verdict should be for appellees on their counterclaim for the sum of $1,000 due on the purchase price.

The court further instructed the jury that, if it believed from the evidence that the engine was in such defective condition that it could not have been put in first-class condition, then appellant would have the right to reject the same without waiting for appellees to repair it, and appellant was entitled to recover.

No exceptions were saved to the giving of these instructions, and they substantially submitted to the jury the respective theories of the parties to this lawsuit.

We cannot agree with counsel for appellant in their contention that there was no legal evidence to support the verdict. One of the witnesses for appellees testified that if they had been allowed to put in the repairs that they ordered, on the engine, it would have been in good condition and would have lasted appellant a good long time. He said that the engine was not burned out on the inside, and that the cylinders did not need reboring. He was sent up there to repair the engine and was prevented from repairing it by appellant. He had had ten years' experience in installing machinery of this kind and seeing that it operated in a satisfactory manner.

Wingfield, the manager of appellees, also testified that the engine was in good condition and ready for operation when the missing parts were attached to it; that he ordered the missing parts to be shipped to appellant at its place of business, and sent an experienced machinist up there to attach the parts to the engine.

It is true that the evidence for appellant showed that the engine was in very bad condition and could not have

been put in condition for use except temporarily. The jury, however, were the judges of the credibility of the witnesses, and under the settled rules of this court we cannot review its finding where there is any evidence of a substantial character to support it. In other words, the question of the preponderance of the evidence is a matter for the jury trying the case, and we have no concern with it on appeal. It is our duty to uphold the verdict where there is legal evidence to support it, and the evidence for appellees, if believed by the jury, entitled them to recover the balance of the purchase price on the engine.

Counsel for appellant also assign as error the refusal of the court to instruct the jury that if it found that appellees, or their agent, notified appellant that the machinery could not be put in first-class condition, appellant had a right to reject the same, and the jury should find for appellant.

This instruction was predicated upon an affidavit made by F. B. Cooper, the agent of the International Harvester Company, who was sent by that company at the request of appellees to attach the missing parts to the engine.

At the request of appellant he made an *ex parte* affidavit to the effect that the engine could not be put in first-class condition. He was not the agent of appellees for any purpose except to install the engine. Hence he could not bind appellees by an *ex parte* affidavit as to the condition of the engine. Cooper testified as a witness in the case, and it was proper to introduce the affidavit for the purpose of contradicting his testimony given at the trial and thereby attacking his credibility as a witness.

It is also insisted by counsel for appellant that the court erred in refusing to instruct the jury that, if it found that the repair of the engine was not made within a reasonable time after the agreement to repair it, it should find for the appellant.

There was no error in refusing to give this instruction. Appellees ordered the missing parts for the engine from the International Harvester Company and got that company to send an experienced man to attach the parts to the engine. This was done within a short time after the engine was sold to appellant. Appellant refused to receive the parts or to permit Cooper to attach them to the engine, on the ground that the engine was in such defective condition that it could not be placed in first-class condition for that season's ginning. There was no issue on the failure of appellees in making repairs on the engine within a reasonable time, and on this account the court did not err in refusing this instruction.

The respective theories of appellant and appellees were submitted to the jury in instructions to which no objections were made or exceptions saved, and, there being evidence to support the verdict, the judgment must be affirmed.

NORWOOD v. MAYO.

Opinion delivered May 22, 1922.

1. TAXATION—ADVERSE POSSESSION UNDER TAX TITLE.—Under Crawford & Moses' Dig., § 6947, limiting the time of bringing an action to recover lands sold for taxes to two years, actual possession of land taken and held continuously for two years under a tax deed bars an action for recovery, though the sale is irregular or void for jurisdictional defects.
2. ADVERSE POSSESSION—SUFFICIENCY OF POSSESSION.—Where a person claiming cut-over land placed a tenant on the land who remained in possession eight months, and on his leaving another tenant took possession and remained some months, and then left, and the house was vacant for a month before another tenant took possession, and none of the tenants cultivated or inclosed the land, but only cut firewood, the possession was not of sufficient character to give title by adverse possession.
3. ADVERSE POSSESSION—NATURE OF POSSESSION.—In order to acquire title to woodland by adverse possession, there must be actual use of the land of such unequivocal character as reasonably to

indicate to the owner visiting the premises during the statutory period that such use and occupation indicate an appropriation of ownership in another.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; affirmed.

Gautney, Caraway & Dudley, for appellants.

A deed based on a void tax sale, on its face properly describing the land, and purporting to convey it to the purchaser, is color of title. 77 Ark. 324; 80 Ark. 82.

Where a purchaser of land at a tax sale goes into possession under a deed properly describing it, and continues in possession for more than two years, he acquires title to the land. 129 Ark. 270.

If the owner, having right of action for possession, fails to act for a period of two years, the title to the land should be quieted in the adverse holder. 83 Ark. 334; 76 Ark. 477; 60 Ark. 499; 60 Ark. 163; 66 Ark. 141; 59 Ark. 460; 23 L. R. A. (N. S.) 1102; 126 Ark. 86.

Appellant having actual possession of part of the land under his deed, even though the deed was void, the land being occupied, had constructive possession of the whole tract. 71 Ark. 117; 78 Ark. 99; 80 Ark. 82; 93 Ark. 30; 84 Ark. 140.

All actions to test the validity of the sale of lands delinquent for taxes shall be commenced within two years from date of sale. C. & M. Dig., sec. 10119; 1 R. C. L. 687; 2 C. J. 112.

Any visible or notorious acts which clearly evince an intention to claim possession is sufficient to establish a claim for adverse possession. Tiedeman on Real Property, 3 ed. sec. 495; 92 Ark. 321; 80 Ark. 82; 75 Ark. 593.

The tax is a charge upon the land itself, and when sold vests the title in the purchaser. C. & M. Digest, sec. 10025. This conveyance carries with it the interest of all other persons in the land. C. & M. Digest, sec. 10109; 84 Ark. 1; 123 U. S. 747; 31 L. ed. 309. It is the land that is sold for taxes, and not merely the interest or equity of the owner. 18 Ark. 423; 39 Ark. 315.

The appellant was entitled to a decree quieting his title under his tax deed, although the tax sale and deed based thereon were void. 76 Ark. 442; 76 Ark. 447; 79 Ark. 194.

The appellees are not without proper remedy under the statute. C. & M. Digest, sec. 10047.

Fuhr & Futrell, for appellees.

A void tax sale can be followed by none other than a void tax deed. Possession for the required two years under a void tax sale and deed does not effect a devolution or investiture of title.

The statute, C. & M. Digest, sec. 6947, is penal and must be strictly construed. 43 Ark. 409.

A statute of short limitations must be strictly construed. 86 Ark. 300; 49 Ark. 203.

The tax sale was void for the reason that the taxes had been paid and the land was not delinquent when sold.

The Legislature has the power to make the statute of limitations operate to devolve title, and, unless the language used is such as to compel such a construction, the courts should construe it as going to the remedy only. 83 Ark. 495; 96 Ark. 446; 96 Ark. 105; 67 Ark. 105.

HART, J. Louis Mayo brought this suit in equity against W. A. Maywood to cancel as a cloud on his title a clerk's tax deed to certain land in the western district of Craighead County, Ark.

Maywood relied on the validity of the tax sale and adverse possession for two years under his tax deed.

The chancery court found the issues in favor of the plaintiff, and a decree was entered accordingly. To reverse that decree the defendant Maywood has duly prosecuted this appeal.

At the trial it was shown that the title to the land in question was in Louis Mayo, and that he had regularly paid the taxes on the land up to and including the year 1916. His tax receipt for the year 1916 is exhibited in the record. The land was sold by the collector of taxes for the nonpayment of taxes for the year 1916, and W. A.

Maywood became the purchaser at the tax sale. At the expiration of two years a clerk's tax deed was executed to Maywood, and he entered into possession of the land under it. He claimed to have been in possession of the land under his tax deed for two years before the present suit was brought, but the testimony as to the continuity of his possession is in dispute and will be discussed later.

Counsel for the plaintiff first seek to uphold the decree on the theory that a short statute of limitations like 6947 of Crawford & Moses' Digest applies only to tax sales invalid because of defects and irregularities in the proceedings, and that possession under such a statute will not sustain a deed that is valid on its face, if there were jurisdictional or fundamental defects in the sale, or where the taxes for the nonpayment of which the land was sold had in fact been paid.

This is what is called the majority rule in 26 R. C. L. par. 399, and, amongst other cases, reliance is placed upon the case of *Redfield* v. *Parks,* 132 U. S. 239, where the Supreme Court of the United States in construing the statute now under consideration held that a deed of land sold for the nonpayment of taxes, which recites that the sale was made on a day which was not the day authorized by law, is void on its face, and is not admissible in evidence to support an adverse possession under a statute of limitations.

Subsequent to the rendition of that decision this court took up the precise question in *Ross* v. *Royal,* 77 Ark. 324, and the court held that a tax sale on a day not appointed by law is void, but that actual possession of land taken and held continuously for the period of two years under a clerk's deed bars an action for recovery, whether the sale be merely irregular or void on account of jurisdictional defects. The court said that the statute in question is a statute of limitations, and as such prevents the impeachment of the title even on grounds of fundamental and jurisdictional defects where possession has been held for the requisite length of time under it.

In the application of the rule in *Dickinson* v. *Hardie*, 79 Ark. 364, the court held that continuous adverse possession for more than two years under a clerk's tax deed confers a valid title, although the owner of the land had paid the taxes before the day of sale. The court said that the statute in question is purely a statute of limitations and runs against void sales as well as voidable sales. These opinions have become rules of property in this State, and it is now too late to question their soundness or to overrule them.

Counsel for the plaintiff also seek to uphold the decree on the ground that the defendant did not have two years continuous unbroken possession of the land in question under his tax deed before this suit was brought, and in this contention we think counsel are correct.

The land in question was cut-over land. A railroad runs through one corner of the land. A sawmill company which had purchased the timber on the land had erected a small box storehouse on the railroad right-of-way on the land in question and another small box dwelling house on the land. After Maywood received his collector's tax deed, he purchased the small box storehouse on the right-of-way from the person who owned it and placed a tenant in the box dwelling house on the land in question. None of the land was in cultivation, and no rent was paid by the tenant, except that he agreed to look after the land for Maywood. This tenant remained upon the land for about eight months and then left. Another tenant immediately took possession of the house for Maywood. After remaining on the land for some months he left it, and the house was vacant for about a month before Maywood got another tenant to move into the house. During all of this time no land was placed in cultivation and no improvements were made upon the land, except that a fence was placed around a garden spot which had been cleared. There was also a small amount of firewood cut from the land by the tenant for his own use.

In order to acquire title to woodland there must be actual use of the land of such unequivocal character as to reasonably indicate to the owner visiting the premises during the statutory period, that such use and occupation indicate an appropriation of ownership in another. *Earle Imp. Co.* v. *Chatfield,* 81 Ark. 296, and *Connerly* v. *Dickinson,* 81 Ark. 258. We quote from the earlier case of *Scott* v. *Mills,* 49 Ark. 266, the following:

"The adverse possession necessary to vest title in the holder must be continuous and unbroken for the full period prescribed by the statute. 'Adverse possession,' says Mr. Justice GIBSON, in *Stephens* v. *Leach,* 7 Harris 262, 'professing as it does to be founded not on title but on trespass, is essentially aggressive, and the stamp of its character must always be preserved by acts on the premises. A man does not discontinue his possession by locking up his house in town, or suspending his cultivation in the country, provided he does not suffer the buildings in the one case, or the fields in the other, to be thrown open; but he is bound to continue a positive appearance of ownership by treating the property as his own, and holding it within his exclusive control. An intention to resume suspended intrusion of which the owner of the title may know nothing, is short of the requirements of the statute. The question is not, what did the outgoing occupant intend? but, what did he do? Did he keep his flag flying and present a hostile front to adverse pretensions? An adverse possession ought to be such as to challenge the right of all the world; but when an occupant has evacuated the place and suffered it to go to wreck, he hauls down his colors and his challenge is withdrawn.' In other words, when one leaves the ground personally, during the period of limitation prescribed by the statute, he must leave it under circumstances indicating that he has not left the possession, but still holds it. He must so leave it that the condition and appearance of the premises themselves show to the world

that there is still a person in actual control and exercise of dominion. If he should leave the premises, personally, but not in the condition or manner indicated, before the expiration of the time prescribed by the statute of limitations, he acquires no title by adverse possession."

In the application of this principle to the present case it may be said that during the month of the two years in question when the land was vacant there was nothing to indicate to the owner, had he visited the place, that any one was in possession of it claiming it exclusively as his own.

It follows that the decree must be affirmed.

DAVIS & WORRELL v. GENERAL MOTORS ACCEPTANCE CORPORATION.

Opinion delivered May 22, 1922.

1. CORPORATIONS—DOING BUSINESS IN STATE.—The doing of business in this State by a foreign corporation is the exercise in this State of some of the ordinary functions for which the corporation was organized.
2. CORPORATIONS—DOING BUSINESS IN STATE.—A foreign corporation with an office outside of the State which furnished dealers in motor vehicles in Arkansas, with whom it contemplated doing business, with blank forms to be used by such dealers in selling their motor vehicles and through commercial agencies secured financial rating of the dealers and customers to whom they made sales, but had no interest in the business of the dealers from whom it purchased commercial paper and no established agency in the State, and made its contracts regarding purchase of paper and paid for same outside the State, was not doing business in the State, within the meaning of Crawford & Moses' Dig., §§ 1825-1832.
3. BILLS AND NOTES—FRAUD.—In an action on notes given for the purchase of motor trucks, evidence held not to show any fraud or misrepresentation by the seller of the trucks.
4. BILLS AND NOTES—BONA FIDE PURCHASER—DEFENSE.—In an action on notes given as part of the purchase price for motor trucks, where defendant alleged fraud and misrepresentation on the part of the seller, but the notes were transferred to plain-

tiffs before maturity and without notice of any fraud or misrepresentation, the alleged fraud and misrepresentation constituted no defense.

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

STATEMENT OF FACTS.

The General Motors Acceptance Corporation brought this suit in equity against Davis & Worrell and the Newport Foundry & Machine Company to obtain judgment against the defendants in the sum of $1,969.20 and $1,916.48, the balance due respectively on two promissory notes given for two motor trucks, and to foreclose its vendor's lien on the same.

Davis & Worrell defended on the ground that the General Motors Acceptance Corporation could not maintain the suit because it was a foreign corporation and had not complied with our statute regulating such corporations, and that the sale of the motor trucks to them by the Newport Foundry & Machine Company had been induced by false representations.

The General Motors Acceptance Corporation is a foreign corporation organized under the laws of the State of New York and it has a branch office at Dallas, Texas. On the 17th day of May, 1920, Robert Davis and Frank Worrell, doing business as Davis & Worrell, at Imboden, Ark., purchased from the Newport Foundry & Machine Company of Newport, Ark., two motor trucks, and after making a cash payment executed their negotiable promissory notes for the balance of the purchase money. Title to the motor trucks was retained in the seller until the balance of the purchase price was paid.

L. C. Barber was a witness for the plaintiff. According to his testimony he was assistant credit manager for the General Motors Acceptance Corporation at Dallas, Texas, and the purchase of the notes in question was made in June, 1920, before the notes became due. The notes were purchased at Dallas, Texas, for value received before maturity. There is a balance due on one

truck of $1,969.20 and on the other of $1,916.48. It was the custom of the plaintiff to furnish blank forms of notes to the Newport Foundry & Machine Company of Newport, Ark., and to purchase notes executed to that company by purchasers of motor vehicles from it. The plaintiff has no agency in the State of Arkansas, but buys commercial paper from approximately forty concerns selling motor vehicles in the State of Arkansas. The plaintiff does not do business with any concern in Arkansas that does not handle the products of the General Motors Corporation. That corporation, however, is not owned by the plaintiff, and it does not appear whether the two corporations have the same directors and stockholders. The plaintiff company is not operated to handle the financial end of the General Motors Corporation. It purchases commercial paper from various persons and corporations in the State of Arkansas and elsewhere which sell motor vehicles. It requires the dealers from whom it buys the commercial paper to make a financial statement, and the amount of credit extended to such dealer depends upon such financial statement. The Newport Foundry & Machine Company had made such a statement, and the plaintiff had agreed to extend a line of credit to it. The plaintiff makes an investigation of the dealer's financial condition and gives him a rating on this. The dealer indorses the commercial paper to the plaintiff. The investigation of the dealer is made through references given by him and by reports from commercial agencies.

Davis & Worrell were investigated by the plaintiff before it purchased the notes in question. The notes in question were purchased from the Newport Foundry & Machine Company, and that company indorsed the notes. Blank forms of contracts are furnished to dealers from whom the plaintiff contemplates buying notes. The plaintiff requires a purchaser's statement on the back of each contract. It then investigates in every instance both

the maker and the indorser of the commercial paper through various commercial agencies, before buying the security.

The approval of the paper in the present case was made in Dallas, Texas, and the purchase of it was made there; and the money was paid outside the State.

J. V. Isaacs, the manager of the Newport Foundry & Machine Company, was also a witness for the plaintiff. According to his testimony he sold the notes in question to the plaintiff at Dallas, Texas, and the payment was made through a bank at Chicago, Ill. The notes were given for sale of motor trucks to Davis & Worrell and were indorsed by the Newport Foundry & Machine Company to the General Motors Acceptance Corporation. The Newport Foundry & Machine Company was not the agent of the General Motors Acceptance Corporation, and that company did not have anything to do with the business of the Newport Foundry & Machine Company. The Newport Foundry & Machine Company made arrangements with the plaintiff for a line of credit with it. It had made a statement of its financial condition to the plaintiff and had a general line of credit based on that statement and the investigation of its condition made by the plaintiff.

According to the testimony of the defendants, Davis & Worrell, the sale of one of the trucks was procured by fraudulent representations. Evidence was adduced by the plaintiff to contradict this testimony. The evidence on this phase of the case will be stated more particularly in the opinion when we come to discuss the question of whether or not the sale should be set aside on account of the fraudulent representations of the seller.

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

To reverse that decree Davis & Worrell have duly prosecuted an appeal to this court.

Mehaffy, Donham & Mehaffy, for appellant Davis & Worrell.

Appellee had no capacity to sue on the notes, as it was a foreign corporation doing business in this State without having complied with the law. 128 Ark. 211. By the conduct of its business appellee has violated act 313 of Acts 1907. See 115 Ark. 166; 124 Ark. 539. The defect in the notes was inherent, and a subsequent purchaser must take notice of such defect. 136 Ark. 52.

Appellee was not an innocent purchaser of the notes, as it knew exactly how the Newport Foundry & Machine Company conducted its business, and knew that that company was selling the trucks as new, when in fact one of them was second-hand. See cases in 121 Ark. 250; 110 Ark. 578; 97 Ark. 537; 105 Ark. 281.

Boyce & Mack, for appellant, Newport Foundry & Machine Company.

There was no fraud in the sale of the trucks and no misrepresentation. They were sold under a written contract. Oral warranties or agreements could not properly be shown. 45 Ark. 284; 108 Ark. 254.

Rogers, Barber & Henry, for appellee.

The appellee was not engaged in an intrastate business. Its contracts were made and money paid in another State, thus carrying on an interstate business not subject to regulation by this State. See 57 Ark. 24; 206 Fed. Rep. 802; 55 Ark. 625; 160 U. S. 167; 92 Ala. 145; 98 Ala. 409; 54 Ark. 566.

HART, J. (after stating the facts). It is first contended by counsel for Davis & Worrell, the defendants, that the plaintiff, General Motors Acceptance Corporation, is not entitled to maintain this suit because it has not complied with our statute regulating foreign corporations doing business in this State. Crawford & Moses' Digest, secs. 1825-32 inclusive.

It appears from the record that the plaintiff has not complied with our statute prescribing the terms upon which foreign corporations may do business in this State.

It is the contention of the plaintiff that the transaction in question does not bring it within the prohibition of the statute. The statute does not specify what particular acts shall constitute doing business in this State by a foreign corporation. The general holding, however, is that the doing of business is the exercise in this State of some of the ordinary functions for which the corporation was organized. In other words, it is the actual doing or engaging in business in this State by such corporation.

In *White River Lumber Co.* v. *Southwestern Improvement Assn.*, 55 Ark. 625, it was held that a foreign corporation is not doing business within the meaning of the statute by entering into a contract with a resident thereof, where the contract is made and is to be performed elsewhere.

So too in *State Mutual Fire Ins. Assn.* v. *Brinkley Stave & Heading Co.*, 61 Ark. 1, it was held that a contract made with a foreign insurance company through its local soliciting agent at a place outside of the State is not doing business within the State within the meaning of the statute. These cases hold that the rule is not altered by the fact that the contracts relate to property in this State.

Again, in *Scruggs* v. *Scottish Mortgage Co.*, 54 Ark. 566, it was held that a foreign corporation, in lending money on land in this State, is not doing business in the State, within the meaning of sec. 11, art. 12 of the Constitution of 1874, if the agreement for the loan was made in another State, and the notes and securities delivered and the money paid there.

In *Bamberger* v. *Schoolfield,* 160 U. S. 149, it was held that a foreign corporation is not doing business in a State by purchasing in another State negotiable securities executed within the first State.

In the application of the principle stated in the illustrative cases given above, we agree with the chancellor that the transaction in the present case does not come

within the prohibition of our statute regulating foreign corporations doing business in this State.

It is true that it was a part of the business of the plaintiff corporation to discount notes of this character, and that it did discount notes purchased from about forty dealers in motor vehicles in the State of Arkansas. The plaintiff was organized under the laws of the State of New York and had a branch office at Dallas, Texas, where it transacted its business with residents of the State of Arkansas. It furnished dealers of motor vehicles in Arkansas with whom it contemplated doing business with blank forms of contracts to be used by such dealers in selling their motor vehicles. There was a place on such form for the purchaser of the motor vehicle to make a statement of his financial condition. The dealer was required to send to the plaintiff at Dallas, Texas, a statement of his financial condition, and an investigation of his financial condition was also made through reports by commercial agencies and otherwise. Then the plaintiff would agree to extend a general line of credit to such dealer. The dealer in making a sale would take the note of the purchaser on one of the blank forms furnished by the plaintiff. This was all done, however, to better enable the plaintiff to pass upon the securities offered it for discount. The plaintiff had no interest whatever in the business of the dealers from whom it bought such commercial paper. It had no established agency in this State. In each instance the paper was sent to its office in Dallas, Texas, and accepted there. The money was paid there, or through a bank in Chicago upon orders of the home office in New York. Thus it will be seen that the contract was made and the money paid in each instance outside of the State. The applications for sale of commercial paper were received by the plaintiff at its office outside of this State. They were passed upon there and accepted or rejected there. The plaintiff had no agency in this State, and the mere fact that it acted upon applications coming through residents

in this State would not constitute doing business in this State within the meaning of the statute.

As we have said, it does not appear that the plaintiff ever had an agency in this State, and the most that can be said is that it actually accepted discounts from forty different dealers in motor vehicles. The negotiations, however, were conducted by the dealers themselves, who, although residents of this State, were not in any sense the agents of the plaintiff, and the plaintiff was not in any way connected with their business or obligated to purchase at a discount or otherwise the notes which such dealers should take for motor vehicles sold by them.

It is true that the furnishing of blank contracts to be used by the dealers in selling their motor vehicles and in purchasing the notes given for said motor vehicles tended to further the business of such dealers, but this did not make such transactions fall within the terms of the act. This would not be the controlling test. The test is, was the transaction of the business such that the corporation was for the time being, through its agents or otherwise, within the State for the purpose of doing business?

In reaching this conclusion we do not mean to say that a foreign corporation must have an agency established in this State to bring it within the operation of our statute regulating foreign corporations doing business in this State; but we do hold that in a case like this, where the foreign corporation had its place of domicile in another State and discounted commercial paper of parties with money paid out in such other State on applications made to it there through dealers in this State, such transactions do not constitute doing business in this State by such foreign corporation.

It is also insisted by counsel for Davis & Worrell that the decree should be reversed because one of the motor trucks was purchased through the false representations of the Newport Foundry & Machine Company. Frank Worrell, one of the members of the firm, testified

that this truck was represented to him to be a new truck, and that when he began to use it he found that it had been used for at least six months, and that some of its parts showed wear, and that it was altogether in such a defective condition that it could not be used. Two of his employees corroborated his testimony.

On the other hand, the manager of the Newport Foundry & Machine Company testified that Worrell was a man of several years' experience in the use of motor trucks and that he made a thorough examination of the one in question before he purchased it. The truck was never repainted, as testified to by Worrell. At the request of Worrell the truck was changed so as to put a dump body upon it, and it was probably touched up to cover up the scars made in making the change. The car was driven through the country from Newport to Imboden at the time it was purchased, but it was entirely new. An employee of the company who drove the truck through the country and delivered it, testified that it was new and all right.

The chancellor found the issue of fraudulent representations in favor of the plaintiff, and when we consider that Worrell had had several years' experience in running motor trucks and made a thorough examination of the one in question, it can not be said that the finding of the chancellor that he was not induced to buy it by the false and fraudulent representations of the seller was against the preponderance of the evidence.

Moreover, the plaintiff purchased the note given for the purchase price of the motor truck for value before maturity, and it does not appear from the record that it had any knowledge of any false representations which induced the sale of the motor truck, if any such were made by the seller.

As we have already seen, the plaintiff was not interested in the sale of the motor trucks and had nothing whatever to do with the sale thereof.

There is a dispute between the parties to this lawsuit as to what testimony properly appears in the record; but, inasmuch as we have accepted the abstract of the testimony made by appellants, and have reached the conclusion that the decree should be affirmed, we have decided not to go into the dispute between the parties in this respect or to consider which is right.

From the conclusions we have reached, it follows that the decree must be affirmed.

ROAD IMPROVEMENT DISTRICT NO. 3 *v.* MORRIS.

Opinion delivered May 22, 1922.

1. HIGHWAYS—JURISDICTION OF CHANCERY—TO COMPEL REASSESSMENT.—Though plaintiff may have a remedy at law by mandamus to compel a reassessment, the chancery court has jurisdiction to compel reassessment of benefits in a road improvement district organized under the Alexander law (Crawford & Moses' Dig., § 5399 *et seq.*), on ground that liens on real estate are involved.
2. HIGHWAYS—IMPROVEMENT DISTRICT—REASSESSMENT.—A complaint based on Crawford & Moses' Dig., § 5430, *held* to state a case which entitles plaintiffs to a reassessment of all the lands in a road improvement district, making it the duty of the commissioners to order the same.
3. HIGHWAYS—MODE OF MAKING REASSESSMENT.—Under the Alexander Law (Crawford & Moses Dig., § 5399 *et seq.*) where a reassessment of benefits is ordered, it must be made in such manner as to leave the contractual rights of third persons which have intervened undisturbed.
4. HIGHWAYS—POWER TO ORDER REASSESSMENT.—Under Crawford & Moses' Dig., § 5430, providing that the board of commissioners may, not oftener than once a year, order a reassessment of benefits, the commissioners are authorized to order a reassessment of all the lands in a road improvement district.
5. HIGHWAYS—INJUNCTION AGAINST COLLECTION OF ASSESSMENT.—Where the reassessment of benefits of a road improvement district has been ordered, but has not yet been made and become final, an order enjoining the collection of the original assessment is premature.
6. HIGHWAYS—INJUNCTION AGAINST COLLECTING ASSESSMENT—BOND.—Crawford & Moses' Dig., § 5460, providing that no injunc-

tion shall issue to stay work on any road or the collection of any tax, unless the party applying therefor shall first give a prescribed bond, applies to suits to stay the construction of an improvement or which question the general right to collect the taxes due the district, but does not apply to a suit of an individual property owner, who seeks a correction of his own assessment, or an adjustment or reassessment of general benefits.

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

Harry M. Woods, for appellant.

The chancery court is without jurisdiction to either assess or reassess the property in an improvement district. See C. & M. Dig., sec. 5430, as to reassessments, and *Johnston* v. *Conway,* 151 Ark. 398, as to lack of jurisdiction in the chancery court. If the commissioners refuse to reassess, the remedy is by mandamus, or they may be removed. Act 303 Acts 1921.

A bond should have been required upon the issuance of the injunction. C. & M. Dig., 5460.

R. M. Hutchins and *Coleman, Robinson & House,* for appellees.

Upon the showing made it became the duty of the commissioners to make a reassessment, which they promised to do, but failed to carry out the promise. The court was not asked to make a reassessment, but merely to direct the commissioners to order one. Under the changed conditions the first assessment is arbitrary and confiscatory, entitling these property owners to relief. 141 Ark. 254; 133 Ark. 64.

The chancery court has jurisdiction to restrain the enforcement of an arbitrary assessment. 275 Fed. 600; 147 Ark. 547.

The bond required by sec. 5460, C. & M. Digest, is only applicable to temporary or preliminary injunctions. The case here was determined on its merits on a final hearing.

SMITH, J. Appellees were plaintiffs below, and filed a complaint containing substantially the following allegations: Plaintiffs are the owners of lands situated in

Road Improvement District No. 3, a district organized pursuant to the provisions of act No. 338 of the Acts of 1915 (Acts 1915, page 1400), commonly known as the Alexander law, §§ 5399 *et seq.*, C. & M. Digest. The order of the county court creating said district was made and entered on the 31st day of August, 1917. Said district was organized for the purpose of constructing the following hard roads: A road from McCrory west two miles; a road from McCrory south two miles; a road from McCrory north two miles; a road from McCrory east to the Cross County line, a distance of nine miles. For the purpose of constructing said roads, all the lands in the district were taxed on the basis of the estimated betterments resulting from the whole improvement. Betterments against the plaintiffs' lands were assessed upon the assumption that the entire improvement would be completed, as were all other lands in the district. After the betterments had been so assessed, the commissioners of the district sold bonds aggregating $150,000, with the proceeds of which the roads north, south and west of McCrory were constructed, but only two miles of the road east of McCrory have been constructed, and seven miles of that road have been only partially constructed. That the dump is partially thrown up, but the road is not in condition for use, and no benefit has accrued or will result from the partial work already done.

Plaintiffs are informed and believe that the district has exhausted its resources, and has no funds on hand, and no power to raise funds for completing the seven miles of unfinished road. The law limits the cost of the improvements to thirty per cent. of the total assessed value of the lands in the district for State and county purposes, and the cost of the work already done has reached this limit. The cost of constructing that part of the road which is already completed far exceeds the original estimate of the cost of such work. The improvement already completed is better in character and amount than

called for by the original plans, and the benefits accruing from the completed improvement to the lands adjacent thereto far exceed the benefits assessed against said lands.

Plaintiffs allege that, by reason of the fact that the road contiguous to their lands was not in fact constructed and cannot be constructed for lack of funds and inability under the law to raise additional funds, no benefits will accrue to their lands, and that, as a matter of fact, the incomplete work of throwing up a partial dump has rendered the travel over it much more difficult, and is therefore a damage rather than a benefit. They further allege that building certain roads better than those called for by the plans exhausted the district's funds before all the roads were built, and thus has brought about an inequality in the assessment of benefits as a whole which should be rectified by the commissioners of the district. Plaintiffs allege that, in anticipation of the completion of the improvement, they had paid taxes for two years, and had just recently ascertained that the district is without funds to complete the proposed improvement, and immediately upon obtaining that information they filed an application with the commissioners of the district for a reassessment of benefits, pursuant to § 18 of the act under which the district was organized; but the commissioners have failed and refused to readjust the assessments of benefits. Plaintiffs allege the payment of assessments for the years 1919 and 1920, and that other assessments extending over a period of twenty years are outstanding against their lands and will constitute liens thereon, in satisfaction of which the lands will be sold if relief is not afforded. Plaintiffs made no objection to the payment of their 1919 and 1920 assessments because they then assumed the plans of the district would be completed by building all the roads therein called for. It is further alleged that they have no remedy at law; that the commissioners refused to reassess the benefits; that the county clerk has extended, and the collector is now collecting, said assessments, and the said collector will, in

due course, return the lands of these plaintiffs as delinquent if said assessments are not paid, and the lands will be sold. The complaint concludes with the following prayer: "Wherefore the plaintiffs pray for an order from this honorable court to the board of commissioners of the defendant road improvement district, directing them to make a reassessment of benefits on all the lands included in the district, pursuant to the authority conferred on said board by § 18 of the act under which it was established; and for an order restraining the county clerk from extending any road tax against the plaintiffs' lands, and the collector from collecting any such tax, based on the present assessment of benefits against said lands; and for an order directing the board of commissioners to charge the plaintiffs' lands with such sum as the tax for 1919 and 1920 would have amounted to on the basis of the readjusted assessment of benefits, and credit said lands with the amount of tax actually paid for said years. And the plantiffs hereby offer to give a good and sufficient bond, to be approved by the court, conditioned that the plaintiffs will pay the full amount of road tax that shall be found to be due from their lands, respectively, when the reassessment of benefits shall have been made, as soon as the amount of such tax is ascertained, which tax the plaintiffs hereby offer to pay. And the plaintiffs pray for such other, further and general relief as the facts may entitle them to, and to equity shall seem meet and proper."

To the complaint the defendants filed a demurrer, which was overruled, and, as defendants refused to plead further, an order of the court was entered directing a reassessment of the betterments, pursuant to § 18 of said act No. 338 (§ 5430, C. & M. Digest), and enjoining the collection of the tax on the lands described in the complaint.

No bond was filed with the complaint; and no bond was required under the order of the court.

The defendant road district excepted, and has appealed.

Two questions are discussed and presented for our decision: First, may the chancery court order the commissioners to make a reassessment of the property? Second: Can the collection of taxes be enjoined without filing a bond conditioned as required by § 5460, C. & M. Digest?

We think the chancery court had jurisdiction of this suit, upon the ground that it involves the enforcement of liens upon real estate. *Bowman Engineering Co.* v. *Arkansas & Missouri Highway District,* 151 Ark. 47.

In opposition to this view, the case of *Johnston* v. *Conway,* 151 Ark. 398, is pressed upon us. In that case the chancery court had itself made an assessment of betterments to pay a judgment due a contractor for the construction of a municipal improvement, and in doing so levied an assessment against the property in the district which exceeded the benefits accruing to the property by reason of the improvement. We there held that the property owners could not be required to pay an assessment against their property for the cost of an improvement which exceeded the benefits accruing to the property by reason of such improvement. In the same case we also held that an assessment of benefits in a local improvement district, and any revision or readjustment thereof must be made by the board of assessors of the district in the manner prescribed by law, and that the chancery court was without jurisdiction to make such assessments for that purpose. The decree in that cause was reversed because it contravened both the legal propositions just stated.

Here the chancery court made no attempt to reassess the lands, but ordered that action to be done by the commissioners as assessors for the district, and the court has not, in the instant case, ordered an assessment made in excess of that authorized by law.

It is true that in the case of *Johnston* v. *Conway, supra,* we said a creditor of the district had an ample remedy at law to enforce any right he had, and that his

remedy was not by action through the chancery court, and upon the remand of the cause leave was given, if the parties were so advised, to transfer the cause to the law court.

Without questioning the correctness of the directions there contained, under the facts there recited, it does not follow that a similar order must be entered in this case. We think the plaintiffs had a remedy at law by mandamus to compel the reassessment of benefits; but we are also of opinion that the relief to which plaintiffs are entitled may be worked out under the directions of the chancery court.

There are two sections of this Alexander road law which deal with the question of reassessments. The first of these is § 17 (§ 5429, C. & M. Digest), which authorizes a reassessment to conform to alterations in the plan of the improvement; and the section contains a proviso that if the district has issued bonds or other negotiable evidences of indebtedness, the total amount of the assessed benefits shall not be diminished.

The other section, and the one under which the court ordered the commissioners to proceed, is numbered 18, (§ 5430, C. & M. Digest), and reads as follows: "§ 5430. The board of commissioners may, not oftener than once a year, order a reassessment of benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment and with like effect; but if the district shall have issued interest-bearing evidence of the debt, the total amount of the assessed benefits shall never be diminished."

These sections were construed by this court in the case of *Earle Road Improvement District No. 6 of Crittenden County* v. *Johnson,* 145 Ark. 438. The road district in that case, as in this, was organized under the Alexander road law. At the 1919 Regular Session of the General Assembly a curative act was passed validating the organization of this district No. 6. In addition, this act (act No. 55 of the Regular Session of the General As-

sembly, Road Acts, volume 1, page 36) contained a section numbered 11 which provided that the commissioners of district No. 6, and those of three other districts, all organized under the Alexander law, might, "not oftener than once a year, require the assessors to reassess the benefits in said respective districts." The same section also provided that the commissioners of road districts Nos. 7, 8 and 9 (which were districts created by another section of the act of which section 11 was a part) might, "not oftener than once a year, reassess the benefits in their respective districts; but in the event the respective districts shall have incurred indebtedness or issued bonds, the total of assessed benefits shall never be diminished."

Construing section 11 of this act No. 55 we there said: "A reasonable interpretation of the language of the statute is that it was intended to confer upon the commissioners of the district authority to order a general reassessment of the property under the restriction that the total amount of benefits should not be diminished below the amount of the obligations of the district. This interpretation of the statute is made clear when we consider it in the light of certain sections of the general statute under which this district was originally organized."

The court then proceeded to construe §§ 17 and 18 of the Alexander road law, in which connection it was said: "Section 17 provides, in substance, that when, by reason of a change of plans, the previous assessment of benefits has become inequitable, a new assessment may be made, and section 18 provides that the commissioners 'may, not oftener than once a year, order a reassessment of benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment and with like effect.' Section 18 cannot be construed as mere authority to correct inequalities in the original assessment, for that subject is fully covered by section 17. Obviously, the framers of the statute meant to create additional power in section 18 and to authorize something more than mere correction of inequalities. They meant,

in other words, that there could be a complete reassessment of the benefits to the property, with the proviso that the total amount of benefits as originally assessed should not be diminished so as to reduce the amount below the obligations of the district.

"Section 11 of the new statute, which is now under consideration, conforms to section 18 of the general statute and authorizes a general reassessment. The term 'reassessment' necessarily implies a new assessment or to assess again, and it does not refer to particualr pieces of property, but to all the property in the district."

Upon this interpretation the court announced its conclusion to be that the commissioners of the district were acting within their legal powers in ordering a reassessment.

It is true that in the case from which we have just quoted there was a special act, and we have set out its provisions; but it appears that the special act did not substantially enlarge the powers conferred on the commissioners by the general statute; and we conclude here, as we did there, that the commissioners have the legal power to order a reassessment, and under the allegations of the complaint it is their duty to do so.

It does not follow, however, that the injunction in this cause was properly granted. Upon the contrary, we think it was prematurely ordered. This reassessment has been ordered, but it has not yet been made. It must be "made, advertised, revised and confirmed as in the case of the original assessment and with like effect;" and, inasmuch as interest-bearing evidences of debt have been issued, the total amount of the assessed benefits may not be diminished. Section 5430, C. & M. Digest.

The existing assessment must therefore be permitted to stand until the reassessment has been made and has become final. The outstanding obligations of the district are based upon the original assessment, and the proceedings to collect thereunder could not be enjoined until that

assessment has been fully superseded by another assessment which meets the requirements of the law permitting the reassessment to be made.

It follows therefore that, while the court properly ordered a reassessment, the order restraining the collection of assessments was prematurely made and must be dissolved.

Section 5460, C. & M. Digest (which was § 41 of the Alexander road law), provides that "no injunction or process shall issue to stay the work on any road, or the collection of any tax thereunder, * * * unless the party applying therefor shall first enter into bond with good and sufficient security, to be approved by the court or judge granting same, and payable to the board of commissioners for the benefit of said district in double the amount already expended on the establishment of the district and outstanding contracts, said bond to be conditioned for the payment of such amount, if said injunction is wrongfully granted, nor shall any injunction be granted except on ten days' written notice to the president of the board of commissioners, which notice shall state the time and place of the intended application for said injunction. Any injunction issued by any court, unless the foregoing terms have been complied with, shall be void."

It is obvious that the provisions of the section just quoted apply to suits which seek to stay the construction of an improvement, or which questions the general right to collect the taxes due the district, and that it does not apply to the suit of individual property owners who seek a correction of their own assessments or an adjustment or reassessment of the general benefits.

Moreover, as we have said, the injunction, in this case prematurely issued, and, as it must be dissolved, there is no occasion for a bond, even though the section quoted applied to suits of this character.

It follows therefore that, under the case made by the pleadings, the plaintiffs are entitled to have a reas-

sessment of benefits by the commissioners; but until that reassessment has been made the collection of the old assessments should not be suspended, and the injunction ordering this done is dissolved.

SMITH v. STATE.

Opinion delivered May 22, 1922.

1. PERJURY—FALSE TESTIMONY BEFORE GRAND JURY.—In a prosecution for perjury in which it was claimed that defendant gave false testimony before the grand jury, testimony of the foreman of the grand jury as to the testimony given by the defendant in which he used the expression "If I remember right" and "It is my belief", and the testimony of another witness as to what defendant swore in which the witness used the expressions "My recollection is", and "I am of the impression", *held* sufficient to make the question as to what defendant testified before the grand jury one for the jury.
2. PERJURY—FALSE TESTIMONY—MATERIALITY.—False testimony before the grand jury considering a charge against certain persons for larceny that the witness did not on the day before the examining trial attempt to compromise or settle the case against such persons *held* perjury; the false testimony being material as being calculated to suppress inquiry as to whether such persons had authorized the witness to suppress the examining trial.
3. CRIMINAL LAW—INVITED ERROR.—Defendant could not, on appeal, complain of the admission by the trial court of a written memorandum in evidence where he objected to oral testimony to the same effect on the ground that the memorandum was the best evidence of the facts.
4. CRIMINAL LAW—QUESTION FOR JURY.—Credibility of a witness is a question for the jury.

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

Minor Pipkin, for appellant.

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

SMITH, J. Appellant was convicted of perjury, and has appealed. For the reversal of the judgment he in-

sists that the verdict was contrary to the evidence; and that the alleged false testimony was not material.

The indictment alleges that the grand jury was engaged in the examination of a charge against Jess Nichols and Harvey Jane for the larceny of certain meat, and that pending such examination witness testified "that he did not, on the day prior to the examining trial of the case against the said Nichols and Jane, attempt to compromise or settle said case, which was then and there pending in justice court, with Mrs. Bud Bickle, and did not ask her if she would settle the case if she should be paid $75, or any other amount." The indictment alleges the materiality and the falsity of the testimony.

The foreman of the grand jury testified, and in doing so made use of such expressions as "If I remember right", and "It is my belief". These statements were made in repeating the testimony of appellant before the grand jury. The deputy prosecuting attorney also testified in the case, and in doing so he used the expression, "My recollection is", and "I am of the impression."

It is insisted that the use of these and other similar expressions of the witnesses shows that the witnesses were not sufficiently certain and definite to meet the requirements of the law. But this was a question of fact for the jury, and the jury's verdict is conclusive of the question.

The chief insistence is that the alleged false testimony was immaterial. It is said that the testimony could not have been offered at the trial of Nichols and Jane upon the charge of larceny, in the absence of a showing that these persons had authorized appellant to make the proposition to Mrs. Bickle.

It is to be remembered, however, that the false testimony was given before the grand jury, a body having general inquisitorial powers, and the allegation of the indictment is that appellant was interrogated about an incident which had occurred the day before the examining trial of Nichols and Jane before the justice of the

peace. The denial by appellant that he had made Mrs. Bickle an offer to settle the case would probably and naturally have tended to close the inquiry about the offer of money to settle the prosecution; whereas a truthful answer to that question and an admission that he had made such an offer would naturally have led to the inquiry, at whose instance the offer was made, and, if it had been made at the instance of Jane or Nichols, that fact would have been developed by the grand jury. The false answer was calculated to suppress the inquiry whether Nichols and Jane had authorized or induced appellant to attempt to suppress the examining trial. False swearing under these circumstances is perjury. In the case of *Smith* v. *State,* 91 Ark. 200, a syllabus reads as follows: "In an investigation before a grand jury any testimony is material whose necessary effect is to suspend, if not prevent, further investigation of a subject of inquiry, as where defendant's false testimony prevented the grand jury from investigating whether liquors in a given instance had been sold illegally."

Error is assigned in admitting in evidence a written memorandum of the appellant's testimony before the grand jury. If there was any error in admitting this writing, it was invited, as objection was made to the testimony of both the foreman of the grand jury and the deputy prosecuting attorney that there was a memorandum which would be the best evidence. This memorandum was identified by the deputy prosecuting attorney as having been made by him; and, while it is not identical with the testimony of that officer at the trial, we think there was no substantial difference between the recitals of the memorandum and the testimony of that officer. At any rate, the difference, if any, was a question going to the credibility of the witness, and that was a question for the jury.

No error appearing, the judgment is affirmed.

INDEX

ABATEMENT AND REVIVAL:

effect of dismissal of former suit pending. *Flannagan* v. *Citizens' State Bank*, 216.

ACCOUNT STATED:

effect of failure to make objection. *Bank of Commerce* v. *Fairbank*, 56.

ACKNOWLEDGMENT. See DEEDS.

ACTIONS:

not error to refuse to require plaintiff to elect between several causes of action when. *Ft. Smith Light & Traction Co.* v. *Bailey*, 574.

ADMIRALTY:

jurisdiction in case of injury on barge being constructed is not in Federal court. *Missouri Valley Bridge & Iron Co.* v. *Malone*, 454.

suitors may resort to common-law courts of State. *Id.*

ADVERSE POSSESSION:

effect of adverse possession for two years under tax title. *Norwood* v. *Mayo*, 620.

possession held insufficient to give title. *Id.*

nature of adverse possession. *Id.*

ANIMALS:

conviction of malicious mischief in killing dog sustained. *Tallman* v. *State*, 554.

not error to refuse to istruct as to treble damages when. *Id.*

APPEAL AND ERROR:

conclusiveness of chancellor's finding. *Bank of Commerce* v. *Fairbanks*, 56.

presumption from absence of bill of exceptions. *Carl-Lee* v. *Griffith*, 74.

exclusion of witness' opinion harmless when. *Caddo River Lbr. Co.* v. *White*, 93.

indefiniteness of pleading not raised on appeal. *Harrell* v. *Saline Oil & Gas Co.*, 104.

conclusiveness of chancellor's finding. *Augusta Cooperage Co.* v. *Bloch*, 133; *Stranghan* v. *Bennett*, 254; *Rachels* v. *Garrett*, 343.

APPEAL AND ERROR—Continued.

defect of parties not raised on appeal. *Arkansas Road Construction Co.* v. *Evans*, 142.

defect of parties raised how. *Id.*

bill of exceptions unnecssary where error appears on face of record. *Ft. Smith Spelter Co.* v. *Clear Creek Oil & Gas Co.*, 170.

motion for new trial unnecessary when. *Id.*

circuit court's finding on conflicting evidence *held* conclusive. *Sachs* v. *Norton-Wheeler Stave Co.*, 212.

no reversal for admission of improper evidence invited by appellant. *Hodge* v. *Brooks*, 222.

finding in favor of claimant of estate *held* prejudicial. *Brackville* v. *Holt*, 248.

order merely sustaining demurrer *held* not final. *Fairview Coal Co.* v. *Arkansas Cent. Ry. Co.*, 295.

order sustaining demurrer to complaint and reciting that plaintiff declined to plead further and prayed appeal *held* not final. *Id.*

incapacity of infant to sue in own name not raised on appeal. *Barnett* v. *McClain*, 325.

presumption where motion for new trial filed out of time was considered. *Fitzhugh* v. *Norwood*, 412.

decree refusing to dissolve injunction is final and appealable. *Grinnell Co., Inc.* v. *Brewer*, 527.

judgment in another cause not noticed unless pleaded. *Brown* v. *Wilkes*, 545.

order preserving right to sue in equity unnecessary when. *Id.*

stenographer's notes not filed as deposition. *Wiegel* v. *Moreno-Burkham Const. Co.*, 564.

presumption that decree was sustained by evidence when. *Id.*

oral testimony in chancery case brought up how. *Desha Road Imp. Dist. No.* 2 v. *Stroud*, 587.

presumption in favor of court's finding where evidence lacking. *Id.*

trial court's ruling on conflicting evidence not disturbed. *Mitchell* v. *Conway Cotton Oil Co.*, 594.

effect of affirming order granting new trial. *Id.*

jury and not Supreme Court are judges of credibility of witnesses. *Farmers' Club Co.* v. *Emmerson Merc. Co.*, 614.

conclusiveness of verdict of jury. *Id.*

ASSAULT AND BATTERY:

instruction as to self-defense disapproved. *Huddleston* v. *Stewart*, 270.

ASSIGNMENTS:

sub-contractors' certificates of indebtedness not assignable. *Arkansas Road Construction Co.* v. *Evans*, 142.

ASSIGNMENT FOR BENEFIT OF CREDITORS:

conveyance to trustees held to be a general assignment when. *Brown* v. *Wilkes*, 545.
assignment held void as inconsistent with statute. *Id.*
void assignment treated as assignment for all creditors *pro rata*. *Id.*
assignees not entitled to recover property when. *Id.*
judgment against assignees individually is proper when. *Id.*

ATTORNEY AND CLIENT. See EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCES.

percentage of recovery of fee by attorney. *Vaughan* v. *Humphreys*, 140.
client and not attorney entitled to costs and extra allowance. *Id*
how reasonableness of attorney's fee determined. *Rachels* v. *Garrett*, 343.
how value of attorney's services determined by court. *Id.*
conclusiveness of chancellor's finding thereon. *Id.*
right of client to control suit. *Red Bud Realty Co.* v. *South*, 380.

BILL OF REVIEW. See DIVORCE.

BILLS AND NOTES:

evidence held not to show fraud in procuring notes. *Davis & Worrell* v. *General Motors Acceptance Corporation*, 626.
fraud in procurement of notes no defense against *bona fide* purchaser. *Id.*

CARRIERS:

right of passenger to rely upon brakeman's statement as to train's movement. *Missouri Pac. Rd. Co.* v. *Kennedy*, 77.
relation of passenger not terminated on leaving train when. *Id.*
not contributory negligence to board moving train when. *Id.*
contributory negligence by passenger held to reduce damages when. *Id.*
right to eject passenger failing to pay fare. *Ft. Smith & V. B. Dist.* v. *Kidd*, 489.
rule as to use of coupons upheld. *Id.*
liability for false imprisonment of passenger. *Id.*

CERTIORARI:

lies to review action of county board of education when. *Mitchell* v. *Directors of School District No. 13*, 50.

CONSTITUTIONAL LAW:

insufficiency of answer alleging that levee assessments were confiscatory. *Moore* v. *Long Prairie Levee District*, 85.

CONSTITUTIONAL LAW—Continued.

every reasonable construction resorted to to avoid unconstitutionality. *Standard Oil Co. of La.* v. *Brodie*, 114.
gasoline tax act of 1921 held not arbitrary, unreasonable or discriminatory. *Id.*
such act does not violate due process clauses. *Id.*
special road tax held not violation of Fourteenth Amendment as to due process. *Harper* v. *Brooksher*, 480.
such act held not to violate State Const., art. 5, § 25. *Id.*
such act not violation of Road Tax Amendment, No. 3. *Id.*
construction of adopted constitutional provision binding when. *Mitchell* v. *Hopper*, 515.
in proposing amendments to Constitution, Legislature acts as convention. *Id.*
legislative construction of constitutional provisions looked to when. *Id.*
Governor not authorized to veto resolution for constitutional amendment. *Id.*

CONTINUANCE:

not granted for absence of material witness when. *Franklin* v. *State*, 531.

CONTRACTS:

construction of oral agreement in substitution for written agreement. *Motor Wheel Corporation* v. *Childs*, 178.
consideration for mutual rescission. *Id.*
conclusiveness of engineer's decision. *Brown & Froley* v. *Monroe County Road Imp. Dist.*, 606.

CORPORATIONS:

venue of action against domestic corporation. *Bud Red Realty Co.* v. *South*, 380.
right of minority stockholder to sue to compel accounting of corporate assets. *Id.*
right of stockholder to sue on behalf of corporation. *Id.*
right of minority stockholder to sue for benefit of himself and other injured stockholders. *Id.*
corporation a necessary party in such case. *Id.*
minority stockholder not required to prove protest. *Id.*
good faith required in management. *Id.*
burden on managing official to show how he expended corporate funds. *Id.*
liability of such official for negligence in paying taxes. *Id.*
such official not entitled to credits when. *Id.*
authority of chancery to dissolve corporation. *Id.*

CORPORATIONS—Continued.

judgment and execution against insolvent corporation set aside when. *Grinnell Co., Inc.* v. *Brewer*, 532.
foreign corporation doing business in State when. *Davis & Worrell* v. *General Motors Acceptance Corporation*, 626.
foreign corporation held not to be doing business in State. *Id.*

COUNTIES:

invalidity of claim for bridge constructed without authority. *Ross Drainage Dist.* v. *Clark County*, 175.
county road warrants subject to call for cancellation and reissuance. *A. L. Greenberg Iron Co.* v. *Wood*, 371.
warrants payable in future subject to such call. *Id.*
validity of statute creating courthouse improvement district. *Williams* v. *Arkansas County Courthouse Imp. Dist.*, 469.

COURTS:

how jurisdiction of circuit court ascertained. *Adams* v. *State*, 202.
power of circuit court to abate liquor nuisance by injunction. *Id.*
probate court has no jurisdiction to declare a person an heir of a decedent. *Brackville* v. *Holt*, 248.
limit of probate jurisdiction. *Id.*
circuit court held to have no jurisdiction of consolidated suit on separate courses of action for less than $100 each. *Gage* v. *Road Imp. Dist. No. 3*, 321.

CRIMINAL LAW. See CONTINUANCE.

former acquittal of larceny from a certain person no bar of prosecution for larceny from another. *Kellogg* v. *State*, 193.
identity of owner of stolen property named in different indictments. *Id.*
plea of former jeopardy properly overruled when. *Id.*
effect of allegation of time of commission of larceny. *Id.*
instruction as to circumstantial evidence held substantially correct. *Id.*
necessity of objection and exception to rulings as to evidence. *Williams* v. *State*, 289.
ground for motion in arrest of judgment. *Id.*
court's statement of opinion not prejudicial when. *Murchison* v. *State*, 300.
instruction as to right to disregard testimony of witness who swore falsely not open to general objection. *Id.*
not error to refuse instruction already recovered. *Id.*
remarks of court in urging a verdict held not to coerce jury. *Id.*
sufficiency of circumstantial evidence. *Loge* v. *State*, 317.

CRIMINAL LAW. See CONTINUANCE—Continued.

duty to set aside conviction based on insufficient evidence. *Id.*
remarks of court held not a comment on weight of testimony. *Holmes* v. *State*, 339.
instruction held not open to general objection. *Id.*
objection to court's remarks waived by failure to object. *Id.*
remarks of court held improper. *Id.*
effect of wrongful separation of jury. *Brust* v. *State*, 348.
suspension of trial not to require discharge of jury when. *Id.*
admissibility of accused's admission as to his age. *Id.*
instruction held not to assume disputed fact. *Dollar* v. *State*, 410.
instruction held harmless. *Id.*
requested instructions properly refused when embraced in instructions given. *Id.*
admissibility of proof prior to attempt to steal in larceny cases. *Nichols* v. *State*, 467.
instruction urging jury to reach verdict held not erroneous. *Franklin* v. *State*, 536.
deceased's hat admissible in murder case when. *Id.*
admissibility of bullet which killed deceased. *Id.*
necessity of motion for new trial. *Id.*
not abuse of discretion to refuse change of venue when. *Tallman* v. *State*, 554.
judge's reasons for denying change of venue immaterial. *Id.*
denial of change of venue not ground for reversal when. *Id.*
not error to refuse to multiply instructions. *Id.*
no jurisdiction over island situated in another State. *Goodman* v. *State*, 560.
appellant could not complain of testimony invited by him. *Smith* v. *State*, 645.
credibility of witness question for jury. *Id.*

DAMAGES: See VENDOR AND PURCHASER.

opinion of physician as to permanency of injury admissible. *Caddo River Lbr. Co.* v. *White*, 93.

DEATH:

recovery for wrongful death distributed how. *Murphy* v. *Province*, 240.
complaint held to sustain recovery under either State of Federal statute. *Id.*
State statute regarding recovery by locomotive engineer. *Id.*
Lord Campbell's Act repealed by Railroad Hazards Act. *Id.*
who are beneficiaries under latter act. *Id.*

DEEDS:

presumption of execution of acknowledgment and recorded deed. *Straughan* v. *Bennett*, 254.

DEPOSITIONS:

suppression of; where taken after master filed report when. *Red Bud Realty Co.* v. *South*, 381.

DESCENT AND DISTRIBUTION: See DEATH.

burden of proving relationship. *Brockville* v. *Holt*, 248.

DISMISSAL AND NONSUIT:

effect of order dismissing action as to one of two parties. *Caruthers* v. *Davis*, 200.

DIVORCE:

custody of child awarded to father when. *Shelpman* v. *Shelpman*, 110.
power of court to award alimony. *Id.*
amount of alimony reduced when. *Id.*
in division of property error to charge wife with property previously conveyed to her by husband when. *Glover* v. *Glover*, 167.
division of property must be made when divorce is granted. *Taylor* v. *Taylor*, 206.
conclusiveness of decree upon wife's property rights. *Id.*
insufficiency of bill of review. *McMurray* v. *McMurray*, 365.
bill of review does not lie for attorney's unfaithfulness. *Id.*
bill of review for failure to grant alimony properly dismissed when. *Id.*

ELECTRICITY:

effect of agreement not to re-enter business of furnishing electricity. *Barnett* v. *Mays*, 1.
right to use streets and alleys for transmission. *Id.*
effect of streets and alleys being temporarily closed. *Id.*
contributory negligence of plaintiff's decedent question for jury when. *Ft. Smith Light & Traction Co.* v. *Bailey*, 574.

EQUITY: See DEPOSITIONS; HIGHWAYS.

will retain cause for complete relief when. *Augusta Cooperage Co.* v. *Bloch*, 133.
should administer complete relief instead of remanding cause to law court. *Id.*

ESTOPPEL:

landowner estopped by written statement when. *Lesser-Goldman Cotton Co.* v. *Fletcher*, 18.

ESTOPPEL—Continued.

mortgagor estopped to deny title of purchaser at foreclosure sale when. *Straughan* v. *Bennett*, 254.
mortgagor's privies bound by his estoppel. *Id.*
owners of oil lease estopped by acquiesence to question formation of corporation to exploit same. *Stewart Oil Co.* v. *Bryant*, 432.

EVIDENCE:

opinion of physician as to permanency of personal injury *held* admissible. *Caddo River Lbr. Co.* v. *White*, 93.
evidence admissible to explain why party assented to judgment. *Knapp* v. *Gray*, 160.
parol evidence to explain writing admitted when. *Motor Wheel Corporation* v. *Childs*, 178.
inadmissible to vary written contract by parol. *Lybrand* v. *Watkins Hardware Co.*, 266.
relations of co-sureties on notes may be shown. *Bank of Searcy* v. *Baldock*, 308.
admissions of agent in *ex parte* affidavit inadmissible when. *Farmers' Club Co.* v. *Emmerson Mercantile Co.*, 614.

EXECUTORS AND ADMINISTRATORS:

discretion to allow maximum compensation to administrator. *Triplett* v. *Chapman*, 12.
allowance of attorney's fee held excessive. *Id.*
liability of administrator for interest on money in his hands. *Id.*
complaint against executrix need not allege making of authenticating affidavit. *Carl-Lee* v. *Griffith*, 74.
executor not personally liable on contracts on behalf of estate when. *Clifford* v. *McAlester Coal Co.*, 276.
claims required to be verified must be specific and not contingent. *Evans* v. *Hoyt*, 334.
claim of partner against deceased partner held contingent until settlement. *Id.*

FACTORS:

liable for conversion of mortgaged cotton when. *Wilson-Ward Co.* v. *Farmers' Bank & Trust Co.*, 368.

FALSE IMPRISONMENT:

liability of master for servant's unlawful act in causing arrest. *Ft. Smith & V. B. Dist.* v. *Kidd*, 489.
failure of street car passenger to pay fare did not authorize his arrest. *Id.*
liability of carrier for servants' unlawful act in causing arrest. *Id.*

FRAUDULENT CONVEYANCES:

right of creditors to question attorney's fee. *Rachels* v. *Garrett*, 343.

liability of attorney making settlement with maker of note due to insolvent debtor. *Id.*

GAMING:

evidence *held* to sustain conviction of running a gambling house. *Turner* v. *State*, 40.

sufficiency of indictment for running a gambling house. *Id.*

Crawford & Moses' Dig., §§ 2630, 2631, 2635 *held* not repealed. *Id.*

offense of keeping gambling house committed when. *Id.*

liability for permitting gaming tables to be exhibited. *Id.*

GARNISHMENT:

against maker of negotiable note should impound note. *Knapp* v. *Gray*. 166.

answer of garnishee, not traversed, presumed true. *Id.*

GOODWILL:

agreement not to furnish electricity construed. *Barnett* v. *Mays*, 1.

GOVERNOR:

not authorized to veto resolution for constitutional amendment. *Mitchell* v. *Hopper*, 515.

HIGHWAYS:

highway act not rendered invalid by exclusion of abutting land when. *Neterer* v. *Dickinson & Watkins*, 5.

how expenses levied an abandonment of district. *Id.*

authority to pay expenses in such case must be found in statute. *Id.*

validity of act authorizing assessment of expenses. *Id.*

who may sue on contractor's bond. *Arkansas Road Construction Co.* v. *Evans*, 142.

sufficiency of vote to authorize levy of road tax. *Watts* v. *Bryan*, 313.

who may sue on contractor's bond. *Gage* v. *Road Imp. Dist. No. 3*, 321.

special road tax act of 1920 upheld. *Harper* v. *Brooksher*, 475.

compensation of highway engineer determined on *quantum meruit* basis when. *White-Jackson Road Imp. Dist. No. 1* v. *Blackshire*, 581.

right to compensation on abandonment of project. *Id.*

evidence *held* to sustain finding in favor of engineer's compensation. *Id.*

HIGHWAYS—Continued.

act creating road improvement disrict upheld. *Desha Road Imp. Dist. No. 2* v. *Stroud*, 587.
limitation to right to attack assessments. *Id.*
effect of making assessment on wrong basis. *Id.*
zone system of assessments approved. *Id.*
evidence held to sustain finding that there was no error in engineer's estimate. *Brown & Froley* v. *Monroe County Road Imp. Dist.*, 606.
grading contract *held* not to require district to supply gravel. *Id.*
evidence held to sustain finding that grade stakes were set. *Id.*
provision for liquidation damages waived when. *Id.*
Jurisdiction of chancery to compel reassessment of benefits in highway improvement district. *Road Improvement Dist. No. 3* v. *Morris*, 635.
complaint held to state case calling for reassessment. *Id.*
mode of making such reassessment. *Id.*
power of board of commissioners to order reassessment of benefits. *Id.*
injunction against collection of assessments premature when. *Id.*
statute prohibiting injunction to stay work construed. *Id.*

HOMICIDE:

murder resulting from several acts charged in conjunction and in one count. *Franklin* v. *State*, 536.
State not required to elect between methods of killing relied on. *Id.*
evidence held to justify conviction of involuntary manslaughter. *Id.*

HUSBAND AND WIFE:

instructions in action for alieniating wife's affections approved. *Hodge* v. *Brooks*, 222.
intentional alienation must be shown. *Id.*
effect of wife permitting husband to use her property. *Maloney* v. *Hale*, 462.

IMPROVEMENTS:

what is local improvement for assessment purposes question for jury. *Williams* v. *Arkansas County Court House Imp. Dist.*, 469.
local improvement must be for public purpose. *Id.*
property assessed must be specially benefited. *Id.*
primary purpose to benefit adjoining property. *Id.*
county court house held not a public improvement. *Id.*

INDICTMENT AND INFORMATION:

indictment for robbery and for aiding in robbery held to charge a single offense. *Williams* v. *State*, 289.
indictment held to charge a felony. *Brust* v. *State*, 348.

INJUNCTION: See HIGHWAYS.

power of circuit court to abate liquor nuisance by. *Adams* v. *State*, 202.

INSURANCE:

attorney's fee recoverable as part of costs when. *Vaughan* v. *Humphreys*, 140.
effect of breach of warranty to keep fire extinguisher. *Union Marine Fire Ins. Co.* v. *High*, 156.
by-laws as to mode of designating beneficiary *held* valid. *Mosaic Templars of America* v. *Hearon*, 568.
validity of assignment of policy. *Id.*
provision as to mode of designating beneficiary not waived when. *Id.*

INTEREST:

borrower chargeable with compound interest when. *Bank of Commerce* v. *Fairbank*, 56.
validity of increased rate after maturity of note. *Red Bud Realty Co.* v. *South*, 381.

INTOXICATING LIQUORS:

proof of sale by employee as evidence of employer's guilt. *Murchison* v. *State*, 300.
possession of no evidence of manufacturing. *Logi* v. *State*, 317.
effect of proof of having small quantity of hops and yeast. *Id.*
"malt liquor" defined. *Id.*
evidence *held* to sustain conviction of selling. *Holmes* v. *State*, 339.
instruction as to sale of Jamaica ginger held not prejudicial. *Dollar* v. *State*, 410.

JUDGMENT:

conclusiveness as to matters which were or might have been litigated. *Taylor* v. *Taylor*, 206.
right of plaintiff to judgment notwithstanding verdict. *Coleman* v. *Utley*, 233.
general over of dismissal held to bar a second action when. *Thomas* v. *Missouri Pac. Rd. Co.*, 297.
privy of defendant in former action may plead *res judicata*. *Id.*

JURY:

juror not disqualified by opinion when. *Murchison* v. *State*, 300.
not error to refuse peremptory challenge after acceptance. *Brust* v. *State*, 348.
number of challenges allowed in consolidated action. *Ft. Smith Light & Traction Co.* v. *Bailey*, 574.

LANDLORD AND TENANT:

notice of cancellation of lease may be revoked. *Lesser-Goldman Cotton Co.* v. *Fletcher*, 17.
tenant holding over after termination of lease liable for double rent when. *Id.*
statute providing for such double rent strictly construed. *Id.*
holding over by tenant *held* not wilful when. *Id.*
terms of lease binding on assignee when. *Id.*
landlord's right to lien for advances to tenant. *Smith* v. *Johnson*, 262.
sufficiency of proof that advances were reasonably necessary. *Id.*
finding that advances were necessary upheld. *Id.*
right of landlord to lien for advances. *Walker* v. *Rose*, 599.
purchasers of crop not innocent when. *Id.*
bank held liable for converting proceeds of crop when. *Id.*

LARCENY:

allegation of ownership is material. *Kellogg* v. *State*, 193.
admissibility of proof of prior attempt to steal. *Nichols* v. *State*, 467.
defendant must have participated in act. *Id.*

LEVEES:

sufficiency of complaint to recover delinquent taxes. *Moore* v. *Long Prairie Levee Dist.*, 85.

LIBEL AND SLANDER:

evidence in mitigation of damages properly excluded when. *Huddleston* v. *Steuart*, 270.
charge of perjury actionable *per se*. *Barnett* v. *McClain*, 325.
right of compensatory damages. *Id.*

MALICIOUS PROSECUTION:

dismissed by compromise not a termination of prosecution. *Woodson* v. *McLaughlin*, 151.

MANDAMUS:

pendency of another proceeding no defense when. *Wesley* v. *Baker*, 529.

MASTER AND SERVANT: See SEAMEN; ADMIRALTY.

instruction on subject of proximate cause disapproved. *Wisconsin & Ark. Lbr. Co.* v. *Scott*, 65.

questions of assumed risk and contributory negligence held for jury when. *Id.*

servant handling sleek and crooked pole held to assume risk. *Caddo River Lumber Co.* v. *White*, 93.

contributory negligence question for jury when. *Id.*

sufficiency of allegation of negligence in stacking sacks of feed. *Francis* v. *Arkadelphia Milling Co.*, 236.

employee held to have assumed obvious risks caused by master's negligence. *Id.*

danger of fall of stacked sacks of feed *held* assumed. *Id.*

liability of master for negligence of fellow servant causing injury. *Missouri Valley Bridge & Iron Co.* v. *Malone*, 454.

instruction as to liability for act of fellow servant disapproved. *Id.*

servant's contributory negligence question for jury when. *Ft. Smith Light & Traction Co.* v. *Bailey*, 574.

MINES AND MINERALS:

unnecessary to give notice of forfeiture of oil and gas lease when. *Harrell* v. *Saline Oil & Gas Co.*, 104.

forfeited lease not reinstated when. *Id.*

MORTGAGES:

finding that absolute deed was intended as mortgage upheld. *Bank of Commerce* v. *Fairbank*, 56.

mortgage of "6 acres of cotton" *held* indefinite. *Norman* v. *S. L. Joseph Mercantile Co.*, 127.

title acquired by purchaser of such cotton. *Id.*

sufficiency of proof of publication of notice of foreclosure. *Straughan* v. *Bennett*, 254.

sufficiency of oral appointment of substituted trustee. *Id.*

mortgagee not an innocent purchaser when. *Bank of Searcy* v. *Baldock*, 308.

MUNICIPAL CORPORATIONS: See NUISANCE.

statutes relating to passage and publication of ordinances of general or permanent nature inapplicable to special contracts. *Barnett* v. *Mays*, 1.

owner of electrict generating plant not entitled to use streets and alleys for transmission. *Id.*

NAMES:

middle initial considered when. *Kellogg* v. *State*, 193.

NEGLIGENCE:

to be actionable negligence must be proximate cause of injury. *Wisconsin & Ark. Lbr. Co.* v. *Scott*, 65.
proximate cause defined. *Id.*

NUISANCE:

distinction between public and private nuisance. *Ft. Smith* v. *Western Hide & Fur Co.*, 99.
remedy for nuisance within municipality. *Id.*
sufficiency of evidence to establish existence of nuisance. *Id.*
effect of growth of city upon hide and fur businsess. *Id.*
effect of procuring license to conduct business. *Id.*

PARTNERSHIP:

liability of both partners for libel of one partner. *Barnett* v. *McClain*, 325.
each partner as agent of parrnership. *Id.*
necessity of settlement of partnership affairs before surviving partner can file claim against estate of deceased partner. *Evans* v. *Hoyt*, 334.
such claim inchoate and contingent until estate wound up. *Id.*

PAYMENT:

voluntary payment not recoverable. *Turpin* v. *Antonio*, 377.
when payment involuntary. *Id.*

PERJURY:

indictment not defective for failure to allege that defendant testified voluntarily. *Warren* v. *State*, 497.
no defense that defendant was indicted for testifying falsely about his own guilt. *Id.*
evidence held to sustain conviction of perjury in swearing before grand jury. *Id.*
witness testifying as to perjury must be corroborated. *Id.*
instruction held argumentative and misleading. *Id.*
sufficiency of testimony to prove alleged perjury. *Smith* v. *State*, 640.
false testimony before grand jury *held* perjury. *Id.*

PERPETUITIES:

deed to trustees of Confederate Veterans, an unincorporated association, held not to violate the rule against perpetuities. *Ward* v. *McMath*, 506.

PLEADING:

effect of general demurrer. *Moore* v. *Long Prairie Levee District*, 85.

RAILROADS:

not suable for injury during federal control. *Missouri Pac. Rd. Co.* v. *Johnson*, 146.
error to substitute wrong federal agent as defendant. *Id.*
effect of substitution of such agent. *Id.*
sufficiency of proof of killing animal by train. *Davis* v. *Porter*, 375.
presumption of negilgence in such killing overcome when. *Id.*
duty as to stopping train in such case. *Id.*

RAPE AND CARNAL ABUSE:

rape and carnal abuse may be charged in single count. *Brust* v. *State*, 348.

REFORMATION OF INSTRUMENTS:

sufficiency of proof of mutual mistake. *Augusta Cooperage Co.* v. *Bloch*, 133.
jurisdiction of chancery to reform a deed of land in trust. *Ward* v. *McMath*, 506.
widow and heirs of deceased grantor necessary parties to suit to reform deed. *Id.*
contract may be reformed for fraud or mistake. *Wiegel* v. *Moreno-Burkham Const. Co.*, 564.

ROBBERY:

indictment for robbery and for aiding in robbery held to charge single offense. *Williams* v. *State*, 289.
sufficiency of evidence. *Id.*

SALES:

contract held to have been mutually rescinded. *Motor Wheel Corp.* v. *Childs*, 178.
when delivery completed. *Vance* v. *Bell*, 229.
sufficiency of symbolical delivery. *Id.*
evidence held to sustain finding that engine was in first-class condition. *Farmers' Club Co.* v. *Emmerson Merc. Co.*, 614.
instruction as to making repairs disapproved. *Id.*

SCHOOLS AND SCHOOL DISTRICTS:

act creating county boards of education upheld. *Mitchell* v. *Directors of School District No. 13*, 50.
notice of proceedings to change boundaries required.
certiorari lies to review proceedings of county board changing boundaries of school districts. *Id.*
extent of review on certiorari of order of county board. *Acree* v. *Patterson*, 188.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

new evidence received on such review in circuit court. *Id.*
necessity of notice of proposed change of boundaries of districts. *Id.*
directors of affected districts proper parties to attack on order creating new district. *Id.*
such districts presumed to be parties to contest. *Id.*
county board held to be party to such contest when. *Id.*
in mandamus to compel school board to maintain separate school for white children, no defense that petition is pending before county board of education. *Wesley* v. *Baker*, 529.
acts of county board of education are *quasi* judicial. *Id.*
such acts reviewed by certiorari. *Id.*
validity of order re-transferring children to district of their residence. *Id.*

SEAMEN:

fellow-servant rule inapplicable when. *Missouri Valley Bridge & Iron Co.* v. *Malone*. 454.

STATUTES: See CONSTITUTIONAL LAW.

gasoline tax of 1921 held not to be uncertain. *Standard Oil Co. of La.* v. *Brodie*, 114 .

STATUTES CITED:

CONST. OF UNITED STATES:

Art. 1, § 7 ..... 517, 519
Art 5 517
Amendment 14 477

FEDERAL STATUES:

Act Feb. 28, 1920 .... 148, 201
Fed. Jud. Code § 256 454
U. S. Comp. Stat. § 8337a ..... 455.

MANSF. DIGEST:

§ 102 77

SAND. & HILL'S DIGEST:

§§ 2207-17 351
6485 288
6530 288

KIRBY'S DIGEST:

§ 2390 354
6021 329
6093-6 330
7180 288
7544 53

CRAWFORD & MOSES' DIGEST:

§ 101 ..... 337, 338
106 76
216 252
486-493 ..... 540, 545, 546
827-9 177
1074-5 ..... 243, 244
1176 392
1190 87
1314 415
1469 510
1532 257

STATUTES CITED—Continued.

C. & M. DIGEST—Continued.

1653 4
1737 391
1800 530
1820-1 408
1994-5 373
2509 554
2511 554
2630-1 48
2632 ..... 46, 48, 50
2635 48
3015 553
3224 290
3511 ..... 170, 207, 208, 368
3514 211
5314-5 ..... 475, 480
5446 ..... 146, 323
5542 257
6196-7 204
6201 204
6557 31
6807-8 260
6890 265
7137 449
7138 ..... 244, 245, 246
7353 401
7499 3
7502 3
8821 ..... 54, 191
8823 190
8876 52
8877 55
10180 ..... 287, 288
10320 ..... 138, 414
10494 362
10507 ..... 422, 230

CONSTITUTION 1874:

Art. 2, 10 290
2, 18 478
2, 21 477
5, 25 478
6, 15 ..... 122, 516
6, 16 ..... 517, 518, 523
7, 28 53
13, 3 315
19, 13 401
19, 16 177
19, 22 515
Amdt. 3 ..... 314, 478

ACTS:

1875, Feb. 1 522
1879, p. 128, § 1 ..... 517, 521
1905, No. 106 87
1911, p. 55 244
1917, No. 13, § 14 496
No. 81 559
No. 92 176
No. 339 87
p. 2173 286
1919, No. 43 7
No. 234 52
No. 571, § 28 174
1920, Feb. 4 7
No. 328 476
1921, p. 372 555
p. 490 121
p. 573 86
p. 685 ..... 116, 117
p. 914 ..... 466, 467

STREET RAILROADS: See CARRIERS.

right of street car company and driver of automobile to use streets. *Yaffee* v. *Ft. Smith L. & T. Co.*, 416.
whether such driver required to look and listen for cars held for jury. *Id.*

TAXATION: See CONSTITUTIONAL LAW.

gasoline tax of Acts 1921, p. 685, upheld as not violating uniformity clause of Constitution. *Standard Oil Co. of La.* v. *Brodie*, 114.

power of State to tax use of highways. *Id.*

taxes erroneously assessed and voluntarily paid not recoverable when. *Walton* v. *Arkansas County*, 285.

effect of adverse possession under tax deed for two years. *Norwood* v. *Mayo*, 621.

TENACY IN COMMON:

liability of co-tenant for improvements made without his knowledge. *Bank of Commerce* v. *Fairbank*, 56.

tenant in common cutting timber not liable to co-tenants for treble damages. *Fitzhugh* v. *Norwood*, 412.

damages recoverable from a co-tenant for wrongful cutting of timber. *Id.*

TRESPASS:

treble damages not awarded for unintentional cutting of timber. *Augusta Cooperage Co.* v. *Block*, 133.

TRIAL:

separate instructions may be given as to elements of damage and the effect of contributory negligence. *Missouri Pac. Rd. Co.* v. *Kennedy*, 77.

not error to refuse instruction already given. *Missouri Pac. Rd. Co.* v. *Johnson*, 146.

testimony of party treated as undisputed when. *Woodson* v. *McLaughlin*, 151.

not error to direct verdict on undisputed evidence when. *Lybrand* v. *Watkins Hardware Co.*, 266.

necessity for submitting prepared instructions. *Huddleston* v. *Stewart*, 270.

contributory negligence question for jury when. *Yaffee* v. *Ft. Smith Light & Traction Co.*, 416.

general objection to instruction sufficient when. *Id.*, *Missouri Valley Bridge & Iron Co.* v. *Malone*, 454.

abstract instruction properly refused. *Ft. Smith Light & Traction Co.* v. *Bailey*, 574.

TROVER AND CONVERSION:

bank held liable for converting prcoeeds of crop subject to landlord's lien. *Walker* v. *Rose*, 599.

TRUSTS:

parol trust not engrafted on deed when. *Glover* v. *Glover*, 167.
constructive trust not imposed on wife's property when. *Id.*
evidence held to sustain finding of resulting trust. *Stewart Oil Co.* v. *Bryant*, 432.
jurisdiction of chancery to reform a trust deed. *Ward* v. *McMath*, 506.

USURY:

mortgage not usurious by reason of charge of brokerage fee when. *Green* v. *Conservative Loan Co.*, 219.

VENDOR AND PURCHASER:

damages recoverable for breach by purchaser of the contract to purchase. *McGregor* v. *Echols*, 128.
incumbrance on land sold no defense to purchaser when. *Id.*
evidence held competent to establish liability under contract of purchase. *Knapp* v. *Gray*, 160.
vendor held to have severed rent from fee when. *Sachs* v. *Norton-Wheetler Stave Co.*, 212.
purchaser affected with notice of mortgage recited in deed. *Flannagan* v. *Citizens' State Bank*, 216.
purchaser takes subject to such prior incumbrance, but is not personably liable. *Id.*

VENUE:

of suit against domestic corporation. *Red Bud Realty Co.* v. *South*, 380.

WATERS AND WATER COURSES:

whether overflow caused by obstruction in stream or by insufficiency of culvert *held* for the jury. *Oberste* v. *Missouri Pac. Rd. Co.*, 89.
duty of landowner to keep ditch open. *Id.*

WILLS:

validity of will in handwriting of testatrix upheld. *Musgrove* v. *Holt*, 355.
place of signature. *Id.*
effect of third person adding clause after signature. *Id.*
effect of addition and erasure. *Id.*
effect of holograph will written partly with ink and partly with pencil. *Id.*
jurisdiction of equity to construe will. *Le Flore* v. *Handlin*, 421.
intention of testator to prevail. *Id.*
inadmissible to prove mistake of fact of testator when. *Id.*

WILLS—Continued.

intention of testator to exclude children enforced when. *Id.*
sufficiency of designation of children. *Id.*
"children" held not to include grandchildren when. *Id.*

WITNESSES:

refusal to permit cross-examination as to collateral matter approved. *Murchison* v. *State*, 300.
witness not impeached as to collateral matter brought out on her cross-examination. *Brust* v. *State*, 348.

WORDS AND PHRASES:

assessment. *Walton* v. *Arkansas County*, 285.
children. *Le Flore* v. *Handlin*, 430.
claim against estate. *Evans* v. *Hoyt*, 334.
conversion. *Wilson-Ward Co.* v. *Farmers' Bank & Trust Co.*, 368.
final order. *Fairview Coal Co.* v. *Arkansas Central R. Co.*, 295.
local improvement. *Williams* v. *Arkansas County Courthouse Imp. Dist.*, 475.
majority of electors. *Watts* v. *Bryan*, 313.
malt liquor. *Logi* v. *State*, 317.
murder. *Franklin* v. *State*, 536.
owned. *Turner* v. *State*, 49.
private nuisance. *Ft. Smith* v. *Western Hide & Fur Co.*, 101.
proximate cause. *Wisconsin & Ark. Lumber Co.* v. *Scott*, 65.
public improvement. *Williams* v. *Arkansas County Courthouse Imp. Dist.*, 475.
public nuisance. *Ft. Smith* v. *Western Hide & Fur Co.*, 101.
recovery. *Vaughan* v. *Humphreys*, 142.
run, maintain and operate. *Turner* v. *State*, 40.
said. *Le Flore* v. *Handlin*, 430.
tax on property. *Standard Oil Co.* v. *Brodie*, 114.
wilful holding. *Lesser-Goldman Cotton Co.* v. *Fletcher*, 17.