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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

NICHOLAS *v.* BRIGHT.

Opinion delivered May 22, 1922.

1. APPEAL AND ERROR—APPEAL FROM ORDER TRANSFERRING CAUSE.—An order transferring a cause from the circuit court to the chancery court is not a final order or judgment from which an appeal can be taken.
2. TRIAL—CROSS-COMPLAINT—DIRECTION OF VERDICT.—In an action on a note where defendant prayed for judgment over against third persons claimed by him to have agreed to pay the note, but it was admitted that the note was his personal obligation, and he offered no evidence to establish his claim against such third persons, the court did not err in directing a verdict for plaintiff.

Appeal from Arkansas Circuit Court, Southern District; *George W. Clark,* Judge; affirmed.

Botts & O'Daniel, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee, Bright.

1. Appellant's answer does not deny the execution and delivery of the note to Bright, nor that it was past due and unpaid. The court's instruction was right. 133 Ark. 105, 111. A corporation is bound only by its own contracts, not by members thereof acting in their private capacity. 37 Ark. 164.

2. After Lambert, Roan and Hollis, by their consent, were made parties, it was not proper to transfer the entire cause to equity. Bright's action could not be delayed by an independent controversy between appellant and these parties. C. & M. Digest, § 1204, subdiv. 3. The cross-complaint was no defense against the original complaint. 31 Ark. 345, 349.

3. There was no error in withdrawing the case from the jury and directing the verdict for the plaintiff against Nicholas. 75 S. E. 588; 73 Ark. 561; 76 *Id.* 520; 89 *Id.* 24; 97 *Id.* 438; 103 *Id.* 401; 104 *Id.* 267; 67 *Id.* 147; 90 *Id.* 439.

4. And the cause was properly transferred to equity for disposition of the issues between Nicholas and the other parties. 36 Ark. 228, 236.

HUMPHREYS, J. Appellee, R. C. Bright, instituted suit against appellant, J. P. Nicholas, in the Arkansas County Circuit Court, Southern District, to recover $593.78, upon the following promissory note:

"Stuttgart, Ark., September 1, 1917.

"Sixty days after date, for value received, I promise to pay to the order of R. C. Bright $500 five hundred and no-100 dollars. Payable at the Southern Trust Company, Little Rock, Ark., with interest at the rate of eight per cent. per annum from date until paid. Interest payable semi-annually, or to become as principal and bear same rate of interest. The makers and endorsers severally waive presentment and protest.

"(Signed) J. P. NICHOLAS."

Appellant interposed the defense that, while he signed the note individually, it was in fact not his obligation but the obligation of the Nicholas Pump & Well Company, which had been organized to take over the assets and liabilities of the Nicholas-Brown Pump & Well Company, theretofore operating in said county; that M. C. Hollis, Albert Lambert and Frank Roan were promoters of the Nicholas Pump & Well Company and became stockholders therein and agreed to finance said corporation; that in process of the formation of said corportion it became necessary to have $500 with which to pay the labor bills and pressing accounts of the Nicholas-Brown Pump & Well Company; that it was agreed by all the parties to the new corporation that appellant should sign the note, but that Hollis, Lambert and Roan should advance the money to pay it; that appellee R. C. Bright

knew of and acquiesced in the arrangement; that, after the new corporation was organized, the old corporation, of which appellant was manager, turned over to the new corporation accounts, tools, shop, pump, well material and construction contracts worth $20,000; that Hollis, Lambert and Roan refused to furnish capital for the new corporation, which prevented it from operating, to appellant's damage in the sum of $10,000. Appellant prayed that his answer be treated as a cross-bill against M. C. Hollis, Albert Lambert and Frank Roan, and for judgment over against them for said sum, and for the amount of the note in case R. C. Bright should recover personal judgment thereon against him. By consent M. C. Hollis, Albert Lambert and Frank Roan were made parties, and M. C. Hollis filed a separate answer denying that he was indebted to appellant growing out of the organization of the Nicholas Pump & Well Company, or upon the note executed by appellant to appellee R. C. Bright, stating that at the request of Nicholas, who was badly in need of funds, he telephoned R. C. Bright, who was a very close personal friend, requesting him to loan the appellant $500, which was done; that it was not his obligation, or the obligation of the new corporation, as alleged in appellant's cross-complaint.

The cause was submitted upon the pleadings and evidence, which resulted in a directed verdict in favor of appellee R. C. Bright against appellant for the amount of the note, together with interest and costs, and a transfer of the cause upon the cross-complaint to the chancery court, from which is this appeal.

The undisputed evidence showed that appellee R. C. Bright had no connection whatever with either the old or new corporation; that he knew nothing concerning the transaction between the corporation, or between appellant, Hollis, Lambert and Roan, with reference to the organization of the new corporation or the purposes for which it was organized; that he loaned $500 to appellant through the recommendation of M. C. Hollis; that Hollis

'phoned him that Nicholas wanted $500, stating what security he could give; that he authorized Hollis to take a note and mortgage on a rice crop and draw draft on him in favor of J. P. Nicholas, with note and mortgage attached; that some thirty days after the note was executed appellee R. C. Bright was informed that the Nicholas Pump & Well Company had been organized to take over the business of the old corporation, and was invited to take stock in it, which he declined to do. Testimony was introduced responsive to the issue joined upon the cross-complaint and answer thereto, which appellant claims conclusively established his right to judgment against the defendants in his cross-bill. We deem it unnecessary to set out or discuss this evidence, as his cause of action upon his cross-complaint was transferred to the chancery court. It is true the cause was transferred over appellant's objection, but it was not a final order or judgment from which an appeal could be taken. This court said, in the case of *Womack* v. *Connor*, 74 Ark. 352, concerning an order transferring a case from the chancery to the circuit court, that "the order of transfer to the circuit court affects a substantial right in the action, but it is not such an order as determines in effect the action, and prevents a judgment from which an appeal might be taken. The order does not discontinue the action; it discontinues it in the chancery court, but the action under the order continues in the circuit court until it is disposed of there. The order does not abate the action; it merely transfers it to another forum. * * * * If the order of the court is erroneous, it can be corrected on appeal from the final judgment when taken."

Appellant contends that the judgment in favor of appellee against him should be reversed because the court, in the midst of the evidence, peremptorily instructed the jury and thereby prevented appellant from developing the issues fully between appellee and appellant. There is nothing in the record to indicate whether the evidence had been closed when the court instructed a verdict for

appellee in the amount claimed. The transcript shows that, just after J. P. Nicholas was asked, on cross examination, whether the note sued upon was his personal obligation to Bright, which question was answered by him in the affirmative, the court instructed the verdict, and that thereupon counsel for the appellant objected and excepted to the ruling of the court. The objection was general, and not specific. The court was not informed that appellant had further testimony to introduce responsive to the issue between appellant and appellee; nor did appellant offer to introduce further testimony tending to establish the defense interposed by him. All the parties to and connected with the execution of the note had testified fully. There was no conflict in their evidence, and the effect thereof showed that the note was the personal obligation of appellant, J. P. Nicholas, so far as R. C. Bright, the payee, was concerned. The issue joined in the cross-complaint and answer thereto was independent of and collateral to the issue joined in the original complaint and answer thereto. This being so, it was not error to render a judgment upon the main issue, as it did not in any wise prejudice the rights of the parties in the cross-complaint. It is provided in the third subdivision of section 1204 of Crawford & Moses' Digest that "the filing and prosecution of the cross-complaint shall not delay the trial and decision of the original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-complaint."

The judgment is therefore affirmed.

ROBERTSON v. COOPER.

Opinion delivered May 22, 1922.

1. GUARDIAN AND WARD—EXCHANGE OF MINOR'S LAND—JURISDICTION. —Probate courts are without jurisdiction to order the lands of a minor exchanged for other lands; hence such an order is void.

2. CANCELLATION OF INSTRUMENTS—LACHES.—A suit brought on April 5, 1916, to cancel a deed executed on June 7, 1880, by plaintiff's guardian purporting to convey plaintiff's half interest in some land which had been assigned as dower to plaintiff's mother, who died in August, 1915, was not barred by laches or limitation, as plaintiff's cause of action did not accrue until her mother's death.
3. GUARDIAN AND WARD—RATIFICATION BY WARD OF UNAUTHORIZED EXCHANGE.—In an action brought in 1916 to cancel an unauthorized deed executed by plaintiff's guardian in 1880 in exchange for other lands, where plaintiff attained her majority in 1884, sold part of the realty received in the exchange, and continued to use and enjoy part of it for 35 years, *held* that she ratified the unauthorized sale because, although she had full knowledge of the facts, she did not offer to return the property within a reasonable time after reaching majority.

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

Mann & McCulloch, for appellant.

1. The probate court was without jurisdiction to authorize the guardian to exchange the lands of the ward for other land; and, since this is true, and the alleged exchange of land was never reported to or approved by the probate court, his deed to Hutton, appellee's source of title, was void. 71 Ark. 218; 33 *Id.* 425; 47 *Id.* 460; 95 *Id.* 164; *Id.* 256; 61 *Id.* 80.

2. The deed being absolutely void, and not merely voidable, the defenses of laches, estoppel and ratification are not available to appellees to divest the title out of the appellant. 108 Ark. 154.

3. It was not within the power of appellant to repudiate effectively the exchange prior to the termination of the life estate, nor, prior to that time, was it incumbent on her to take action. 123 Ark. 35; 52 *Id.* 341.

Daggett & Daggett, for appellees.

1. Appellant reached her majority in 1884, when, notwithstanding coverture and outstanding dower, it was her privilege to affirm or repudiate the guardian's deed made for her. Her actions subsequent to that date amount to an affirmance. 95 Ark. 74; 122 *Id.* 530; 103 *Id.* 312; 115 *Id.* 1.

2. Having accepted the benefits of the deed from Hutton by appropriating the proceeds from the sale of part of the lands and retaining certain of the tracts conveyed to her, appellant cannot now repudiate her contract without offering to restore the consideration, at least to the extent the same now remains in her hands. 14 R. C. L. § 20; 39 Ark. 293; 51 *Id.* 294; 52 *Id.* 150; *Id.* 207; 136 *Id.* 237; 90 *Id.* 351.

3. Appellant is barred by laches in failing to bring suit within a reasonable time after becoming of age. 121 Ark. 615.

HUMPHREYS, J. This is an appeal from a decree of the Lee Chancery Court on appellee's cross-bill, canceling the purported right, title and interest of appellant in and to the southwest quarter of section 9 and the north half of the south half of section 8, township 3 north, range 2 east, in said county, and setting aside same as a cloud on appellee's title thereto, which was rendered upon the following agreed statement of facts:

"Abner Beard, from whom all parties deraign title, died intestate in the year 1872, leaving surviving him his widow, Mary C. Beard, and two children, Ethel A. Beard, plaintiff in this cause, and James N. Beard as his sole heirs at law. At the date of his death Abner Beard was seized in fee simple of the lands sued for, together with various lands in Lee County. After the death of the said Abner Beard the lands sued for, together with other lands, were assigned to the widow, Mary C. Beard, as her dower, by proper order of the Lee Probate Court. That Ethel A. Beard, plaintiff in this cause, and Jas. N. Beard each inherited an undivided one-half interest in fee in all the lands owned by Abner Beard at the date of his death, subject to the rights of creditors of his estate and the dower right of his widow, Mary C. Beard, in certain lands.

"After the death of the said Abner Beard his widow, Mary C. Beard, qualified as administratrix and so continued until her marriage with S. C. Buckingham, who

then qualified as administrator *de bonis non* under orders of the Lee Probate Court, and as such administrator continued until the date of the institution of the proceedings in the Lee Chancery Court by Ethel Beard, a minor, by her next friend, H. N. Word.

"On December 17, 1872, Jas. N. Beard, one of the surviving heirs, conveyed his undivided one-half interest in all the lands of his father to Mary C. Beard. On January 7, 1880, Mary C. Beard, then Buckingham, conveyed her dower interest and the undivided interest acquired from Jas. N. Beard to H. N. Hutton.

"On January 5, 1880, Ethel A. Beard, then a minor over the age of 14 years, made application to the Lee Probate Court for the appointment of a guardian, and thereupon Luther Benham was duly appointed guardian of the said Ethel A. Beard. The said Luther Benham duly qualified as guardian and entered upon the discharge of his duties. On the same day Luther Benham as such guardian filed his petition in the Lee Probate Court praying the conveyance of the reversionary interest of his ward in the lands sued for to H. N. Hutton, in consideration of which the said H. N. Hutton would convey his interest in other lands to the said Ethel A. Beard.

"The probate court entered an order authorizing the conveyance. Thereupon the said guardian conveyed all interest of the said Ethel A. Beard in and to the lands sued for to H. N. Hutton. On the same day H. N. Hutton conveyed to the said Ethel A. Beard all his interest in the lands acquired by his deed from Mary C. Beard, with the exception of the lands sued for herein. It is agreed that the said deed is in due legal form and is sufficient to vest the title to the lands therein described, subject only to the rights of creditors of Abner Beard, deceased, in Ethel A. Beard.

"On November 17, 1877, the said Ethel A. Beard, by her next friend, filed her complaint in the Lee Chancery Court against S. C. Buckingham, as administrator *de bonis non,* and certain creditors of the said estate, in

which she prayed that the administration be opened and that said accounts be corrected, and that a receiver be appointed to take charge and manage said estate. That H. B. Derrick was by order of said court appointed receiver. On May 11, 1878, the chancery court directed the receiver to pay the plaintiff, Ethel A. Beard, the sum of $80 for board, tuition and clothing, which was done. That upon decree of chancery court the said receiver advertised all the lands belonging to Abner Beard, at date of his death, for sale for the payment of debts of said estate. That said sale was duly held and on May 9, 1882, said receiver filed his report of sale and said report was duly approved and confirmed. That at said sale Luther Benham, guardian, purchased the NE ¼ 14-3-2, and the said Ethel A. Beard has been the owner and in possession of said land since the date of sale. That on May 17, 1883, the said receiver made his final report in said cause, and upon order of the court paid over to Luther Benham as guardian of Ethel Beard the funds then remaining in his hands, and said receiver was then discharged.

"That partition of lands ordered by the probate court in Lee County, between Ethel Beard and H. N. Hutton, was never confirmed by said court, but the said guardian subsequently filed his first, second and final settlements, which were approved, and guardian finally discharged on May 29, 1884.

"The lands conveyed by Hutton to Ethel A. Beard were sold by said receiver in the manner hereinbefore set out for the purpose of satisfying the claims of creditors of the estate of Abner Beard, except the following lands: NE of 4-3-2 was not sold, and has been in the actual possession of the plaintiff from the date of her purchase from Hutton until the present time, claiming and receiving the entire rents and profits therefrom. The east half of S. E. of 14 was not sold by the receiver, but was sold to V. M. Harrington on June 11, 1883, for taxes of 1882. The frl. part of S. E. of 13-3-2 was not sold by said receiver, but was sold and conveyed by a warranty

deed to W. A. Andrews by Ethel Beard (then Robertson) on February 21, 1890.

"H. N. Hutton took possession of the lands sued for during the year 1880, and on January 8, 1880, sold and conveyed the same to R. M. Banks. That on February 22, 1886, R. M. Banks conveyed said lands to David H. Stayton. That on January 26, 1892, David H. Stayton conveyed said lands to Julius Lesser. That Julius Lesser, on September 12, 1906, conveyed said lands to G. W. Cooper.

"It is agreed that all of said deeds are in due and legal form and properly executed. That Hutton and his grantees have held actual, open, notorious and peaceable possession of said lands, claiming under said deeds from the dates thereof to the present time, under the belief that they were owners thereof; that all of said conveyances are *bona fide;* and that G. W. Cooper purchased under the belief that the order of the Lee Probate Court authorizing the conveyance of Ethel Beard to H. N. Hutton was a good and valid order.

"It is agreed that George W. Cooper has departed this life, leaving surviving him his widow, Tina Cooper, and his minor daughter, Jessie Cooper; that the said Tina Cooper afterwards married one Taggart and thereafter was adjudged insane, and that Elgan C. Robertson is her duly appointed guardian. That Chas. McKee is the duly appointed and acting administrator of the estate of George W. Cooper, and that D. S. Clark is the duly appointed, qualified and acting guardian of the person and estate of Jessie Cooper, minor.

"That Mary C. Buckingham, widow of Abner Beard, died in August, 1915. That Ethel A. Beard, now Robertson, plaintiff herein, was born October 25, 1866; that she married E. D. Robertson on May 16, 1888, and has been ever since and is now a married woman; that she lived in Lee County continuously from the date of her birth until September, 1887, at which time she moved to Wynne, Arkansas, and resided there until October, 1915;

when she returned to Lee County, where she has since resided."

Before the submission of the cause to the court the following substitution of parties was made: The death of G. W. Cooper, party defendant, was suggested to the court, and the cause was revived in the name of Tina (Cooper) Taggart, widow of G. W. Cooper, deceased, and Jessie Cooper, his sole heir at law. Thereafter Tina (Cooper) Taggart was judicially declared insane, and upon proper notice Elgan C. Robertson, her duly appointed guardian, was made party defendant. The said E. C. Robertson, guardian of Tina (Cooper) Taggart, filed answer prior to the submission of this cause. D. S. Clark, legally appointed guardian of Jessie Cooper, entered his appearance and filed answer, in which he adopted the answer previously filed by G. W. Cooper. Chas. McKee, duly qualified and acting administrator of the estate of G. W. Cooper, deceased, entered his appearance and filed answer, adopting the answer previously filed by G. W. Cooper.

The agreed statement of facts reflects that the undivided one-half interest in the lands sought to be recovered by appellant was inherited by her from her father, who died intestate in the year 1872, leaving him surviving his widow, Mary C. Beard, and his two children, appellant and James N. Beard, his sole heirs at law; that the lands in question, along with other lands belonging to the estate, were set aside to the widow as her dower interest therein; that H. N. Hutton acquired the interests of James N. Beard and Mary C. Beard by purchase January 7, 1880, and procured a deed from appellant's guardian to her undivided one-half interest therein, in exchange for Hutton's undivided one-half interest in 1321 acres of other lands formerly belonging to said estate, which Hutton had also acquired by purchase from Mary C. Beard and James N. Beard; that G. W. Cooper obtained title to the lands in question, through mesne conveyances, from H. N. Hutton; that all the lands conveyed by Hutton

to appellant in exchange with her guardian for her undivided one-half interest in the lands in question, except the northeast ¼ of section 14 and the east half of the southeast ¼ of section 14, and a fractional five acres of the southeast ¼ of section 13, township 3 north, range 2 east, in said county, were sold under an order of court to pay the indebtedness against said estate; that in 1890 appellant sold said east half of the southeast ¼ of section 14 and a fractional part of the southeast ¼ of section 13 to W. A. Andrews, and that she had retained and enjoyed the benefit of the said northeast ¼ of section 14; that appellant attained her majority on the 25th day of October, 1884, and married May 16, 1888; that her mother, Mary C. Beard, died in August, 1915. This suit was instituted on the 5th day of April, 1916.

The questions presented on the issues joined for determination on this appeal are, the validity of the deed to the lands in question executed by appellant's guardian to H. N. Hutton, and, if void, whether appellant was barred by limitation and laches from a recovery thereof, and, if not, whether she impliedly ratified the void sale of said lands by her guardian by retaining a part of the lands acquired by her in exchange therefor.

(1) Under the rule announced in *Meyer* v. *Rousseau*, 47 Ark. 460, and approved in *McKinney* v. *McCullar*, 95 Ark. 164, probate courts are without jurisdiction in this State to order an exchange of a minor's lands for other lands. The exchange of appellant's undivided one-half interest in the lands in question to H. N. Hutton by her guardian was therefore without authority and void.

(2) Appellant was not barred by limitations or laches, as her right of action for recovery of the lands did not accrue until her mother's death in 1915, said lands having been assigned, along with other lands, to her mother as her dower in the estate of appellant's father.

(3) This court is committed to the doctrine that a ward will ratify the unauthorized acts of his guardian by

long acquiescence therein, provided the ward has full knowledge of all facts and circumstances surrounding the transaction. The following announcement, in substance, was made by this court in the case of *Davie* v. *Davie*, (*post* p. 633, quoting syllabus 2): "Where a guardian sells the land of an infant ward without authority, and the money is applied to the ward's use, the fact that the ward does nothing to disaffirm the sale for nearly seven years after she becomes of age must be deemed a ratification of the sale." The principle with reference to the affirmance or disaffirmance of infants' contracts when they attain their majority was applied by this court in the last cited case to the unauthorized or void act of a guardian relating to a contract for the conveyance of his ward's real estate. Appellant, who attained her majority in 1884, should have, within a reasonable time thereafter, offered to return the property in her possession at that time, which she had received in exchange for the property in question. Instead of doing this, she sold a part of the real estate and retained 160 acres, and for more than 35 years has enjoyed the use and benefit thereof. By these acts she must be held to have ratified the unauthorized and void sale by her guardian of the lands in question.

No error appearing, the decree is affirmed.

MOORE v. STATE.

Opinion delivered May 22, 1922.

1. INTOXICATING LIQUORS—"STILL" DEFINED.—Under Acts 1921, No. 324, §§ 2, 3, prohibiting the possessing of a still, the word "still" is used in its broad sense, including any device used for separating alcoholic spirits from fermented substances, whether connected up or not, if the various parts had been assembled for the production of alcoholic spirits.
2. INTOXICATING LIQUORS—POSSESSION OF STILL—EVIDENCE.—Evidence showing that defendant had all the parts of a still unassembled in a smokehouse and 18 gallons of mash with a sack of malt in his kitchen, supported a conviction of possessing a still.

3. INTOXICATING LIQUORS—FAILURE TO REGISTER STILL—BURDEN OF PROOF.—Under Acts 1921, No. 324, § 2, prohibiting the keeping of a still without registering it, where the indictment alleged failure to register, the State is not required to prove this issue, but, being a negative allegation particularly within defendant's knowledge, he should disprove it, notwithstanding § 5 of the act provides that a certificate of the revenue collector may be introduced to show the status of the still.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; affirmed.

J. M. Kelso and *McKay & Smith,* for appellant.

J. S. Utley, Attorney General, *Elbert Godwin* and *Wm. T. Hammock,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Columbia Circuit Court for the crime of keeping in his possession a stillworm or still without registering the same with the proper United States officer, contrary to section 2 of act 324 of the Acts of 1921, and as punishment therefor was sentenced to serve two years in the State Penitentiary. From the judgment of conviction an appeal has been duly prosecuted to this court.

The record disclosed that the sheriff and his deputy searched the home of appellant and found a trough, with a little galvanized pipe run through it, and a tin can covered up with cloth in his smokehouse, and found in his kitchen 18 gallons of mash, with a small sack of malt in it. When the trough, with the galvanized pipe run through it, was connected with the can, it made what is commonly known as a "wildcat" still. At the time of the discovery the trough was not connected with the can. When the discovered parts were connected, whiskey could be made with it; that is, it was a contrivance or device which, when properly used, would separate alcoholic spirits from fermented substances. Both the sheriff and the deputy testified that while the device, when connected up, was not an old-time still; it was the character of still used for making whiskey by the "wildcatters" in Columbia County. No evidence was introduced by the State showing that the still was not registered with the proper

officers of the United States. The indictment, however, alleged that it was not registered.

Appellant first insists that the judgment should be reversed because the section of the statute under which appellant was indicted had reference to a real still or stillworm, and not to articles which might be connected up and used as a substitute for a real still or stillworm. The meaning ascribed to the section by appellant would indeed be very technical. The intention of the Legislature is reflected in section 3 of the act, which, among other things, provides that "any device or any process which separates alcoholic spirits from any fermented substance, shall be regarded as a distillery." We think the Legislature used the word "still" in its broad sense, and intended to include any device commonly used for separating alcoholic spirits from fermented substances, whether connected up or not, if the various parts had been assembled for the production of alcoholic spirits. Of course, the act was not intended to reach and punish individuals who had in their possession articles which might be converted into a still, unless the articles had been assembled for the purpose of separating alcoholic spirits from fermented substances. In the instant case the evidence showed that the small galvanized iron pipe had been run through the trough and was ready to be connected with the tin can. In fact, the several parts were connected and exhibited to the jury. These parts were found together in appellant's smokehouse, concealed under a cloth. Eighteen gallons of mash, with a small sack of malt in it, was found in appellant's kitchen. These were facts from which the jury might reasonably infer that the parts had been assembled, and partly connected, for the purpose of producing alcoholic spirits. The evidence was therefore sufficient to show that appellant had a still, within the meaning of the statute referred to, in his possession.

Appellants also insists upon a reversal of the judgment because the State failed to prove that the still was not registered with the proper United States officer. This

was a negative averment, particularly within appellant's knowledge, and should have been disproved by appellant himself. Greenleaf on Evidence, sec. 79; Bishop on Statutory Crimes (3rd Ed.), sec. 1051; *Hooper* v. *State,* 19 Ark. 143; *Williams* v. *State,* 35 Ark. 430; *Edgar* v. *State,* 37 Ark. 481; *Josey* v. *State,* 88 Ark. 269. It is true, section 5 of the act referred to provides that a certificate of the revenue collector may be introduced as evidence showing the status of the still, but this section was not intended to change the well established rule in relation to the burden of proving a negative allegation in an indictment within the particular knowledge of an accused. It simply provided a method by which the accused could disprove the allegation; or, if he disproved it in some other way, a method by which the State could establish the truth of the allegation.

No error appearing, the judgment is affirmed.

GALLOWAY *v.* STALLINGS.

Opinion delivered May 29, 1922.

CORPORATIONS—LIABILITY OF OFFICERS—FAILURE TO FILE STATEMENT.—An unverified statement of the affairs of a corporation filed in the county clerk's office is not a sufficient compliance with Crawford & Moses' Dig., §§ 1715, 1725, 1726, requiring the filing of a verified statement annually, and does not relieve the president and secretary from personal liability for the debts of the corporation contracted during the period of default.

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

S. S. Jefferies, for appellant.

The appellants discharged their full duty when they deposited the report with the proper official. 28 Ark. 244; 128 Ark. 59; 168 Pac. 40.

The report filed by the appellants was a full compliance with sec. 1715 of C. & M. Digest, in that it gave the information required by the statute. 124 Ark. 495; 96 Ark. 268; 123 Ark. 226.

In the absence of the president it was proper for the vice-president to sign the report. 79 Ark. 465.

The mere failure to attach the corporate seal to a report is not of substance, but of form merely. 109 Pac. 952.

Gregory & Holtzendorff and *Bogle & Sharp,* for appellee.

The statute was not complied with. 40 N. Y. S. 1081. Lack of the verification required by the statute invalidates the report. 14a C. J. 416.

The certificate required must be true and correct. 92 Ark. 416.

The report must be signed and verified by the officers designated by the statute. 7 R. C. L. 515; 92 Ark. 266; 79 Ark. 465; 11 Ark. 37; 136 Ark. 414; 14a C. J. 214.

McCULLOCH, C. J. Appellants, O. C. Galloway and F. M. Kennedy, are president and secretary, respectively, of the Galloway-Kennedy Company, a domestic corporation, domiciled in Monroe County, and appellee is a creditor of said corporation for indebtedness which arose during the year 1920.

This is an action instituted by appellee against appellants to recover the amount of said indebtedness, and liability of appellants for the debts of the corporation is asserted on account of their alleged failure, as officers of the corporation, to comply with the statute by filing a verified annual report of the affairs of the corporation. The statute on this subject reads as follows:

"The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of

each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose." Crawford & Moses' Digest, sec. 1715.

"The certificates required by sections 1711, 1715, 1721 and 1723, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly." *Id.* sec. 1725.

"If the president or secretary of any such corporation shall neglect, fail or refuse to comply with the provisions of section 1715, and to perform the duties required of them respectively, the person or persons so neglecting, failing or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal, and shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not to exceed five hundred dollars, and each and every day such person or persons shall so neglect to comply with the provisions of said section 1715 or fail to refuse to perform said duties, shall constitute a separate offense. Act May 6, 1909." *Id.* sec. 1726.

It appears from the undisputed evidence that Kennedy was vice-president of the corporation, as well as secretary, and that in the absence of appellant Galloway, the president, he caused one of the employees of the corporation to prepare a statement of the affairs of the corporation in accordance with the terms of the statute, and signed the name of the president thereto and his own name, and delivered the same to a lady employed in the office of the county clerk, who was not, however, deputized by the clerk; but the statement was not verified by an affidavit of any of the officers of the corpora-

tion, or any other person. The statement so delivered at the clerk's office was not filed and was not noted on the record in the office, but the employee who received it put it away among the corporation papers in the office, and it was later discovered there by the clerk during the progress of the trial of this cause.

The sole question presented in this case is whether or not there was sufficient compliance with the statute by delivering at the clerk's office in this manner an unverified statement of the affairs of the corporation so as to avoid personal liability on the part of the president and secretary.

We are of the opinion that the statute was not complied with, and that liability of the officers exists under the statute. This conclusion is in accordance with the plain letter of the statute, which provides that the certificate "shall be made under oath or affirmation by the person subscribing the same," and that upon failure to perform the duty enjoined by the statute the president and secretary "shall jointly and severally be liable to an action founded on this statute for all debts of such corporation," etc. The certificate is incomplete without the affidavit; it is no certificate at all in a legal sense, and therefore the filing of an unverified certificate is tantamount to filing none at all. The purpose of the statute was to apprise persons dealing with the corporation of information as to its affairs, but actual lack of information on the part of a creditor is not essential to liability under this statute, which imposes the liability, regardless of the fact that the creditor may or may not have had actual information concerning the affairs of the corporation.

By failing to comply with the statute, the officers mentioned assumed legal liability for the debts of the corporation which accrued during the period of such default.

The statement delivered by appellants at the office of the county clerk was not accepted and filed as a valid certificate under the statute by the clerk or any deputy.

Of course, if the certificate had been in legal form, appellants would have discharged their full duty by delivering it at the clerk's office to some one in charge thereof, but before claiming immunity from liability they must show that the certificate was in form and substance in accordance with the requirements of the statute. Not having complied with the statute, appellants rendered themselves liable for the debt.

Judgment affirmed.

CROSBY v. STATE.

Opinion delivered May 29, 1922.

1. INTOXICATING LIQUORS—REPEAL OF STATE LAW.—The State statute prohibiting the sale of liquor was not repealed or superseded by the Eighteenth Amendment to the Constitution of the United States or by the Volstead Act.
2. CRIMINAL LAW—EXPRESSION OF OPINION BY JUDGE.—The provision of Const., art. 7, § 23, that "judges shall not charge juries with regard to matters of fact, but shall declare the law," is mandatory, and any expression or intimation by the judge of an opinion as to controverted facts is thereby forbidden.
3. CRIMINAL LAW—EXPRESSION OF OPINION BY JUDGE.—Where a witness for the State, in a prosecution for selling intoxicating liquors, denied that defendant had sold liquor to him within three years before the return of the indictment, and denied that he had so testified before the grand jury, an order of the court, made in the jury's presence, for the arrest of such witness for perjury was an expression by the court as to the facts which the jury must have regarded as indicating the court's belief that defendant had sold whiskey to the witness, and requires a reversal of the conviction.
4. CRIMINAL LAW—PREJUDICIAL ERROR.—The prejudice resulting to accused from the court's action in ordering the arrest for perjury of a witness who had denied that accused had sold him any whiskey was not cured by the court's excluding from the jury an argument of the prosecuting attorney that the witness had perjured himself.
5. CRIMINAL LAW—PRESUMPTION AS TO ERRONEOUS RULINGS.—Where an erroneous ruling of the trial court might result in prejudice, the judgment must be reversed unless it affirmatively appears that there was no prejudice.

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

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

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

WOOD, J. 1. Appellant was indicted for the crime of selling and being interested in the sale of intoxicating liquors. He demurred to the indictment on the ground that the court was without jurisdiction because the 18th amendment to the Federal Constitution and the Federal statute (Volstead act) superseded the State law under which appellant was indicted. The court overruled the demurrer.

This court, after an exhaustive review of the authorities upon the subject, has decided the precise question in the recent case of *Alexander* v. *State,* 148 Ark. 491, holding that the 18th amendment and the Volstead act "did not impair the integrity of any existing State statute to enforce prohibition, nor interfere with the enactment of any future legislation by the State for that purpose." This means, of course, that the State statute prohibiting the sale of liquor is not repealed or superseded by the 18th amendment or the Volstead act; for, if this amendment and this act superseded the State statute prohibiting the sale of liquor, then the integrity of such statute is not only impaired but destroyed. In *Alexander* v. *State, supra,* we concluded that the statute under which the appellant was convicted "is a valid and subsisting law." We adhere to that decision.

2. Witness Smith was called as a witness for the State and testified that he never purchased any whiskey from the appellant on the 10th of September, 1921, or at any other time within three years before the filing of the indictment. The witness was handed a statement purporting to be his testimony taken before the grand jury, and he testified that he signed the statement; that he read the same or it was read to him before he signed it. The witness stated that he testified before the grand jury

that three or four years ago he bought some whiskey from the appellant, but that he did not buy any whiskey from him on the 10th of September, 1921. Thereupon, the record shows the following occurred: "By Mr. Williamson (prosecuting attorney). I ask to have this witness held for perjury. This is all the State can do." By the court: "All right, the witness may stand aside. Mr. Sheriff, you will hold this witness under a thousand dollar bond for perjury; let the prosecuting attorney file information against him. He is in the custody of the sheriff." (To which action, ruling and statements on the part of the prosecuting attorney and on the part of the court, in the presence and hearing of the jury, the defendant at the time excepted, and asked that his exceptions be noted of record, which is accordingly done).

The bill of exceptions further recites as follows: "And thereupon, during the closing argument of the prosecuting attorney, Hugh U. Williamson, and after the defendant's counsel had made their argument to the jury, Mr. Williamson, the prosecuting attorney, stated to the jury among other things in his argument, as follows: 'Here is Mr. Crosby, he has been engaged in selling liquor out there for a good while, for a long time, and he has gotten caught."

Objection by counsel for the defendant to the above statement, and counsel for defendant requests the court to instruct the jury not to consider such argument, and to rebuke the prosecuting attorney for making such statement. Which the court fails to do, but remarks: 'The jury will have to be the judges of the evidence.' (To which refusal of the court to so instruct the jury and to rebuke the prosecuting attorney, the defendant at the time excepted and asked that his exceptions be noted of record, which is accordingly done). And thereupon, during the further argument, in closing for the State and when the defendant had no opportunity for reply, the prosecuting attorney, among other things, stated to the jury as follows: 'You can see the straits the defendant has gone to

when you saw the old man Smith perjure himself here.' Objection by counsel for defendant to the above argument by the prosecuting attorney sustained by the court, and the court told the jury that the above was improper argument on the part of the prosecuting attorney. (But owing to the prejudicial nature of such argument, regardless of the court's ruling and instruction to the jury, the defendant desires to except to the argument, and asks that his exceptions be noted of record, which is accordingly done).

"And thereupon, the prosecuting attorney during the further argument for the State in closing his case and when the defendant had no opportunity for replying, made, among other statements, the following: 'Old man Smith bought some whiskey from him (defendant) away back sometime ago, and that goes to establish his reputation.' Objection by counsel for defendant to the above statement by the prosecuting attorney overruled by the court. (To which ruling of the court and to which argument of the prosecuting attorney the defendant at the time excepted and asked that his exceptions be noted of record, which is accordingly done)."

Section 23 of article 7 of our Constitution provides that "judges shall not charge juries with regard to matters of fact, but shall declare the law." C. & M. Digest, p. 79. This is a mandatory provision of the Constitution, and the numerous cases of this court collated by the digesters under the above section show how important it is in the administration of justice under our juridical system that trial judges observe the above mandate of the Constitution. Excerpts from one or two of the cases will suffice to show what the mind of the court has been, and still is, upon the above provision, and that any departure from it by trial judges must inevitably result in a reversal of their judgments.

In *State* v. *Wardlaw*, 43 Ark. 73, Justice SMITH, speaking for the court, said: "The circuit court committed an error in advising the attorney for the State, in the

presence of the jury, to drop the prosecution for want of evidence. Our Constitution forbids judges to charge juries with regard to matters of fact."

Judge BATTLE, speaking for the court, in the case of *Sharp* v. *State,* 51 Ark. 147, said: "In all trials the judge should preside with impartiality. In jury trials, especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness or as to controverted facts. For the jury are the sole judges of fact and the credibility of witnesses; and the Constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the Constitution, and would be a palpable violation of the organic law of the State."

In *Catlett* v. *Ry.,* 57 Ark. 461-466, Chief Justice COCKRILL, speaking for the court, said: "This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. * * * The Constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts."

In the recent case of *Martin* v. *State,* 130 Ark. 442, a witness whose testimony tended to prove that the appellant was not guilty of the crime charged was arrested in the presence and hearing of the jury, by order of the court directing the sheriff to take charge of the witness and hold him to bail in the sum of $500 to answer the charge of giving away whiskey, etc. This court held that the conduct of the court constituted prejudicial error, and

we quoted from the case of *Golden* v. *State,* 75 Miss. 130, as follows: "It is very easy to order such witness into custody, and to do it 'immediately,' without the knowledge of the jury. The testimony in this case is exceedingly unsatisfactory, and, in view of that fact, this action of the court may well have weighed heavily with the jury against the defendant." In concluding the opinion, we said: "The theory of the court, in ordering a reversal in the cases there cited, is that the verdict of the jury should be made up in every case from the testimony of the witnesses alone, uninfluenced by any act or opinion of the trial judge reflecting his estimate of the weight and credibility of any testimony."

The Attorney General contends that Smith gave no testimony that was either favorable or unfavorable to the accused, and that, being a witness for the State, his arrest for perjury by order of the court in the presence and hearing of the jury could not have been prejudicial to the appellant. But it occurs to us that the proceedings, reflected by the record as above set forth, must necessarily have resulted to the prejudice of appellant in depriving him of a fair and impartial trial. After the witness had testified that he told the grand jury that he bought some whiskey from appellant three or four years ago, but that he had not bought any whiskey from appellant on the 10th of September, 1921, or any other day in 1921, the prosecuting attorney immediately asked the court to have him arrested for perjury and the court granted the request in the manner recited above in the bill of exceptions, and the prosecuting attorney followed this up in his closing argument with the following comment: "You can see the straits the defendant has gone to when you saw the old man Smith perjure himself here."

While the court told the jury that the above argument was improper, we are convinced that this ruling of the court was not sufficient to remove the prejudice that may have been created in the minds of the jury by the conduct of the prosecuting attorney and the court itself

in causing the arrest of the witness Smith in the presence and hearing of the jury. Taking the whole record of this proceeding, it was clearly calculated to cause the jury to believe that Smith had testified before the grand jury that he had bought whiskey from the appellant on the 10th of September, 1921, or within three years prior to the finding of the indictment, and that on the trial he had committed perjury by testifying to the contrary, and that this was done at the instigation of the appellant. The order of the court directing the arrest of the witness was tantamount to telling the jury that the witness Smith was unworthy of belief and that his testimony before the jury was not entitled to any credit.

It was wholly within the province of the jury to say whether the testimony of the witness as disclosed by his examination at the trial was true or false. They were the sole judges of it, and if they believed it true it was certainly very favorable to the appellant, and they had the right to accept it. Therefore, the trial judge should not have invaded the province of the jury and should not have told them, in effect, that the testimony of the witness Smith before them was unworthy of belief. The most reasonable and natural inference for the jury to draw from the conduct of the prosecuting attorney and the trial judge, as disclosed by the above record, was that, in their opinion, the testimony of the witness Smith as given before the grand jury, and upon which the indictment was predicated, was true, and that his testimony at the trial was false. Certainly it cannot be said that the jury might not have come to this conclusion, and, if they could have done so, who can say that they did not do so, and who can say that such determination did not enter into and was not reflected by their verdict? Where the effect of an erroneous instruction or ruling of the trial court might result in prejudice, the rule is that the judgment must be reversed on account of such ruling, unless it affirmatively appears that there was no prejudice. No such showing is reflected by this record. *Magness* v. *State*, 67

Ark. 595-604-5; *St. L. & S. F. R. Co.* v. *Crabtree,* 69 Ark. 134; *Neal* v. *Brandon,* 70 Ark. 79-82; *Conway* v. *Coursey,* 110 Ark. 557-562.

3. Other rulings of the court are assigned as error, but these are not likely to be repeated on a new trial. We therefore deem it unnecessary to discuss them. For the error indicated the judgment is reversed and the cause remanded for a new trial.

DISSENTING OPINION.

McCULLOCH, C. J. The trial court was undoubtedly acting within its powers in ordering the arrest of witness Smith (*People* v. *Hays,* 140 N. Y. 484; *State* v. *Swink,* 151 N. C. 726; *State* v. *Strado,* 38 La. Ann. 562), and the questions to decide now are whether there was an abuse of discretion by the court as to the circumstances under which the arrest was made, and whether prejudice resulted to appellant.

In *Martin* v. *State,* 130 Ark. 442, we held that it constituted prejudicial error for the trial court to order the arrest of a witness for the accused in the presence of the jury, the reason given in the opinion being that the action of the court was calculated to destroy or lessen "the faith of the jury in the credibility of the witness." This view is in accord with the weight of authority. See note to *State* v. *Swink, supra;* 19 Ann. Cas. 442. But in the present case the arrested witness was not introduced by appellant and gave no testimony in the latter's favor. The witness stated that he had not bought any intoxicating liquors from appellant within the period of the statute of limitation, and this testimony was of a negative character and had no probative force. *Doran* v. *State,* 141 Ark. 442.

The only substantive testimony given by the witness was favorable to the State to the effect that he had purchased liquor from appellant more than three years before the finding of the indictment. Appellant was therefore not interested in upholding the credibility of

this witness, and suffered no prejudice from the impairment of his credibility.

If the arrest of the witness in the presence of the jury had the effect of lessening his credibility, then the harm fell upon the State and not upon the defendant. There could certainly be no prejudice to the defendant in discrediting a State's witness who had given no testimony favorable to appellant.

It is a settled rule of this court not to reverse for mere irregularities or errors in trials, unless prejudice might have resulted.

It should be added that the conduct of the witness upon which the court based its order of arrest was committed in the presence of the jury, and the court gave no intimation of opinion as to whether the perjury was probably committed by the witness in the testimony before the grand jury, or in that given before the trial jury. So it is difficult to discover in the incident any expression of opinion by the court upon the weight of the evidence or the credibility of the witness.

The court sustained the objection to improper comments of the prosecuting attorney in regard to the witness, and admonished the jury that they should not consider the same. It seems to me that the admonition of the court ought to be treated as a removal of the prejudicial effect of the improper remarks of the prosecuting attorney. We ought, I think, to accord to the trial judge the discretion of determining how far he should go in correcting improper remarks of counsel.

The cases in this court are so numerous that it is unnecessary to cite them, holding that when the court excludes an improper remark to the jury it is no ground for reversal.

I discover no prejudicial error in the record in this case, and I think the judgment should be affirmed. I am authorized by Mr. Justice HUMPHREYS to say that he shares these views.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY v. CONLY.

Opinion delivered May 29, 1922.

1. COMMERCE—APPLICATION OF FEDERAL EMPLOYERS' LIABILITY ACT.—Where a common carrier was engaged in interstate commerce, and an employee employed in such commerce was injured, the Federal Employers' Liability Act of April 22, 1908, controls and supersedes State laws upon the subject.
2. COMMERCE—REGULATION BY CONGRESS.—Congress has power under the commerce clause to prohibit carriers engaged in interstate commerce from employing minors under a certain age and to make such carriers liable for any injuries sustained by such employees while engaged in interstate commerce.
3. COMMERCE—POWERS OF STATES.—The power of the States to regulate their internal affairs is inherent and has never been surrendered, but such power is different from the power to create a civil liability in favor of the employees of interstate carriers against their employers; the former power being possessed by the States exclusively, while the latter is possessed by Congress alone since it assumed jurisdiction over the subject.
4. MASTER AND SERVANT—ASSUMED RISK—INSTRUCTION.—In an action by a minor for injury, defendant's request for instruction that, if the danger was so obvious that a boy of plaintiff's experience would have appreciated it, then plaintiff is charged with the knowledge and appreciation thereof and cannot recover, even if no special instructions were given him, was correct, and its refusal was error.
5. MASTER AND SERVANT—QUESTION FOR JURY.—In an action against an interstate carrier for injury where there was an issue under the evidence as to whether plaintiff was defendant's servant, and also as to whether defendant was negligent, and, if so, whether its negligence was the proximate cause, and also as to whether plaintiff had assumed the risk, the refusal of an instruction directing a verdict in defendant's favor was not error.

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

W. F. Evans, E. L. Westbrooke and *W. J. Orr,* for appellant.

1. At the time of the accident the defendant was a carrier engaged in interstate commerce, and the plaintiff was employed in such commerce. The Federal Employers' Liability Act applies. 124 Ark. 127 and cases cited.

It is exclusive and supersedes all State laws on the subject. 129 Ark. 534; 244 U. S. 147; *Id.* 170; *Id.* 360; 167 N. W. 349; 162 Pac. 111.

2. In view of the foregoing decisions the court's instruction "A" was manifestly erroneous and prejudicial. See also 247 U. S. 367; 233 U. S. 492; 41 U. S. Sup. Ct. Rep. 36; 40 *Id.* 275; 239 U. S. 548; 226 *Id.* 135; 236 *Id.* 554; 136 Ark. 440.

3. For the same reasons the court erred in refusing to instruct on the question of assumption of risk as requested by the defendant.

Roy Penick and *Basil Baker,* for appellee.

It is true that where Congress has the power to pass any particular act, and has once covered the field, State laws must yield, in so far as they may be in conflict, but it is by no means true that where a State law has been passed and where it may be regarded as in aid of the congressional act, it would be held void. 146 Ark. 448. Since it has been held that the Congress of the United States is without power to pass a child labor law, is it not equally true that it is without power to pass an act that would nullify such a law passed by the State? It cannot, under the guise of regulation of interstate commerce, invade the rights of the States, and has no authority to control the States in the exercise of their police power over local trade and manufacture. 247 U. S. 251, 62 L. Ed. 1102; 276 Fed. 452; 219 U. S. 453, 55 L. Ed. 290. The Congress has not yet covered that part of the field pertaining to the employment or prohibiting the employment of minors under 16 years of age by interstate carriers, if it has the right to do so, and the States, in the exercise of their police power, have the right to act in regard to that phase of the situation.

WOOD, J. The appellant is a common carrier engaged in interstate commerce. This action was instituted by Hal Conly, a minor, by his next friend, Cheatham Conly, and also by Cheatham Conly in his own right, appellees, against the St. Louis-San Francisco Railway Company,

appellant. It is alleged in the complaint that Hal Conly was a minor fifteen years of age employed by the appellant; that he was engaged in unloading lumber, shipped in interstate commerce, from a car; that because of the manner in which the lumber was loaded the work was hazardous, which fact, by reason of Conly's youth and inexperience, was unknown to him; that appellant negligently failed to warn, or to instruct him of the dangerous character of the work and as to the manner of its performance; that, while Conly was performing his work and using due care for his own safety, the timbers fell from the car on Conly, seriously and permanently injuring him, to his damage in the sum of $10,000, for which he prayed judgment.

In a second count to the complaint Hal Conly and Cheatham Conly set up the same cause of action as alleged in the first count and prayed damages in the sum of $10,000. Appellant, in its answer, denied all the material allegations of the complaint and set up the affirmative defenses of contributory negligence and assumed risk.

1. It is established by the pleadings, and the undisputed testimony as well, that at the time of the alleged injury the appellant was a common carrier engaged in interstate commerce and young Conly was in its employ doing work relating to such commerce. At the conclusion of the testimony the court instructed the jury that Cheatham Conly was not entitled to recover. He has not appealed, and therefore passes out of the case.

Among other instructions the court, on its own motion, gave the following:

"A. You are instructed that if you find from a preponderance of the evidence that the defendant company, through Arthur Anthony, employed the plaintiff, Hal Conly, at a time when he was a minor, under the age of sixteen years, and put him to work to moving timber from one car to another car on its tracks, and that he was injured while so at work, and that the injuries complained

of herein were the direct result of such unlawful employment of the plaintiff, then you will find for the plaintiff."

Among other prayers for instructions, the appellant prayed the following: "4. You are instructed that, if you find and believe from the evidence that the danger of the timbers falling when the stakes were removed from the bad order car was so obvious that a boy of Hal Conly's experience would have appreciated the danger, then Hal Conly is charged with the knowledge and appreciation thereof, and will not be heard to say that he did not know and appreciate such danger, and he cannot recover herein, even if you find that no special instructions or warnings were given to him."

The above prayer of appellant was in conformity with the law on the doctrine of assumed risk as announced by this court in the case of *Emma Cotton Seed Oil Co.* v. *Hale,* 56 Ark. 216-331, 222. This prayer for instruction, therefore, should have been granted, provided the Federal Employers' Liability Act (April 22, 1908, 35 Revised Statutes at Large, 65, ch. 149, Compiled Stat. 1916, sec. 8657) is controlling. It should be said in this connection that the prayers of appellant for instructions Nos. 3, 5 and 6 were not applicable to the facts of this record, and were therefore abstract and misleading, and the court did not err in refusing to grant them, even though the Federal act controls.

Does the Federal act control? Since the appellant was a common carrier engaged in interstate commerce and at the time of the alleged injury the appellee was employed in such commerce, the Federal act applies. *Long* v. *Biddle,* 124 Ark. 127. And, since the Federal act does apply, as was said by this court in *St. Louis, I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520-534, "that act therefore governs the case. Since its passage all State laws upon the subject have been superseded. 'It covers and overlaps the whole State legislation, and is therefore exclusive.'" In addition to the cases there cited see

New York Cent. Rd. Co. v. *Winfield,* 244 U. S. 147; *Erie Rd. Co.* v. *Winfield,* 244 U. S. 170; *New York Cent. & H. R. R. Co.* v. *Tonsellito,* 244 U. S. 360; *McLean* v. *Chi. Great West. R. Co.* (Minn.) 167 N. W. 349; *Smithson* v. *Atchison, T. & S. F. Ry. Co.,* 162 Pac. (Cal.) 111.

In the cases above cited the Supreme Court of the United States holds that the Federal act "establishes a rule of regulation which is intended to operate uniformly in all the States as respects interstate commerce, and in that field it is both paramount and exclusive."

In *Smithson* v. *Ry., supra,* the action was brought by minor through his guardian *ad litem* to recover damages from the defendant for injuries sustained by the minor while in its employ. The action was brought under the provisions of the Federal Employers' Liability Act. There was a State law providing that "no minor under the age of eighteen years shall be employed or permitted to work between the hours of ten o'clock in the evening and five o'clock in the morning." The Supreme Court of California held that the statute of the State could not be given effect as a police regulation, although not conflicting with the Federal act. In so holding the court quotes from the Supreme Court of the United States in the case of *Prigg* v. *Commonwealth of Pa.,* 16 Peters 539, 617, 10 Law. Ed. 1060, as follows: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it. * * * The will of Congress upon the whole subject is as

clearly established by what it has not declared as by what it has expressed."

In *McLean* v. *Ry., supra,* an action was brought by the plaintiff under the Federal Employers' Liability Act. In holding that a city ordinance, a police regulation limiting the speed of trains, having all the effect of a statute, could not be admitted to contravene the rules of evidence as to liability under the Federal statute, the Supreme Court of Minnesota, among other things, said: "The act covers the entire field under which the employer in interstate commerce shall be liable for injury to its employee likewise engaged. It pertains solely to the relation of master and servant. It does not supersede State legislation outside of this field. Nor does it deal with the duties and obligations of either to the public; but it does supersede all State and municipal legislation governing the circumstances under which the master, while within the provisions of the act, shall be liable for injury to the servant. It follows that the ordinance in question was superseded by the act of Congress and was not admissible in evidence."

The above decisions of the Supreme Courts of California and Minnesota contain a correct analysis and interpretation of the Federal Employers' Liability Act and its effects upon a State statute or municipal ordinance when the latter are invoked either to contravene or to supplement the Federal act. It is unnecessary to say more. Congress, through the Federal Employers' Liability Act, has covered the entire field of liability of interstate carriers to their employees for injuries sustained by them while engaged in such commerce. It is unquestionably within the power of Congress, under the commerce clause of the Constitution, to prohibit carriers engaged in interstate commerce from employing minors under a certain age and to make such carriers liable for any injuries sustained by such employees while engaged in interstate commerce. Congress, having such power and having entered upon such field of legislation, State

Legislatures covering the same subject-matter are as much bound by the silence of Congress as by what it has expressly declared within the scope of its power. As is forcefully expressed by the Supreme Court of the United States in one of its cases, "We may not piece out this act of Congress by resorting to the local statutes." It is therefore wholly beyond the power of the State Legislature to make make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the State. This power of Congress, under the commerce clause of the Constitution, does not in any manner trench upon or dislodge the police power of the States over their own local and internal affairs which are reserved to them under the 10th amendment to the Constitution. *Drexel Furn. Co.* v. *Bailey,* 276 Fed. 452; *Hammer* v. *Dagenhart,* 247 U. S. Rep. 251, 272, *et seq.*

As is said in *Hammer* v. *Dagenhart, supra,* "the power of the States to regulate their purely internal affairs by such laws as seem wise to the local authorities is inherent and has never been surrendered to the general government." But such power is altogether different and occupies an entirely different field from the power to create civil liability in favor of the employees of carriers while engaged in interstate commerce against their employers for the violation of some police regulation of the State. The former power the State possesses exclusively; the latter is possessed by Congress alone after it has once assumed jurisdiction over the subject. It follows that the court erred in giving instruction A on its own motion and in refusing appellant's prayer for instruction No. 4.

2. The court did not err in refusing appellant's prayers for instructions asking a directed verdict in its favor as requested in its prayer for instruction No. 2; first, because it was an issue for the jury, under the evidence, as to whether the appellee, Hal Conly, was the

servant of Arthur Anthony and not the servant of the appellant; second, it was also an issue for the jury as to whether or not the appellant was negligent, and, if so, whether its negligence was the proximate cause of the injury; and third, it was also an issue for the jury as to whether or not the appellee had assumed the risk incident to the work he was engaged in at the time of his injury.

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

NELSON v. NELSON.

Opinion delivered May 29, 1922.

1. MUNICIPAL CORPORATIONS—ORDINANCE CREATING IMPROVEMENT DISTRICT.—An ordinance creating Improvement District No. 2 within a city for the purpose of improving "all of that portion of all of the streets within the corporate limits of said city which run east and west through said city, provision for the paving of which is not made by Paving District No. 1" sufficiently designated the streets and the portions thereof to be improved, since the streets and portions thereof to be paved could be ascertained by reference to the ordinance creating the other district.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—CHARACTER OF IMPROVEMENT.—An ordinance creating an improvement district for improving streets "by draining and grading, or draining, grading, construction of curbing, guttering, paving and necessary storm sewering, or by otherwise improving said streets in such manner as the board of commissioners of said district, to be hereinafter named, may deem substantial, adequate and proper," *held* void for failure to describe the character of the improvement, as required by Crawford & Moses' Dig., § 5652.

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

G. E. Keck and *Little, Buck & Lasley,* for appellants.

The ordinance is valid. It contains the same descriptive language as used in the petition signed by the property owners. By reference to the streets and parts of streets improved under the ordinance creating

paving district No. 1, it definitely locates the streets and parts of streets intended to be improved, and authorizes the commissioners to select the character of material to be used, and to formulate the plans and specification for the work, as they would have the right to do, unless such plans and specifications of the improvement to be made were incorporated in the ordinance. 97 Ark. 338; 90 Ark. 37; 105 Ark. 68; 148 Ark. 246.

V. G. Holland, for appellee.

The ordinance is not valid. There is no means whereby a property owner living upon any street described in the ordinance could ascertain whether the street in front of his property would be improved or, if improved, in what manner. The ordinance is too vague and uncertain. 119 Ark. 119; 130 Ark. 44.

WOOD, J. Ordinance 229 of the city of Blytheville, Arkansas, creates Improvement District No. 2 of said city for the purpose, as expressed in the ordinance, of "improving all of that portion of all the streets within the corporate limits of said city which run east and west through said city, provision for the paving of which is not made by Paving District No. 1 of said city; said improving to be done by draining and grading, or draining, grading, construction of curbing, guttering, paving and necessary storm sewering, or by otherwise improving said streets in such manner as the board of commissioners of said district, to be hereinafter named, may deem substantial, adequate and proper; said draining and grading, or draining, grading, construction of curbing, guttering and necessary storm sewering to be done, located and constructed on that portion of said streets provision for the paving of which has not been made by Paving District No. 1, as the commissioners hereinafter appointed may deem for the best interest of the district; and said draining, grading, or draining, grading, construction of curbing, guttering, paving and necessary storm sewering may be done in such manner and constructed of such materials

as the commissioners for said district, to be hereinafter appointed, may deem for the best interest of the said district, the cost of such improvement to be assessed against the real property in said district."

The question presented by this appeal is whether or not the above ordinance is valid. It will be observed that the ordinance creates an improvement district embracing all the real property within the corporate limits of the city of Blytheville for the purpose of improving "all of that portion of all of the streets within the corporate limits of said city which run east and west through said city, provision for the paving of which is not made by Paving District No. 1 of said city."

The above provision is sufficiently definite to designate the streets and the portions thereof which were to be improved, because the ordinance plainly points out the way to ascertain what streets and what portions thereof are to be improved by embracing "all the streets and the portions thereof provision for the paving of which had not been made by Paving District No. 1 of said city." By referring to the ordinance creating Paving District No. 1 and the streets and portions of streets authorized to be paved under that ordinance, it could be easily ascertained what streets and portions of streets running east and west through said city had not been paved or authorized to be paved under that ordinance. After thus creating the district and designating the property to be improved, the ordinance then provides that said streets shall be improved as follows: "By draining and grading, or draining, grading, construction of curbing, guttering, paving, and necessary storm sewering, or by otherwise improving said streets in such manner as the board of commissioners of said district, to be hereinafter named, may deem substantial, adequate and proper."

The language of this latter provision is so vague that it is impossible for the property owners in the district to determine therefrom the character of the im-

provement to be made. The property owner could not determine whether the improvement contemplated was both draining and grading, or whether it was simply draining without grading, or grading without draining; or whether it was simply by curbing without guttering, or guttering without curbing; or whether it was simply by paving; or, in other words, whether it contemplated only one of the methods mentioned, or one or more, or all of them, combined; or by some other method, not mentioned, if the commissioners deemed such method to the best interest of the district. Under the indefinite language used it would be wholly within the discretion and power of the commissioners to adopt any one, or all of the methods designated for improving the streets mentioned; or they could use one or all methods on a portion of the streets, or one or any combination of the different methods mentioned on the remainder.

The statute under which the above ordinance was passed provides as follows: "The council of any city of the first or second class, or any incorporated town, may assess all real property within such city, or within any district thereof, for the purpose of grading or otherwise improving streets and alleys, constructing sewers, or making any local improvement of a public nature in the manner hereinafter set forth." Sec. 5647, C. & M. Digest. This statute conferring power upon the city council to create improvement districts, and other statutes prescribing the method of procedure, clearly contemplate that the ordinance creating the improvement district shall designate, at least in general terms, the nature of the improvement to be undertaken. For instance, if the improvement contemplated is the draining, grading, construction of curbing, guttering and paving of streets, the ordinance should so specify; or, if it contemplates that the streets should be improved in some other manner, the ordinance should so specify. Likewise, if it only contemplates that the streets should be improved by only one method, it should so specify. But if the ordinance be

so framed that the property owners in the district to be created cannot determine therefrom the nature of the improvement contemplated, the ordinance is void because of its vagueness. The property owners cannot, either in their preliminary petition asking for the creation of the district, or in their petition asking for the appointment of commissioners and that the improvement be made, broaden the terms of the statute so as to confer authority upon the city council to create an improvement district, appoint commissioners, and order the improvement to be made, the general nature of which has not been designated. It would be impossible for any property owner to determine form the above ordinance what the nature of the improvement contemplated would be. Any property owner, upon an examination of the ordinance under review, would know that certain designated streets were to be improved, but he would be utterly at a loss to know what the nature and character of the improvement would be.

The word "otherwise" as used in the ordinance is all-comprehensive and would certainly confer upon the commissioners very broad powers; in fact, the power to make any kind of improvement which they might deem substantial, adequate and proper to conserve the best interests of the district. In the language of one of our cases, this ordinance "would clothe the commissioners with a roving commission which would be only controlled by their own discretion." *Cox* v. *Road Imp. Dist. No. 8 of Lonoke County,* 118 Ark. 119-123. The Legislature did not intend by the statute authorizing city councils to create improvement districts and to appoint commissioners to make such improvement, to confer upon the commissioners any such unlimited power.

In *Less* v. *Imp. Dist. No. 1 of Hoxie,* 130 Ark. 44-46, we said: "It is necessary that there should be no uncertainty about the improvement which it is proposed to make." And in *Cox* v. *Imp. Dist., supra,* we said: "It is not contemplated that upon and after the establishment

of the district there shall be any doubt about the improvement to be constructed. Otherwise, property owners might sign the petition under the apprehension that a certain road or street was to be improved, only to learn after the district had been established and the plan approved that they were mistaken or had been deceived. One of the purposes of requiring a petition in writing is to prevent such controversy."

While the ordinance in this case follows the language of the preliminary petition, the preliminary petition itself is too vague and indefinite to meet the requirements of the statute. If the ordinance creating the district designates in general terms the nature of the improvement contemplated as required by the statute, so that the property owners embraced in the district may be advised thereof, then the ordinance is valid, the commissioners may be appointed and the improvement made upon complying with the other provisions of the statute relating thereto. See secs. 5650, 5652, 5653, C. & M. Digest, and other provisions of the statute applicable to such cases. (Chap. 89, C. & M. Dig., "Municipal Improvement Districts"). Where the nature and character of the improvement is set forth in the ordinance only in general terms, and the kind of material to be used in making the improvement is not specifically designated, and the property owners have not in their petition for the improvement specifically designated the same, then, to be sure, the commissioners may exercise a wide discretion in determining the kind of material to be used. See *McDonnell* v. *Imp. Dist. No. 45 Little Rock,* 97 Ark. 334-339, and cases there cited.

The appellants rely upon the last case above cited to sustain their contention that the ordinance herein is valid, but in that case the petitions "specified that the improvement should be made by grading, draining, construction of curbing and paving." There was therefore no uncertainty as to the character of the improvement for which the district was organized. The uncertainty

was only in the kind of material to be used, which was left to the discretion of the commissioners. The decision in that case does not sustain the appellants' contention, but on the contrary is, as we take it, authority for the present holding.

The decree of the trial court holding the ordinance void, and granting the appellee relief for which he prayed, is in all things correct, and it is affirmed.

TALLMAN v. BENNETT.

Opinion delivered May 29, 1922.

VENDOR AND PURCHASER—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.—Payment by the purchaser of land of the taxes due thereon, thereby preventing a forfeiture for taxes, *held* a good consideration for an agreement by the vendor to extend the time of one of the purchase-money notes.

Appeal from Arkansas Chancery Court, Northern District; *John M. Elliott,* Chancellor; affirmed.

STATEMENT OF FACTS.

Elliott Tallman brought this suit in equity against M. G. Bennett *et al.*, to obtain judgment on three promissory notes, the principal of which aggregates $12,000, and to foreclose a mortgage on a tract of land given to secure said notes.

All three of the notes were dated March 24, 1920, and bore interest at the rate of 6% per annum from date until paid, and the interest was payable annually or to become as principal and bear the same rate of interest. The first note was for $6,000 due on or before one year after date. The remaining two notes were for $5,000 and $1,000 and due on or before two years after date.

According to the testimony of Tallman, M. G. Bennett applied to him for an extension of the note, and he told him he would extend the note if he would increase the interest from 6% to 10%. Tallman required this because he himself was borrowing money and was paying the

increased rate. Tallman told Bennett that unless he did this he would exercise his right to declare all the notes due and bring suit to recover judgment on them and to foreclose the mortgage given to secure them. The mortgage was on 380.41 acres of land in Arkansas County, Ark., and contained a clause providing that, should sixty days' default in the payment of any note or interest on the same be made, then all the indebtedness should become due at the option of the mortgagee. Bennett paid the interest on the notes on the 20th day of May, 1921, and the payment was indorsed on each note separately.

According to the testimony of M. G. Bennett, some time before the first note became due he saw that he could not pay it because the price of rice had become so low. The notes were given in part payment of the purchase price of a tract of land. Bennett had already paid $6,000 of the purchase price, and offered to reconvey the land to Tallman if he would cancel the notes. This Tallman declined to do, and asked Bennett if he could pay the interest on the notes and the taxes on the land. Bennett thought that he could do this if the payment of the first note was extended. Thereupon Tallman agreed to extend the note for one year. Bennett paid the interest on the notes about the time the interest became due, and also paid the taxes on the land, which amounted to about $1,100. E. G. Bennett, one of the makers of the notes, said that he was present when Tallman agreed to an extension of the note for one year, and that nothing was said about raising the interest from 6% to 10%.

E. C. Benton, cashier of the First National Bank, testified that that bank held one of the notes as collateral for money owed it by Tallman, and that the interest on the note was paid by Bennett when it became due.

The court found the issues in favor of the defendants, and dismissed the complaint of the plaintiff on the ground that the suit was prematurely brought.

To reverse that decree the plaintiff Tallman has duly prosecuted an appeal to this court.

George C. Lewis, for appellant.

The findings of fact by the chancellor are against the preponderance of the evidence. A verbal agreement between the payee of a note and the maker, that if the latter paid the interest at maturity, the payee would extend the note, not being based on a consideration, is not such an agreement for an extension as would discharge the surety. 82 Ark. 28; 123 Ark. 463; 143 Ark. 498. To make a valid contract of extension, the extension must be for a definite period and the new contract based upon a new consideration. 123 Ark. 463. If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration. 112 Ark. 223.

James E. Ray, for appellee.

In a suit in equity where there is conflict between two witnesses detailing the same transaction, this court will accept the testimony credited by the chancellor. 83 Ark. 524. Payment of interest in advance is a good consideration. 4 Elliott on Contracts, sec. 3404; 3 R. C. L. 438; 54 Ark. 100.

HART, J., (after stating the facts). This court held that, in order to discharge a surety on a note by a new contract by the extension of the time of payment, the extension must be for a definite period, and the new contract must be based upon a new consideration. *Thornton* v. *Bowie,* 123 Ark. 463; *Colvin* v. *Glover,* 143 Ark. 498; and *Vestal* v. *Knight,* 54 Ark. 97.

Counsel invoke the rule applied in those cases to secure a reversal of the decree in the present case. There is something more in the present case, however, than the agrement to extend the note for one year in consideration that the Bennetts should pay the interest which was already due. The notes were given for the balance of the purchase price of 380.41 acres of land in Arkansas County, Ark. The land was in the possession of the Bennetts, and they were raising rice on it. The price of rice be-

came so low that the Bennetts saw that they would not be able to pay the first note of $6,000 when it became due and the interest on the notes became due. They had already made a payment of $6,000 on the land, and offered to deed it back to Tallman if he would surrender their notes. Tallman declined to do this. He had deposited one of the notes in the bank as collateral security for an indebtedness he owed it. Tallman told Bennett that, if he would pay the interest on the notes and the taxes on the land, he would extend the note which was due for another year. Bennett agreed to do this. He paid Tallman the interest on the two notes in his possession and to the bank the interest on the note it held as collateral. He also paid the taxes on the land, which amounted to about $1,100.

Under § 10082 of Crawford & Moses' Digest, the taxes became a charge upon the land.

Sec. 10083 provides a penalty of 25% upon the taxes so returned delinquent.

Sec. 10086 provides for a sale of delinquent land for the taxes, penalty and costs therein.

By agreeing to extend the notes for one year, Tallman secured the payment of the taxes on the land. Otherwise it would have been forfeited for taxes and sold by the collector for the taxes, statutory penalty, and cost of sale. This constituted a consideration for the extension of the payment of the note for one year.

In this connection it may also be considered that Bennett paid the interest on one of the notes to a bank which held it as collateral security for an indebtedness of Tallman.

The agreement for the extension of the note for one year has all the essentials of a binding contract. Tallman extended it for a definite period of time in consideration that Bennett should pay the taxes on the land, thereby preventing the statutory forfeiture and sale thereof by the collector. This was an agreed equivalent for the extension and such consideration as would sup-

port it. It was something entirely additional to what he could have obtained without the extension agreement.

Therefore the judgment will be affirmed.

CAPPS v. JUDSONIA & STEPROCK ROAD IMPROVEMENT DISTRICT.

Opinion delivered June 5, 1922.

1. STATUTES—AUTHORITY TO CALL ELECTION.—Act No. 8 of Extraordinary Session of 1920, § 36, providing that the act should not become effective until approved by votes of the landowners of the proposed highway improvement district at an election to be held at a time and place to be fixed by the county court, requires that court to call such election, and vests in the court the discretion to fix the time and place for holding it.
2. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—A statute creating a road improvement district which provides that the act shall not become effective until approved by a vote of the landowners at an election to be held at a time and place fixed by the county court, is not invalid as a delegation of legislative power to the county court.
3. STATUTES—REFERENDUM.—Crawford & Moses' Dig., §§ 7510, 7512, relating to referendum of municipal ordinances under Amendment 7 of the Constitution, do not apply to an act of the Legislature creating a proposed highway improvement district and providing that it shall become effective only upon approval by vote of the landowners of the proposed district.
4. STATUTES—REFERENDUM.—Under Const. Amendt. 7, and Crawford & Moses' Dig., § 9767, authorizing the General Assembly to order a referendum on any measure enacted, at such time and in such manner as the General Assembly may direct, the General Assembly may refer to the landowners of a proposed road improvement district the question whether or not the act should take effect; such election to be held at a time and place to be fixed by the county court.
5. STATUTES—NOTICE OF REFERENDUM.—An order of the county court calling an election of the landowners of a proposed road improvement district to determine whether the act creating the district should be adopted, to be held at the usual voting places in a township in the proposed district, notice of which was published in the only weekly newspaper published in the district, was sufficient, in connection with testimony in the record showing that

mass meetings were held in the district prior to the election, at which the question was discussed, to show that the landowners were given a fair opportunity to express their will on the issue.

6. HIGHWAYS—ROADS CONNECTED BY HIGHWAY.—Act 1920 (Ex. Session), No. 8, creating a road improvement district for the improvement of two designated roads, was valid where the roads were connected by an improved road.

7. HIGHWAYS—ENTRY OF ASSESSMENTS IN BOOK.—Act 1920, No. 8, §§ 7 and 8, providing that the highway commissioners shall enter the assessment of benefits of the proposed district in a book to be filed with the county clerk, and that the secretary of the board shall publish notice of the filing, are mandatory and jurisdictional, and assessments are invalid where, at the time the notice was published, they had not all been extended on the book.

Appeal from White Chancery Court; *John E. Martineau,* Chancellor; reversed in part.

J. N. Rachels, for appellants.

1. The act is inoperative, and section 36 thereof only renders it more so. An election to be held at a time and place to be fixed by the county court of White County confers no authority on anyone to call an election, the time and place for holding which *may* be fixed by the county court. If the county court should have refused to act on the subject, could it have been compelled to act? This court has said it could not. 47 Ark. 80-85; 104 *Id.* 583. An act must be clear and definite before it can be enforced. 122 Ark. 491-498. All elections on measures referred to the people must be had at the biennial general election, except when the Legislature orders a special election. 105 Ark. 380. See Amendment 7, Constitution. The county court could not act *sua sponte.* 17 Standard Procedure, 674 § 2 and cases cited; *Id.* 678 and cases cited. It could call the election, if it could do so at all, only under C. & M. Digest, §§ 7510 and 7512. There is nothing in the act indicating that the General Assembly ordered an election, and this court cannot supply that intention. 143 Ark. 83-87. See also 67 Ark. 30; 131 *Id.* 429; 104 *Id.* 298.

2. Two or more roads cannot be constructed under a single act which only provides for a single system with a

single board of commissioners. 141 Ark. 288; *Road Improvement Districts 1, 2 and 3* v. *Crary,* 151 Ark. 484; 118 Ark. 294-302.

3. The assessment was arbitrary, capricious and confiscatory, was not made as provided by the act, and was not made and filed with the county clerk before the notice provided for by section 9 of the act was published. Cooley on Taxation, 3rd ed. 1252 and cases cited; *Id.* 1254 and cases cited; *Id.* 1257-1258; 88 Wis. 599; 50 N. Y. 502; 9 Wash. 253; 9 Standard Encyc. of Proc. 1158; 160 Pa. 499; 51 N. J. L. 267; 63 N. J. L. 202; 54 Cal. 536; 13 Ark. 198; 15 *Id.* 43-49; 15 Am. and Eng. Enc. of L., 2nd ed. 356; 50 Ark. 116-129; 89 *Id.* 513-517. The list, called assessment list, was fatally defective under the requirements of section 7 of the act. These requirements are mandatory. 79 Ark. 236; 99 *Id.* 508.

4. The notice of the election was insufficient, not only in the method and length of time of publication, but also in failure to designate the bounds of the district, thereby effectuating a fraud upon the landowners. 116 Ark. 167.

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

1. The act is definite and certain, and the election held thereunder was valid. The Legislature could not well have been more explicit in the language employed in section 36 of the act, without itself fixing the time, place and manner of holding the election, and it had the power to delegate that duty to the county court.

This is a special act. The initiative and referendum amendment applies to laws of a general nature and not to special acts. See C. & M. Digest, §§ 9764, 9766, 9767; 104 Ark. 583; 104 *Id.* 516.

Under the provisions of C. & M. Digest, § 9767, the Legislature itself could have refused this act to the people; also under its terms as also under the initiative and referendum, it had the power to refer the act in the manner it did.

2. On the question as to whether or not the election held was legally sufficient, see 43 Ark. 66; 92 Ark. 70; 25 R. C. L. 772, § 19.

3. The contemplated improvements constitute a single improvement. 139 Ark. 602-603; *Id.* 524; 142 *Id.* 58; 138 *Id.* 553; 137 *Id.* 354; 130 *Id.* 514.

4. The method of assessment of benefits is valid. 141 Ark. 164; 137 *Id.* 568; 139 *Id.* 322; 147 *Id.* 449.

WOOD, J. This is an action by the appellants, taxpayers and owners of real property, in what is known as the Judsonia-Steprock Road Improvement District (hereafter called district). The district was created by act No. 8 of the Acts of the General Assembly in extraordinary session, approved January 31, 1920. The action is against the district and its commissioners. The complaint and the amendments thereto with the exhibits are voluminous, and we shall not undertake to set them out in detail, but will only state the issues in a general way and dispose of them in the manner in which they are presented in the brief of counsel for appellants.

1. Appellants contend that the act creating the district is not a complete act; that it is too vague to be operative, as shown by the provisions of section 36 of the act, which is as follows:

"Sec. 36. This act shall not become effective until after the same shall have been approved by a vote of the landowners of the territory hereinbefore described and embraced in said district, at an election to be held at a time and place to be fixed by the county court of White County, at which election only landowners of said district shall be permitted to vote, and provided that if either a majority in value as shown by the last county assessment, or acreage of the landowners in said district, voting in said election, shall vote for this act, the same shall be declared adopted by the county court of White County and shall at once become effective; provided, further, that at said election there shall be elected by the landowners in said district and voting in said election three

landowners of the district as commissioners of said district by the county court of White County, which court shall also designate the term that each of said commissioners shall hold office, as hereinbefore provided, and the commissioners so appointed by said court shall hold office for the term designated and fixed by said court and until their successors are appointed, as herein provided; and provided further, that the returns of the election herein provided for shall be made to and canvassed by the county court of White County, which court shall make an order declaring the result of said election."

Counsel for appellants argue that the county court, under the above section, had no authority to call an election. When section 36 is taken as a whole, and the language used by the Legislature to express its intention is given its plain and natural meaning, it unquestionably shows that it was the intention of the Legislature to direct the county court of White County to hold an election at which the landowners in the territory should voice their approval or disapproval of the act, and provided that if either a majority in value as shown by the last county assessment, or acreage, of the landowners voting at said election shall vote for the act, the same should be declared adopted and at once become effective. It is the duty of the court to construe the language of the section as a whole and give meaning and effect to every word, if possible. When this is done, we have no doubt that the legislative purpose was to require an election to be held, and likewise to require the county court to fix the time and place of such election. The language, "at an election to be held at a time and place to be fixed by the county court," is as mandatory in its meaning and effect as if the Legislature had said "at an election which *shall* be held," etc. The use of such language does not leave it optional or discretionary with the county court to call an election. This is mandatory; but the fixing of the time and place for such election is a matter within the court's discretion.

No power is delegated to the county court to make the law, that is, to determine what the law shall be, but upon the county court is conferred the power, and it is made its mandatory duty, to ascertain, by voice or vote of the landowners in the district, at an election to be called by the county court, whether the majority in value or acreage will that the act shall become effective. Providing for "an election to be held at a time and place to be fixed by the county court" is tantamount to commanding the county court to call an election and to fix the time and place of such election. These were ministerial functions imposed upon the court. Under the language employed, such functions were imposed by necessary implication, and this could be, and was, done as effectually as by the use of express terms The court, *sua sponte,* could have exercised such function in the absence of any petition of interested landowners of the district, but in this case, as the record shows, there was a petition of ten landowners of the district which was made the basis of the court's call. Had the court failed to act upon the prayer of such petition, then undoubtedly these landowners would have had a remedy by mandamus to compel it to call an election and fix the time and place thereof.

The case is ruled on this point by the cases of *Boyd* v. *Bryant,* 35 Ark. 69-74; *Nall* v. *Kelly,* 120 Ark. 277-286; *Harrington* v. *White,* 131 Ark. 291-294. In the latter case, we said: "It is insisted, in the first place, that the statute is void because it is an attempt to delegate legislative authority. It seems plain to us, however, that the statute is not a delegation of legislative authority, but comes within the rule that the Legislature may 'make a law to delegate the power to determine some facts or state of things, upon which the law makes or intends to make its own action depend.' *Boyd* v. *Bryant,* 35 Ark. 69; *Nall* v. *Kelly,* 120 Ark. 277." We also quoted from the Supreme Court of Ohio in the case of *Cincinnati, etc., Rd. Co.* v. *Commissioners,* 1 Ohio St. 77, as follows:

"The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." After the above quotations, we conclude by saying: "Applying that test to the case in hand, it is plain that the statute does not amount to a delegation of the legislative power, but on the other hand the Legislature exercised its power by declaring what the law shall be when put into operation in a given locality by ascertainment of certain facts, *i. e.*, the will of the majority in the given locality to be affected."

2. Counsel for appellant next insist that if the county court had the power to call the election, it could only do so under the provisions of secs. 5110 and 5112 of Crawford & Moses' Digest. The above sections have reference to the referendum of municipal ordinances passed under the authority of Amendment No. 7 of the Constitution, providing for general legislation under what is known as the initiative and referendum, and the enabling acts. See also secs. 9764 to 9767 C. & M. Digest, inclusive. The above sections, therefore, have no application to the act under review. This is a special act. Amendment No. 7, among other things, provides as follows: "All measures referred to the people of the State shall be had at the biennial general elections, except when the legislative assembly shall order a special election." Sec. 9767, *supra*, provides: "The General Assembly may order the referendum upon any measure enacted thereby, and the same shall be voted upon and the result of the vote thereon declared in the same manner as measures upon which the referendum has been ordered by petition, or at such time and in such manner as the General Assembly may direct."

Unquestionably, under the above provisions of the Constitution and the enabling acts, the General Assem-

bly had the power to refer to the landowners of the district the question as to whether or not the act should take effect, such question to be determined at a special election to be held at a time and place fixed by the county court.

3. Since the provisions of the enabling acts pertaining to general legislation under the initiative and referendum, as to the time, place and manner of holding elections, have no application, the only question we need consider in regard to the election is whether or not the election called at a time and place designated by the county court and conducted in the manner directed by it, gave the landowners of the district a fair opportunity to express their will on the issue as to whether or not the act should take effect.

It could serve no useful purpose to set out, *in extenso,* the order of the county court calling the election. It shows that the election was to be held at the usual voting place in Harrison Township, White County, Arkansas, on the 13th day of March, 1920, and the notice of such election was dated February 18, 1920. This notice was published in the Judsonia Advance, a weekly newspaper having a *bona fide* circulation in Harrison Township of White County, one of the townships included in the improvement district, the same being the only township of the district in which a newspaper was published. There is testimony also in the record tending to prove that prior to the election there were mass meetings held in the district at which the issue as to whether or not the law should take effect was discussed.

Without discussing the matter further, it suffices to say that the manner in which the county court conducted the election was sufficient to give the landowners of the district a fair opportunity to voice their wishes on the issue. No act of fraud is alleged, or shown, in the conduct of the election on the part of those designated to hold the same, and it is not proved by the appellants that the result of the election as declared by the county

court was other than the free and intelligent choice of a majority in acreage and value of the landowners of the district voting at the election. We are convinced, therefore, that the act was duly adopted in compliance with sec. 36 of the act, and should become effective from and after the 20th of March, 1920, as declared by order of the county court, unless the act contains other provisions which render it invalid.

4. The appellants contend that there are two roads to be improved, and two separate and distinct improvements, which cannot be grouped together for the purpose of taxing the landowners in the district as for a single improvement. Counsel for appellants, in his brief, attaches a copy of the map which was on file with the county clerk of White County, showing that there are two roads to be improved. Sec. 27 of the act provides: "The commissioners of said district may, at any time hereafter, subject to the approval of the county court of White County, and in accordance with the provisions of this act, extend and improve the roads herein provided for or improve any of the roads in said district connecting the roads herein provided for, or either of them, with any other improved road in said district, or connecting either of said roads herein called for with the other; provided, however, that the improvement of any road or roads not herein provided for shall not cause the cost of construction of all the roads so improved in said district to exceed in cost forty per cent. of the value of the lands and real estate and real property in said district, as shown by the county assessment in effect at the time said additional road or roads are to be improved."

Section 8 of the act provides as follows: "If the commissioners conclude that lands not within the boundaries of the district, as hereinbefore laid out, will be benefited by the improvement of the roads, they shall assess the benefits and damages to such lands and return a separate assessment thereof."

The testimony of F. O. White, county judge of White County, was to the effect that the two roads shown on the map and described in the act as the roads to be improved by the creation of this district are connected by an improved road known as the State highway, and that this highway lies entirely within the boundaries of the district. It will be observed that section 27 conferred upon the commissioners the power, subject to the approval of the county court, to "improve any of the roads in the said district connecting the roads herein provided for, or either of them, with any other improved road in said district, or connecting either of said roads herein called for with the other." The trial court was therefore justified in finding as a fact that, under the uncontroverted evidence, the roads to be improved constituted but a single scheme or project for the improvement of these highways. But, aside from this, there is nothing in the record to demonstrate that the determination by the General Assembly that the improvement contemplated constituted but a single project was an arbitrary and unreasonable exercise of legislative power. Our conclusion that the act is not invalid because it creates a district for the improvement of two roads specifically designated, and other connecting roads mentioned, constituting but a single scheme of local improvement, is in accord with numerous decisions of this court. Therefore we need not pursue the question further. *Bennett* v. *Johnson,* 130 Ark. 507-514; *Tarvin* v. *Road Imp. Dist.* 137 Ark. 354-364; *Sallee* v. *Dalton,* 138 Ark. 549-553; *Booe* v. *Simms,* 139 Ark. 595-602-3; *Van Dyke* v. *Mack,* 139 Ark. 524; *Easley* v. *Patterson,* 142 Ark. 52-58; *Desha Road Imp. No. 2* v. *Stroud,* 153 Ark. 582, where the cases are collated.

5. The appellants challenge the validity of the assessment of benefits made by the commissioners on various grounds, only one of which it is necessary to discuss and decide. Section 7 of the act provides, among other things, as follows: "The commissioners shall pro-

ceed to assess the lands within the district and shall inscribe in a book each tract of land, and shall assess the value of the benefits to accrue to each tract by reason of such assessment, and shall enter such assessment of benefits opposite the description, together with the estimate of the probable cost to the landowners. * * * * * The commissioners shall also assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to lands taken or damaged; and where they return no such damages as to any tract of land, it shall be deemed a finding by them that no damages will be sustained." Section 9 provides, in part, as follows: "The assessment of benefits of said district shall be filed with the county clerk of White County, and the secretary of the board shall thereupon give notice of its filing by publication for two weeks in a newspaper published and having a *bona fide* circulation in that county. This notice may be in the following form: Judsonia and Steprock Road Improvement District. Notice is hereby given that the assessment of benefits and damages of the above district has been filed in the office of the county clerk of White County, where it is open to inspection," etc. (Then follows a provision for description of land beyond the district). The notice concludes by calling upon all persons wishing to be heard to appear on the day named.

One of the commissioners, the secretary of the board, testified that the board of commissioners authorized one Louis Bell to do the mechanical work of extending the benefits. Prior to that time the board had determined upon the method for arriving at the benefits, and gave instructions to Bell as to the method to be pursued. The board met on the 24th of November for the purpose of assessing the benefits. At that time Bell had not finished the work of extending the benefits on all the land, "but had the work completed and was working on the books to put in on there. He had most of it on the books." The testimony of this witness further shows that the

record of the board "does not show the benefits assessed against each separate piece of property." The board, as assessors of the district, certified that the assessments as the same appeared on the commissioners' records were equitable and just, to the best of their knowledge and belief. This certificate was signed by them on the 24th of November, 1921. At this time, as his testimony above shows, Bell had not finished the work—that is, had not succeeded in actually extending the benefits on all of the lands.

Bell testified concerning this in part as follows: At that time and before the 24th of November, 1921, he had figured up the entire benefits. On that day the commissioners signed the certificate, but all of the assessed benefits were not actually written down in the book. The above testimony was uncontroverted, and it shows that sections 7 and 9 of the act had not been complied with as above set forth in regard to the assessment of benefits before the notice required by section 9 was published. A majority of the court have reached the conclusion that sections 7 and 9 require that the commissioners as assessors shall enter the value of benefits to accrue to each tract of land in a book opposite the description of each tract, and that this book, showing the benefits assessed against each tract, shall be filed with the county clerk of White County; that these provisions are mandatory, and were intended for the benefit of the property-owner, and were therefore jurisdictional requirements which had to be complied with before the secretary of the board was authorized to give the notice specified in the statute. The language of these sections shows that the Legislature contemplated that the assessment of benefits in the manner indicated was to be complied with as a condition precedent to the notice and the hearing provided for before the commissioners for the equalization and adjustment of the assessments of benefits. The notice was essential in order that the property owners might examine the book containing the assessment of

benefits to determine whether or not they were objectionable and whether or not they desired to be heard upon the assessments, and, if so, to prepare for such hearing. It was not enough that the property owners should have the right simply to appear before the commissioners on the day specified in the notice. The statute was framed so as to give the property owner the right to examine and compare his own assessment with every other assessment in the district, in order to determine whether the assessment as a whole, or his own assessment of benefits as compared with the others, was fair and just, or whether it was unequal, inequitable, and discriminatory.

It follows that the assessment of benefits made by the board of commissioners as assessors of the district was null and void. The court erred in not so holding and in dismissing that portion of the appellant's complaint which called in question the validity of such assessment. On account of this error the decree is therefore reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

McCULLOCH, C. J., (dissenting). I do not think that the requirement of the statute that the completed assessment list should be filed with the county clerk before the publication of notice is jurisdictional, and avoids the assessment if not complied with. The purpose of the requirement is to give the owners of property an opportunity to be heard as to the correctness of the assessments—to provide a time and place for such hearing and notice thereof in advance. The specification of time of two weeks is not for the purpose of giving that much time to prepare for a contest, but it is to insure publicity, so that every interested owner can be advised of the hearing. The failure to file the completed list was a mere irregularity, and should be disregarded unless prejudice actually resulted. In this instance the list was incomplete when filed on the day the notice was given, but it was completed before the day set for the hearing, and every landowner had an opportunity on that day to

contest the correctness of the assessment. In fact, the landowners who are parties to this suit appeared, and their complaints against the assessment were heard, therefore the failure to complete the list of assessments before it was filed had no prejudicial effect whatever.

Of course, if the owners of property had been deprived of the opportunity to be heard on account of the failure to complete the assessment list before the day of hearing—in other words, if they were deprived of the fullest opportunity to be heard in complaint against the assessments—then a court of equity should grant relief, even treating the failure to file the list in time as a mere irregularity; but where no harm resulted, the assessments should not be avoided on account of the irregularity.

The commissioners do not sit as a court, though, in passing on complaints against assessments, they act in a *quasi*-judicial capacity; and strict compliance with the requirements of the statute should not be exacted as to matters affecting the jurisdiction of the board. Substantial compliance with the statute is all that should be required.

ABSTON v. STATE.

Opinion delivered May 29, 1922.

1. CONSPIRACY—SUFFICIENCY OF EVIDENCE.—In a prosecution for night-riding under Crawford & Moses' Dig., § 2795, evidence that accused and others banded themselves together for the purpose of blowing up some strip-pit mines during the night time, and that, when arrested in an abandoned slope near the mines, they were armed and masked, *held* sufficient to warrant a conviction.
2. CRIMINAL LAW—QUESTION FOR JURY.—Where the evidence was conflicting, the question whether a witness was an accomplice was for the jury.
3. CONSPIRACY—SUFFICIENCY OF EVIDENCE.—Under an indictment which charged that accused conspired to wilfully damage a certain strip-pit mine, evidence that three strip-pit mines adjoined each other, and were not far from where accused and his confederates were arrested, *held* sufficient to show that they intended to damage the strip-pit mine described in the indictment.

4. CRIMINAL LAW—EXEMPTION OF WITNESSES FROM RULE.—It was within the court's discretion to exempt the prosecuting attorney, sheriff and deputy sheriff from the rule against the presence of witnesses in the courtroom.

5. CONSPIRACY—ADMISSIBILITY OF EVIDENCE.—In a prosecution for night-riding, evidence of the finding of firearms and ammunition on the morning after the arrest of the accused and his confederates, at the place of the alleged unlawful assemblage, *held* admissible.

6. CONSPIRACY—EVIDENCE.—Evidence as to the finding of dynamite in a weather-beaten condition near the scene of an unlawful assemblage two weeks thereafter was properly admitted as against the objection that it was too remote; the weight of such evidence being for the jury.

7. CRIMINAL LAW—GENERAL OBJECTION TO INSTRUCTION.—A mere general objection to an instruction does not preserve for review the question whether the instruction is calculated to confuse and mislead the jury.

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

Webb Covington, for appellant.

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

McCULLOCH, C. J. Appellant was indicted and convicted of the crime of night-riding, a felony under the statutes of this State. Crawford & Moses' Digest, sec. 2795 *et seq.*

There were two counts in the indictment, the first one charging that appellant and Bob Ragon, Otis Clark, Bascal Morgan and Jim Cornett "did unite, confederate and band themselves together for the wilful and unlawful purpose of doing an unlawful act in the night time by wilfully, unlawfully and maliciously injuring the mining property of Werner-Dunlap Coal Company." The other count alleged that appellant, together with the persons named in the first count, "did unite, confederate and band themselves together for the purpose of doing unlawful acts while riding masked, and being disguised and armed, and then and there wilfully, unlawfully and feloniously, while so masked and disguised and wearing arms, did go

forth in the night time for the purpose of wilfully, unlawfully and maliciously damaging and destroying the mining property of Werner-Dunlap Coal Company."

According to the evidence adduced, the offense was committed in the coal regions of Johnson County, near Spadra.

Appellant was the secretary of one of the miners' unions operating in the locality, and there was friction between the union miners and the operators concerning the conduct of the operators in bringing in non-union labor to work in the mines. The character of mining done there was what is called "strip-pit" mining. The coal lies near the surface, and the method is to strip the earth from the surface down to the layers of coal and then mine out the coal without sinking a shaft or slope.

It appears from the testimony that there were in that locality three mines of this character, all of which were adjoining each other, and one was owned and operated by the Werner-Dunlap Coal Company, a copartnership composed of Lewis Werner and Bob Dunlap. These mines were within a mile or two of the place where appellant and his associates were alleged to have gathered for the purpose of committing the unlawful act of injuring the mining property.

The offense is alleged to have been committed on Saturday night, September 24, 1921.

According to the evidence, the union of which appellant was the secretary and one of the leaders, met in regular session on the preceding Tuesday night at the hall where they were accustomed to meet, and near the close of that meeting appellant privately requested a portion of the members—twelve or fifteen of them—to meet him across the railroad track for a conference. According to the testimony, when this small number of the members of the union met across the railroad with appellant, he addressed the assemblage and stated that the strip-pit mines were a menace to the community,

that the course pursued by the operators was starving the miners and their families, and that they (the miners) must get rid of the strip-pit mines. Appellant suggested that those present go out and blow up the strip-pit mines and run the inmates off, and called a meeting and suggested that all present assemble the following Saturday night at an abandoned slope in an old field or prairie, a few miles distant. This testimony comes from one Wilson, a witness who, according to some of the testimony adduced, was an accomplice.

Before the date named, Wilson informed Mr. Dunlap of the plan, and the sheriff and his deputies were at the designated place (the old slope) on Saturday night, and there arrested appellant and numerous other parties who were masked and armed. Firearms were taken from the persons of appellant and other parties, and the next morning the sheriff found guns and ammunition at the place where they had assembled the night before. About two weeks later one of the deputies of the sheriff found some dynamite concealed in a stump near one of the strip-pits and also the fuse, which had been rained on, and had been concealed at that place for a considerable length of time, at least long enough to become weather-beaten.

There is a conflict in the testimony, and appellant denied all the charges with respect to conspiracy to injure property, and also denied that he wore a mask at the time he was arrested at the slope. He admitted that he was armed at the time, as did others who were arrested at the same time, but they all claimed that, on account of the bringing in of lawless non-union miners, it was necessary to go armed for self-protection. Appellant denied that he advised unlawful methods or that he met or conspired with any parties for the purpose of committing any unlawful act, and stated that he passed along by the old slope for a wholly different purpose and on a different mission.

The evidence tends to show that appellant and those who were arrested with him on the occasion named were men of good character in the community.

Our conclusion is that the evidence was sufficient to sustain the verdict.

It is earnestly insisted that Wilson, according to the undisputed evidence, was an accomplice, and that there was not sufficient corroboration. We are of the opinion, however, that it is not undisputed that Wilson was an accomplice in the commission of the alleged offense, but that there was enough evidence to justify a submission of that issue to the jury. This was done by one of the court's instructions.

Wilson admitted that he was at the meeting of the miners' union on Tuesday night, and that he attended the private meeting called by appellant after the adjournment. He admits listening to appellant's proposition to the other men to mask themselves and join together for the purpose of committing an unlawful act, and that he asked the question, in response to appellant's proposition, why they did not send off and get non-resident persons to come in and use the dynamite; but on direct inquiry he stated that he did not agree to go into the enterprise with appellant and the others, and that before the meeting at the slope on the following Saturday night he informed Dunlap of the plans, and that he attended the meeting at the request of the sheriff and not for the purpose of joining in the unlawful acts to be thereafter committed.

Appellant requested the court to give an instruction telling the jury that Wilson was an accomplice and must be corroborated. The court refused to give that instruction, but did give one submitting to the jury the question whether or not Wilson was an accomplice, and stating that if it was found that he was an accomplice he must be corroborated before there could be a conviction on his testimony.

It is also urged that the evidence fails to make out the offense because it does not show that the property of the Werner-Dunlap Coal Company was to be injured, but merely shows that the parties agreed to blow up or damage the strip-pit mines, without indicating which ones were to be subject of attack.

The three strip-pits were adjoining each other and not very far distant from the place where appellant and his co-conspirators assembled, and the inference was warranted that they intended to direct their operations toward all of the strip-pits in that locality, including the one owned and operated by the Werner-Dunlap Coal Company. The evidence on that issue was, we think, sufficient.

It is next contended that the court erred in enforcing the rule against the presence of witnesses in the court room, in exempting three of the State's witnesses from the operation of the rule. The witnesses exempted were the sheriff himself (Mr. Bartlett), Brock, the prosecuting attorney, who acted as one of the sheriff's deputies on the night appellant and his associates were arrested at the slope, and W. S. Jett, who was also a deputy sheriff but was an employee at the mines.

It was a question within the discretion of the court in determining which of the witnesses should be exempted from the operation of the rule, and we cannot say that there was an abuse of the discretion in this instance. *Vance* v. *State,* 70 Ark. 272; *St. L. I. M. & S. Ry. Co.* v. *Pate,* 90 Ark. 135.

It was clearly competent for the State to prove the finding of firearms and ammunition at the place of the alleged unlawful assemblage the next morning after the parties were arrested, but it is contended that the finding of the dynamite and fuse two weeks later near the strip-pit was too remote to be admissible.

No precise rule can be laid down with respect to admissibility of testimony concerning conditions existing after the commission of an offense. In some circum-

stances the court may say, as a matter of law, that it is too remote, and again, under other circumstances, it may be determined as a matter of law that the general condition is not remote and should be considered as evidence, and still again, under other circumstances, it may be a question to submit to the jury to determine the remoteness of the circumstances adduced in evidence. Of course, in either event, the weight of the testimony is a question for the jury. The finding of dynamite secreted near the scene of the crime two weeks after its commission would appear to be too remote a circumstance to throw any light upon the issues involved, and, if nothing else is shown, the circumstances would perhaps be inadmissible, but in this instance it was shown that the explosive appeared to be weather-beaten, as if it had been there some time, and the jury could have inferred that the explosive had been secreted there about the time of the commission of the offense, and this would be a circumstance tending, in some degree, to show that there had been preparations made to blow up the mine. It was, as before stated, a question for the jury to determine what inference should be drawn from that circumstance, and we think it was a competent circumstance to go to the jury.

It is contended that the court improperly permitted the State to introduce in evidence statements of the coconspirators in the absence of appellant after the arrest of the former, but we do not find in the record that any such testimony was introduced.

Error of the court is assigned in giving the following instruction:

"In determining whether or not the defendant and these parties alleged in the indictment, or either of them, united or banded themselves together or confederated themselves together for the purpose of doing an unlawful act charged, it is proper, of course, and you may take into consideration, not only all the evidence that has been introduced, but all the facts and circumstances to which

the witnesses have testified in this case, in determining whether or not such a confederation or such a uniting or such a banding took place between the defendant and those charged, or any of them. That is true, of course, in all cases. That is what in law is called direct evidence. And all the direct testimony and all the circumstantial evidence may be taken into consideration by you in determining the guilt or innocence of the defendant in this case."

The objection to this instruction was general and not specific. The language used expressed a confused distinction between direct evidence adduced and proof of facts and circumstances, but, when the whole of instruction is considered together, it is manifest that the court meant to deal with the subjects of direct evidence and circumstantial evidence. If objection was to be made to that feature of the instruction, it should have been done specifically.

The particular argument made here against the instruction relates to that part which refers to the banding together "between the defendant and those charged, or any of them," it being contended that this permitted the jury to convict appellant upon proof of the banding together of any of the alleged conspirators.

If it be conceded that this language is of doubtful meaning and could be construed to mean that the defendant could be convicted on such proof, the objection ought to have been made specific. The instruction correctly directed the jury to consider, not only the direct testimony, but all the circumstances in the case, for the purpose of determining whether or not appellant and the other parties named assembled together and masked themselves for the purpose of committing an unlawful act in the night time. There is direct testimony on this subject, and, aside from the direct testimony of Wilson, the principal witness, it is a strong circumstance that appellant and numerous other parties were discovered gathered together at this remote place in the night time, masked and armed.

We do not think that this instruction was erroneous, or, at least, that it contained such obviously erroneous statements which could be reached by a general objection.

Error of the court is assigned in refusing to give some of the instructions requested by appellant, but we are of the opinion that the refused instructions were fully, or at least sufficiently, covered by those which the court gave.

The evidence was considered by the jury, and by the trial court on the motion for a new trial, and since it is legally sufficient to sustain the verdict, we do not feel at liberty to disturb it.

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

WEBB v. STATE.

Opinion delivered May 29, 1922.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence tending to show that defendant struck the deadly blow with a gun barrel without provocation, with malice aforethought, and after deliberation, *held* to sustain a verdict of murder in the first degree.
2. CRIMINAL LAW—HARMLESS ERROR.—Where, in a prosecution for murder, a witness for defendant was allowed to testify without objection that defendant had previously been convicted of resisting an officer, it was not prejudicial error, on cross-examination of defendant, to permit defendant to be interrogated concerning such conviction, where defendant detailed exculpating circumstances concerning the conviction.
3. HOMICIDE—FAILURE TO INSTRUCT AS TO MODE OF PUNISHMENT.—In a prosecution for murder, where no request therefor was made, the court's failure to instruct that the jury, on finding defendant guilty of murder in the first degree, might fix his punishment at death or life imprisonment, was prejudicial error, where the jury found defendant guilty of murder in the first degree without fixing the punishment.

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

D. L. Purkins and *A. H. Hamiter,* for appellant.

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

McCULLOCH, C. J. Appellant was indicted by the grand jury of Lafayette County for the crime of murder in the first degree, and on the trial of the case the jury rendered a verdict finding appellant guilty of murder in the first degree, as charged in the indictment, and judgment was rendered on the verdict for the imposition of the punishment of electrocution.

Appellant is a negro, and the charge against him is the killing of another negro named Elmond Green by striking him with a gun-barrel. The killing occurred at night near the home of a negro woman named Mary Ford, where there was a small social gathering attended by a small party of negroes of both sexes.

Green and one of Mary Ford's daughters, Leona, decided to attend a social gathering at another place, and went out in front of Mary Ford's house to get in Green's buggy. The girl testified that, after she got into the buggy, Green walked around to unhitch the horse, and that she heard the sound of blows, and thinking that Green was striking the horse, she called to Rufus Huie, another negro, who was standing on the porch, to come out and make Green stop beating the horse. Huie ran out, and when he reached the place he discovered that appellant had been striking Green. When Huie ran out there, appellant commanded him to stand back, and threatened to shoot. Another witness says he heard Huie state, after he had gone out to the place of the killing, that "Bill Webb has killed Elmond," and that appellant exclaimed, "God damn you, this is Mr. Bill Webb tonight." A pair of gun-barrels were found at the spot, with blood on the breech end.

The evidence tends to show that appellant was secreted in the bushes near the place where Green's horse was hitched, and that he was lying in wait for Green.

There is other evidence which establishes the fact that appellant and his wife had separated, and that there was some trouble between them on account of Green's attention to appellant's wife.

Appellant himself testified that he went to Mary Ford's house that night to pay a small sum of money that he owed to one Nesbit, and that when he got near the house he heard a conversation between Green and his (appellant's) wife, and heard Green threaten to whip her, when he (appellant) interposed, and that Green then thrust his hand in his bosom as if to draw a weapon.

Appellant testified that he did not strike Green with a gun-barrel, but struck him with a stick.

The evidence was sufficient to sustain the verdict for murder in the first degree.

The evidence tends to show that appellant was lying in wait, and that he struck the deadly blows with the gun-barrel, and did so without any provocation, with malice aforethought and after deliberation.

Appellant introduced as a witness A. B. Knight, a white man, in whose family appellant's wife was cooking, for the purpose of proving that appellant and his wife had not separated but were on good terms, and that appellant visited his wife frequently at the home of witness. On cross-examination, the prosecuting attorney drew out from the witness Knight that prior to that time he had paid a fine for appellant upon the conviction of the latter for resisting an officer. On re-direct examination, appellant's counsel re-examined Mr. Knight on that subject and had him state the occasion and the person with whom appellant was having a difficulty when he resisted an officer. There was no objection made to this testimony of Mr. Knight.

Appellant testified in his own behalf, and on cross-examination the prosecuting attorney was permitted to interrogate appellant, over the objection of his counsel, concerning his conviction of the offense of resisting an officer. The court overruled the objection, and appellant

testified concerning the circumstances under which he resisted the officer. Appellant admitted that he had entered a plea of guilty, but his explanation of the incident was to the effect that his conduct on the occasion named did not amount to resisting an officer. The ruling of the court on this subject is now assigned as error.

We have often held that a defendant may, on cross-examination, be interrogated concerning any of his past conduct which might affect his credibility as a witness. It is unnecessary to determine whether or not the present instance comes within that rule, for appellant's own statement was more favorable to himself than the other witness, Mr. Knight, who did not pretend to detail the exculpating circumstances attending the alleged offense of resisting an officer, but merely stated that appellant had been convicted, and that he (witness) had paid the fine. This testimony went in without objection, and we cannot see that it added anything prejudicial to appellant to permit him to make an explanation of the circumstances according to his own version of them. Appellant did not ask for the exclusion of Knight's testimony, and, as before stated, we cannot see that his own testimony would make any more unfavorable impression than that made by the testimony of Knight.

We conclude, therefore, that there was no prejudice in this ruling of the court, without deciding whether or not it was competent to draw out from appellant on cross-examination the fact that he had been guilty of the crime of resisting an officer—an offense which might, or might not, involve moral turpitude so as to affect the credibility of the witness.

The form of the verdict rendered by the jury was as follows: "We, the jury, find the defendant guilty of murder in the first degree. J. T. Kennedy, Foreman," and, as before stated, the court rendered judgment for the extreme penalty of electrocution.

There is a statute fixing the punishment for murder in the first degree at electrocution, but there is another statute which reads as follows:

"The jury shall have the right in all cases where the punishment is now death by law, to render a verdict for life imprisonment in the State Penitentiary at hard labor." Crawford & Moses' Digest, § 3206.

We have decided that the statute just quoted did not repeal the old statute fixing the penalty at electrocution, but merely gave the power to the jury to reduce the punishment to life imprisonment, and that a verdict finding the defendant guilty of that crime, without fixing the punishment at imprisonment, called for a judgment for the extreme penalty of electrocution. *Kelly* v. *State,* 133 Ark. 261.

In the present case it appears from the record that the court did not instruct the jury as to the form of the verdict and was not asked to do so. It is now contended by appellant's counsel that it was error for the court to fail to give such an instruction informing the jury that it was within their power to reduce the punishment to life imprisonment, and that an order ought to be entered here reducing the punishment in order to eliminate the error.

We have steadily adhered to the rule that it is not error for a trial court to fail to give an instruction on a given subject unless the court is requested to do so. *Allison* v. *State,* 74 Ark. 444; *Scott* v. *State,* 77 Ark. 455; *Mabry* v. *State,* 80 Ark. 345; *Hobbs* v. *State,* 86 Ark. 360; *Snyder* v. *State,* 86 Ark. 456; *Ray* v. *State,* 102 Ark. 594. We have applied this rule in cases where the court had failed to give instructions on the lower degrees of homicide.

There is nothing in the statutes of this State which requires a court to give instructions unless requested by the parties to do so. The only statute on the subject reads as follows: "When the evidence is concluded the court shall, on motion of either party, instruct the jury on the law applicable to the case." Crawford & Moses' Digest, sec. 3179.

We perceive no reason why the rule announced above should not be applied to the failure of the court to give an instruction concerning the power of the jury to reduce the punishment for murder in the first degree to life imprisonment. It rests upon the same principle as the failure to give any other instruction of law applicable to the issues involved in the trial. We believe it to be good practice for the court in all murder cases to inform the trial jury that they have the power to fix the punishment at life imprisonment, but there is no error in the court's failure to do so unless attention is called to it by a request for an instruction on that subject.

Affirmed.

HART, J., (on rehearing). Counsel for appellant contends that, inasmuch as the statute gives the jury an alternative right to fix the punishment in capital cases at death or life imprisonment in the State Penitentiary, the court erred in not charging the jury with respect to the punishment. In this contention we think counsel are correct, and that the motion for a rehearing should be granted. It is true that this court has set its face against errors which do not affect the merits, but in a capital case justice requires that the jury be told what duties the statute devolves upon it to perform in the way of fixing the punishment of the accused, provided he is found guilty.

Sec. 3205 of Crawford & Moses' Digest provides that the jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he is guilty of murder in the first or second degree.

Sec. 3206 provides that the jury shall have the right, in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State Penitentiary at hard labor.

The statute provides that the jury, and not the court, shall have the right to fix the punishment, and it follows that, under such a statute, it is necessary to inform the jury of the punishment imposed by the statute in order

that it may properly exercise the right vested in it. If the court had explained to the jury the distinction and difference of penalty of murder in the first degree, the finding of the jury might have been different. By not telling the jury that it had a right to fix the punishment of the defendant at life imprisonment, the latter was deprived of a substantial right. The right to exercise the discretion under the statute was given to the jury, and the court could not exercise it.

We think this holding is in accord with the rule laid down in *Winkler* v. *State,* 32 Ark. 539. The reason for the rule in such cases is clearly expressed by Mr. Justice HARLAN in *Colton* v. *Utah,* 130 U. S. 83, as follows: "Without such recommendation the court, in the absence of sufficient grounds for a new trial, has no alternative but to sentence the accused to suffer death. While in this case the jury were instructed as to what constituted murder in the first and second degrees, they were not informed as to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of punishment of death. If their attention had been called to that statute, it may be that they would have made such a recommendation, and thereby enabled the court to reduce the punishment to imprisonment for life. We are of the opinion that the court erred in not directing the attention of the jury to this matter. The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice. Its object could only have been met through a recommendation by the jury that the lesser punishment be inflicted, and it is not to be presumed that they were aware of their right to make such recommendation. The failure of the court to instruct them upon this point prevented it from imposing the punishment of imprisonment for life, even if, in its judgment, the circumstances of the case rendered such a course proper."

So, too, in *Blair* v. *Commonwealth,* 7 Bush (Ky.) 227, it was held that the instructions to the jury were prejudicial to the defendant in not submitting to its determination whether, if the defendant was found guilty, his punishment should be death or confinement in the penitentiary.

In *Cesure* v. *State,* 1 Tex. Ct. of Appeals 19, it was held that on the trial of offenses to which alternative penalties are attached, it is the duty of the district judge, whether asked or not, to give such alternative penalties in the charge to the jury, and that an omission to do so is error.

The court said that under such a statute the question of punishment to be inflicted is a matter entirely discretionary with the jury, and is as legitimate a subject of inquiry by them as any other question involved in the case. The court further said that, in failing to give a charge submitting this question to the jury, the trial court committed a material error calculated to injure the rights of the defendant, for which a new trial should have been granted.

In *Mays* v. *State,* 143 Tenn. 443, 226 S. W. 233, the court had under consideration a statute allowing the jury, upon finding mitigating circumstances, to commute the punishment, upon conviction in capital offenses, to imprisonment for life. The court reaffirmed the rule announced in an earlier case that the language of the act clearly vested in the jury the exclusive power and authority to fix the punishment of defendants in cases where they have been convicted of murder in the first degree. The court further held that the act was mandatory.

In the case last cited the State contended that the law fixed the punishment for murder in the first degree at death, except where the jury should find mitigating circumstances, and that therefore, when a simple verdict of guilty of murder in the first degree was rendered by the jury without a finding of mitigating circumstances, the

death penalty followed by force of the law, and the act of the trial judge in imposing said penalty was but ministerial.

The court said that, under the act, the jury did not have to make any finding at all of mitigating circumstances in the sense of stating such a finding in their verdict, in order to impose less than the death penalty.

The court said further that the matter of punishment within the limits stated was one for the discretion of the jury, and that the jury might reduce the punishment if it was of the opinion that there were mitigating circumstances.

The court reaffirmed the rule that the statute committed to the jury the power of assessing the punishment and that this power was exclusive. It was held that a verdict which did not fix the punishment was a nullity, and that no valid punishment could be based thereon.

In the present case the finding of the jury might have been different, had the court explained to the jury the alternative right given it by the statute in fixing the punishment of the accused. Therefore, the majority of the court is of the opinion that, the punishment prescribed by the statute being alternative in its character, and the statute having made it the duty of the jury to exercise its discretion in fixing the punishment, it was part of the law applicable to the case, and the trial court erred in not charging the jury in regard to the discretion to be exercised by it in case the accused was found guilty of murder in the first degree.

The error can be cured, however, by reducing the punishment of appellant to life imprisonment. The sentence of death for murder in the first degree will be set aside, and the sentence reduced to imprisonment for life in the State Penitentiary at hard labor, unless the Attorney General elects within two weeks to have the judgment reversed and the cause remanded for a new trial.

McCULLOCH, C. J., and HUMPHREYS, J., dissent.

LITTLE RED RIVER LEVEE DISTRICT NO. 2 v. GARRETT.

Opinion delivered May 29, 1922.

1. BANKS AND BANKING—KNOWLEDGE OF OFFICERS.—A bank with which bonds proposed to be issued by a levee district were deposited by the latter's directors, who were also officers of the bank, and in control of its affairs, is charged with knowledge of such officers' fraudulent conduct in attempting to sell the bonds to the bank without authority and for their own purposes, and was not an innocent purchaser of the bonds.
2. PRINCIPAL AND AGENT—NOTICE OF AGENT.—An agent's knowledge is ordinarily imputed to the principal unless the agent acts for himself or has a personal interest rendering it improbable that he will report his knowledge to his principal.
3. CORPORATION—NOTICE TO OFFICER.—The exception to the general rule of imputing an agent's knowledge to his principal of cases where the agent acts for himself or has a personal interest, does not apply where an officer of a corporation acts as its sole representative or agent in the transaction, or where he is the corporation without accountability to any superior.
4. LEVEES—NOTICE OF WANT OF AUTHORITY TO SELL BONDS.—A bank's acts in purchasing levee district bonds from its controlling officers, who were also directors of the district, and crediting the proceeds to their individual accounts, was sufficient to charge it with knowledge of their want of authority to sell for their own benefit, even if they were not its only representatives in the transaction.
5. BANKS AND BANKING—LIABILITY FOR DIVERSION OF LEVEE DISTRICT'S BONDS.—In a suit by a levee district against the receiver of a bank for an accounting, in the absence of proof that the proceeds of levee district bonds credited by the bank to the individual accounts of the controlling officers of the district, who were also controlling officers of the bank, were used for the benefit of the district, the bank is chargeable with the amount thereof.
6. BANKS AND BANKING—DIVERSION OF PROPERTY—BURDEN OF PROOF.—In a suit by a levee district to hold a bank liable for diverting proceeds of sale of its bonds, where plaintiff contended that the bank should be charged with the proceeds of an unauthorized sale by a district director, the plaintiff had the burden of showing by a preponderance of testimony that the bank received these funds, it not being sufficient to show that the director had been guilty of other misappropriations and that it was not improbable that he had placed such funds in the bank.

7. BANKS AND BANKING—LIABILITY FOR DIVERSION OF LEVEE DISTRICT'S FUNDS.—In a suit by a levee district to hold a bank liable for diverting the district's funds, in the absence of proof that a levee district collector's canceled check, indorsed by the district, for tax money deposited to his credit, was not paid or was wrongfully paid to some one not authorized by the district to receive the money, the bank was not chargeable with the amount thereof.

Appeal from White Chancery Court; *John E. Martineau,* Chancellor; reversed in part.

Culbert L. Pearce, John E. Miller and *C. E. Yingling,* for appellant.

That part of the decree awarding the fourth issue of bonds to appellant is supported by the law and the evidence. The burden was on appellee to show that the bank purchased these bonds in good faith and paid value therefor. 82 Conn. 333, 135 Am. St. Rep. 278; 149 Wis. 413, 136 N. W. 549. The bank had knowledge of the infirmities of the bonds, as the knowledge of Long and Erganbright is imputable to the bank. 7 R. C. L. 658, sec. 659; 77 Ark. 172; 107 Ark. 250; 147 Mass. 268, 9 Am. St. Rep. 698; 118 Ill. 625. Where a person as an officer of a corporation deals with himself individually, the corporation being represented by no one except the person himself, the corporation will be chargeable with notice of any knowledge possessed by the officer. 22 S. W. 1056; 90 Iowa 554; 121 Mass. 490; 64 Mo. App. 527; 4 S. D. 312; 60 Fed. 78; 97 Ga. 527; 112 Ga. 823; 72 N. Y. 286; 32 Hun. 105; 28 R. I. 41; 20 S. W. 1119; 12 Fed. 686, and many other cases cited by appellant.

The district was not liable to the bank on the bonds because they were stolen from the district by the bank officials. 95 Me. 553, 55 L. R. A. 730.

The bank was liable for the misappropriation of the proceeds of the sale of the third issue bonds, which went to the individual credit of Erganbright, under the general rule that if the bank has knowledge that a breach of trust is being committed by the improper withdrawal of funds, it incurs liability. Many of the cases above cited are applicable, but in addition, see 3 R. C. L. p. 550, sec.

177; 136 Ark. 442; 135 Ark. 291; 69 Ark. 43; 18 Tex. 811; 129 Ga. 126; 82 Conn. 8; 211 Mass. 409; 1914-B Ann. Cas. 677; 1917-F, L. R. A. (N. S.) 300.

Brundidge & Neelly, for appellee.

The knowledge of Erganbright that Long had no authority to sell the bonds is not imputable to the bank. The rule that a corporation is not bound by the knowledge of its officers, where an officer is acting in his own interests, instead of that of the bank, is sustained by the weight of authority. The following cases are in point: 3 R. C. L. pgs. 478-9; 140 Ark. 67; *Id.* 367; 100 Fed. 705; 191 Fed. 657; 180 Fed. 687; 118 Fed. 800; 147 Mass. 268; 239 Fed. 704; 240 Fed. 114; 178 Fed. 57; 2 Pomeroy's Eq. Jur. (3d Ed.) par. 675; 190 Fed. 136; 6 A. & E. Ann. Cas. 675; 6 A. L. R. 237, and many others cited by appellee.

Fraud is not presumed, but must be proved, and the burden of proving the bonds were not sold is upon appellant.

McCULLOCH, C. J. The First National Bank of Judsonia, domiciled at the town of Judsonia, in White County, continued to do business until June 3, 1920, when it was found to be insolvent, and its affairs were taken over by a receiver appointed by the National Comptroller of the Currency. C. M. Erganbright was the president of the bank, and C. F. Long was its cashier. They were the managing officers of the bank, and, according to the testimony in the present litigation, they exercised complete control over the affairs of the bank, without accounting to any other officers or board. Long resigned as cashier in December, 1919, on account of criticism from a bank examiner, but he continued in joint control with Erganbright over the affairs of the bank.

After the bank failed it was discovered that it had been wrecked by these two parties who controlled it. It was found that they were manipulating the affairs of the bank for their own purposes, and had robbed the bank to the extent of nearly $100,000. The books and accounts of

the bank were left in obscurity on account of the manipulation of the various accounts by Erganbright and Long to cover up their unlawful and fraudulent transactions.

Appellant, Little Red River Levee District No. 2 of White County, is an improvement district organized under the statutes of this State for the purpose of constructing and maintaining a levee along certain stretches of Little Red River. Erganbright and Long and T. J. Pryor were the three directors of the district, and the accounts of the levee district were carried with the bank controlled by the two directors, Erganbright and Long. These parties, it appears from the testimony, dominated the affairs of the levee district as they did those of the bank.

There were four separate bond issues by the levee district. The last issue of $20,000, and the proceeds of the sale of a portion of the third issue are involved in the present litigation.

The transactions which form the subject-matter of this controversy run back to June 30, 1917, and it is conceded that on that date the levee district owed the bank the sum of $10,610.60 on overdrafts. It is also undisputed that subsequent to that date the bank purchased from Erganbright and Long third-issue bonds of the levee district aggregating the sum of $35,000, face value, and that the proceeds thereof—$34,000—were credited to the personal account of Erganbright. It is claimed on the part of the district that $5,000 more of that issue of bonds was purchased in the same way, but there is a controversy on that point.

In August, 1919, it was determined by the directors of the levee district that another bond issue of $20,000 was necessary to make certain repairs on the levee, and the bonds, in denominations of $500 each, were actually printed and signed, but the board then determined not to use the bonds, but to postpone the needed repairs until a more propitious time. Erganbright and Long took the

bonds and placed them in the vaults of the bank for safe-keeping, and the bonds have remained there until the present moment, having passed into the hands of the receiver when he took charge.

It appears that on December 10, 1919, notwithstanding the fact that the bonds were not to be put into circulation, but were to be safely kept in the vault of the bank, Erganbright and Long credited $18,000 to the levee district as the market value of the bonds, and this entry was made on the books of the bank as a purchase of the bonds by the bank. The proof shows that this was done solely for the purpose of covering up fraudulent transactions of Erganbright and Long and to balance up their accounts as nearly as possible. The funds thus credited were used by Erganbright and Long for purposes, according to the testimony, other than for the use of the levee district. At any rate, according to the preponderance of the evidence, the funds were not expended for the benefit of the district.

This action was instituted by the levee district against the receiver of the bank to cancel the alleged sale and transfer of the bonds to the bank and to recover possession of the bonds, and also to have an accounting with the bank as to the funds of the district received by the bank subsequent to June 30, 1917.

In the complaint it is alleged that the fourth-issue bonds were fraudulently put into circulation by Erganbright and Long, without authority and for their own purposes, and that the bank received the same without consideration and with knowledge of the fraudulent purposes of said parties. It is also alleged in the complaint that the bank purchased $35,000 of the third-issue bonds and wrongfully placed the proceeds of the purchase to the credit of Erganbright, and that, after allowing credits due the bank, the latter was indebted to the levee district in the sum of $35,000.

The receiver answered denying the charge relied upon by appellant, and alleged that the bank purchased the

fourth-issue bonds for a valuable consideration and was an innocent purchaser thereof, and also alleged that the bank was not indebted to the levee district in any sum, but that the district was indebted to the bank in the sum of $19,367.03.

There was a trial of the issues before the chancery court, and there was a decree in favor of appellant for the cancellation of the sale of the fourth-issue bonds, but the court dismissed appellant's complaint as to the prayer for the recovery of the proceeds of the former bond issue, and also dismissed the cross-complaint of the receiver against appellant. A cross-appeal has been prosecuted by the receiver.

The facts alleged by appellant with respect to the fraudulent use of the fourth-issue bonds by Erganbright and Long are established by the overwhelming weight of the evidence.

It is undisputed that Erganbright and Long looted the bank and had been engaged in that nefarious enterprise for several years. They had also been controlling the affairs of the levee district and using its funds for their own purposes for several years. They both fled the country the night before the bank went into the hands of a receiver, and Long has never returned or been heard of since that date. Erganbright returned and was indicted in the United States District Court and is now serving a term in the Federal prison. He testified as a witness in this case, and made no attempt to explain or excuse his wrong-doings. He admitted that he and Long had no authority to use these bonds, and he denied having used them in any way, and claimed that they still remained in the vault of the bank merely for safe-keeping. The testimony shows, however, that the price of the bonds was credited to the levee district on December 10, 1919, and there was a deposit slip for the amount in Erganbright's own handwriting. It is shown also that he signed the report of the bank examiner to the Comptroller of the Currency specifying these bonds as part of the assets of the bank.

The testimony of Erganbright is, of course, unreliable, but it merely corroborates the testimony of other reliable witnesses, particularly Mr. Pryor, the other director, to the effect that there was no authority whatever for the circulation of the bonds. Erganbright and Long acted solely for the bank and also assumed to act solely for the levee district, and simply used these bonds for their own fraudulent and unlawful purposes.

Under these circumstances, we are of the opinion that the bank was not an innocent purchaser, and that the chancery court properly canceled the purported sale of the bonds and decreed their return to the levee district. While the proceeds were credited on the bank's books, under the direction of Erganbright and Long, to the levee district, those funds were not, according to the evidence, used for the benefit of the levee district, because there were no repairs made thereafter and no further expenditures of funds.

The bank and the receiver, as its representative, are in no situation to claim immunity from the charge of knowledge of Erganbright's and Long's fraudulent conduct in attempting to sell the bonds. A corporation must necessarily act through agents, and the universal rule is that knowledge of an agent is ordinarily to be imputed to the principal; but there is an exception to that rule, that such knowledge of the agent will not be imputed to the principal where the agent acts for himself or has a personal interest in the transaction, thus rendering it improbable that he will report his knowledge to his principal. *Bank of Hartford* v. *McDonald,* 107 Ark. 232. This exception to the general rule has been, in many intances, extended to cases where an officer of a corporation acts for another corporation. Under these circumstances, the officer is treated as having a personal interest in the transaction, and his knowledge is not to be imputed to the corporation which he serves.

This exception, however, to the rule does not extend to instances where an officer of a corporation acts as its

sole representative or agent in the transaction under review. The reason for the exception fails where the officer of the corporation is its sole representative, and especially where, as in the present case, the officer is the corporation itself, without accountability to any superior. It would be entirely beyond reason or justice to hold that a person acting as the agent of both parties could wrongfully transfer property of one of his principals to the other. The facts of the present case illustrate the injustice of such a rule, for Erganbright and Long, without any actual authority, have simply attempted to transfer the property of the levee district—$20,000 of the fourth-issue bonds—to the bank.

The facts do not present a case for the determination which of two innocent parties must suffer where one has made it possible for injury to be imposed, inasmuch as Erganbright and Long acted for both of the parties in the transaction and merely took the property of one and appropriated it to the use of the other.

The authorities on the questions here involved are numerous, but are not altogether in harmony as to the circumstances under which knowledge of an agent of a corporation will be imputed to it, but the principle here announced has been recognized by this court in the case of *Skillern* v. *Arkansas Woolen Mills,* 77 Ark. 172. The following authorities are also found to sustain this view: 7 R. C. L. 658; Note to *Lilly* v. *Hamilton Bank* (U. S. Cir. Ct. Ap.) 29 L. R. A. (N. S.) 558; note to *First Natl. Bank* v. *Burns* (Ohio St.) 49 L. R. A. (N. S.) 764; *Loring* v. *Brodie,* 134 Mass. 453; *Atlantic Cotton Mills* v. *Indian Orchard Mills,* 147 Mass. 268; *Brobston* v. *Penniman,* 97 Ga. 527; *Anderson* v. *Kinley,* 90 Iowa 554.

Counsel for appellee rely upon the decision of this court in *Greer* v. *Levee District,* 140 Ark. 60, but in that case the officers dealing with the bank were not the sole representatives of their principals in the transaction. That, in other words, was a case where the exception to the rule against imputing knowledge of the agent to his principal was clearly applicable.

The decree is therefore correct as to the cancellation and return of the bonds, and same will be affirmed.

The other issues in the case merely come down to questions of fact, as there is little, if any, dispute as to the law applicable thereto.

The bank purchased third-issue bonds from Erganbright and Long and credited the proceeds to Erganbright's account. This, of itself, was sufficient to charge the bank, even if Erganbright and Long had not been its only representatives in the transaction, with knowledge of the want of authority on their part to sell the bonds for their own benefit. The authority to sell the bonds is not disputed, but to sell them for the personal benefit of the directors was quite another thing, and there was no apparent authority for Erganbright and Long to sell the bonds and appropriate the funds to their own use.

An audit of the books was made by an accountant for the district, and the receiver also made an audit. These accounts are necessarily voluminous, and, to some extent, difficult to fully comprehend. They start, however, with an undisputed balance due the bank by the district, as an overdraft, on June 30, 1917, and the undisputed fact that the bank purchased the bonds and paid the proceeds to Erganbright, for his own use, amounting to $34,000. This put the burden on the receiver to show that the proceeds of this sale were expended by Erganbright for the benefit of the district. We fail to find sufficient proof in the record to account for these funds as having been used for the benefit of the district, and therefore the bank should be charged with this amount.

It is further shown that the bank received to the credit of the district, after June 30, 1917, taxes collected from the property owners, aggregating the sum of $17,004.85, thus making an aggregate of $51,004.85 to be debited against the bank. Against this, the overdraft of $10,610.60 should be credited, and also the sum of $30,877.21, shown to have been expended for the use of the district.

After crediting to the bank the aggregate amount of $41,487.81, it leaves a balance of $9,517.04 chargeable against the bank.

It is contended on behalf of appellant that the bank should be charged the further sum of $4,307.50, the proceeds from the additional sale of $5,000 of the third-issue bonds. This batch of bonds was sold by Erganbright to Mr. Orthwein of St. Louis, for the sum of $4,307.50, but it is not shown by the proof that these bonds went into the hands of the bank. It devolved upon appellant to show by a preponderance of the testimony that the bank received these funds. Erganbright and Long were at the time guilty of all sorts of defalcations and misappropriation of funds, and it is easy to believe that they placed these funds in the bank, but in the absence of affirmative proof we cannot assume that they did so. So the chancellor was correct in refusing to allow that item.

There is also an item of $8,496 tax money received by S. T. Hughes, collector of the levee district, and which, it is claimed, was paid over to the bank. The only proof on this subject is that Mr. Hughes deposited his collections of taxes made by him in the bank to his own credit as collector, and that he drew a check on this fund in favor of the levee district. He exhibited with his testimony a canceled check showing the indorsement of the levee district, but it is nowhere shown in the proof who actually received these funds. The canceled check was evidently returned to Hughes by the bank—at least that is the inference, but he does not say so in his own testimony—but the check was properly indorsed, and in order to recover this sum it devolved upon appellant to show that this check was not, in fact, paid, or that it was wrongfully paid to Erganbright or some one else not authorized by the levee district to receive the money.

On this branch of the case the decree is reversed, and a decree will be renderd here in favor of appellant for the sum of $9,517.04, with costs of appeal.

It is so ordered.

McCULLOCH, C. J., (on rehearing). A petition for rehearing has been presented by each party; appellants, on the ground that this court erred in not allowing, as a claim against the bank, the additional item of $4,307.50, net price of the bonds sold to Orthwein, and $8,496, tax money alleged to have been paid into the bank by Hughes, appellant's tax collector; and appellee, on the ground that an item of $4,893.03 included in the charges against the bank subsequent to June 30, 1917, is improper, for the reason that it is included in the balance, or overdraft, shown on that date, and that the evidence clearly shows that the overdraft of appellant on the date mentioned above was $12,636.73, instead of $10,610.60, the sum on which our former judgment was based.

We are convinced, on re-examination of the accounts and other evidence in the record, that our original conclusion with respect to the additional items contended for by appellant was correct, and appellant's petition for rehearing is therefore overruled.

We are equally convinced that we erred in charging appellee with the item of $4,893.03 for tax money received after June 30, 1917, and also in regard to the amount of the overdraft. Counsel for appellee has clearly shown the errors in these respects, and there should be a correction of our former judgment.

Increasing the overdraft to $12,636.73, as appellee is entitled to, and eliminating the additional charge of $4,893.03 for tax money received, the judgment against appellee should be for $2,597.88, instead of $9,517.04, as rendered on the original hearing.

The rehearing asked for by appellee is therefore granted, and the reduction indicated above is ordered.

DUNHAM v. PHILLIPS.

Opinion delivered May 29, 1922.

1. APPEAL AND ERROR—FAILURE OF CROSS-APPELLANT TO FILE BRIEF.—Failure of an appellee to file a brief in support of his cross-appeal will be deemed an abandonment thereof.
2. VENDOR AND PURCHASER—RESCISSION—ACCOUNTING OF RENTS.—Where a contract for the sale of a farm was rescinded several months after the date of the sale, the purchaser must not only restore the land but he must also account for the rents and profits therefrom.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts, not against the preponderance of the evidence, will not be set aside on appeal.

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

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees for the rescission of a contract for the sale of forty acres of land in Washington County, Ark.

Appellee, A. J. Phillips, filed an answer in which he stated that he was willing for the contract for the sale of the land to be rescinded, but asked judgment against appellant for the rents and profits which he had received from the land.

Appellant D. J. Dunham was a witness for himself. According to his testimony taken at the trial in August, 1921, he was nearly eighty years of age. He had been living in Arkansas for about two years. Prior to that time he had lived in Oklahoma. A. J. Phillips and J. O. Phillips are brothers living in Washington County, Ark. J. O. Phillips and appellant made a contract with A. J. Phillips for the purchase of forty acres of land in question, which was set in an apple and a peach orchard, for the price of $13,000. A. J. Phillips and J. O. Phillips both told Dunham that the land was worth more than $13,000, and he relied on their representations because he had not been in Arkansas long enough to know the value of the land. The contract was made on the 8th

day of June, 1920. A. J. Phillips represented that he owned the land and had a good title thereto, but there were certain defects in the title which it was necessary to remove. He said that he could perfect the title by the 15th of September, 1920. A. J. Phillips executed a deed to the land and placed it in the First National Bank of Springdale in escrow to be delivered to the grantee when the purchase price was paid and the title was cleared. Dunham deposited in the bank $7,000 in cash and his note for $6,000. These amounts were to be turned over to A. J. Phillips when the title to the land was perfected. By the terms of the contract D. J. Dunham and J. O. Phillips are each to have an undivided one-half interest in the land.

J. O. Phillips took possession of the land. Dunham and J. O. Phillips were also interested in two other peach orchards. J. O. Phillips paid Dunham $2,200 for his share of the entire peach orchard deal. Dunham does not think that any part of this was from the land in question.

The children of A. J. Phillips had an interest in the land, and Dunham claimed a rescission of the contract on the ground that A. J. Phillips did not have a good title to the land. J. O. Phillips had possession of the land, and Dunham had nothing whatever to do with gathering the peach crop. A. J. Phillips paid $1,000 of the $7,000 deposited by Dunham in the bank to J. O. Phillips for his commission in making the sale of the land. Dunham did not know that J. O. Phillips was to receive any commission for the sale of the land.

A. J. Phillips was a witness for himself. He helped gather the peaches on the place after he had made a sale of the land to his brother, J. O. Phillips, and to D. J. Dunham. He was employed by his brother for that purpose. There were 825 bushels of peaches produced on said land in 1920, and they were worth $4 per bushel in Springdale, near which town the land was situated. No accounting was made to A. J. Phillips by J. O. Phillips or D. J. Dunham of the peaches and apples grown on the

land for the year 1920 and harvested after the sale of the land to them.

The above is substantially all the testimony necessary to decide the issues raised by the appeal.

The chancellor was of the opinion that D. J. Dunham should recover from A. J. Phillips the $1,000 of the purchase price of the land which A. J. Phillips had paid to his brother, J. O. Phillips, as a commission for selling the land.

The court further found that the peach crop for the year 1920 was of the net value of $3,300, and that D. J. Dunham and J. O. Phillips harvested said peach crop after they became tenants in common of the land, and that each should account to A. J. Phillips for the sum of $1,650, being one-half of the whole amount received by them for the peach crop.

The court further found that D. J. Dnham was entitled to a rescission of the contract for the purchase of the land from A. J. Phillips on June 8, 1920. The court was of the opinion that the judgment of $1000 in favor of D. J. Dunham against A. J. Phillips and J. O. Phillips should be applied as a setoff against the judgment of A. J. Phillips against D. J. Dunham for the sum of $1,650 and that the balance, which is $650, should be declared a lien upon the $6,000 held in escrow by said First National Bank. Said bank was directed to deliver the deed held by it in escrow to A. J. Phillips and to deliver the balance of the $6,000, after deducting the $650, to D. J. Dunham. The bank was ordered to cancel the $6,000 note held by it in escrow and surrender the same to D. J. Dunham.

A decree was entered accordingly, and to reverse that decree an appeal was taken by D. J. Dunham from that part of the decree which affected his interest adversely, and an appeal was taken by A. J. Phillips from that part of the decree which affected him adversely.

John W. Grabiel, for appellant.

J. O. Phillips, being one of the wrongdoers, is not entitled to relief. 6 R. C. L. 932, par. 316.

There was a failure to show any damage to the orchard or apple crop by want of spraying and cultivating. 67 Ark. 371; 97 Ark. 54; 57 Ark. 512; 71 Ark. 302.

The relation of tenants in common is not that of partners, unless by agreement. 158 Pa. St. 197; 38 A. S. R. 838. One tenant in common cannot bind the other or the estate by an unauthorized act. 38 Cyc. 101. They do not sustain the relation of principal and agent, and are not partners. 91 Ark. 133.

There is no relation of landlord and tenant between A. J. Phillips and the joint purchasers. 27 R. C. L. 654, sec. 416; 148 U. S. 345.

The legal unity of possession is the only unity among tenants in common; such tenants hold by several and distinct titles. 230 S. W. 579. One tenant cannot bind his cotenant by his unauthorized contracts or torts. 91 Ark. 133.

The relation of cotenancy between owners of property gives rise to no power on the part of one to render his cotenant liable to himself or bind third persons by any expenditures he may make or contracts he may enter into. 7 R. C. L. 874; 138 Ala. 399; 89 Me. 103; 159 Pa. St. 10; Note 91 A. S. R. 880.

Appellant was entitled to rescind the contract, because appellee was at all times in default. 8 How. 134; 197 Fed. 788; 166 Mass. 139; 92 U. S. 104.

HART, J. (after stating the facts). In the first place it may be said that A. J. Phillips has not filed a brief in the case, and under the settled rules of practice in this court he will be deemed to have abandoned his appeal. This leaves but a single issue raised by the appeal of D. J. Dunham, and that is the question of whether or not A. J. Phillips was entitled to recover the rents and profits after the contract for the sale of the land was rescinded.

It will be remembered that D. J. Dunham brought this suit for the purpose of having the contract for the sale of the land rescinded, and that A. J. Phillips in his answer stated that he was willing to have the contract rescinded

but asked for judgment for the rents and profits of the land after the date of the sale.

The court rendered judgment in favor of A. J. Phillips against D. J. Dunham for the sum of $1,650, which was found to be one-half of the value of the peach crop which Dunham and J. O. Phillips took from the land after the sale to them.

The court correctly held that A. J. Phillips was entitled to recover the rents and profits from the land. Dunham and J. O. Phillips took possession of the land under their contract of purchase, and if Dunham wished to rescind the contract he must restore the land and account for the rents and profits. *Davis* v. *Tarwater,* 15 Ark. 286, and *Griffith* v. *Maxfield,* 63 Ark. 548.

We are also of the opinion that the finding of the amount of rents by the chancery court is not against the preponderance of the evidence. According to appellant's own testimony, he was interested in three different peach orchards with J. O. Phillips and received $2,200 as his share in the whole venture. While he does not think that any of this came from the A. J. Phillips orchard, he is not sure of it. At any rate, he admits that J. O. Phillips had the entire charge of gathering the peach crop and that he had nothing to do with it.

On the other hand, A. J. Phillips testified positively that he was employed to help gather the peaches and that 825 bushels were gathered which were worth $4 per bushel.

Under the settled rules of this court a finding of fact made by the chancellor will not be disturbed on appeal unless it is against the preponderance of the evidence.

Therefore the decree will be affirmed.

RICHARDSON v. FOWLER.

Opinion delivered May 29, 1922.

1. SALES—CONSIGNMENT TO SHIPPER'S ORDER—DELIVERY.—Where grain was consigned to shipper's order with directions to notify buyer, a delivery to carrier did not pass title to buyer, there being no evidence that the parties intended such delivery to have that effect.
2. SALES—NECESSITY OF DELIVERY.—Actual or constructive delivery is necessary to complete a sale of chattels.

Appeal from Randolph Circuit Court; *Dene H. Coleman,* on exchange, Judge; reversed.

STATEMENT OF FACTS.

H. T. Fowler, doing business as the Fowler Commission Company at Kansas City, Mo., sued H. L. Richardson to recover $1,055.83, the balance alleged to be due for the purchase price of a car of corn.

The contract sued on was made by letters and telegrams. On the 12th day of June, 1920, H. L. Richardson sent a telegram from Reyno, Ark., to the Fowler Commission Company at Kansas City, Mo., asking the price on No. 3 mixed corn in bulk and date of delivery. The Fowler Commission Company sent a telegram to Richardson on the same day as follows: "Bulk three mixed corn, dollar ninety Reyno, prompt shipment, answer quick." On the same day the Fowler Commission Company wrote a letter to Richardson in which the above telegram was copied and was confirmed as follows: "Bulk No. 3 mixed corn, dollar ninety per bushel delivered at Reyno." Richardson received the above telegram and letter. Upon receipt of the telegram, Richardson wired back, "Accept your offer any size car at once, @ dollar ninety, c bu."

On June 14, 1920, the plaintiff shipped a car containing 1,625 bushels of No. 3 bulk corn over the St. Louis & San Francisco Railroad to the Fowler Commission Company at Reyno, Ark. This was the only railroad company from Kansas City, Mo., to Reyno, Ark. The

car of No. 3 mixed bulk corn was inspected by a licensed grain inspector of the United States, whose inspection certificate shows the car of corn to have been as represented when delivered to the railroad company.

On June 14, 1920, plaintiff also drew a draft on defendant for the sum of $2,876.61, being the purchase price of the corn at $1.90 per bushel, less the freight from Kansas City, Mo., to Reyno, Ark. The Fowler Commission Company was the consignor in the bill of lading and the car of corn was consigned to order of Fowler Commission Company, destination, Reyno, Ark., notify H. L. Richardson at Reyno, Ark. At the bottom of the bill of lading appears the signature of the agent of the railroad company and also that of Fowler Commission Company as shipper. The car of corn reached Reyno on June 22, 1920. It was hot and souring and had so deteriorated that it would not have graded No. 3 and was worth only about $1.45 per bushel in its damaged condition. Richardson refused to accept the car of corn on account of its damaged condition, and it was shipped back to Kansas City, Mo., to the plaintiff. The plaintiff then sold the car of corn at $1.45 per bushel, which was the best price obtainable in its damaged condition. The plaintiff credited the defendant with the amount received for the car of corn in its damaged condition and sued the defendant for the balance of the purchase money. The defendant refused to accept the corn or to pay the balance of the purchase money and defended the suit on the ground that he had a right to reject the corn because it was damaged when it reached Reyno.

The case was tried before the circuit court sitting as a jury. The court was of the opinion that under the facts recited above, the delivery of the corn by the plaintiff to the carrier at Kansas City, Mo., constituted a delivery to the defendant, and that the defendant was liable for the balance of the purchase price.

Judgment was accordingly rendered in favor of the plaintiff, and the defendant has appealed.

Schoonover & Jackson, for appellant.

This case differs from the case of *Roberts Cotton Oil Co.* v. *Grady,* 105 Ark. 53, in that the corn was consigned to the seller's own order, and not to the order of the buyer. Where that is done the carrier is not authorized to treat the person to be notified as a consignee. It cannot, without liability to the true owner of the goods, deliver the consignment to the party to be notified without the production and surrender of the receipt or the bill of lading. 10 C. J. 259; 116 Ark. 198. See also 4 R. C. L. 842, § 294; 125 Tenn. 658. Under the admitted facts appellant is not liable to the appellee in any amount.

W. L. Pope and *M. D. Bowers,* for appellee.

Delivery of goods to a common carrier, in pursuance of the directions of the purchaser, is delivery to the purchaser. 44 Ark. 558; 53 *Id.* 200; 79 *Id.* 603; 98 *Id.* 482; 105 *Id.* 56; 106 *Id.* 477; 137 *Id.* 397; 138 *Id.* 350.

HART, J. (after stating the facts).

The law in the case has been settled in favor of the defendant by several decisions of this court, and we cite the following: *Gibson* v. *Inman Packet Co.,* 111 Ark. 521; *Georgia Marble Finishing Works* v. *Minor,* 128 Ark. 124; *McGehee* v. *Yunker & Ronk,* 137 Ark. 397.

In the last mentioned case the court said that the delivery of goods by the seller to the carrier duly consigned to the purchaser constitutes a delivery to the purchaser and consummates the sale. The court also said that the converse of the rule is, that where the seller consigns the shipment to his own order, thus manifesting his intention to reserve his dominion and right of disposition over the property, nothing else appearing to manifest an intention to pass the title, such consignment does not constitute a delivery to the purchaser. In that case the testimony tended to show that the parties agreed on a method of delivery of the potatoes by delivery to the carrier and that the bill of lading was made out in the name of the seller to be changed as soon as the consignment reached Ft. Smith. The court said that the circum-

stances warranted the inference that the parties intended that the sale would be complete, and that the title to the potatoes should pass by delivery to the carrier. In such cases oral proof may be admitted to show the real intention of the parties to the transaction with respect to the question of delivery.

In the present case there is nothing in the record tending to show that the parties agreed that the corn should be consigned to shipper's order when the contract for its purchase was executed. The defendants purchased from the plaintiff a car of corn of a certain grade for a stipulated price. The plaintiff on his own motion consigned the corn to himself at the place where the defendant lived, with directions on the bill of lading to notify the defendant. Thus it will be seen that the plaintiff reserved his dominion over the corn until the purchase price was paid by the defendant. There was no agreement between the parties or anything else in the record tending to show that the plaintiff intended to pass the title to the corn to the defendant when it was delivered to the carrier.

There being nothing in the record from which it could be legally inferred that the sale was complete when the plaintiff delivered the corn to the carrier, the court erred in finding for the plaintiff. A delivery, either actual or constructive, is essential to complete a sale of chattels, and the title does not pass until there has been such a delivery.

As we have said, the plaintiff having consigned the corn to shipper's order without any agreement in this respect with the defendant, and there being nothing else in the record from which it could be legally inferred that plaintiff intended to pass the title when he delivered the corn to the carrier, the circuit court should, as a matter of law, have found for the defendant and rendered judgment accordingly.

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

MISSOURI PACIFIC RAILROAD COMPANY v. BREWER.

Opinion delivered May 29, 1922.

1. EXCEPTIONS, BILL OF—CERTIFICATION.—Special act No. 163 of 1921, p. 270, applicable to the First Judicial Circuit, does not render sufficient the approval and certification of a bill of exceptions by the official stenographer, without the approval of the presiding judge.
2. APPEAL AND ERROR—PRESUMPTION.—Where the trial court, by overruling a demurrer to a complaint, decided that the complaint stated a cause of action, it will not be presumed on appeal, in the absence of a bill of exceptions, that a cause of action was proved and the complaint amended to conform to the proof.
3. PLEADING—WHEN DEMURRER TO COMPLAINT OVERRULED.—If the facts stated in a complaint, with every reasonable inference therefrom, constitute a cause of action, a demurrer to the complaint should be overruled.
4. RAILROADS—FAILURE TO DRAIN RIGHT-OF-WAY.—A railroad company had a right to remove earth from its right-of-way with which to construct its tracks and repair its embankment, and, though it voluntarily dug a ditch to drain a hole thereby created, its failure to continue draining it gave no right of action to a contractor subsequently contracting to construct a highway across such hole.

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

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

The complaint did not state a cause of action. It was rainfall and surface water that filled the borrow-pit. Not even a property owner would have had the right to complain, much less the plaintiffs, who were mere contractors. 39 Ark. 463, 471-476; 27 *Id.* 572; 29 *Id.* 569; 66 *Id.* 275; 95 *Id.* 349; 125 *Id.* 372; 123 *Id.* 1; 75 Me. 284; 101 S. W. 934; 40 Cyc. 579. Appellant had the right to use the dirt on its right-of-way and to dig the borrow-pit; also to ditch the same, though not compelled to do so, for the purpose of drainage, without incurring liability for failure to keep it up, even to a property owner. 39 Am. St. Rep. 344; 43 N. W. 849; 78 Mo. 504; 86 Am. Dec. 216; 53 Am. Rep. 581.

Brundige & Neelly, for appellee.

The complaint states a cause of action. The authorities cited by appellant favor the appellee's contention rather than that of appellant. We call special attention to 39 Ark., cited by appellant, and to the rule as laid down at page 472. See also 66 Ark. 275; 95 Ark. 345; 123 Ark. 1, 6. Under the testimony, it was a question for the jury whether or not this was surface water that caused the damage, and whether or not the railroad company was negligent in not keeping the ditch open. If the complaint did not sufficiently state a cause of action, it should be treated as having been amended to conform to the proof.

SMITH, J. Appellees, who were the plaintiffs below, filed a complaint containing substantially the following allegations: That on or about the———day of April, 1920, plaintiffs contracted with the commissioners of North Arkansas Highway Improvement District No. 1 to construct several miles of highway, commencing near the town of Bradford and running parallel with the tracks of the defendant, Missouri Pacific Railroad Company, in a northerly direction. That the railroad company, in constructing its double track and repairing its embankment, dug a hole, commonly known as a borrow-pit, on the west side of said railroad track, said hole being about 150 feet long, 100 feet wide, and 5 feet deep. That the highway, as laid out by the engineers and adopted by the commissioners of the road district, passed very nearly over the center of said hole, and that it was necessary to fill up said hole to construct a base for said road.

Plaintiffs further allege "that after said railway company had dug the hole above referred to, on account of the rains the same became filled with water. That the railway company dug a ditch running from said water-hole north to a creek, said ditch being along and upon the right-of-way of the said defendant railway company, for the purpose of draining said hole. That the said ditch performed the purpose for which it was in-

tended up until sometime in the spring of 1920, when the said ditch became filled by the negligence of the said defendant company in allowing dirt to slough from the dump of the said railroad company, and the ditch to become clogged with trash and dirt until it was impossible for the water to drain from the pond or hole. That said water has stood in the said pond from the time that it was stopped up until the present time.

"That on October 22, 1920, plaintiffs gave notice to the agent and employees of the said defendant company that they had reached said pond in the construction of the roadbed, and that it would be necessary that the said ditch be opened and the pond drained, in order that they could complete the building of the dump over the pond, and for the further purpose of allowing them to pass over to complete the work on the other side of the creek, as there was no way by which plaintiffs could get across other than by following the old road which went through the pond and hole.

It was alleged that the railroad company failed and refused to open said ditch and allow the water to drain out of said pond, and that, by reason of the carelessness and negligence of the defendant company in failing to open said ditch and keep the same open, these plaintiffs have been damaged by having to lay their teams off from October 31, 1920, to January 1, 1921, and by having to build the road across the hole.

There was a prayer for damages in the sum of $5,000.

A motion was filed to make this complaint more definite and certain in the following particulars: First, by alleging to which employees notice was given to open the ditch; second, by alleging how many teams were laid off and on what days; third, by alleging the items making up the damage for which judgment was prayed; and by alleging whether the plaintiffs were original contractors or sub-contractors. The motion to make definite was overruled.

Whereupon the defendant railroad company filed a demurrer. This demurrer was also overruled, and at the trial which thereafter occurred there was a verdict and judgment for plaintiffs in the sum of $1,200, from which is this appeal.

We have before us a bill of exceptions signed only by the official court stenographer of the First Judicial Circuit of which White County, where the trial occurred, is a part.

In the case of *Chaffin* v. *Lee County National Bank,* 151 Ark. 106, we held that act No. 163 of the Acts of 1921 (Special Acts 1921, page 270), which applies only to the First Judicial Circuit of the State, was not intended to deprive the presiding judge of the right and duty of passing upon and approving the bill of exceptions in a case tried before him, and that a bill of exceptions approved and certified to by the stenographer only was insufficient.

We have no bill of excetions in the instant case and cannot, therefore, consider any assignments of error except those which appear from the face of the record.

For reversal of the judgment it is insisted that the complaint does not state a cause of action. In response to this contention counsel for plaintiffs insist, first, that the complaint does state a cause of action, and that, if a cause of action is not stated, it will be presumed that a cause of action was proved and that the complaint was amended to conform to the proof.

There is no room, however, for such a presumption in this case, as the court, by overruling the demurrer to the complaint, held that a cause of action was stated in the complaint, and it is not to be assumed that the court required anything more to be proved than was alleged in the complaint.

The case of *Rowe* v. *Allison,* 87 Ark. 206, defines the practice where a cause is appealed without a bill of exceptions bringing the testimony into the record. In that case it was said that "a conclusive presumption must

prevail that the evidence sustains the decree of the court, so far as it is possible for a decree based on the complaint to be sustained by evidence. If the decree is without the issues, or the complaint does not state a cause of action, this presumption cannot aid the appellee. *Jones* v. *Mitchell,* 83 Ark. 77. Where the decree is not responsive to the issues, it is void. *Rankin* v. *Scofield,* 81 Ark. 440; *Cowling* v. *Nelson,* 76 Ark. 146." See also *Fletcher* v. *Simpson,* 144 Ark. 436; *Wiegel* v. *Moreno-Burkham Construction Co.,* 153 Ark. 564.

It becomes necessary, therefore, to determine whether a cause of action is stated in the complaint.

In testing the sufficiency of a complaint on demurrer, the rule is that, if the facts stated in the complaint, together with every reasonable inference therefrom, constitute a cause of action, the demurrer should be overruled. *Kilgore Lbr. Co.* v. *Halley,* 140 Ark. 448, 215 S. W. 653; *Wm. R. Moore Dry Goods Co.* v. *Ford,* 146 Ark. 227. Does the complaint in this case, under this test, state a cause of action?

Counsel for appellee review the authorities on the right to impound surface waters, thereby overflowing adjacent lands. But we do not think the complaint set out above presents any such issue. The allegations of the complaint are that "the railroad, in constructing its double track and repairing its embankment, dug a hole, commonly known as a borrow-pit, on the west side of said railway track, said hole being about 150 feet long, 100 feet wide, and 5 feet deep," and that "the road, as laid out by the engineers and adopted by the commissioners of the State Highway Department, passed very nearly over the center of said hole, that it is necessary to fill up said hole and to construct a base for said road." It is further alleged that for a time the railroad company drained this hole or pool by means of a ditch on its right-of-way, and the basis of the suit appears to be that the railroad company had ceased to keep the ditch open after notice so to do.

The railroad company had the right to remove earth from its right-of-way with which to construct its double track and to repair its embankment. Vol. 2 Elliott on Railroads (3d Ed.) page 617.

Its action in digging the ditch appears to have been voluntary so far as draining the borrow-pit or hole is concerned, and its failure to continue draining the borrow-pit affords plaintiff no cause of action.

Plaintiffs' contract to build the highway across the borrow pit was made on or about the —— day of April, 1920, at which time the borrow-pit and ditch had been dug, as the complaint alleges "that the said ditch performed the purpose for which it was intended up until sometime in the spring of 1920, when the said ditch became filled by the negligence of the said defendant company in allowing dirt to slough from the dump of said railroad company, * * * *."

The complaint does not, therefore, allege the breach of any duty owing to the plaintiffs by the railroad company; and the demurrer to the complaint should have been sustained, and the judgment will therefore be reversed and the cause remanded, with directions to sustain the demurrer, with leave to the plaintiffs to amend their complaint if they are so advised.

DAVIS v. REYNOLDS.

Opinion delivered May 29, 1922.

1. EVIDENCE—VARYING WRITTEN CONTRACT.—The terms of a written contract are not contradicted or varied by showing the real parties in interest.
2. EVIDENCE—VARYING WRITTEN CONTRACT.—Plaintiff, suing on a written contract on its face purporting to have been made by a third person, may show by parol evidence that the third person made the contract as plaintiff's agent.

Appeal from Randolph Circuit Court; *J. B. Baker*, Judge; reversed.

W. L. Pope and *M. D. Bowers*, for appellant.

Appellee is bound by the act of her agent in signing the contract. 147 Ark. 226; 141 Ark. 25; 117 N. E. (Ind.) 526; 15 N. E. 345; 37 N. E. 355; 31 Cyc. 1263-1274; Mechem on Agency, chap. 5, Ratification.

Schoonover & Jackson, for appellee.

The demurrer was properly sustained. 87 Ark. 97; 120 Ark. 472; 38 Ark. 127; 108 Ark. 362; 91 Ark. 400.

A contract should be construed most strongly against the person who writes it. 73 Ark. 338; 74 Ark. 41; 84 Ark. 431; 90 Ark. 88; 97 Ark. 522; 105 Ark. 518; 112 Ark. 1; 115 Ark. 166.

A court of equity only has power to reform a contract. 23 R. C. L. 354.

A contract must be construed according to its terms. 84 Ark. 349. A court of equity cannot add parties to or substitute other parties for those named in the contract. 34 Cyc. 934. Parol evidence is not admissible to alter or vary the terms of a written contract. 4 Michie on Contracts, 371; 146 Ark. 127; 144 Ark. 279. Parol evidence is admissible where there is doubt as to the meaning of the instrument. 139 Ark. 507.

HUMPHREYS, J. This suit was instituted by appellant against appellee in the Randolph Circuit Court to recover $8,350 on account of an alleged breach of a written contract for the sale and purchase of 1,400,000 feet of timber, to be severed from lands belonging to appellee and delivered by her on the skids at the sawmill sold by her to appellant. The contract was executed on the 17th day of March, 1921, and recited that it was between Elmer Reynolds, party of the first part, and E. W. Davis, party of the second part. It was signed by Elmer Reynolds, party of the first part, and E. W. Davis, party of the second part. The contract was made the basis of the suit, but it was alleged in the complaint that, while signed by Elmer Reynolds, it was, in fact, the contract of appellee; that appellee was the owner of the sawmill and timber which appellant purchased, and that appellee constituted

Elmer Reynolds her agent to sign the contract in her stead and to carry out the terms thereof; that, pursuant to the terms of the contract, appellee placed appellant in possession of the sawmill and received a consideration therefor, and permitted Elmer Reynolds to deliver to appellant a part of the timber in accordance with the terms of the contract.

Appellee filed a general demurrer to the complaint, which was sustained by the court, over the objection and exception of appellant. Appellant declined to plead further and elected to stand upon his complaint; whereupon the court dismissed the complaint, over the objection and exception of appellant. Appellant has prosecuted an appeal to this court from the judgment sustaining the demurrer and dismissing his complaint.

The trial court sustained the demurrer upon the theory that it did not appear on the face of the contract that appellee was a party thereto or interested therein, and that to allow this fact to be established by oral evidence would contravene the principle that the terms of a written contract cannot be contradicted or varied by parol testimony. It is frequently the case that agents enter into contracts with third parties without disclosing their principals; but, if authorized to act, their principals are bound by their agents' contracts. This rule would be of little avail unless the name of the undisclosed principal could be shown by oral evidence. The terms of a written contract are not contradicted or varied by showing the real parties in interest. In the case of *Arkadelphia Milling Co.* v. *Campbell,* 141 Ark. 25, this court, in passing upon a contract similar to the one in the instant case, ruled that it was proper to submit the question of whether the agent who signed his own name to the contract had actual authority to bind his principal to the terms thereof, although the name of the principal did not appear therein. The rule announced in that case is applicable and controlling in this. The court erred in sustaining the de-

murrer to the complaint, and for that reason the judgment is reversed and the cause remanded, with direction to overrule the demurrer.

FELKER v. McKEE.

Opinion delivered May 29, 1922.

APPEAL AND ERROR—PROCEEDINGS ON REMAND.—A direction to the trial court, on reversing and remanding a case, to overrule a demurrer and proceed according to the principles of equity not inconsistent with the opinion, means that the trial court should render a decree in accordance with the record already made, and not that appellant might further develop his case.

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

Duty & Duty, for appellant.

The chancellor misinterpreted the mandate of this court. In its order of reversal the court intended that the demurrer be overruled and to proceed to try the issue of facts. The chancellor has jurisdiction to proceed on any question not presented or settled by the decision. 16 Ark. 181; 54 Ark. 278; 72 Ark. 162; 102 Ark. 542; 82 Ark. 51; 72 Ark. 156. The case was not fully developed, due to a misconception of the law by the trial court. 88 Ark. 318; 110 Ark. 31; 99 Ark. 500.

The use of the words "for further proceedings" contemplated that there was to be a new trial. 122 Ark. 500; 92 Ark. 554. Where, on an appeal or writ of error, a cause is reversed and remanded for new trial, the case stands as if no action had been taken by the lower court. 122 Ark. 500; 79 Ark. 475.

The opinion of this court upon facts is not binding on the trial court, where a cause is remanded for further proceedings. 52 Ark. 473; 124 Ark. 545.

E. H. Thomas, McGill & McGill, for appellee.

If appellant conceived that the former decision was arrived at under a misapprehension of the evidence, his remedy was by motion for rehearing, filed with proper

time. 10 Ark. 186; 56 Ark. 170; 81 Ark. 440; 85 Ark. 158; 92 Ark. 484; 99 Ark. 218; 135 Ark. 372; 137 Ark. 341; 142 Ark. 434.

If it had been intended that a new trial was to be had upon the whole or any part of the case, specific directions to that effect would have been given. *Deason & Keith* v. *Rock,* 149 Ark. 401.

Although the chancery court only passed on the demurrer, the case was heard upon the merits, and appellant could not appeal upon one branch and develop new evidence on a second trial. 85 Ark. 101; 93 Ark. 394; 4 C. J. 1116-17.

HUMPHREYS, J. This is the second appeal in this case. On former appeal the case appears under the style of *Maxwell* v. *Felker,* and may be found reported in 148 Ark., p. 393. Reference is made to that case for a statement of the issues involved on the former appeal. The case was reversed and remanded, with directions to overrule the demurrer, and for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion of the court. Originally the cause had been submitted to the chancery court upon the pleadings and evidence. The court did not pass upon the demurrer to the bill until the evidence had been concluded. At that time the demurrer to the bill was sustained, treating the bill as amended to conform to the facts, because the bill did not state sufficient facts to constitute a cause of action either in law or equity. This court, however, upon the record made, on consideration of the pleadings, exhibits and evidence, held that the instrument made the basis of the suit was a promise on the part of J. E. Felker to the Citizens Bank of Rogers to pay $15,400, with interest at eight per cent. per annum, for the redemption of $15,400 of the preferred stock of Jones Brothers & Co. which had been pledged by Felker to said bank to secure said sum. Upon reversal and remand of the cause J. E. Felker, appellant herein, requested the trial court to permit him to offer proof on the market value of Jones

Brothers & Co. stock, and further proof under his plea of payment. This request was refused, and the court proceeded to hear the case upon the record as originally made, over the objection and exception of appellant.

The only question presented for determination on this appeal is whether the court erred in overruling appellant's motion to permit him to offer further proof upon two of the issues presented by the pleadings in the cause. His case was submitted upon the merits in the original trial. Ample opportunity was given him to fully develop his case upon all issues presented by the pleadings. To construe a reversal and remand of a cause for further proceedings, which had been submitted originally upon the merits, to mean that appellant might further develop his cause would enable him to proceed in his case by piecemeal and try it over every time he secured a reversal *ad infinitum*. No suggestion was made to this court after the reversal of the cause, by motion for rehearing or otherwise, that all the issues joined had not been fully developed. The interim between the reversal of the cause and the issuance of the mandate was the time to suggest that all or certain of the issues had not been fully developed. Had this been done, and had the court been of the opinion that appellant was entitled to further develop the case, specific directions to that effect would have been included in the mandate. The language used upon the remand of this cause was similar to the language used in the case of *Deason & Keith* v. *Rock,* 149 Ark. 401. It was said by this court in that case that "unless the direction for a new trial is specifically made upon a part or all of the issues involved, a direction for further proceedings, according to law and not inconsistent with the opinion, can mean nothing more than to render a decree in accordance with the record made. * * * * We think a direction to a trial court, upon reversal and remand of a chancery decree for further proceedings according to law and not inconsistent with the opinion, means nothing more than to render a decree in accordance with the record made." It

is true that the Deason case did not go off on demurrer, but there is no difference in principle between that and the instant case, as in the instant case the cause was submitted to the court upon the pleadings and evidence for determination upon the merits. The dismissal of the suit on the ground that the bill, treating it as amended to conform to the facts, did not state facts sufficient to constitute a cause of action, either in law or equity, was, in effect, a hearing and dismissal of the cause of action upon the merits, notwithstanding that at the conclusion of the evidence the court sustained the demurrer to the bill. It was held by this court in the case of *Remmel* v. *Collier*, 93 Ark. 394, that where the whole case was submitted to the chancery court for a final hearing upon the pleadings and evidence, and the court sustained the demurrer and dismissed the cause, it was a hearing upon the merits, and it was the duty of appellant to bring up the whole record. This rule, of course, would have no application where a demurrer had been sustained to a bill and the bill dismissed without an inquiry into the merits of the cause. It only has application where the testimony is taken and the cause submitted upon the pleadings and evidence. In the instant case no directions were given to hear further testimony upon the issues involved, nor was a new trial ordered. The only direction given was to overrule the demurrer and proceed according to the principles of equity not inconsistent with the opinion. This meant that the court should retry the case upon the record already made and render a decree in accordance therewith.

No error appearing, the decree is affirmed.

KERN v. BOONEVILLE AND SANATORIUM HIGHWAY DISTRICT.

Opinion delivered June 5, 1922.

1. HIGHWAYS—IMPROVEMENT DISTRICT—CONTRACTS.—Where, after an engineer, employed to do the preliminary and constructive work in building a highway for five per cent. of the cost of construction, had done the preliminary work, it was found imprac-

ticable to construct the highway, the engineer was entitled to recover, not under the contract, which was premature, but on *quantum meruit.*

2. HIGHWAYS—ENGINEER'S COMPENSATION.—Where an engineer was employed to prepare the plans and specifications for building a highway 4½ miles long at a cost not to exceed $75,000, and, instead of doing so, he prepared plans for a highway to cost over $200,000, a finding of the chancellor that he did not act in good faith in preparing the plans, and therefore was not entitled to any compensation, will be sustained.

Appeal from Logan Chancery Court, Southern District; *J. V. Bourland,* Chancellor; affirmed.

S. L. White, for appellant.

Kincannon & Kincannon and *Joseph M. Hill, amicus curiae,* for appellee.

McCULLOCH, C. J. The General Assembly, at the extraordinary session in February, 1920, by special statute created a road improvement district designated as the Booneville and Sanatorium Highway District, in Logan County, for the purpose of improving the public road from Booneville to the State tuberculosis sanatorium.

The statute provided that the improvement should be constructed of "asphaltic macadam, warrenite, asphaltic concrete, or of some similar durable, tried and proved materials consistent with the permanency of the improvement contemplated and the economical upkeep of the same, as the judgment of the commissioners may indicate as being for the best interest of the district."

The commissioners of the district entered into a contract with appellant, who was a professional engineer, for the purpose of doing the engineering work, both preliminary and constructive. Appellant did the preliminary work and furnished plans for and estimates of the cost of the construction of the improvement, showing a cost of $204,968, and the further sum of $106,405 for improving the streets in three adjoining blocks in the city of Booneville.

The estimates of the cost far exceeded the probable benefits, though the point of assessing benefits was never

reached in the progress of affairs, and it was found impracticable to construct the improvement. In fact, an action was instituted by the property owners in the chancery court against the commissioners, and a final decree was rendered enjoining the commissioners from constructing the improvement.

In appellant's contract with the district it was stipulated that he was to receive five per centum of the total cost of construction as compensation for his services, payable in installments. The contract was in the usual form, such as has come before us in recent cases dealing with the subject of engineer's fees. The contract was premature, and appellant's compensation for the work done is to be determined upon the *quantum meruit* rule. *Bowman Engineering Co.* v. *Arkansas-Missouri Highway Dist.*, 151 Ark. 47.

Appellant claimed compensation in the sum of $6,222.28, which was two-fifths of five per centum of the total estimated cost of the improvements, including the improvement of streets in the city of Booneville, but during the progress of the trial he reduced this claim to $4,752.28. A hearing before the chancery court on oral and documentary evidence resulted in a finding that appellant was not entitled to any compensation for his services, and the court dismissed his complaint for want of equity.

According to the evidence, the promotion of the enterprise originated in a conference between the trustees of the State tuberculosis sanatorium and certain citizens of Booneville, and plans were discussed for the improvement of the road in question, a distance of about four and one-half miles. It was suggested that the trustees would use an available fund of $6,000, that the county would contribute $1,000 from its funds, and a district would be formed for taxation to raise $6,000 more, and that the balance would be furnished out of the State road fund, making a total estimated cost of about $25,000. Later it was concluded that it would cost more than that—approximately $60,000 or $75,000.

The statute finally passed creating the district was prepared in the office of the State Highway Commission, and, according to the evidence, the original promoters of the road had nothing to do with its details.

There were other bidders for the engineering contract, but it was let to appellant, and he went to Booneville to close the contract. The evidence shows that in the conferences with the commissioners, particularly at a certain meeting mentioned by some of the witnesses, information was communicated to appellant that it was understood that the road would not cost more than sixty or seventy-five thousand dollars.

Appellant prepared plans and estimates for a cost of $204,698, in addition to the cost of improving the streets in Booneville, which was not included in this district.

Appellant directed his proof to the question of amount of compensation for preparing the plans and specifications which he furnished to the commissioners, but the first question which confronts us for determination is whether or not the chancery court was correct in its finding that appellant was not entitled to any compensation at all. Therefore, for the present it is unnecessary to decide what compensation appellant would be entitled to if he should be allowed anything at all.

The contention is that appellant is not entitled to any compensation because he did not perform the services in good faith, and that his services did not produce results of any value whatever to the district.

The statute under which the commissioners and the engineer were proceeding prescribed the type of construction to be employed in improving the road, and, according to the evidence adduced before the court, appellant was informed concerning the expense to be incurred, which implied the limit of resources of the district, and the conclusion is justified that he did not act in good faith in proceeding with the preliminary work of preparing the plans and specifications, when he must have known in advance that it was not possible to construct the improve-

ment within the limits outlined by the commissioners. Some of appellant's own witnesses testified that any person with technical knowledge on the subject would have known, by casual observation, in advance, that the improvement could not be made within the limit of cost expressed by the commissioners.

Appellant's skill as an engineer is unquestioned, and the fact that he had information of the plans and notions of the commissioners with respect to the cost of the improvement leads irresistibly to the conclusion that in continuing with the work, which he must have known would go far beyond their expectations in point of cost, he did not act in good faith, and, since his work had not been of any value to the district, there is no reason why he should be paid compensation.

There is a conflict in the testimony as to what information was imparted to appellant, but we think that the finding of the chancellor on this issue was not against the preponderance of the evidence. One of the commissioners, and also the attorney for the district, testified that at the preliminary conferences appellant was informed as to the maximum cost of the improvement, and the inference is justified that appellant knew before he proceeded to any substantial extent with his work that the road could not be built within the limit of cost announced by the commissioners or within the maximum resources of the district.

There is other testimony from disinterested sources that appellant in preparing the plans adopted unnecessary methods, particularly with reference to the grade of the road, which called for more expensive improvement than was necessary.

Our conclusion, upon the whole, is that the testimony does not preponderate against the finding of the chancery court that appellant did not perform his work in good faith, so as to produce results of any value to the district.

The decree is therefore affirmed.

HIGGINBOTHAM v. ROAD IMPROVEMENT DISTRICT NO. 3.

Opinion delivered June 5, 1922.

1. PLEADING—MERE CONCLUSION.—In a suit to restrain highway improvement commissioners from building a lateral highway, an allegation that plaintiff's land will receive no benefit is too general, and amounts to no more than a mere conclusion.
2. HIGHWAYS—INEQUITABLE ASSESSMENT—REMEDY.—Under special act of 1913, p. 864, as amended by unpublished special act of 1920, § 6, where the assessment of benefits for the construction of lateral roads is inequitable, the remedy of a property owner is by petition to the commissioners for a reassessment, and not by a proceeding to restrain the commissioners from constructing the road.
3. HIGHWAYS—AUTHORITY TO MAINTAIN AND REPAIR CONSTRUED.—Under special act of 1913, p. 864, as amended by unpublished special act of 1920, § 2, requiring the commissioners of a certain road improvement district to maintain and repair the roads constructed under their supervision, it was not beyond their authority to regrade and widen the roads, shape up ditches, put in culverts, and drain and re-surface the roads with seven inches of gravel.

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

Morris & Morris, for appellant.

1. The right of the commissioners to maintain the roads in the district is not denied. 140 Ark. 381; 143 *Id.* 228. But, in this instance, it is not maintenance or repair work that is in contemplation, but reconstruction. That, we think, was not intended by the act. 7 Words and Phrases, 6100. It cannot be that the Legislature intended to empower the commissioners to expend for repairs a sum so nearly equal the initial cost of the improvement. See § 2 of the amendatory act.

2. Section 3 of the amendatory act is invalid and unconstitutional in requiring the commissioners to construct five miles of new road within their district, because the construction of this lateral road will not benefit the lands of the plaintiffs. 83 Ark. 54.

Chas. A. Walls, for appellee.

1. So far as pertains to the right to maintain and repair roads is concerned, 140 Ark. 381 and 143 Ark.

248, cited by appellant, and 144 Ark. 494, are controlling. The language employed by the Legislature in the act in question amounts to a legislative finding that the lands in the district are benefited to the extent of the repairs and maintenance. This finding should be conclusive. 83 Ark. 54; 112 Ark. 357; 140 Ark. 381; 144 Ark. 494; 147 Ark. 112; 83 Ark. 334; 47 Pa. St. 362; 142 Ky. 46. See 7 Words and Phrases, 6096-6101, and 4 *Id.* 2nd Series, 271-275 for definition of "repair" and "repairs". It is generally held that the words "maintain and repair" are synonymous terms and mean the same thing. 111 Iowa 310; Webster's Dict.; 155 Mo. 391.

2. That the act is invalid in authorizing the construction of the lateral road is not supported by the previous decisions of this court. Both by the original act, act 212 Acts 1913, §§ 15, 18, and by the amendatory act, act 133, Acts 1920, § 6, the property owner is amply protected, and is afforded ample remedy to correct any injustice or inequalities in assessments or reassessments.

McCULLOCH, C. J. Appellee is a road improvement district created by the county court of Lonoke County pursuant to the terms of a special statute applicable to that county (Acts 1913, p. 64), and the road specified in the organization of the district was improved at a cost of $105,000, exclusive of interest on bonds.

The General Assembly, at the extraordinary session held in February, 1920, enacted another statute amending the former statute referred to above by conferring authority upon the districts formed under the original statute to provide for the repair and maintenance of the roads constructed, and also to improve certain lateral roads running out from the main road which had been improved.

The section of the new statute containing the authority to provide for the repair and maintenance of the road reads as follows:

"Section 2. The board of commissioners of Road Improvement Districts Number One (1), Two (2), Three

(3), Four (4), Five (5), Six (6), Seven (7), Eight (8), all of which were created under the terms and provisions of act 212 of the Acts of 1913, and the board of commissioners of any district which may be hereafter created in Lonoke County, under the terms and provisions of said act, or under the terms and provisions of any general act applicable to the county, are hereby required to maintain and repair the roads constructed under their supervision, subject to the approval of the county court, and, in order that said roads may be properly maintained and repaired, it shall be the duty of the board of commissioners of said districts to cause a competent engineer to make an estimate of the cost thereof from time to time, which shall be reported to the county court. If the county court finds the cost of said maintenance and repair to be reasonable and to the best interest of the district, it shall authorize the board of commissioners of said district to borrow money for the purpose of maintaining and repairing said roads, and shall enter a levy upon the property previously assessed for a sum sufficient to maintain and repair said roads, which levy shall be added to and collected with the annual tax already levied for the original improvement. All lands and other real property in said districts are hereby declared to be benefited in proportion that the cost of said maintenance and repairs bears to the present assessment of benefits now in force in said districts; provided, that nothing in this act shall be construed as prohibiting a reassessment of benefits when ordered; provided further, that if any district shall have issued interest-bearing obligations, the total amount of the assessed benefits in any district shall never be reduced."

The section of the new statute authorizing appellee to construct a lateral is as follows:

"Section 5. The board of commissioners of Road Improvement District No. 3 of Lonoke County, Arkansas, are hereby authorized and empowered to improve, by grading, draining and surfacing the following described

public road in said district, to-wit: Beginning at or near the northeast corner of the northeast quarter of the northeast quarter of section fifteen (15), township two (2) south, range nine (9) west, where a public road joins the macadam road already constructed in said district, and running thence in a southeasterly direction following said public road to about the southwest corner of the southeast quarter of section 23, township 2 south, range 9 west; thence continuing along said public road in a southerly direction to the northwest corner of the northeast quarter of section 35, township 2 south, range 9 west, thence east along the public road to the northeast corner of section 36, where Indian Bayou drainage ditch in Indian Bayou Drainage District Number 2 intersects said public road.

"That the commissioners of Road Improvement District Number 3 of Lonoke County, Arkansas, are hereby authorized and empowered to borrow such sums of money that may be required to construct the five miles of road above described, and when said money is so borrowed, the commissioners shall call upon the county court to levy a tax upon the present assessment of benefits in force in said district sufficient to pay the cost thereof, which levy shall be added to and collected with the annual tax already levied for the original improvement."

Section 6 of the new statute is as follows:

"If any owner of real property finds that, by reason of the construction of the road set out in sections three (3) and four (4) and five (5) of this act, that the assessment of benefits previously made has become inequitable by reason thereof, they shall file a petition with the commissioners of the district affected, asking that the benefits be reassessed, and the board of commissioners shall order a reassessment of the lands affected, or if the commissioners of said districts find that any assessment has become inequitable, they shall order assessors for said district to reassess the benefits upon the lands or other real property affected, which assessment shall be made, advertised and confirmed in accordance with the methods

set out for the original assessments, and, as assessed, shall be final and binding on the property owners, unless an appeal is taken therefrom within ten (10) days after the order is made by the county court confirming said assessment."

Appellant is the owner of real property in the district, and instituted this action in the chancery court of Lonoke County to restrain the commissioners of the district from proceeding to improve the lateral road, and also from proceeding under the contract to repair the road.

There is an attack upon the validity of the statute with respect to the provision for improving the lateral road, and there is an attack upon the validity of the proceedings about to be attempted by the commissioners with respect to the repair and maintenance of the road. The court sustained the demurrer to the complaint, and we will discuss the several attacks in the order mentioned.

The lateral road to be improved runs off from the main road originally improved, several miles southeast of England, and it is alleged in the complaint, in general terms, that the lands of appellant, which are situated several miles northwest of England, will receive no benefit from the construction of the additional improvement, that is to say, the lateral, and that the statute is void in providing for the improvement of the lateral road to be paid for by taxation upon the benefits originally assessed for the road already improved.

The allegation in regard to there being no benefits to appellant's land is too general to amount to more than a mere conclusion. *Salmon* v. *Board of Directors of Long Prairie Levee Dist.*, 100 Ark. 366. The allegation does, however, present a question as to the validity of the statute in providing for the payment of the cost of construction of the lateral road by taxation based upon benefits accruing from the original construction of the main road.

This assessment of benefits was made at a time when the addition of the lateral road was not contemplated, and there might be a difference in the accrual of benefits from the added improvement. The enactment of the statute necessarily implies a determination by the lawmakers that benefits to the lands in the district from the improvement of the lateral road will accrue to all lands in the district in the same proportion as the benefits from the original improvement of the main road accrued. It is not shown by proper allegations in the complaint that this determination of the lawmakers is obviously wrong. Mere distance from the lateral road to be improved does not necessarily determine the question of benefits. In addition to that, the rights of property owners are amply protected by the provisions for a reassessment of benefits in the whole district by reason of the construction of the lateral. Under the section of the statute providing for a reassessment there is a complete remedy to the property owners by a reassessment—not a mere readjustment or equalization of assessments, but a new assessment to meet the conditions arising by reason of the construction of the new part of the improvement. Under this section there is authority for this, either upon application of the property owners or on the initiative of the commissioners themselves. It is not merely a provision for the correction of individual assessments, but calls for a complete reassessment, upon proper application.

We are of the opinion, therefore, that the statute was valid in regard to the improvement of the lateral road, and that if appellant has any grievance in regard to the assessment of benefits, the remedy provided by the statute itself is adequate.

It is alleged in the complaint that the commissioners of the district have prepared plans and specifications for "regrading, widening, shaping-up the ditches, and putting in culverts, proper drainage, and re-surfacing the road with seven inches of gravel, or about fifteen hundred

tons per mile, which, in fact, is reconstruction work"; that the proposed cost of such improvement is to be $85,-250, and that, unless restrained, they will let a contract for the improvement of the road to that extent. But the contention is that this contract sought to be made by the commissioners is beyond the scope of the authority contained in the statute to "maintain and repair" the roads.

The question presented by this allegation in the complaint, which, for the purpose of testing the correctness of the court's ruling, must be taken as true, is whether or not the commissioners are about to exceed their authority, which is limited to maintenance and repair of the road.

To repair means, according to the lexicographers, "to mend, add to, or make over; to restore to a sound or good state." Standard Dictionary. "To restore to a sound or good state after decay, injury, dilapidation or partial destruction; to restore or reinstate as in former standing." Webster.

A fair interpretation of the meaning of the word, as used by the lawmakers in this statute, is that it means restoration to the original state of the road after the former improvement was completed. Not exact, but substantial restoration was intended. It was not intended that an entirely new improvement should be constructed in disregard of the original plans, but only restoration of the improvement according to the original plans, with mere incidental changes allowable.

The same principle is applicable as that announced by this court in the cases of *Rayder* v. *Warrick,* 133 Ark. 491; *Hout* v. *Harvey,* 135 Ark. 102, and *Carson* v. *Road Imp. Dist.,* 150 Ark. 379, in dealing with the power of commissioners of improvement districts to make changes in the plans of improvements.

Applying this principle to the allegations of the complaint in the present case, we do not think that the language employed amounts to a charge of substantial departure from the original plans of the improvement.

The regrading of the road may be essential for the purpose of restoration; the widening of the road does not necessarily imply a substantial change, nor does the increase in the depth of the surfacing necessarily constitute a substantial charge, when considered in the light of the total cost of the improvement. This all may be done, and yet the improvement be confined substantially to repair or restoration work, using that part of the old improvement which still remains. We see nothing in this charge which could be held to constitute a departure from the language of the statute. The chancery court was therefore correct in sustaining the demurrer to the complaint.

Affirmed.

HART, J., dissents.

JACKSON v. STATE.

Opinion delivered June 5, 1922.

1. JURY—DISQUALIFICATION.—It was not error to refuse a new trial for disqualification of one of the petit jurors, though witnesses testified that one B. had stated that one of the jurors told him that he knew all about the case, and that they were going to convict defendant, where B. testified that one of the grand jurors had made such a statement to him.
2. SEDUCTION—INSTRUCTION AS TO CORROBORATION.—In a prosecution for seduction it was proper to instruct the jury that whether the testimony of the prosecuting witness has been corroborated by other testimony which, unconnected with that of the prosecuting witness and independent of her testimony, tends to establish the guilt of the defendant, was a question for the jury.
3. SEDUCTION—NECESSITY AND SUFFICIENCY OF CORROBORATION.—In a prosecution for seduction, where there is no evidence to corroborate the prosecutrix, the court should take the case from the jury; but where there is corroborating evidence, its weight is for the jury.
4. SEDUCTION—EVIDENCE—LETTERS.—In a prosecution for seduction, the admission in evidence of letters containing terms of affection and endearment, written by accused to the prosecutrix two or three years before the alleged offense, and while accused was

keeping company with the prosecutrix, was proper, as the letters tended to prove the love existing between the defendant and prosecutrix, which might subsequently be a basis for their engagement to marry.

5. SEDUCTION—SUFFICIENCY OF EVIDENCE.—In a prosecution for seduction, evidence *held* sufficient to support a verdict of guilty.

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

D. A. Bradham and *Clay & Ball*, for appellant.

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

HART, J. Wesley Jackson prosecutes an appeal to this court to reverse a judgment against him for the crime of seduction.

It is first insisted by counsel for the defendant that the judgment should be reversed on account of the disqualification of one of the jurors. This assignment of error is based upon the testimony of the sheriff and of an uncle of the defendant to the effect that Julius Beasley came into one of the offices in the courthouse, while the jury was deliberating upon its verdict in the present case, and stated that he had heard one of the jurors say that he knew all about the case and that they were going to send the defendant to the penitentiary.

Julius Beasley testified that he did state that he heard one of the jurors say that the defendant would be sent to the penitentiary, and started to explain his remarks, but the witness would not listen to him. Beasley testified that the qualifications of his remarks would have been that one of the grand jurors had told him that the boy was in a close place and that they (meaning the grand jury) had held the case open to hear his side of it, and that he did not see any chance for the boy.

The court overruled the motion for a new trial on this account, thereby finding that no member of the petit jury made the statements attributed to Beasley by the witnesses and that no prejudice had resulted to the defendant by reason of the disqualification of any member

of the petit jury. It cannot be said that the court abused its discretion and acted arbitrarily in the matter. Therefore this assignment of error is not well taken. *Hamer* v. *State,* 104 Ark. 606, and *Sneed* v. *State,* 143 Ark. 178.

It is next insisted that the court erred in instructing the jury that it was a question for it to say whether the testimony of the prosecuting witness had been corroborated by other testimony, which, unconnected with that of the prosecuting witness and independent of her testimony, tends to establish the guilt of the defendant, etc.

There was no error in giving this instruction. Of course, where there is no corroborating evidence, it is the duty of the court to take the case from the jury, because there could be no conviction unless the prosecuting witness is corroborated both as to the promise to marry and the fact of the intercourse. But where there is corroborating evidence, the weight of it is for the jury, and it is within the province of the jury to determine whether the evidence of the prosecuting witness has been sufficiently corroborated by the other evidence in the case, both as to the promise of marriage and the sexual intercourse. *Brooks* v. *State,* 126 Ark. 98.

It is next contended by counsel for the defendant that the court erred in allowing the introduction of certain letters of the defendant to the prosecuting witness.

Counsel for defendant specifically object to these letters because they were written during the first part of the year 1917, and the witness testified that the crime was committed in September, 1920.

With regard to the general objection to the introduction of the letters, it may be stated that the prosecuting witness testified that she knew the handwriting of the defendant and identified the letters as having been written by him. They were dated in January, March, and April, 1917, and one of them the prosecuting witness says was written during the first part of 1918. The prosecuting witness testified that the defendant kept company with her during the whole of the time from the first of

the year 1917 to the fall of 1920, when he seduced her. The letters of the defendant to the prosecuting witness are full of endearing terms to her, and each one assures her of his great love for her. He tells her that he will love her forever, and wishes for the same kind of affection from her. Under the circumstances these letters were competent as tending to prove the love existing between the prosecuting witness and the defendant which might subsequently be a basis for their engagement to marry.

Finally, it is insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. The prosecuting witness testified in positive terms that she was 19 years of age on the 20th day of December, 1921, and that the defendant began coming to see her during the first of the year 1917 and continued to visit her regularly until the year 1921; that she loved the defendant and became engaged to be married to him; that in September, 1920, she had sexual intercourse with him in Bradley County, Ark., on their way home from camp meeting; that she yielded to the defendant because he promised to marry her, and that she relied on such promise; and that, as a result of their intercourse, which occurred several times, a baby was born unto her on the 19th of June, 1921.

The defendant was a witness for himself, and denied that he had ever been engaged to marry the prosecuting witness. His counsel insists that there is not sufficient corroborating evidence in the case.

In addition to the love letters referred to above, the testimony for the State shows that an uncle of the prosecuting witness went to a school in the neighborhood at which the defendant attended and told him that the prosecuting witness was pregnant and had said that the defendant had promised to marry her, and had requested the witness to ask the defendant what he was going to do about it. According to the testimony of the witness, when he broached the subject to the defendant, the latter

replied that he knew the prosecuting witness was in that fix. The witness asked the defendant what he was going to do about it, and he replied that he did not have any money with which to purchase a marriage license. The witness advised him to talk the matter over with his father, but the defendant replied that his father would not let him have the money. Finally it was agreed between them that the defendant should go home and get some other clothes and come back and marry the prosecuting witness. The defendant went home, but failed to return and marry the prosecuting witness as he had promised. On the other hand, he left the country and did not return for some time.

The father and mother of the prosecuting witness both testified that during all of this time the defendant had visited her regularly at their home.

According to the testimony of the uncle of the prosecuting witness, the above statements of the defendant were made to him voluntarily. It is true that the defendant was only twenty years of age, and testified that he acted under a sense of fear; but the court found otherwise by admitting his testimony to go before the jury. The jury, by convicting the defendant, found that his statements were voluntarily made. They were in the nature of a confession and were sufficient corroboration of the testimony of the prosecuting witness. *Lind* v. *State,* 137 Ark. 92; *Oakes* v. *State,* 135 Ark. 221; *Patrick* v. *State,* 135 Ark. 173; and *Smedley* v. *State,* 130 Ark. 149.

We find no prejudicial error in the record, and the judgment will be affirmed.

PATTERSON v. MILLER.

Opinion delivered June 5, 1922.

1. DEEDS—INTEREST OF GRANTOR CONVEYED.—The effect of a deed which does not limit the grantor's interest conveyed is to convey his entire interest, but he may convey a particular interest; and when this is done only that interest is conveyed, and the grantor reserves to himself all he has not conveyed.
2. TENANCY IN COMMON—ADVERSE POSSESSION OF CO-TENANT.—The grantee of an undivided one-half interest in land could not acquire title by adverse possession to any part of the land except that of which he had actual pedal possession as against his co-tenants.
3. TENANCY IN COMMON—CO-TENANT IN POSSESSION TO PAY TAXES.—A tenant in common in possession of the land, who has received rents enough to keep the taxes paid, was required to pay the taxes for the benefit of himself and his co-tenants.
4. TENANCY IN COMMON—ADVERSE POSSESSION.—Entry on the land by a tenant in common is presumed to be in subordination to the rights of his cotenants, and his occupancy, for whatever length of time continued, is not adverse to his co-tenants until affirmative knowledge has been brought home to them that his possession is hostile and adverse.
5. TENANCY IN COMMON—ADVERSE POSSESSION—EVIDENCE.—Evidence *held* insufficient to overcome presumption that owner of undivided half interest, in occupying same, did not hold adversely to his co-tenants.
6. TAXATION—PURCHASE OF ONE WHO SHOULD HAVE PAID TAXES.—Where a bank neglected its duty as agent of a taxpayer to pay the taxes on land, and permitted the land to be sold for non-payment thereof, its purchase at the tax sale amounted merely to the payment of the taxes.
7. TENANCY IN COMMON—ADVERSE POSSESSION.—Where a tenant in common conveys the whole title, the grantee by adverse possession for the requisite period can acquire title by limitation, the conveyance of the whole title constituting an act of ouster.

Appeal from Crittenden Chancery Court; *Archer Wheatley,* Chancellor; reversed on cross-appeal, affirmed on appeal.

Randolph & Randolph and *Hughes & Hughes,* for appellants.

1. The findings by the chancellor lead, we think, to a decree of broader scope in favor of the Hill title

than the decree actually rendered. Hill did have color of title, and his title by adverse possession ought not to have been confined to the tracts actually occupied, and to that extent the court took an erroneous view of the deed under which he held. 50 Ark. 340, 345; 63 W. Va. 623, 129 Am. St. Rep. 1024, 1031-1032; Freeman on Co-Tenants, § 328; 27 Calif. 549; 55 Mich. 111.

2. The title of appellants was good to the whole of the lands under the seven years' statute; but if not, it was good under the two years' statute. The tax deeds to Beck and his deed to Mrs. Hill were admittedly void; nevertheless they were color of title under the statute of two years.

It is true that a co-tenant buying in an outstanding tax title while the co-tenancy exists, does not hold adversely, but takes for the benefit of all; but the case is different where the co-tenancy no longer exists because of a previous ouster, and the holding is already adverse. In the latter case he may acquire a tax title and set it up in himself. 38 Cyc. 50-51, 7 R. C. L. 861; 21 Wis. 331; 28 Am. Dec. 86; 8 Am. and Eng. Am. cases, 990.

3. The appellees are barred by laches from setting up the claim they now assert. The chancellor, on the authority of *Taylor* v. *Leonard,* 94 Ark. 122, declined to apply this doctrine to the whole claim, though applying it to the claim for rents and profits. It should have been applied to exclude appellees from all relief. They do not set up a legal title, but, if any, an equitable title only. Moreover, their claim is not divisible.

4. If the deed made in 1889 by Apperson to Hill is properly construed as conveying to Hill an undivided half interest in the land described, the court is justified in presuming from the long continued possession and use of the land by Hill, his representatives and tenants, that he acquired in a lawful manner the entire title to the tract. 92 Tenn. 753-754; 120 U. S. 534; 175 U. S. 520; 138 Fed. 772; 135 Ark. 232; 2 Corpus Juris, 288-291.

B. J. Semmes and *Berry & Wheeler,* for appellees.

1. There is no evidence, either direct or circumstantial, of an ouster.

It is not disputed that one who holds open, notorious and hostile adverse possession of land for the requisite time without title is entitled to the land so held, but to enlarge the limits thereof beyond that in actual occupancy, there must be color of title. 80 Ark. 82. As to co-tenants, the rule is that if the deed conveys only an undivided interest, it is color of title only as to the interest conveyed. 2 C. J. 185; 7 R. C. L. 856; 77 N. E. 142; 102 Ark. 611, 145 S. W. 537.

2. The theory that, even though the tax deed to Beck was void, it still constituted color of title, and that therefore appellants are entitled to relief, is not tenable. 55 Ark. 104; 128 *Id.* 605; 133 *Id.* 441; 7 R. C. L. 824; 94 Ark. 122.

On the cross-appeal:

1. The burden of establishing the ouster was upon Patterson and McGehee. The making of leases, sale of timber, payment of taxes and collection of rents introduced by them as evidence, are all presumed to be under the true title, and not hostile. The ouster must be clearly proven.

2. No title to the tract of land vested in Bates *et al.* by virtue of the deed of W. W. Miller and wife, Minetry Myers Miller. The deed explains itself simply as intending to determine the estate in reversion caused by a condition broken in a deed from S. U. Apperson. Years before Apperson had died, and there was no title to revert to Mrs. Miller. 2 C. J. 290; 30 N. E. 96.

SMITH, J. This suit originated as a bill in equity to quiet title to the north half and the fractional southwest quarter section 31, township 8 north, range 6 east, Crittenden County, Arkansas. The plaintiffs are Geo. W. Patterson and H. A. McGhee, who purchased the lands from Mrs. Olivia Hill Grosvenor, who had, in turn, acquired them from her mother, Mary M. Hill, the widow

of Napoleon Hill. The defendants, among others, included the heir of D. E. Myers, deceased, viz., his daughter, Minetry Myers Miller, and the heirs of Wm. M. Sneed, deceased, viz., Mary B. Neely, Louise Sneed Hill, Richard Sneed, and Hampton Fenton Sneed. The complaint deraigned title and prayed that title to the lands be quieted in the plaintiffs.

The defendant, Minetry Myers Miller, filed an answer and cross-complaint, in which she sought, as the sole heir of D. E. Myers, deceased, to assert an undivided one-fourth interest in said lands. She prayed that her interest be established and that partition of the land be made in kind.

Minetry Miller, a daughter of Minetry Myers Miller, filed an intervention and cross-complaint, in which she averred that under the will of D. E. Myers she was entitled to a remainder interest in the land sought to be recovered by her mother, and she adopted the answer and cross-complaint of her mother. As an additional cross-complaint she averred that Mary N. Hill and Olivia Hill Grosvenor had collected rents and profits for which they should account. The heirs of Sneed averred their ownership of an undivided one-fourth interest in the lands, and adopted the answer and cross-complaint of Minetry Myers Miller. They also prayed judgment for rents and profits. All other defendants defaulted.

Mary M. Hill and Olivia Hill Grosvenor filed an answer to the several cross-complaints in which defenses are set up which will later be discussed. The plaintiffs Patterson and McGhee adopted as their answer to the several cross-complaints the answer thereto of Mrs Hill and Mrs. Grosvenor.

The cause was heard by the chancellor on the very voluminous record now before us, and a recovery of a certain part of the lands was awarded Mrs. Miller and her daughter, and the Sneed heirs were also awarded a recovery of a certain interest in the lands; but the court denied any recovery against Mrs. Hill and Mrs. Gros-

venor for rents and profits. The plaintiffs' title was quieted against the other defendants as to all parts of the lands not recovered under the cross-complaints.

Under the finding thus made the parties stipulated as to the taxes and improvements, the claim for rents being disallowed; but this stipulation does not suffice for us to render a final decree here, because we do not concur in certain of the chancellor's findings, as will later appear, and the parties may, if they are so advised, take further testimony on the question of rents and profits and betterments. From the findings and decree of the chancellor all parties whose interests in the litigation have been set out have appealed.

The chancellor prepared an opinion in which he recited a number of facts. Such of these as are essential to a statement of the case are as follows:

On April 18, 1870, E. N. Apperson acquired as trustee the title to about 40,000 acres of swamp land lying in Crittenden and other counties in Arkansas, the land in litigation being the first tract described in his deed. The equitable title to the lands at that time was held as follows: E. N. Apperson, 3/8; G. V. Rambaut, 1/8; Napoleon Hill, 2/8; W. H. Wood, 2/8. Rambaut sold his 1/8 interest to Apperson. The deed under which Apperson held as trustee gave him power to convey the fee title, the beneficiaries being interested only in the proceeds of the sales of the lands. These titles became incumbered with tax sales, and Apperson employed D. E. Myers and W. N. Sneed, law partners as Myers & Sneed, to discharge these liens and to straighten up the titles to the lands. This contract was evidenced by a deed dated July 18, 1887, which recited that it was to take effect as of October 28, 1882. This deed conveyed to Myers & Sneed an undivided half interest in all the lands there described as compensation for services performed and to be performed. This deed was not filed for record until June 13, 1890.

On January 28, 1888, Apperson, as trustee, executed to Napoleon Hill a deed conveying an undivided half in-

terest in certain of these lands, including all of section 31, township 8 north, range 6 east. We quote from this deed, as we think it has a very important bearing on the litigation. The grantor recites that, for the consideration of $1,401.75, he has "this day sold and do by these presents alien and convey unto Napoleon Hill aforesaid, an undivided one-half interest in the following real estate." Following a description of the lands, it is recited that "all of said lands herein conveyed being an undivided one-half of all the same. * * * But I, the said E. M. Apperson, do hereby convey not only such claim as I own or have in said undivided half of said lands in my own right, but likewise any and all claim or title vested in me as trustee. It being my intention to make to said Hill, and his heirs and assigns, a clear deed to one-half of said real estate as trustee and otherwise.* * *" It will be borne in mind that at the time of the execution of this deed the trustee owned only an undivided one-half, as he had previously conveyed an undivided one-half to Myers & Sneed. The deed to Hill was filed for record June 16, 1888.

W. M. Sneed died testate in 1895, and devised the bulk of his estate to his executrix as trustee, and through a bill filed by D. E. Myers, as attorney for the executrix, in the chancery court of Shelby County, Tennessee, the estate was administered in insolvency; and it is insisted that neither in the will nor in the insolvency proceeding was any reference made to the deceased's claim of an interest in the lands here in litigation.

In 1899 D. E. Myers, as his own attorney, brought suit against all persons for whom Apperson (who was then dead) had been trustee. This suit did not include the land in section 31-8-6, for the reason, no doubt, that the trustee had previously divested himself of the title by his deed to Myers & Sneed and the deed to Napoleon Hill. The lands involved in the suit by Myers were sold, and the bulk of them was purchased by Noland Fontaine as trustee for those interested in a syndicate, the decree re-

citing the beneficiaries and their interests. Fontaine was the business associate of Hill, and Myers represented Hill as attorney in many matters, particularly in the management of the Arkansas lands, and the testimony shows that a close and intimate friendship existed between Hill and Myers. It is also shown that Myers frequently borrowed money from Hill, and on one occasion at least had given Hill a deed of trust on his Tennessee property, to secure such advances, but the deed of trust was not placed of record. Fontaine, as trustee, managed the lands vested in him as trustee under the supervision of Myers until 1910, when the trust was finally settled.

Myers died testate in 1910, and by his will vested his estate in the Union & Planters Bank & Trust Company of Memphis, as trustee, to manage the estate and to pay the income thereof to his daughter, Mrs. Miller, for her life, with remainder to her children. The trustee accepted the trust, and was engaged in managing the estate at the time this litigation was begun. A son of Napoleon Hill has for some years been president of the Union & Planters' Bank & Trust Company.

It is insisted that Mrs. Miller recognized that she had no interest in the land here involved, because she had, in 1911, executed a deed to the defendants, Bates, Stratton and Buchanan, conveying an undivided two-thirds of an undivided one-fourth part in a large quantity of land formerly belonging to the syndicate, including the land in suit, which she pretended to own through another chain of title said to be antagonistic to the chain of title set up in her cross-complaint. The lands had been conveyed by E. N. Apperson prior to the execution of a declaration of trust by Apperson in 1870 to the St. Louis & Memphis Railroad Company by a deed containing the condition subsequent that the grantee build a railroad, and that condition had never been performed.

The deed to Bates *et al.* has this caption: "Quitclaim Deed to Lands conveyed by E. N. Apperson and Susan B. Apperson to the St. Louis & Memphis Railroad

Company by conditional deed, said company having forfeited said lands. Re-entry is hereby made, determining said estate in reversion." Following this caption the deed has the following recitals: "Know all men by these presents: That we, W. W. Miller and wife, Minetry M. Miller, *née* Minetry Myers, sole surviving heir-at-law of Emma Myers, deceased, *née* Emma Apperson, wife of D. E. Myers, deceased, and daughter of E. N. Apperson and Susan B. Apperson, and one of the four heirs-at-law of the said E. N. Apperson and Susan B. Apperson, deceased, late of the County of Shelby and State of Tennessee, reserving to ourselves one-third net of an undivided one-fourth part of the hereinafter described lands. * * *"

The purpose of this deed was to make re-entry determining the estate in reversion created by the deed from Apperson to the railroad.

There is a presumption, of course, that a grantor intends to convey his entire interest by his deed, and such is the effect of a deed which does not limit the interest conveyed. But a grantor may convey a particular interest, and when this is done only that interest is conveyed, and the grantor reserves to himself all he has not conveyed. *Cocks* v. *Simmons,* 55 Ark. 111.

The deed to Bates *et al.* is, by its express terms, a quitclaim deed. It contains no covenants of warranty. It describes all the lands contained in the deed from Apperson to the railroad and, for the purposes of making reentry, conveys the undivided one-fourth interest of Minetry Myers Miller as the granddaughter of Apperson. The other three heirs of Apperson made similar conveyances. After defining the purpose of the deed and the extent of the interest of Mrs. Miller as an heir of Apperson, she proceeds to convey this interest, "reserving to ourselves one-third net of an undivided one-fourth part of the hereinafter described lands." In other words, this is a quitclaim deed to the interest of Mrs. Miller in the estate of her grandfather, less a third of that quarter which she reserved to herself; but, as has been shown, Apperson

owned no interest in the land in suit at the time of his death.

It is contended, and the chancellor found the facts to be that, after Hill obtained his deed from Apperson, he proceeded to have the land put in cultivation under leases signed by him as owner; that he paid the taxes in his own name, and collected the rents for his own benefit, for a period of thirty years; and that he sold the timber thereon for his own account. The chancellor found that this possession gave Hill title to the land which he had actually occupied, but that, as his deed conveyed only an undivided one-half interest, his possession could not be enlarged to the extent of the boundaries of the lands described in the deed so as to include the undivided half interest of his cotenants which was not embraced in his deed; in other words, that Hill had no title or color of title to the half interest of his cotenants, and he could not, therefore, acquire title to any part of the land except that of which he had actual pedal possession.

In addition to the facts stated, Mrs. Grosvenor claims title to the land as follows: After the death of Napoleon Hill, the Union & Planters' Bank & Trust Company, as the agent for his estate, permitted the land to sell in 1912 for the taxes of 1911, at which sale J. O. E. Beck became the purchaser. Beck obtained a tax deed from the clerk, and on May 17, 1915, executed to Mrs. Hill a quitclaim deed. As this suit was not filed until December 24, 1919, it is said that the four years' possession under this tax deed has ripened into title.

It is pointed out that the deed from Apperson to Hill was recorded before the deed from Apperson to Myers and Sneed was recorded, and it is insisted that, as the deed was intended to convey the whole title, it should be given that effect because it was first placed of record. We think, however, there is no conflict in the deeds. The deed to Hill, by express language, purports to convey only an undivided one-half interest, and it is not contended—indeed, under the record before us it could not well be

contended—that Hill was unaware of the deed to Myers & Sneed made prior to his deed and pursuant to a contract by which the trustee was to convey to Myers & Sneed an undivided half interest in all the lands in consideration of services rendered and to be rendered by Myers & Sneed. We regard it as a fact beyond dispute that Hill knew of the prior deed to Myers & Sneed at the time the deed was executed to him.

It is undisputed that Hill and those claiming under him have paid all taxes, and that receipts therefor were taken in Hill's name.

One Throgmarten testified that in 1889 he cleared about ten acres of this land, although he had no deed or other claim to it, and that about the time he finished his clearing one G. W. Scott made some claim to the land. Throgmarten knew Scott had no title to the land, but to avoid trouble he surrendered its possession. However, he shortly after this reported to John R. Chase, at Marion, who was an abstracter of land titles, and also Hill's agent, what had occurred between himself and Scott. Soon thereafter Chase prepared a lease to Scott in which Hill was designated as owner, but in a letter to Hill from Chase on this subject Hill is advised by Chase that he owned an undivided three-fourths interest in the land.

It does not appear to be a fact that no Arkansas lands were included in the Sneed administration. In a general creditor's bill filed by the executrix there was listed in the assets of the estate "an undivided five-sixths interest with D. E. Myers and Napoleon Hill, in several thousand acres of wild and timbered land in Arkansas; also a one-half undivided interest with D. E. Meyers in several thousand acres of like lands in Arkansas, value unknown."

The will of D. E. Myers is in the record, and no land is mentioned in his will specifically. He disposed of his estate in general terms.

So far as the deed from Mrs. Miller to Bates *et al.* is concerned, it may be said that the decree was entered

against those defendants for want of an answer, and we may treat any interest there conveyed as canceled; but the execution of that deed and its cancellation by the decree herein has no effect on the title here sought to be asserted, for the reason, as shown above, that it undertook to convey an interest acquired through her grandfather, E. N. Apperson. The interest which Mrs. Miller here seeks to assert is through D. E. Myers, her father, and not Apperson, her grandfather, and she did not purport to convey the interest she now seeks to assert.

While cross-appellants concede that Hill paid the taxes in his individual name, there appears to be no evidence that Hill had them assessed in his individual name; and, while the findings of the chancellor recite the fact to be that the lands were assessed in Hill's name individually, we find no testimony upon which that finding could be based. It is not admitted by cross-appellants that no contribution was made by Myers and Sneed for the taxes paid by Hill. It is their insistence that the conduct of the parties in regard to other tracts of land indicate they must have contributed. This may or may not be true, and this question may be more fully developed on the remand of the cause if the parties are so advised. It is insisted, however, that, if no contributions were made by Myers and Sneed, Hill received enough rents to keep the taxes paid; and this appears to be true; and, if true, it was Hill's duty to keep the taxes down for the benefit of himself and his cotenants.

The designation of Hill as the owner of the land in the leases prepared by Chase is not shown to have been known to Hill's cotenants; but it is shown to have been an untrue designation, according to the letter from Chase, the man who employed that term in the leases he prepared, as he advised Hill that he was the owner of an undivided three-fourths interest.

It is admitted that Hill sold some timber on this land; but the claim is made by appellees that Hill used the proceeds of such sales in the payment of taxes; but

it is not affirmatively shown in the testimony that he made any such use of the proceeds of the timber sold by him. It is admitted that the land was known as the "Hill land", but it is said it was so called from the fact that Hill was interested in and had charge of its management.

It may here be said that if Myers and Sneed and Hill had owned as cotenants only the land here sued for, the chancellor's finding that Hill had held adversely to his cotenant could not be set aside as contrary to the preponderance of the evidence. But this was not the only land owned by them, and the conduct of the parties with reference to the other trusts must be considered as explanatory of Hill's possession of the land in litigation.

The deposition of M. T. Roush was taken, from which it appears that he was stenographer and clerk for Hill, and that he prepared under Hill's direction a list of Hill's Crittenden County lands. Of the twenty-eight tracts of land in Crittenden County conveyed to Napoleon Hill by E. M. Apperson, eleven are shown on page twelve of Roush's land-book as being lands claimed by Hill at the time the book was made.

It will be remembered that these eleven tracts, including the land in suit, were all in a deed from Apperson to Hill; and it is stipulated that Hill had no other deed to any of these lands except the deed from Apperson. He had the same interest, therefore, in all these lands, and the disposition of the other tracts is significant in determining the interest claimed by him in the land in suit. It is admitted that the first of these tracts was never sold by Hill, and that the title was lost by the adverse possession of a third party.

A notation at the bottom of the page containing this list of lands shows that the second and third tracts were deeded to J. T. Barton on January 2, 1900, and the testimony of Barton is peculiarly significant. An objection to the title was made, and Barton went to Meyers, who "claimed an interest in the land," as testified by Barton. The deed to Barton shows a consideration of $800 paid

on January 2, 1900. There is in the record a deed dated March 15, 1906, from Myers, individually and as surviving partner of Myers & Sneed, and the executrix of Sneed, to Napoleon Hill, conveying an undivided one-half interest in these second and third tracts on Hill's land-book, for the consideration of $548.87, cash in hand paid by Napoleon Hill. Attention is called to the fact that six years, two months and thirteen days elapsed between the date of the deed from Hill and the one to him, and that six per cent. interest on $400, or one-half of the consideration paid by Barton, for the time Hill had the whole consideration in his possession, amounts to exactly $548.87, the consideration recited in the deed to Hill.

As to all the other tracts of land in the land-book, it is shown that all the land was sold except the land in litigation. These sales were made to witnesses Shaver, McBee and Morrison. These witnesses testified that in negotiating the purchases of these tracts of land they went to Myers and made their contracts with him. These contracts were made in the lifetime of both Hill and Myers, and deeds were signed by both of them and by the Sneed heirs, and the proceeds divided in proportion to the record title. The last of these sales was made in 1909, just four months before Hill died, and the consideration therefor was divided between the owners in proportion to their record title in June, 1910.

It thus appears that Hill had the same title to all eleven tracts of land, and that all the land was sold in Hill's lifetime and in the lifetime of Myers, or lost by adverse possession, except the land in suit, and the proceeds divided in accordance with the paper title.

Hill died November 2, 1909, and Myers a few months later. They had many transactions together, and were close personal friends, according to the undisputed evidence; and upon the death of Myers his estate was administered, and is now being administered, by the same agency which has charge of the Hill estate.

As has been said, we do not think the title of Hill to the land in litigation can be correctly determined without taking into account the conduct of the parties in regard to all the lands described in Hill's Arkansas landbook. It is not claimed that he had any title except that derived from Apperson, and he had the same interest in all the lands, and as the lands were sold the proceeds of the sales were divided.

It is said that, in view of Hill's long continued possession of the land in suit, the presumption should be indulged that Myers and Sneed conveyed their undivided half interest to Hill, and that for some reason the deed was lost or destroyed. We do not think so, because the conduct of the parties in regard to the other lands rebuts the presumption of a grant to Hill. Besides, Hill, as a tenant in common, had the right to enter and take possession of the land. The presumption is, of course, that Hill's entry was in subordination to the rights of his cotenants, and his occupancy of the land, for whatever length of time continued, was not adverse to his cotenants until the affirmative knowledge had been brought home to them that Hill's possession was hostile and adverse.

It is said that Hill's possession was adverse, and that, being adverse, the possession extended to the boundaries of the deed under which he had entered, and gave him constructive possession of and title to the entire tract; but we do not consider this question, as we have reached the conclusion that Hill's actual possession was not adverse.

In the recent case of *Jackson* v. *Cole,* 146 Ark. 565, we said: "It is the law, as was stated in the case of *Wilson* v. *Storthz,* 117 Ark. 418, that one entering upon the possession of land, under a deed of conveyance to him, is presumed to occupy, and intends to claim, only the interest named in his conveyance." In the case just cited we quoted with approval from 7 R. C. L. pp. 854, 855 (Title, "Cotenancy"), the following statement of the law: "In considering this question the familiar prin-

ciple is recalled that, when one enters upon land, he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his interest."

In that case the entry was made under a deed purporting to convey the whole title, and, indulging the presumption just stated, we held the possession was adverse. We did so upon the theory that the occupant claimed the interest conveyed to him.

In 2 C. J., p. 185, at section 355 of the article on "Adverse Possession," it is said: "Where real estate is held in common, and one tenant assumes to convey the entire estate and does convey it by metes and bounds, the deed will give color of title as to the whole tract, and an entry by the purchaser thereunder claiming title to the whole will operate as an actual ouster and disseizin of the cotenant. If, however, the deed conveys only an undivided interest it is color of title only as to the interest conveyed."

This accords with our holding in the case of *Jackson* v. *Cole, supra.*

The presumption is that Hill claimed only the interest conveyed to him, and that was an undivided half interest. This deed made him tenant in common with Myers and Sneed, and gave him the right to enter upon the land, and, having done so, the further presumption arose that his occupancy was not adverse to his cotenants. *Wilson* v. *Storthz, supra; Parsons* v. *Sharpe,* 102 Ark. 611; *Singer* v. *Naron,* 99 Ark. 446; *Bayles* v. *Daugherty,* 77 Ark. 201; *Goodwin* v. *Garibaldi,* 83 Ark. 74; *McKneely* v. *Terry,* 61 Ark. 527.

When the conduct of the parties is considered, not with reference alone to the land sued for, but that of all the land in which Hill had an undivided interest, we do not think these presumptions have been overcome.

As to the possession under the tax title acquired by purchase from Beck, but little need be said. The sale was void. Moreover, it was the duty of the Union & Planters'

Bank & Trust Company, as agent for Mrs. Hill, to pay the taxes, and the omission to do so was an inadvertent one. This bank was also the trustee for the Myers estate. This purchase by the bank for Mrs. Hill amounted to no more than a payment of the taxes, and Mrs. Hill is entitled to a credit only for the sum required to effect a redemption by purchasing the land from Beck. *Inman* v. *Quirey,* 128 Ark. 605.

Under the case of *Jackson* v. *Cole, supra,* the deed from Mrs. Hill to Mrs. Grosvenor, conveying the whole title, was an act of ouster, and possession under that conveyance would have ripened into title had it been continued for the requisite period; but this deed was not made until September 6, 1918, and the cross-complaints herein were filed in January and February, 1920.

As has been stated, the court below found that there had been an ouster by Hill of his cotenants as to the lands which he had actually occupied for a period of more than seven years before the filing of the cross-complaints herein; but, as we do not think the testimony shows an ouster by Hill of his cotenants, even as to the lands actually occupied, that decree will be reversed. It is therefore ordered that the cause be remanded, with directions to the court below to enter a decree awarding to the heirs of D. E. Myers an undivided fourth interest and to the heirs of Wm. M. Sneed an undivided fourth interest, after stating the account between the parties as to rents, taxes and improvements.

MORGAN *v.* STATE.

Opinion delivered June 5, 1922.

1. CRIMINAL LAW—ACTS AND DECLARATIONS OF ACCOMPLICE.—Where accused, together with another, was charged with burglary and grand larceny, it was error to admit evidence that the accomplice, after the offense was committed, stated that he had found stolen articles in his overcoat pocket which he loaned to accused before the offense and which accused returned after the offense.

2. WITNESSES—CROSS-EXAMINATION OF ACCUSED.—On cross-examination of the accused in a burglary and larceny case, it was proper to permit the State to ask him whether he had committed larceny on a prior occasion.

3. WITNESSES—CROSS-EXAMINATION OF ACCUSED—IMPEACHMENT.—In a prosecution for burglary and grand larceny, in which the accused on cross-examination was asked whether he had committed larceny on a prior occasion, his answer that he had done so was binding on the State, and he could not be impeached by showing that he had done so.

Appeal from Newton Circuit Court; *J. M. Shinn,* Judge; reversed.

Ben E. McFerrin, for appellant.

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

HUMPHREYS, J. Appellant was indicted jointly with Tom Carter, at the January term, 1922, of the Newton Circuit Court, for the crime of burglary and grand larceny. He was granted a severance and tried separately, which resulted in his conviction for grand larceny. From the judgment of conviction an appeal has been duly prosecuted to this court.

The first count of the indictment charges Tom Carter and appellant with burglarizing the store of S. M. Stacey & Son, at Jasper, on the night of the 10th of January, 1922. The second count of the indictment charged them with grand larceny of certain moneys and goods, particularly described, in said store on the same night, belonging to S. M. Stacey & Son. The next morning after the store had been entered and the larceny committed Tom Carter's house was searched and a sack of pennies which had been stolen were found in the bottom of his trunk, and a part of the goods, including shaving brushes and tobacco, were found in his kitchen cupboard. In the course of the trial the sheriff, Sam Hudson, and Rosco Stacey were permitted to testify, over appellant's objections and exceptions, that after their arrest Tom Carter stated to them that he found stolen articles in the pocket of his overcoat which he had loaned to appellant

before the Stacey store was burglarized and which appellant returned to him the next day after the alleged burglary. It is conceded by the learned Attorney General that the trial court committed reversible error in admitting this testimony. The confession of error is based upon the rule announced by this court in the case of *McCabe* v. *State,* 149 Ark. 585, in the following language: "Where a person is charged as principal in the commission of a crime, the acts and declarations of a coparticipant in his absence, and after the commission of the offense, are not admissible."

Appellant also insists that reversible error was committed in admitting testimony tending to show that appellant was guilty of other larcenies. The introduction of this evidence came about in this way: Appellant testified in his own behalf. On cross-examination he was questioned as to whether he had not stolen a pair of shears or scissors out of the mail. (Appellant was a rural mail carrier). Appellant answered, denying that he had done so. These questions, on cross-examination of appellant, were proper as going to his credibility, but the State was bound by his answer, and had no right to contradict him by other witnesses. *Bogue* v. *State,* 152 Ark. 378. The postmaster, J. H. Kilgore, was permitted, over appellant's objection and exception, to give testimony tending to show that appellant had stolen a pair of scissors and a bridle out of the mail sack. Proof of the separate larcenies were not a part of a plan or scheme which would tend to convict appellant of the particular crime charged in this indictment. The admission of the evidence constituted reversible error.

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

ECHOLS & HELTON v. LINCOLN COUNTY.

Opinion delivered June 12, 1922.

1. COUNTIES—RIGHT OF TAXPAYER TO APPEAL FROM ALLOWANCE.—Under the Constitution and statutes, a taxpayer of a county may appeal from an order of allowance against the county, whether he has previously been made a party to the proceedings or not.
2. HIGHWAYS—PROMISE OF COUNTY JUDGE TO MAKE ALLOWANCE.—Where contractors for construction of a road being built by a road improvement district were orally promised by the county judge, on their threatening to abandon the contract, that if they would perform it he would allow them all he could out of the county funds, such promise was indefinite and gratuitous and not binding on the county.

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

Harry T. Wooldridge, for appellant.

The county courts have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, etc. Art. 7, sec. 28, Const.

The act of the county court in ordering the warrant issued for the amount of plaintiff's claims amounted to a ratification of the unauthorized act of the county judge. 72 Ark. 330; 117 Ark. 334; 122 Ark. 114; 122 Ark. 557; 103 Ark. 468; 127 Ark. 470.

The Constitution confers upon county courts exclusive original jurisdiction in the matter of allowing claims and disbursing money for county purposes. Art. 7, sec. 28, Const.; 84 Ark. 329; 131 Ark. 211.

Arthur J. Johnson and *Henry W. Smith*, for appellee.

The county court had no jurisdiction or authority to allow the claims. The Legislature has provided the ways and means for building roads by these districts. C. & M. Digest, sec. 5412.

The county court had no authority to enter into such a contract without an appropriation having first been made therefor. C. & M. Digest, sec. 1976; 136 Ark. 209; 139 Ark. 502; 120 Ark. 476.

The levying court had no authority to appropriate money to help an individual. C. & M. Digest, sec. 1982 sixth.

McCULLOCH, C. J. This is an appeal from a judgment on a claim of appellants against Lincoln County. The claim was presented to the country court and was allowed, but an appeal was prosecuted by A. J. Johnson, a citizen and taxpayer, and on the trial in the circuit court a judgment was rendered disallowing the claim.

Appellants were awarded a contract for the construction of a certain road in Lincoln County by a road improvement district created for that purpose. There was a written contract between appellants and the road district, specifying the price for the work, and a bond was given by appellants to the district and signed by certain citizens of that county as sureties. After the execution of the contract, and before the completion of the work, appellants threatened to abandon the contract, whereupon the county judge entered into an oral agreement with them to the effect that if they would go ahead and complete the construction of the improvement in accordance with their contract with the road district, the county would pay towards the cost of construction "whatever sum it might be able to pay."

Appellants completed the construction of the road in accordance with their contract with the district, and then presented to the county court, for allowance, their claim against the county in the sum of $7,008.38, and asked that that sum be paid to them by the county in excess of the contract price paid by the road district. The county allowed the claim, but, as before stated, A. J. Johnson, a citizen and taxpayer, appealed to the circuit court.

Under the Constitution and statutes of this State a taxpayer of a county may appeal from an order of allowance against the county, whether he has previously made himself a party to the proceedings or not. *Van Hook* v. *McNeil Monument Co.*, 107 Ark. 292.

In the trial of the case below, the facts were undisputed, and the county judge testified that he made an oral agreement with appellants that if they would perform their contract for the completion of the improvement he "would allow them all he could in the way of building culverts and bridges." The judge stated that his reason for making this promise was that he knew that the contractors could not complete the road for the amount of their bid, and he concluded that, inasmuch as citizens of the county were sureties on the bond, it would be expedient and in the interest of harmony to pay the contractors all that he could out of the county funds.

There were no elements of a valid contract in the oral agreement between appellants and the county judge. It was too indefinite to constitute a contract, because the only undertaking on the part of the judge was to "pay what he could," or pay "whatever sum the county might be able to pay." There was at that time no contractual relations between the county and appellants; on the contrary, appellants were under contract with the road district to construct the improvement for a stipulated price. The promise of the county judge was merely gratuitous. The first act of the county court which could operate with any binding force was the subsequent allowance of appellants' claim, and this is the judgment from which the citizen has prosecuted an appeal, which he had a right to do.

The appeal brings up the question whether or not there was a valid claim against the county, and it is not difficult to reach the conclusion that there was no valid claim, for the county was not liable for the payment of any of the cost of the improvement. Of course, the county court has absolute control over the distribution of the road fund in the repair and maintenance of public roads, but that is not what is involved in the present controversy, for, as before stated, the appellants were under

contract with the road district to construct the improvement, and the allowance from the county was a mere gratuity.

The circuit court was correct in refusing to allow the claim, and the judgment is therefore affirmed.

PRIEST v. STATE.

Opinion delivered June 12, 1922.

1. CONTINUANCE—ABSENCE OF WITNESS FROM STATE.—It was not error, in a murder case, to refuse a continuance to enable defendant to secure the attendance of absent witnesses who had left the State to engage in farming, and of whose return there was no assurance.
2. HOMICIDE—EVIDENCE OF MOTIVE.—In a prosecution for murder where there was a conflict in the evidence as to who was the aggressor, proof that defendant was engaged in the illicit manufacture of liquor and of the relation of deceased and members of his family thereto was admissible as tending to establish a motive for the killing and defendant's attitude towards deceased.
3. CRIMINAL LAW—BYSTANDERS' BILL OF EXCEPTIONS—TIME FOR FILING.—Where the trial court gave defendant 60 days to present and file a bill of exceptions, a bystanders' bill of exceptions not filed within the time allowed was ineffectual.
4. CRIMINAL LAW—BILL OF EXCEPTIONS—EXTENSION OF TIME.—A trial judge in vacation has no power to extend the time for filing a bill of exceptions.

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

Clary & Ball, Robt. L. Rogers and *R. W. Wilson*, for appellant.

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

McCULLOCH, C. J. Appellant was indicted by the grand jury of Bradley County for murder in the first degree, alleged to have been committed by shooting and killing Elmer Kennedy on October 21, 1921, and on the trial of the cause appellant was convicted of murder in the second degree.

Appellant was the owner of a farm in Bradley County, and the deceased, Elmer Kennedy, a young man

about twenty years of age, was a tenant, or share-cropper, on appellant's place. The deceased, his mother and his brothers were working together as share-croppers, or tenants, on appellant's farm.

The killing occurred on the public road along that part of the farm where the Kennedys lived. It appears from the testimony that there had been more or less ill feeling between appellant and Elmer Kennedy since the latter came on the farm during the month of May. For a short time before the day of the killing there had been a controversy about the division of the corn crop, and Norris, another tenant on the place, was called in as an arbitrator between them.

Appellant went to the farm with wagons, in company with Norris, for the purpose of gathering and dividing the corn. He was also accompanied by Young, another tenant on the place, and his son. There were two wagons, and they drove into the field, and the Kennedys, including Elmer, joined the party for the purpose of of assisting in gathering the corn and dividing it. After the two wagons had been loaded with corn they were driven outside of the field and were halted near each other on the public road. Appellant was in one of the wagons at the time, and the Kennedys, or some of them, including Elmer, were in the other wagon.

Elmer Kennedy went to the wagon containing the corn which had been assigned to him and his mother and brothers, and gathered a few of the best ears and placed them in the other wagon to repay the quantity of corn that had been used for roasting ears. After doing this, Elmer, according to the evidence, accosted Priest by asking him to go back into the field for the purpose of ascertaining the extent of damage done to the crop by hogs, so that there could be a settlement of that difference between them.

According to the testimony of the witnesses, Elmer Kennedy was standing leaning against one of the wagons at that time. He was totally blind in one of his eyes.

Witnesses stated that either Norris or Young was heard to say to appellant, "Now is your time," and that appellant thereupon got out of the wagon and approached Elmer Kennedy on the blind side and drew his pistol and shot him. The witnesses state that Kennedy was making no demonstration, and that the killing done by appellant was without provocation or justification.

There is a conflict in the testimony, but the evidence adduced by the State was sufficient to justify the finding of the jury that the facts were as just stated.

Appellant and the witnesses he introduced testified that Elmer Kennedy assaulted appellant with a knife and that his mother urged her sons to "clean him up," referring to appellant.

The issues were submitted to the jury upon instructions conceded to be correct, and there is no assignment of error with respect to the court's charge either in giving or refusing instructions.

It is first contended that the court erred in refusing to grant a continuance until the next term to enable appellant to procure the attendance of two absent witnesses, who were shown to be in the State of Mississippi. The court, after hearing evidence from which it appeared that the two witnesses had removed from Bradley County, Arkansas, to the State of Mississippi for the purpose of engaging in farming, announced the conclusion that it was not shown that the witnesses would probably return, and for that reason overruled the motion for a postponement. There was no request for a short postponement to give time for taking the depositions of the witnesses.

The circumstances were such, we think, that they justified the conclusion of the court that there was no reasonable probability of the absent witnesses returning into the jurisdiction of the court, and as a trial court is vested with discretion in such matters, we cannot say that there was any error in refusing to grant the continuance. The two absent witnesses were farmers, and

left the State in September for the purpose of engaging in farming in the State of Mississippi. There was nothing shown which would give rise to the conclusion that the witnesses would come back into the State until such time in the future as they might decide to make a visit or to move back here.

It is next contended that the court erred in permitting the State to introduce testimony concerning appellant's conduct in making, selling and transporting intoxicating liquors.

It was drawn out from some of the witnesses that appellant operated a still on the farm and that he clandestinely sold the output of the still, and that he proposed to deceased and his brothers to employ them on commission to assist him in disposing of the product. There were numerous circumstances proved concerning appellant's connection with the illicit manufacture and sale of liquor, but all of the testimony had reference to the relations between appellant, on the one side, and the deceased and his brothers on the other.

There is other testimony that there was a statement made at one time by appellant to a companion, in substance, that Elmer Kennedy was likely to tell what he knew about the illicit manufacture and sale of liquor by appellant. Elmer's father testified that about two weeks before the killing he met appellant at the gin where they had carried cotton, and that appellant asked, referring to Elmer, "What did you bring that damn boy up here for?" and added, "If you don't keep that boy away from here, I'm going to kill him."

Appellant introduced testimony tending to show that Elmer Kennedy had assaulted him several weeks before this occurred.

This testimony concerning the manufacture and sale of liquor by appellant was introduced, not for the purpose of proving other crimes committed by appellant, but to show the relations between the parties and the probable motive for the killing.

There was a conflict in the testimony as to which of the parties was the aggressor, and it was competent for the State to prove appellant's mental attitude toward the deceased, as reflected by their prior relations, friendly or unfriendly. Appellant would have been entitled to an instruction limiting the testimony to that purpose, but no such instruction was asked.

There is an assignment of error based on references made to this testimony by the prosecuting attorney in the argument before the jury, but since the testimony was competent, it was not improper for reference to be made to it in the argument.

Impeaching testimony was used very freely by both sides. The appellant introduced witnesses impeaching nearly every witness introduced by the State, and after eliciting from each witness the statement that the reputation of the witnesses sought to be impeached was bad, the following question was propounded: "Basing your answer upon their general reputation for truth and morality, would you believe them under oath in a matter in which they are interested?" The court sustained objections to this question, but it is not properly shown in the record what the answer of either of the witnesses would have been to this question. In fact, the record shows nothing except that the question was asked and that exceptions were saved by appellant's counsel.

Since the filing of the State's brief in this court, counsel for appellant have attempted to bring up an additional record by *certiorari* showing the exceptions certified by bystanders.

The motion for a new trial was filed and overruled on February 11, 1922, and the court gave appellant sixty days from that date within which to present and file a bill of exceptions. The bill of exceptions was signed by the court and filed within the time allowed, but it contained no reference to the subject-matter of the present exceptions; that is to say, it did not contain any reference to the substance of what the witnesses would have stated

in response to the excluded question. It appears from the additional record now brought up that on May 31 appellant procured the affidavits of two bystanders and presented the same to the the trial judge for approval as part of the bill of exceptions in the case, and, after obtaining from the judge a signed statement to the effect that he refused to approve what the affiants stated, the affidavits, with the certificate of the judge, were filed with the clerk and brought up here by certiorari. This was, as before stated, all done long after the expiration of the time for filing the bill of exceptions.

It has been established by a long line of decisions of this court, beginning with the case of *Fordyce* v. *Jackson,* 56 Ark. 564, that where an appellant attempts to add exceptions based upon the affidavits of bystanders, such exceptions must first be presented to the trial judge for allowance and rejected by him. This must, of course, be done within the time allowed by the court for filing the bill of exceptions. The trial judge has no power in vacation to extend the time allowed by the court for filing the bill of exceptions, and it is too late after the expiration of the time allowed to present the exceptions to the judge or to file the affidavits of bystanders. In other words, an exception certified by the affidavit of bystanders must be filed within the time allowed by statute or the order of the court, otherwise it is ineffectual.

This completes the discussion of all the assignments of error argued in the brief of counsel.

The instructions were, as before stated, free from any objections, and there is no assignment here with reference to them.

The evidence is abundant in support of the verdict.

Judgment affirmed.

B. F. GOODRICH RUBBER COMPANY v. PRESLEY.

Opinion delivered June 12, 1922.

1. EXCEPTIONS, BILL OF—EFFECT OF STIPULATION.—Crawford & Moses' Dig., § 1323, provides that where the parties to an action agree upon the correctness of a bill of exceptions by indorsement signed by counsel of record, the clerk shall file such agreed bill, and it shall become a part of the record. In a transcript on appeal there was no entry designating any part of it as a bill of exceptions. Twelve days after the clerk had certified the transcript, a stipulation of counsel that the transcript was a complete transcript of the proceedings, and that same might be filed in the Supreme Court. *Held*, there being no compliance with § 1323, the stipulation does not embody the essentials of an agreed bill of exceptions.
2. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—Where errors complained of do not appear in the record proper, they can only be presented for review through a duly authenticated bill of exceptions, according to some one of the methods required by Crawford & Moses' Dig., §§ 1321-3.

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

O. A. Featherston, for appellant.

W. T. Kidd, for appellee.

WOOD, J. This is an appeal from a judgment in favor of the appellee against the appellant in the sum of $10.70. The action arose on an account filed by the appellant against the appellee before a justice of the peace. The appellant claimed that the appellee was due it the sum of $130.48 for automobile casings which the appellant had sold to the appellee. The appellee filed a cross-complaint and alleged that he had a contract with the appellant whereby the appellant guaranteed that its casings would run six thousand miles, and that all casings which did not run that distance the appellant would adjust the claim with the party who had purchased the casing from the appellee; that the appellant had appointed appellee its agent for the purpose of making these adjustments; that appellee had been purchasing casings from the appellant and making adjustments on defective casings since 1917, and that appellant was due the ap-

pellee the sum of $141.18. Trial was had in the court below before a jury and a verdict and adjustment rendered in favor of the appellee in the sum above mentioned.

The appellant contends that the court erred in not granting its prayer for instruction No. 1 for a directed verdict in its favor, and also in refusing certain other prayers of appellant for instructions and in modifying these instructions and giving them as modified, and also in giving appellee's prayers for instruction No. 1.

The appellee contends that these alleged errors cannot be reviewed here for the reason that there is no bill of exceptions setting forth the testimony and the purported instructions of the trial court upon the giving of which appellant predicates error. There is in the transcript what purports to be the proceedings had before the justice of the peace, resulting in a judgment from which an appeal was taken to the circuit court, and what purports to be the proceedings had in the circuit court, resulting in a judgment in that court in favor of the appellee in the sum above mentioned. The transcript contains a record of the judgment, the motion for new trial, the order of the court overruling the same, the prayer of appellant for an appeal, and the order granting the same. Then follows what purports to be the testimony that was adduced at the trial and the purported instructions, with an entry on the margin opposite each instruction purporting to show the ruling of the court on the prayers for instructions. Then follows a supersedeas bond, and the clerk concludes the record as follows: "Clerk's Certificate. State of Arkansas, County of Pike. I, Geo. W. Neal, clerk of the circuit court in and for the county and State aforesaid, do certify that the foregoing forty-six pages of typewriting contain a true and complete transcript of the records and proceedings in the circuit court of said county, in the cause therein stated. In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 8th day of

November, 1921. (Signed) George W. Neal, Circuit Clerk." The seal of the clerk is attached to the certificate. Then follows the fee bill, with the certificate of the clerk showing the same to be correct. After the clerk's certificate and on the last page is the following: "It is agreed by and between O. A. Featherson, attorney for plaintiff, and W. T. Kidd, attorney for defendant, that the foregoing transcript is full and complete as the transcript of the proceedings had in the cause named in caption thereof, and that same may be filed by our consent and approval in the Supreme Court of Arkansas. This Nov. 12, 1921. (Signed) O. A. Featherson, Atty. for plaintiff. W. T. Kidd, Atty. for defendant."

There is no bill of exceptions in the record signed by the trial judge, as required under the provisions of sec. 1321, C. & M. Digest. Nor is there any bill of exceptions established by bystanders under the provisions of sec. 1322, C. & M. Digest.

Sec. 1323 of C. & M. Digest provides as follows: "In all cases, except indictments charging a felony, where the parties to an action agree in writing upon the correctness of a bill of exceptions by indorsement thereon, signed by one or more counsel of record of the respective parties, it shall be the duty of the clerk of the court in which the case is pending to at once file such agreed bill of exceptions, and the same shall become a part of the record as fully, completely and effectively as though approved, signed and ordered filed by the order of the court or judge trying the cause. Provided, said bill of exceptions is filed within the time fixed by the court for filing the same."

There is no entry in the purported transcript of the proceedings designating any portion of the transcript as a bill of exceptions. It will be observed that the agreement signed by counsel for the plaintiff and the defendant does not comply with the requirements of sec. 1323 of C. & M. Digest, *supra,* providing for an agreed bills of exceptions. The purported agreement of counsel

was made twelve days after the clerk had completed the transcript of the record of the proceedings and certified thereto. The clerk does not certify that this agreement of counsel was filed and made a part of the record of the proceedings. There is nothing in the agreement to show that it designates any portion of the transcript of the record as a bill of exceptions and that the same was filed with the clerk of the court. See *Hodges* v. *Collison,* 116 Ark. 420. There is nothing in the agreement signed by the counsel for the parties, nor in the certificate of the clerk, to show that counsel for respective parties had agreed on what should enter into and constitute the bill of exceptions in the cause before the clerk had made up his transcript of the record. The agreement signed by the counsel, as we have stated, was after the clerk had made up the transcript, and the agreement was to the effect that the transcript was full and complete of the proceedings in the cause, and that the same might be filed in the Supreme Court. But this falls far short of being in compliance with the statute as held by this court in the case of *O. K. Houck Piano Co.* v. *Primm,* 112 Ark. 80, where we said: "The act approved April 28, 1911, does not contemplate that the parties may agree upon a bill of exceptions after the clerk has made the transcript and fixed his certificate thereto. It contemplates that the bill of exceptions shall first be agreed upon by counsel for the respective parties, and that then the agreed bill of exceptions should be filed by the clerk and thus become a part of the record in the case." The stipulation of counsel does not purport to show what objections, if any, were made to the rulings of the court concerning the admission or exclusion of testimony before the jury, nor what objections were made, if any, to the ruling of the trial court in granting or refusing prayers for instructions, nor what exceptions, if any, were preserved to the rulings of the court. The stipulation, therefore, does not embody essentials of an agreed bill of exceptions under the statute. *Barry* v. *White Drug*

Co. 109 Ark. 120. See also *Williams* v. *Griffith,* 101 Ark. 84.

The errors complained of do not appear in the record proper and can only be presented for review before this court through a duly authenticated bill of exceptions according to some one of the methods required by our statute, *supra.* See *Madison County* v. *Maples,* 103 Ark. 44; *Carnehan* v. *Parker,* 102 Ark. 439; *Huff* v. *Citizens' National Bank,* 99 Ark. 97. Since there was no bill of exceptions, it must be presumed that the rulings of the trial court were in all things correct, and the judgment must therefore be affirmed.

DICKSON v. JONESBORO TRUST COMPANY.

Opinion delivered June 12, 1922.

1. HUSBAND AND WIFE—ESTATE BY ENTIRETY IN PERSONALTY.—An estate by the entirety may be created in personal property.
2. HUSBAND AND WIFFE—ESTATE BY ENTIRETY IN BANK DEPOSIT.—A bank deposit in the name of "D. and wife" *held* to create an estate by the entirety, though the name of the wife is not mentioned, and she never draws any checks against the account, and D. reserves the right to check against the account and to add to the balances from time to time.
3. HUSBAND AND WIFE—HUSBAND'S SEPARATE PROPERTY.—Where a husband, with his wife's knowledge and consent, withdrew portions of bank deposits kept in the name of himself and wife and reduced the sums withdrawn to his separate possession, Liberty Bonds and Thrift Stamps purchased therewith and notes made to him in his individual name, with his wife's consent, were owned by him alone, and not jointly with his wife as tenants by the entirety.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; reversed in part.

Horace Sloan for J. S. Dickson, appellant and appellee.

An estate of tenancy by the entirety does not exist in personal property in this State. This case is distinguished from that in 147 Ark. 7, on the facts.

There was not a sufficient designation of the wife to render Sarah L. Dickson a tenant by the entirety of this fund with her husband.

Even though the widow be held to be a tenant by the entirety in the bank account, it does not follow that she is entitled to the bonds, stamps and notes, as these were the individual property of G. B. Dickson and now the property of his administrator. See 147 Ark. 7; 8 A. L. R. 1017.

The charge of fraud and collusion made against the administrator in the case in which he is appellee is a general allegation and not legally sufficient. 77 Ark. 355; 51 Ark. 1; 45 Ark. 505; 42 Ark. 186; 34 Ark. 631; 33 Ark. 727.

A court will not reopen a judgment when the application does not disclose some defense on the merits. Crawford's Digest, "Judgments" secs. 46, 100. On the ground of fraud, such fraud must have existed in the procurement of the decree, and the existence of fraud in the original cause of action is insufficient to vacate a decree in equity. 90 Ark. 261. Here no fraud is alleged or pointed out. Only the administrator had the right to bring the suit. 45 Ark. 299; 35 Ark. 289.

Gautney, Caraway & Dudley, for Crowder *et al,* appellants.

Under secs. 1101 and 1102 C. & M. Digest, the grandchildren having an interest in the property should have been allowed to become parties. See also 49 Ark. 100; 74 Ark. 54; 86 Ark. 304.

An estate by the entireties in the funds in bank was not created. There is no presumption that such a result is intended, but there must be something said or done at the time of making the deposit to call for such a rule, or there must be a statute to that effect. See 148 N. Y. S. 302; 146 Pac. 647; 3 R. C. L. 527, sec. 155; 128 A. S. R. 543; 51 A. S. R. 473; 17 A. S. R. 524.

Arthur L. Adams, for appellee Sarah L. Dickson.

The estate of tenancy by the entirety in personal property exists in this State. 147 Ark. 7; 8 A. L. R. 1017; 13 R. C. L. 1106, sec. 129; 21 Cyc. 1197.

Making the deposit in the name of G. B. Dickson and wife as fully identifies Sarah L. Dickson as if her name had been used. Had Mr. Dickson intended to be the sole owner of the deposit he would have used only his own name. Freeman on Cotenancy and Partition (2nd Ed.), sec. 68. Changing the form of the property from cash deposit of bonds, notes, etc., taken in the name of one, does not extinguish the rights of the other tenant. 8 A. L. R. 1014; 7 Tenn. Civ. A. 277; 147 Ark. 7. The wife must have known of such intent and acquiesced therein.

The intervention of Crowder *et al.* was properly denied because jurisdiction of the lower court had been terminated by perfecting the appeal to this court before any action was taken by them. 2 Stand. Ency. Proc. 324; 72 Ark. 475; 88 Ark. 391; 107 Ark. 415; 150 U. S. 31; 29 Ark. 85.

A deposit by a husband to the credit of himself and wife creates a presumption of tenancy by the entirety. 153 Mo. 586; 108 N. Y. Supp. 493, 87 N. E. 1130.

SMITH, J. On December 31, 1921, the Jonesboro Trust Company filed its bill of interpleader against J. S. Dickson, as administrator of the estate of G. B. Dickson, and Sarah L. Dickson, the widow of G. B. Dickson. On the same day the Bank of Jonesboro filed a similar bill. The administrator filed an answer, as did also the widow; and each claimed the funds there described. On January 6, 1922, these causes were consolidated by consent of parties and were heard on an agreed statement of facts, from which we copy the following recitals: G. B. Dickson died intestate November 24, 1921, and was survived by his widow and their sons and by the children of a deceased son and two deceased daughters. On November 28, 1921, J. S. Dickson, a son, was appointed and quali-

fied as administrator, and is now serving as such. G. B. Dickson and Sarah L. Dickson were married in 1886, and all of G. B. Dickson's children were born of this union.

For a great many years prior to the death of G. B. Dickson a general deposit bank account was kept in the Bank of Jonesboro in the name of "G. B. Dickson and wife." During the lifetime of G. B. Dickson checks drawn on this account and signed "G. B. Dickson" were honored. At the time of the death of G. B. Dickson the amount of this general deposit account in the Bank of Jonesboro was $5,526.87.

On March 12, 1918, G. B. Dickson withdrew from the Bank of Jonesboro the sum of $5,000 and deposited this amount in the Jonesboro Trust Company as a general deposit to the credit of "G. B. Dickson and wife." Other deposits were made to this same account from time to time, and certain withdrawals from the account were also made. At the time of the death of G. B. Dickson the amount of this general deposit in the Jonesboro Trust Company was $6,992.94.

The Jonesboro Trust Company had in its possession certain Liberty bonds and Thrift stamps which were purchased from time to time prior to the death of G. B. Dickson and were all paid for by checks drawn by and signed "G. B. Dickson" on the bank deposits in the Bank of Jonesboro and in the Jonesboro Trust Company, both of said deposits being, as above stated, in the name of "G. B. Dickson and wife." The bonds and stamps are all payable to bearer and negotiable by delivery. Said bonds and stamps were delivered to the bank for safekeeping, without any designation as to whether "G. B. Dickson" or "G. B. Dickson and wife" were the owners thereof. Interest collected from time to time on the Liberty bonds was deposited by G. B. Dickson during his lifetime in the Jonesboro Trust Company in the deposit account above referred to as being in the name of "G. B. Dickson and wife."

The trust company also had in its possession two notes payable to the order of G. B. Dickson, both being executed by his sons, and representing money they had borrowed from their father. The money represented by the notes was advanced on checks drawn on the Bank of Jonesboro and payable to the order of E. F. Dickson, and were paid by said bank out of the joint bank deposit held by said bank in the name of "G. B. Dickson and wife." G. B. Dickson did not have any interest in any other bank account in the Bank of Jonesboro except the one made and kept in the name of "G. B. Dickson and wife."

All funds forming the bank deposit accounts, before being deposited in said account of "G. B. Dickson and wife," were the earnings of G. B. Dickson, and not the separate property of his wife, nor did they comprise any portion of her separate estate. The bank account in the Bank of Jonesboro was started over thirty years ago in the name of "G. B. Dickson and wife". An indeterminable part of the bank deposits in controversy represents the remainder, including interest and profit accumulations on the deposits so made from time to time.

On this agreed statement of facts the court, on January 6, 1922, a regular day of the January 1922 term, adjudged that the widow, as the surviving tenant by the entirety, is the sole and exclusive owner of the bank deposits, and also the bonds and stamps and notes. From this finding and decree the administrator, who claimed the title to the property described for the benefit of the estate, prayed and was granted an appeal to this court.

On March 10, 1922, the same being an adjourned day of the January 1922 term of court, the grandchildren of G. B. Dickson filed an intervening petition, in which they alleged their relationship to G. B. Dickson, deceased, and alleged that J. S. Dickson, the administrator, and Sarah L. Dickson, the widow, had fraudulently colluded together for the purpose of enabling Sarah L. Dickson to claim said personal property and of procuring the de-

cree awarding the personal property to her. This petition also alleged that Sarah L. Dickson was old and infirm and without business experience, and that she had no knowledge of the filing of the complaints herein or of the rendition of the decree until after the same had been rendered. That prior to the death of G. B. Dickson he had made advances to his sons who survived him in the sum of $15,000, and that said sons had control of their mother and are inducing her to set up a claim to the personal property in order to defeat petitioners in their claim to their pro rata part thereof as heirs of G. B. Dickson, and will induce her to make a will excluding her grandchildren from participation in her estate, and that said grandchildren had no notice of this proceeding until after the rendition of the decree herein.

On March 10th this motion coming on to be heard, the administrator and widow filed responses to said petition; and the court denied the petition of the grandchildren to be made parties to the litigation, and they have appealed from that order.

We have therefore two appeals before us, that of the administrator from the original decree, and that of the grandchildren from the order of the court refusing to reopen the decree and make them parties to the litigation.

A number of questions of pleading are discussed, which, in our view of the case, we find it unnecessary to decide. We may treat the grandchildren as having properly made themselves parties to this litigation, and we may assume they have shown the influence of the sons over the widow, although that fact was denied in the response which she filed in the court below; yet it is not shown that the agreed statement of facts upon which the cause was submitted omits any material fact or contains any statement which is not true. The showing is not made that the administrator is not defending the interests of the estate faithfully and efficiently, and the case may be finally decided on its merits.

It is admitted that ordinarily the title to the personal property would vest in the administrator for purposes of administration; and the administrator has appealed from the order of the court vesting title to the personal property in the widow.

Treating all parties in interest as having properly made themselves parties to this litigation, it may be said that the verity of the agreed statement of facts has not been impeached. The grandchildren allege that advancements were made to their uncles by their grandfather, and that their uncles have an undue influence with their grandmother, and will induce her to prefer her children to her grandchildren in the disposition of her estate. But these allegations, if true, cannot arrest or alter the devolution of the property, the controlling facts in relation thereto as recited in the agreed statement of facts being unchallenged.

The question, therefore, to be decided is whether the court below properly decreed the widow to be the owner as surviving tenant by the entirety of the property in litigation.

There is much contrariety in the adjudged cases as to whether an estate by entirety can exist in personal property; but this court, in the case of *Union & Mercantile Trust Co.* v. *Hudson,* 147 Ark. 7, after a careful consideration of the authorities and of the adjudged cases on the subject, announced the law to be that such an estate can be created and can exist in personal property in this State.

It is argued that the facts recited in the agreed statement do not evince an intention to create an estate by the entirety. We think they do. The name, Sarah L. Dickson, does not appear with that of G. B. Dickson; but G. B. Dickson's wife name does appear as one of the persons for whose benefit the deposit was made. Dickson was never married but once, and there is no question about the identity of his wife. Deposits made in the name of "G. B. Dickson and wife" as certainly iden-

tify her as would deposits in the names of G. B. Dickson and Sarah L. Dickson. *Parrish* v. *Parrish,* 151 Ark. 161. It is shown that Mrs. Dickson never drew any checks against this account; but no effort was made to show that such checks would not have been paid. The testimony, as we understand it, shows an intention on the part of Dickson to create an estate by entirety in his bank balances; that his balances at any time should be so owned. He reserved and exercised the right to check against and to add to these balances from time to time; but the balances, whatever they might be at any particular time, belonged to "G. B. Dickson and wife," and the balances were therefore owned by them as tenants by entireties.

G. B. Dickson from time to time withdrew by check portions of the bank deposits, and the sums thus withdrawn were, with the knowledge and consent of his wife, reduced to his separate possession. *U. & M. Trust Co.* v. *Hudson,* 147 Ark. 12. The estate by entirety was thus destroyed in the funds so reduced to possession by Dickson, and as he took the title to the bonds, stamps and notes in his individual name with his wife's consent, the court erred in holding that the bonds, stamps and notes were owned by Dickson and his wife as tenants by entirety.

It follows therefore that the decree of the court awarding to the wife the bank balances as surviving tenant by entirety is correct, and will be affirmed; but the decree so adjudging the title to the bonds, stamps and notes will be reversed and judgment entered here in favor of the administrator.

WALDEN v. BERRY.

Opinion delivered June 12, 1922.

TRIAL—INSTRUCTIONS FOREIGN TO ISSUE.—Where the gist of an action was deceit and fraud of defendant in the sale of hogs to plaintiff, and all the evidence was directed to that issue, it was proper to refuse instructions regarding the good faith due from an agent to his principal.

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

W. N. Ivie, for appellant.

J. S. Combs, for appellee.

HUMPHREYS, J. This suit was brought in the Madison County Circuit Court, by appellant against appellee, to recover $100.75 alleged to have been overpaid by appellant to appellee in a hog transaction, through the deceit and fraud of appellee in misrepresenting the number of hogs which would weigh one hundred pounds, as well as the total weight of the hogs. It was alleged in the complaint that appellee agreed to buy a lot of hogs for appellant and deliver them to him at the railroad stock yards in Eureka Springs, at twelve cents per pound for all hogs that weighed over one hundred pounds, and eleven cents per pound for all that weighed less than one hundred pounds; that on the false representations of appellant that half of the hogs delivered weighed more than one hundred pounds each, and all weighed 5,855 pounds, appellant paid appellee eleven and one-half cents per pound for the entire lot, to his damage in the sum of $29.27; that on the false representation of appellant that the lot of hogs weighed 5,855 pounds, when in fact they weighed only 5,255 pounds, he was induced to overpay him $71.50, and thereby was defrauded out of said sum.

Appellee filed an answer admitting the contract but denying that he misrepresented the total weight of the hogs delivered to appellant or the number of hogs in the lot which would weigh over one hundred pounds each.

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

The testimony was directed to the issues of whether appellee misrepresented the total weight of the lot of hogs, and the number in the lot which would weigh more than one hundred pounds, thereby inducing appellant to pay him $100.75 more than he should have done. The testimony responsive to the issues was in conflict. The court instructed the jury, in substance, to find for appellant if fifty per cent. in weight of the lot of hogs did not weigh one hundred pounds or more each, as represented by appellee; also, if the total weight of the hogs was less than 5,855 pounds, represented by appellant to be their correct weight, giving the rule or measure of recovery in the event they found for appellant on either or both issues. The instruction was concrete and clearly defined the issues presented by the pleadings and testimony. As we construe the pleadings and testimony, the only issues joined were, whether appellee induced appellant to overpay him for the hogs, through deceit as to their total weight, or as to the number which weighed over one hundred pounds each.

Appellant sought, by two instructions requested and refused by the court, to inject into the case the good faith and loyalty due from an agent to his principal in the transaction of business for him, and an agent's responsibility for his misconduct which operates to the injury of his principal. We do not think the doctrine of agency invoked has any application in the instant case. The gist of the complaint is for a recovery on account of alleged misrepresentations concerning the total weight of a lot of hogs and the number weighing over a hundred pounds. The claim was not bottomed upon the unfaithfulness, disloyalty, or misconduct of appellee as an agent, but upon specific allegations of deceit and fraud. All the testimony was directed to the issue of de-

ceit and fraud, and not to duties growing out of any fiduciary relationship existing between appellant and appellee. We think the instructions asked and refused announced doctrines governing between principal and agent entirely foreign to the issues involved in this case. It was proper therefore to refuse to give them.

No error appearing, the judgment is affirmed.

HART, J., dissenting.

VAUGHAN v. ODELL & KLEINER.

Opinion delivered June 12, 1922.

1. BROKERS—RIGHT TO COMMISSION—INSTRUCTION.—In a broker's action for commissions, under a contract providing that the broker should receive all over a stipulated price for selling a tract of land, the refusal to give an instruction that, under the terms of the contract, the broker was entitled to commissions, whether the purchase money was paid or not unless the broker warranted the financial ability of the purchasers, *held* not error.
2. BROKERS—RIGHT TO COMMISSION.—Under a contract for the sale of timber which provided that the broker should be paid all over a stipulated price, the broker must procure the consummation of a sale, and not merely a contract of sale.
3. BROKERS—RIGHT TO COMMISSION.—Where a broker has furnished a purchaser who is ready, able and willing to purchase the timber at the owner's terms, the latter is responsible for the broker's commission should he refuse to convey the property.

Appeal from Arkansas Circuit Court, Northern District; *George W. Clark,* Judge; affirmed.

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

This is not a case where there was any duty resting on the broker to show the production of a purchaser ready, able and willing to buy. That point had been passed. The purchaser was produced and a binding contract was entered into between the owner and the purchaser, and a payment on purchase price had been made. The broker's commission was then earned. 89 Ark. 289, 293, 394; 107 Mass. 550, 44 L. R. A. 503; 128 Ark. 10.

John P. Lee and *John L. Ingram,* for appellee.

In this case both parties had to look to the same fund, the owner for his pay for the timber and the broker for remuneration for his services. It was the duty of both to help create that fund, and appellant, whose duty it was to find a purchaser able to buy, failed in his undertaking. Walker on Real Estate Agency 301, § 456; 78 N. E. 106; 81 Ark. 96.

HUMPHREYS, J. This is the second appeal in this case. On the first trial, the circuit court erroneously instructed a verdict for appellees, which resulted in a reversal of the judgment and remand of the cause for a new trial. The issues joined, and the substance of the testimony responsive thereto, were fully stated in the opinion reversing the judgment, so reference is made to the case, under the same style, reported in 149 Ark. at page 118, instead of restating it. On the former appeal, this court construed the contract between appellant and appellee for the sale of a large body of timber owned by appellee to mean that appellant, as a broker or real estate agent, was entitled to a commission for effecting the sale thereof of Carver & Russell, if the non-performance of the contract was occasioned by appellees, the owners of the timber. Under the contract, appellant was to receive, as a commission, the excess above a certain net price to the owners; according to the testimony of appellant, all above $6 per acre, and according to the testimony of appellees, all above $7.50 per acre, for which he might sell the timber. Through the instrumentality of appellant a written contract for the sale of 1040 acres of timber was entered into between appellees and Carver & Russell, for $8 per acre, or a total of $8,320, of which $4,000 was to be paid in cash when the deed was signed; $2,000 in 90 days, and $2,320 in four months. The trial court, in peremptorily instructing a verdict for appellees on the first trial, proceeded upon the theory that, unless the purchase money was finally paid, appellant was not entitled to any compensation under his contract with

appellees for the sale of their timber. This theory did not take into account that the owners of the timber would be responsible for a commission if they were to blame for the nonpayment of the purchase money. There was a conflict in the testimony as to whether the fulfillment of the contract was prevented through the fault of appellees. The judgment was reversed and a new trial directed, in order that the issue of whether the sale failed because Carver & Russell, the purchasers, were unable to comply with the conditions of the contract, or whether appellees wrongfully refused to convey the timber. Upon remand, the cause was submitted to the jury in accordance with the directions given, which resulted in a verdict and judgment against appellant.

Appellant insists that the court committed reversible error in refusing to instruct the jury that appellant was entitled to a commission, under the terms of the contract, whether the purchase money was ever paid or not, unless they found that appellant warranted the financial ability of the purchasers, Carver & Russell, procured by him. The law did not warrant this request. An agreement by an owner to pay a broker or real estate agent all over a stipulated price for selling his property, necessarily implies that the agent shall procure the consummation of a sale and not merely a contract of sale. The owner, of course, would be responsible for the commission should he refuse to convey the property in accordance with the terms of the contract. *Munroe* v. *Taylor*, 78 N. E. (Mass.) 106; *Lewis* v. *Briggs*, 81 Ark. 96.

The court's refusal to give appellant's request was not error. The judgment is affirmed.

SUCKLE v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered May 29, 1922.

1. CARRIERS—LOSS OF GOODS—MARKET VALUE.—In an action for value of goods lost or destroyed in transit, where both parties adopted the theory that the goods were worth as much at the place of shipment as at destination 30 miles distant, and that the proper criterion of value was the original cost thereof at the place where they were purchased, an instruction limiting recovery to the market value at the place of destination was not erroneous, though the proof established the value, and the bill of lading provided for its computation, at the place of shipment.
2. APPEAL AND ERROR—SUBMISSION OF ISSUE ON UNDISPUTED EVIDENCE.—In an action against a carrier for the value of boxes of goods lost in transit, where undisputed evidence showed the contents of the boxes and their value, submission to the jury of the question as to the contents of the lost boxes and their value was reversible error.
3. CARRIERS—LOSS OF GOODS—EVIDENCE OF CONTENTS AND VALUE.—In an action against a railroad for the value of goods lost or destroyed in transit, the undisputed testimony of plaintiff's shipping clerk that the invoices contained in a book, in which an itemized statement of each article packed and the value thereof was entered, were correctly made, and that the goods specified as being in each box were placed there under his supervision and were contained therein when shipped, constituted such definite proof of the contents of the boxes and value of the goods therein as rendered the submission of such questions to the jury reversible error.
4. TRIAL—EFFECT OF UNDISPUTED TESTIMONY OF EMPLOYEES.—Mere employees or clerks cannot be said to be interested in the result of litigation between their employer and third parties, so as to render permissible submission to the jury of issues as to facts definitely established by their undisputed testimony.

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

H. E. Rouse, for appellant.

The measure of damages where goods are lost is the invoice price of the goods at point of shipment, and not at destination. 127 Ark. 246.

Plaintiff's proof that the invoice price of the goods lost was $1,448.90 was uncontradicted. Juries have no

right to disregard uncontradicted evidence. Plaintiff was entitled to a directed verdict. 145 Ark. 399; 84 *Id.* 369; 80 *Id.* 397; 67 *Id.* 514; 66 *Id.* 439; 53 *Id.* 96; 87 *Id.* 70; 101 *Id.* 532; 96 *Id.* 37.

The court had no right to limit plaintiff to proof of actual market value at Fulton. The invoice price of the goods at Prescott was his measure of damages. *Supra;* 10 C. J. 176-177, § 222; *Id.* 397, § 607; 192 S. W. (Ark.) 212 *et seq.*; 110 Ark. 619; 159 Fed. 974. The court's instruction on this subject call for reversal, since it without doubt caused the jury to return the inadequate verdict. 82 Ark. 510; 58 *Id.* 199, 230 S. W. (Ark.) 10; 229 *Id.* 737, 738; 226 *Id.* 168; 110 Ark. 557; 80 *Id.* 455; 70 *Id.* 79. See also 136 *Id.* 357 204 S. W. (Ark.) 618; 115 Ark. 259; 116 *Id.* 238; 82 Ark. 131; *Id.* 381; *Id.* 603; *Id.* 424; 89 *Id.* 105; 131 *Id.* 369.

E. B. Kinsworthy and *R. E. Wiley,* for appellee.

1. The market value at destination was the correct measure of damages. 253 U. S. 97, 64 Law. Ed. 801; 73 Ark. 112; 115 *Id.* 20; 147 *Id.* 109; 127 *Id.* 246; 110 *Id.* 58.

2. The amount of damages was a question for the jury. 86 Ark. 29; 82 *Id.* 86; 95 *Id.* 144; 124 *Id.* 490-495; 54 *Id.* 214; 80 *Id.* 284; 85 *Id.* 121; 139 *Id.* 255.

HUMPHREYS, J. Appellant instituted suit against appellee in the Nevada Circuit Court to recover $1,448.90, the alleged value of two cases of dry goods, consisting of clothing, underwear, etc., and one case of coat racks, shipped over appellee's railroad from Prescott to Fulton, a distance of 30 miles, which were never delivered, but were lost or destroyed in transit. It was alleged the lost goods were included in the bill of lading issued and delivered at the time of the shipment by appellee to appellant, which is in part as follows:

"Missouri Pacific Railroad Company.

"Issued at Prescott, Ark., 9-28-20, consigned by J. Suckle to J. Suckle, Fulton, Ark. Goods received and accepted for shipment; 2 rolls paper, 2 cs. shoes, 1 crt.

coat racks, 1 cs. rubber shoes, 9 cs. dry goods, weight 1,990 lbs., on which freight and war tax was $10.56.

"(Signed) G. A. HAYS, Agent,
"J. SUCKLE, Shipper
"Per C. O. CARRINGTON."

On back of which the following appears: "Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided."

"Sec. 3. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

The allegations in the complaint were denied, and the case was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and judgment in favor of appellant for $750, from which is this appeal.

At the conclusion of the testimony appellant requested the court to direct a verdict in his favor for the full amount claimed, which the court refused to do, over his objection and exception. When the verdict was returned, appellant moved the court to render a judgment in his favor for the full amount claimed, notwithstanding the verdict of the jury, which motion was overruled, over his objection and exception. Appellant's requests proceeded upon the theory that the undisputed evidence showed the shipment and loss of the goods of the value of $1,448.90. Appellee's theory was that there was a dispute in the evidence as to the quality of goods contained in the lost boxes and the value thereof. The court adopted the theory of appellee, and, over the objection and exception of appellant, instructed a verdict in his favor for the market value of the goods at Fulton, the point of destination. In addition to the general objection, appellant specifically objected to the instruction because it limited the market value to Fulton, whereas the proof established

the value at Prescott, and because the bill of lading provided for its computation, in case of loss, at the place and time of shipment. In the course of the examination of witnesses concerning the market value of the goods attention was directed to the cost or invoice prices thereof in New York and Chicago, where the goods were purchased. Neither party attempted to show any difference in the market value of them at Prescott and Fulton. Both adopted the theory that they were worth as much at one point as the other, and that the proper criterion of value was the original cost of the goods. This character of proof was introduced by appellant, relating to the value of the goods, and appellee offered no objection to the manner in which the market value was established. Again, Prescott and Fulton are so near to each other that no material difference could exist in the market value of the goods at either place. No error resulted on account of this phase of the instruction given by the court. Reversible error, however, was committed in submitting the question of the contents of the lost boxes and value thereof to the jury. The trial court should have instructed a verdict in favor of appellant for $1,448.90. The undisputed evidence showed that the goods, which cost that amount in New York and Chicago, were contained in the boxes which were lost. The major portion of the goods came from New York and had been purchased and received only a short time before shipment. The remaining portion had been brought over from the year before, but were worth the invoice or cost price. After a careful examination of the testimony we find no material conflicts or discrepancies therein, and no circumstances from which an inference might be drawn either that the boxes did not contain all of the goods or that the value of the goods was less than claimed. Thirteen boxes of goods were shipped in the first shipment, numbered from 1 to 13. Ten of the boxes were delivered and three lost. The lost boxes were numbered 3, 5 and 7. In packing the boxes preparatory to shipment appellant's clerks used a record called an in-

voice book, in which an itemized statement of each article placed in the box and value thereof was entered. Joe Hubbard, the clerk who did the principal part of the work, testified that the invoice was cerefully made, and that the goods specified as being in each box were placed therein by him or under his supervision, and were contained in the respective boxes when shipped. It appears to us that this is about as definite as proof could be made concerning the contents of the boxes and the value of the goods therein contained. Appellant and his clerk testified where the goods came from that were shipped in these boxes. No. attempt was made to deceive the jury as to the character of the goods shipped. They testified that a part of them had been recently purchased in New York, and that a part of them had been brought over in the stock from the previous year. They testified that those brought over which were in the shipment were worth the invoice price. Appellee insists, however, that the evidence cannot be regarded as undisputed because the witnesses testifying to the facts are interested in the result of the case. There is nothing in the record showing that Joe Hubbard or Claude Carrington, two witnesses introduced in behalf of appellant, in addition to himself, were interested in appellant's business. The cases cited in support of appellee's contention upon this point are not applicable, because in those cases the facts were established by witnesses interested in the result of the cause. Employees or clerks cannot be said to be interested in the result of litigation between their employers and third parties from the mere fact that they are employees or clerks.

For the error in refusing to peremptorily instruct a verdict in the amount claimed in favor of appellant, the judgment is reversed, and judgment is directed here in favor of appellant of $1,448.90 and interest thereon.

PHILLIPS v. MOSAIC TEMPLARS OF AMERICA.

Opinion delivered June 5, 1922.

1. INSURANCE—PROSPECTIVE STATUTE—Acts 1917, p. 2087 (Crawford & Moses' Dig. § 6071), providing that fraternal benefit societies shall be exempt from all provisions of the insurance laws unless they be expressly designated therein, is prospective and applies only to policies thereafter issued.
2. INSURANCE—BENEFIT CERTIFICATE—LIMITATION — Crawford & Moses' Dig., § 6153, providing that an action on an "insurance policy" may be maintained against the company issuing it at any time within the period prescribed by law for bringing action on promises in writing, and declaring that any stipulation in such policy requiring an action to be brought within any shorter time or be barred shall be void, does not apply to benefit certificates, and a limitation in a benefit certificate requiring suit to be brought within one year after the cause of action accrued was valid.

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

J. D. Shackleford, for appellant.

The stipulation in the policy shortening the time within which suit may be brought is squarely in the face of sec. 6153, C. & M. Digest.

Scipio A. Jones and *Carmichael & Brooks,* for appellee.

Section 6153, C. & M. Digest, is supported, so far as fraternal benefit societies are concerned, by sec. 6071, C. & M. Digest, and the limitation in the policy as to time of bringing suit is controlling. 78 Ark. 32.

SMITH, J. This is a suit on a benefit certificate issued June 11, 1914, on the life of Virgil Godbolt by appellee, a mutual fraternal insurance company. The insured died December 8, 1918, and under the terms of the certificate a cause of action accrued thereon ninety days thereafter. The certificate required the suit to be brought within one year after the cause of action accrued; but the suit was not commenced until March 27, 1920. A verdict was directed against the plaintiffs; and that action of the trial court is defended upon the ground, among others,

that the cause of action was barred when the suit was instituted; and as we think this point is well taken we do not consider the other defenses raised.

Appellants insist that the cause of action is not barred, because of the provisions of section 6153, C. & M. Digest, that an action may be maintained on a policy of insurance against the company issuing it at any time within the period prescribed by law for bringing actions on promises in writing, and that "any stipulation or provision in any such policy of insurance requiring such action to be brought within any shorter time or be barred, shall be and the same is hereby declared to be void." The section quoted is a part of the act of March 12, 1901 (Acts 1901, p. 93).

Counsel for appellee insist that the section quoted has no application to the policy sued on, because of section 6071, C. & M. Digest, which provides that fraternal benefit societies shall be exempt from all provisions of the insurance laws of the State, unless they be expressly designated therein; and that, as they are not so designated in section 6153, they are not subject to its provisions.

Section 6071 is prospective and applies only to policies thereafter, and not to those theretofore, issued. *Mosaic Templars of America* v. *Bean,* 147 Ark. 24. See also, *Wells* v. *Union C. L. Ins. Co.,* 81 Ark. 145.

Section 6071, C. & M. Digest, is a part of the act of March 28, 1917 (Acts 1917, p. 2087); and it does not apply, therefore, to the benefit certificate in suit for the reason, as stated, that it was issued June 11, 1914.

We think, however, that section 6153, C. & M. Digest, does not apply to the benefit certificate sued on, and that the limitations as to the time within which suit might be brought is valid. This is the effect of the decision in the case of *Knights of Maccabees* v. *Anderson,* 104 Ark. 417. In that case a judgment had been rendered, under the authority of section 6155, C. & M. Digest, (act March 29, 1905, Acts 1905, p. 307), for attorney's fees in a suit on a benefit certificate issued by a fraternal beneficiary associ-

ation. That section provides that, in all cases where loss occurs, and the *insurance company* liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable for an attorney's fee upon judgment being recovered on the policy. Construing that section in the case of *Knights of Maccabees* v. *Anderson, supra,* the court said: "The appellant is a fraternal beneficiary association, and was doing business in pursuance of sections 4351 *et seq.* of Kirby's Digest. The act of 1905 imposing damages and attorney's fees upon insurance companies under certain conditions only applies to fire, life, health and accident insurance companies; and the question is, whether a fraternal beneficiary association issuing certificates of insurance upon the lives of its members is an insurance company within the terms of said act. It has been held that this act is highly penal, and does not apply to any loss or company not therein expressly named. * * * By the act of the General Assembly of Arkansas, approved May 8, 1899, it is provided in reference to fraternal beneficiary orders of the character of appellant, that 'such orders, societies or associations shall be governed by this act, and shall be exempt from the provisions of all insurance laws of this State, and no law hereafter passed shall apply to said societies, orders or associations unless it be expressly designated therein.' Kirby's Digest, sec. 4352. * * * A benefit society, such as appellant's order, has a dual nature; while it is a business organization, it is also a social organization or club of congenial associates. In the majority of the States such societies are exempted from the operation of laws applicable to stock insurance companies. The Legislature enacting the statue of 1905 knew of the provision of the prior statute exempting these societies and orders from the provisions of laws relating to stock insurance companies. By failing to expressly name such societies, orders or associations in the act of 1905, we are of the opinion that it was the intention of the Legislature not to make said act applicable to them.

See also Cooley's Briefs on the Law of Ins., 3886; *Supreme Council American Legion of Honor* v. *Larmour*, 81 Tex. 71."

The portion of section 4352, Kirby's Digest, quoted above, is substantially copied into the act of March 28, 1917, *supra,* as section four of that act, and is found in Crawford & Moses' Digest as section 6071.

In the case of *Knights of Maccabees* v. *Anderson, supra,* this court followed the decision of the Supreme Court of Texas in construing section 6155, C. & M. Digest, as the statute was borrowed from Texas; but it appears from the language quoted that this was but an addittional reason for the construction given the statute, as the same construction was placed upon it by this court upon a consideration of our own legislation on the subject.

Sections 6155 and 6153, C. & M. Digest, apply only to insurance companies. The sections are alike in that respect, and as the Anderson case, *supra,* held that fraternal benefit societies are not insurance companies within the meaning of section 6155, it must be held that they are not insurance companies within the meaning of section 6153.

If section 6153 does not apply, then the limitation as to the time within which suit must be brought contained in the benefit certificate is valid and must be given effect. *McCulloch* v. *Mutual Reserve Fund Life Assn.,* 78 Ark. 32. The court below, therefore, properly held that the action could not be maintained, and the judgment is affirmed.

STATE v. SCHOOL DISTRICT No. 16.

Opinion delivered June 5, 1922.

1. MANDAMUS—CONCLUSIVENESS OF COURT'S FINDING.—In mandamus against a school board to permit relator's children to attend a white school from which the board had excluded them as being negroes, a finding that they had negro blood, being supported by substantial evidence will not be disturbed on appeal.

2. SCHOOLS AND SCHOOL DISTRICTS—AUTHORITY OF DIRECTORS.—The directors of a school district have authority to determine whether or not the different children in the district are white or colored, and the duty of providing a school for each class and assigning substantial evidence, will not be disturbed on appeal.
3. MANDAMUS—ACTION OF SCHOOL DIRECTORS.—The action of school directors in determining whether a child in the district is white or colored, and assessing it to the approporiate school, is not subject to mandamus unless the directors are shown to have acted arbitrarily.
4. SCHOOLS AND SCHOOL DISTRICTS—ACTION OF SCHOOL DIRECTORS.—Under Crawford & Moses' Dig., § 8915, providing for segregation of white and negro children into separate schools, the directors of a school district are not required to have a formal investigation or proceeding to determine their action in excluding negro children from a school for white children, it being immaterial how they received the information, provided they act reasonably on information before them.
5. SCHOOLS AND SCHOOL DISTRICTS.—"COLORED" DEFINED.—Under Crawford & Moses' Dig., 8915, providing for separate schools for white and colored children, the word "colored" means any person having any trace of negro blood, whether visible or not.

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

R. G. Davies, for appellant.

The term negro is not defined in the statute referring to separation of schools. The only definitions we have are contained in secs. 996 and 2603 C. & M. Digest, the former relating to separation of negroes and whites in passenger coaches, the latter being an act to prevent and punish concubinage. The first definition is more suited to the present circumstances, as being more nearly alike. There a negro was described as one in whom there is a *visible* and *distinct* admixture of African blood. The court specifically found that there was no such visible admixture here. Holdings of other courts on the question are "so long as the negro blood is traceable." 31 L. R. A. (N. S.) 1911; 2 Hill 614; 125 La. 300. A distinct admixture 2 Hill 614; 134 S. W. 1151; 9 Ohio 665; 14 Mich. 414; 29 Conn. 408. See also our own holding as to "all those who, as classes, were apparently white

and likely to be so regarded by men generally'' in 19 Ark. 121, as a test of the matter. See also 24 L. R. A. (N. S.) 447.

Gibson Witt and *Earl Witt,* for appellee.

A negro is a person who has any negro blood, whatever, in his veins. Sec. 2603, C. & M. Digest. Using this as the test the children of appellant were properly excluded from the white schools.

HUMPHREYS, J. Appellant, in his own behalf and as father and next friend of his three children, instituted an action for mandamus in the Montgomery Circuit Court to compel appellees, directors of School District No. 16 in said county, to permit his children to attend the school provided for white children in said district. It was alleged in the petition that the relator and his children are members of the white or Caucasian race, and that his wife, the mother of said children, is also with a trace of Cherokee Indian blood in her veins; that said board excluded the children from attendance upon the white school on the ground that they had negro blood in their veins. The case was submitted on the issue tendered by the complaint, and the testimony adduced by each party, which resulted in a finding that the evidence tended to show a trace of negro blood in said children; and a declaration of law that, for this reason, the school directors had authority to exclude said children from attendance upon the white school in the district, the exercise of which could not be controlled by mandamus, it not appearing that they arbitrarily exercised such power.

Appellant's first insistance for reversal is, that there was no substantial evidence in the record to support the court's finding of fact. A large number of witnesses testified pro and con in the case and, should an attempt be made to set out the testimony of each, it would extend this opinion to great length. Suffice it to say that the witnesses introduced in behalf of the appellant testified, in substance, that the children and their ancestors belonged to the white race; that Ophelia James, the grandmother of the children, and her reputed mother, Maria

Gocio (nee Chairs) had a small strain of Cherokee Indian blood in their veins, but no African or negro blood; that there was some doubt as to whether Ophelia James was a daughter or an adopted child of Maria Gocio; and that the witnesses on behalf of appellee testified that said children belonged to the negro or African race; that Ophelia James, their grandmother, and Maria Gocio, their great grandmother, were negro women. In view of this latter testimony, it cannot be said there was no substantial evidence tending to show a trace of negro blood in the veins of said children.

Applicant's next insistence for reversal is that the court erred in its third and fourth declarations of law which are as follows:

"The directors are given the right and authority to determine whether or not the children in their district are white, or whether or not they have negro blood in them, and it is their duty to assign them to the proper school and to provide a school for each class of children without discrimination."

"The action of the directors cannot be controlled by mandamus because the evidence fails to show that they acted arbitrarily and without evidence to support their action in determining that petitioner's children have negro blood."

Educational interests and school affairs, in each school district, in this State are placed by statute under the control and management of the school directors and they are required by law to maintain separate schools for white and colored children and youth. Sections 1915 and 1916, Crawford & Moses' Digest. In order to effectively exercise this authority, a broad discretion must be accorded them. In defining the authority conferred upon the board, this court took occasion to say in the case of *Maddox* v. *Neal,* 45 Ark. 121, that, while their authority is not without limit, yet "a wide range of discretion is vested in these boards by the statute in the matter of the government and details of conducting the common

schools." Courts will not interfere in matters of detail and government of schools unless the officers refuse to perform a clear, plain duty; or unless they unreasonably and arbitrarily exercise the discretionary authority conferred upon them. We think the correct rule was laid down in the case of *Watson* v. *Cambridge,* 157 Mass. 561. It was said by Mr. Justice KNOWLTON, in rendering the opinion in that case, that "under the law the school committee has the general charge and superintendence of all the public schools in the town. The management of the schools involves many details, and it is important that a board of public officers, dealing with these details and having jurisdiction to regulate the internal affairs of the schools, should not be interfered with, or have their conduct called in question before any other tribunal, so long as they act in good faith within their jurisdiction." Appellant insists, however, that the board in the instant case acted in bad faith, or arbitrarily, and for that reason the court should have granted the writ of mandamus. Had the undisputed evidence in the instant case shown that the children were white, then it would have been unreasonable or arbitrary in the board to exclude them from attendance on the white school, but not so, when there was substantial evidence tending to show otherwise. Appellant's other suggestion, that the board erred in excluding said children without a formal investigation or proceeding, is not sound. We find no such requirement in the statute. It is immaterial how the board obtained its information, if they possessed knowledge or information which warranted their action as reasonable men. As there is testimony in the record tending to show a trace of African blood in the children, we think the court's third and fourth declarations of law are correct.

Appellant contends that the word "colored," as used in the statute pertaining to the maintenance of separate schools for white and African races, means a visible admixture of African blood. The court, in the instant case, made the following special finding of fact: "Petitioner's

children in appearance, show no sign of negro blood, and, judged from their appearance alone, would pass for persons of pure Caucasian blood." Based upon this finding of fact, it is insisted that the court should have compelled the school directors to admit the children to the school maintained for white children in the district. Section 8915 of Crawford & Moses' Digest, in relation to the maintenance of separate schools for whites and blacks, is as follows: "The said board shall make provisions for establishing separate schools for white and colored children and youth, and shall adopt such other measures as they may judge expedient for carrying the free school system into effectual and uniform operation throughout the State, and providing as nearly as possible for the education of every youth." The purpose and intent of the statute was to prevent social equality or intermingling of the white and African races, thereby maintaining harmony and peace in the schools. As much confusion and disorder would result from admitting children in the white schools who have a trace of negro in them, though not disclosed by their appearance, as from admitting children who possess a visible and distinct admixture of African blood. We think the interpretation placed upon the statute by the court is correct. The language is broad, and has no relation to the degree in blood.

No error appearing, the judgment is affirmed.

GOODWIN v. PLANT.

Opinion delivered June 5, 1922.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In trespass for cutting and removing timber, verdict and judgment for defendant will not be disturbed where the evidence was conflicting.
2. TRESPASS—QUESTION FOR JURY.—In trespass for cutting and removing timber, whether any of the timber taken from plaintiff's land was cut by defendant, *held*, under conflicting evidence, to raise an issue for the jury.
3. TRESPASS—RECOVERY OF ONE-HALF OF VALUE OF LINE TREES.—Plaintiff was not entitled to recover one-half of the value of line trees

cut by an adjacent landowner, where the number and value thereof was not proved, and where the action was for trespass instead of for an accounting between cotenants.

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

Brundidge & Neelly, for appellant.

There is no substantial evidence to sustain the judgment, and the same should be reversed under the rule laid down in 112 Ark. 450.

Appellee was liable to appellant in any event for one-half the value of the line trees which he admits he cut. 100 Ark. 329; 93 Pac. 383.

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

This court is not a trier of facts in law cases, and, there being legally susfficient evidence to sustain the judgment, the same will not be set aside. 130 Ark. 465; 142 Ark. 159; 142 Ark. 358; 142 Ark. 378; 145 Ark. 269; 148 Ark. 209; 123 Ark. 428.

HUMPHREYS, J. Appellant instituted suit in trespass against appellee, in the White County Circuit Court, to recover three times the value of timber alleged to have been unlawfully cut and appropriated by appellee on certain lands in township 7, range 4 west, in said county, belonging to appellant.

Appellee filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings, the testimony of the several witnesses introduced in behalf of the respective parties, and instructions of the court, which resulted in a verdict and judgment against appellant, from which is this appeal.

The only contention made by appellant for reversal is that the evidence was insufficient to support the verdict and judgment. The rule on appeal, as frequently announced by this court, is that verdicts returned and judgments rendered in courts of law will not be reversed if there is any substantial evidence to support them. *Leach* v. *Smith,* 130 Ark. 465; *Hines* v. *Rice,* 142 Ark. 159. We

have carefully read the evidence with a view to ascertaining whether there is substantial evidence tending to show that appellee did not cut and appropriate timber growing upon appellant's land. Appellant introduced evidence tending to show that appellee, who owned adjoining lands to his in sections 19 and 23, while cutting his own timber, crossed the division lines, and cut timber on appellant's lands.

Two of appellant's witnesses, I. N. Lake and L. A. Smith, admitted his partner had cut some of appellant's timber, and agreed to adjust and settle the matter. In contradiction of this evidence appellee introduced three witnesses besides himself.

One of the witnesses, R. H. Pietz, supervised the cutting of appellee's timber in section 23. He testified that he went around the lines, already plain, and as a matter of precaution blazed them anew, to prevent his crew from getting over on adjoining lands; that he was on the job every day until completed, and knew that no one working for appellee cut timber on appellant's land. Another witness, Carl Steel, who assisted in cutting and hauling appellee's timber in section 23, testified that the lines around appellee's land were plainly blazed and that the crew did not cross the lines and cut any timber on appellant's land.

The third witness, Ross Reynolds, who owned the timber jointly with appellee in section 19, testified that he supervised the cutting of the timber in that section during the time they owned it jointly; that, before they began cutting, the division lines were established, and that they did not cross the lines and cut any timber on appellant's adjoining land; that later he and appellee sold their timber to Herbert Plant and Bill Knight, and after the sale had nothing to do with cutting and removing the timber.

Appellee testified that no timber was cut by his crews upon appellant's land; that the corners and division lines were plainly marked so that his men would not trespass upon adjoining lands; that he never admitted to I. N.

Lake in the presence of L. A. Smith that his partner had cut any of appellant's timber; that I. N. Lake claimed he had cut timber on appellant's land and demanded pay for it; that he offered to go with Lake and investigate the matter, agreeing, if the investigation showed that his men had gotten over the lines and cut any of appellant's timber, to pay for same; that Lake would never go with him; that thereafter he made an investigation himself and found a few line trees cut but none cut beyond the division lines between him and appellant, except some which had been cut long before his men began cutting and removing timber in said sections.

We think the testimony was in conflict upon the issue involved, and therefore presented a question for determination by the jury. Appellant's final argument, that he should have recovered in any event for one-half the value of the line trees cut and removed, is not sound. In the first place, the number and value of them was not proved. In the next place, this is a suit in trespass and not for an accounting between cotenants.

No error appearing, the judgment is affirmed.

INDEPENDENCE COUNTY v. WRIGHT.

Opinion delivered June 12, 1922.

TAXATION—FEES OF TAX COLLECTOR.—Under a special act (Acts 1917, No. 48), the tax collector of Independence County is entitled to "receive for his compensation one and one-fourth per cent. of all moneys collected by him as such collector." Under the general act (Crawford & Moses' Dig., § 10071), tax collectors are entitled to receive a larger commission on money collected by him. The State Auditor settled with the tax collector on the basis of the general act, instead of the special act, thereby leaving in his hands a sum as commission on the State taxes to which he was not entitled under the special act. *Held* that the county was not entitled to such surplus; Const. Art. 16, § 11, providing that "no moneys arising from a tax levied for one purpose shall be used for any other purpose."

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

I. J. Matheny, for appellant.

Ernest Neill, for appellee.

WOOD, J. This cause was, by consent, tried before the court below upon the following agreed statement of facts: "O. O. Wright is the tax collector of Independence County, and duly made settlement with the county court for all the county taxes collected by him for the year 1920, deducting his commissions thereon as provided by Special Act No. 48 of the General Assembly of 1917, which settlement, in so far as the county taxes are concerned, was duly approved by said county court; that, as to the taxes collected for the benefit of the State of Arkansas for the said year, said collector tendered his settlement to the State Auditor, after having deducted his commissions as provided by said Special Act No. 48, after his entire settlement had been approved by the county court, but that the same was by the State Auditor rejected and said collector required or permitted to settle with the State, in so far as his commission was concerned, under the provisions of section 10071 of Crawford & Moses' Digest, the result of which was to leave in the hands of said collector the sum of $521.61, the same being in excess of commissions allowed said collector under the provisions of sec. 10071 of Crawford & Moses' Digest on funds derived wholly from levies of taxes made for State purposes, over and above the commissions he would have received had the same been computed according to the provisions of said special act No. 48, the said State Auditor having on the part of the State disclaimed said sum of $521.61. It being further agreed that the only issue involved in this action is whether the sum of $521.61 is the property of Independence County and should be by the collector paid into the county treasury as directed by the order of said county court appealed from herein."

Upon the above agreed statement of facts the trial court found the facts in favor of O. O. Wright, the col-

lector. The trial court declared the law to be that, in view of the fact that said sum of $521.61 was derived wholly from a fund created by taxes levied for State purposes, the county of Independence is entitled to no portion thereof. Upon the above finding of fact and declaration of law the court rendered a judgment dismissing the action of the county against the collector and in his favor for costs, from which is this appeal.

Act No. 44 of the Acts of 1893 created the office of tax collector of Independence County and provided that he should "receive for his salary for collecting the taxes of Independence County, Arkansas, a sum not to exceed $1,000 per annum, and out of such sum shall pay his deputies and assistants." The act further provided that the collector "should make a settlement with the county court by paying in all amounts in excess of the amounts of salary due them to that date (date of settlement) into the county treasury." See *Independence County* v. *Young,* 66 Ark. 30.

The above provision of the act of 1893 and the amendments thereto requiring the collector to pay into the county treasury all amounts in excess of fees or commissions due him was expressly repealed by act No. 48 of the Acts of 1917, page 220. The latter act provides that the tax collector of Independence County "shall receive for his compensation one and one-fourth per cent. of all moneys collected by him as such collector, and out of such sum shall pay his deputies and assistants." But there is no provision in the latter act, as there was in the act of 1893, *supra,* requiring the collector to pay the amounts in excess of his salary into the county treasury. On the contrary, as we have said, this requirement of the act of 1893 is expressly repealed by the latter act.

The agreed statement of facts shows that the amount of $521.61 in the hands of the collector was derived wholly from the collection of taxes for State purposes. The agreed statement further shows that the collector tendered a settlement to the State Auditor after deduct-

ing his commissions as provided by act No. 48, after his settlement had been approved by the county court, and that the Auditor rejected such settlement and permitted the collector to settle with the State, in so far as his commissions were concerned, under the provision of sec. 10071 of Crawford & Moses' Digest.

The issue here is not whether the Auditor should have allowed the collector fees under the special act of 1917 instead of under § 10071 C. & M. Digest, *supra,* for collecting State revenues. The only issue here is whether or not the sum of $521.61, the same being a portion of the revenues in the hands of the collector derived wholly from the levy of taxes for State purposes, should be paid by him into the county treasury. It suffices to say that there is no statute requiring him to do so.

The question as to whether the above sum in the hands of the collector is the property of the collector which he should receive as a part of his commission for collecting the State revenues, or whether it is the property of the State representing an amount in excess of the commission allowed the collector under the law, is not before us, and hence is not denied. It is clear, under the agreed statement, that the money is not the property of Independence County. Art. 16, sec. 11, Const. See *Gray* v. *Matheny,* 66 Ark. 36. Hence let it suffice to say that the court was correct in holding that the collector, under the agreed statement of facts, was not required to pay the above sum into the county treasury of Independence County. The judgment is therefore affirmed.

FIELDS v. STATE.

Opinion delivered June 12, 1922.

1. HOMICIDE—KILLING WITH DEADLY WEAPON.—The killing of a person with a deadly weapon when there are no circumstances of mitigation, justification or excuse is at least murder in the second degree.
2. HOMICIDE—MALICE.—In a trial for murder, whether a killing was done with malice *held* under the testimony to be a question for the jury.
3. HOMICIDE—INFERENCE OF MALICE.—In a trial for murder, the jury may infer malice from a killing with a deadly weapon with manifest purpose of taking life, where there were no mitigating circumstances.
4. CRIMINAL LAW—CONCLUSIVENESS OF VERDICT.—As the jury are the sole judges of the weight and credibility of evidence, a verdict supported by substantial evidence cannot be disturbed on appeal, even though believed to be against the weight of evidence.
5. HOMICIDE—INSTRUCTION.—In a trial for murder, an instruction following Crawford & Moses' Dig., § 2375, that to justify a killing in self-defense the danger must appear to defendant, acting without negligence, to be so urgent and pressing that killing is necessary to save himself from death or great bodily harm, that the person killed was the assailant, or defendant in good faith must have declined further contest, did not prejudice defendant, where other instructions given at the request of defendant fully presented the law of self-defense.
6. CRIMINAL LAW—BURDEN OF PROOF—INSTRUCTION.—The court charged that "a reasonable doubt is where, after a careful consideration and comparison of all the evidence in the case, the jury is not convinced to a moral certainty of the truth of the charge, which means the guilt of the defendant. It is not a mere possible doubt, but a real substantial doubt which arises from the evidence in the case." *Held* not to shift the burden on defendant.
7. HOMICIDE—ARGUMENTATIVE INSTRUCTION.—An instruction in a prosecution for murder that, if the evidence failed to show any motive of accused, this should be considered in his favor with all other facts and circumstances, being argumentative, and tending to invade the jury's province, was properly refused.
8. CRIMINAL LAW—INSTRUCTION.—The court is not required to single out evidence to show motive or absence of motive to commit crime for which accused is tried and give a special charge upon it in favor of accused.

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

Henry Stevens and *Powell & Smead,* for appellant.

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

HART, J. Nathan Fields was indicted for the crime of murder in the first degree, charged to have been committed by shooting and killing Grady Talley with a pistol. He was tried before a jury, which returned a verdict of guilty of murder in the second degree, and fixed his punishment at imprisonment in the State Penitentiary for ten years. From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

It is earnestly insisted by counsel for the defendant that the evidence is not legally sufficient to support the verdict. The killing of a person with a deadly weapon, when there are no circumstances of mitigation, justification, or excuse at the time of the killing, is murder in the second degree. *Young* v. *State,* 99 Ark. 407, and *Reed* v. *State,* 102 Ark. 525.

Counsel for the defendant claim that there is no evidence in the record tending to show malice on the part of the defendant or any circumstances from which the jury might infer malice in the killing.

E. S. Dunn and E. D. Haynes were eye-witnesses to the killing, and were the principal witnesses relied upon by the State to convict the defendant.

According to the testimony of E. S. Dunn, he went to a party at Tom Watson's home in Columbia County, Ark., on Saturday night, November 20, 1920. He passed Tom Winn, Grady Talley and Mr. Watson at the gate. He heard Watson tell the other two men not to talk so loud because there were ladies in the house. Talley said, "If we get too loud, just call us down, that is what we want you to do." Dunn passed on in the gate and Watson also came in. The defendant Fields at the same time passed out of the gate. The witness went on the porch

and stood there looking out. It was a bright moonlight night. He saw Winn and Talley outside some steps away from the front gate. Fields was three or four steps from them and next to the gate. Fields first fired three shots at Winn. When Winn fell, Fields fired four more shots at Talley. Fields fired all the shots that were fired there. Neither Winn or Talley fired at Fields. Both Winn and Talley were killed by the pistol shots fired at them by Fields. Fields then came into the house and exhibited two bottles of Garry Owen Bitters and a pistol, which he said he had gotten out of their pockets. The witness was acquainted with all of the parties, but disclaimed any interest in the case. One of the shots fired at Talley struck him in the back. Winn and Talley both died almost instantly after they were shot, and neither of them attempted to shoot at the defendant or inflict upon him any injury.

According to the testimony of E. D. Haynes, he first saw the defendant and the two men who were killed by him walking together from the front yard gate towards some horses that were hitched out in front of it. When they got to the horses, they talked for a little while and started back to the gate. As they walked along the defendant stepped out in front of Winn and Talley and began to shoot at Winn with a pistol. The defendant shot at Winn three times. When Winn fell, the defendant began to shoot at Talley, who had commenced to back away. He shot at Talley four times and several of the shots struck his body. Winn and Talley died almost instantly. It was a bright moonlight night, and the witness could see the three men plainly. He could tell by the flash of the pistol that all of the shots were fired by the defendant and none were fired by Winn or Talley. He could not see that Winn or Talley made any attempt to shoot or to injure the defendant.

Under the authorities cited above, the jury itself is to determine the question of malice, and it may infer malice when the killing is done with a deadly weapon

with manifest purpose to take life without any mitigating circumstances.

The circumstances of the killing detailed by these witnesses were sufficient to warrant the jury in finding the defendant guilty of murder in the second degree. The defendant adduced evidence tending to show that Winn and Talley had said that they were coming to the party at Watson's house for the purpose of provoking a difficulty with the defendant and then killing him. The evidence adduced in the defendant's behalf, also, shows that Winn fired the first shot, and it may also be stated that several witnesses testified to this fact.

We need not, however, set out this evidence in detail, for it is not within our province to pass upon the weight of the evidence. Under the settled rule in this State, the jury are the judges of the credibility of the witnesses, and where there is any evidence of a substantial character to support the verdict of a jury, we are not at liberty to disturb it upon appeal, notwithstanding we might believe that it was against the weight of the evidence.

The undisputed evidence shows that the deceased was killed with a pistol, and, according to the witnesses for the State, there was no provocation for it. According to their testimony, the defendant drew his pistol and shot Winn and Talley at a time when they were making no effort to shoot him or to inflict bodily injury upon him. Under these circumstances the jury might have inferred malice in the killing, and the testimony, if true, justified the verdict.

It is next insisted that the court erred in giving instruction No. 7, which reads as follows:

"You are instructed that in ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, as it appears to the defendant, acting without negligence on his

part, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal injury was inflicted."

This instruction was almost a literal copy of sec. 2375 of Crawford & Moses' Digest. The defense was that the defendant shot Winn and Talley in order to prevent them from killing him or receiving great bodily injury at their hands. Other instructions on self-defense were given at the instance of the defendant. The jury was fully instructed upon the appearance of danger to the defendant, in accordance with the principles of law heretofore laid down by this court.

The court also, at the request of the defendant, instructed the jury upon his right to kill Winn and Talley if they were engaged in carrying out a conspiracy to kill him or to do him great bodily harm. Therefore, we think the record affirmatively shows that no prejudice whatever could have resulted to the defendant from giving instruction No. 7.

The next assignment of error is that the court erred in giving for the State instruction No. 12, which is as follows:

"A reasonable doubt is where, after a careful consideration and comparison of all the evidence in the case, the jury is not convinced to a moral certainty of the truth of the charge, which means the guilt of the defendant. It is not a mere possible doubt, but a real substantial doubt which arises from the evidence in the case."

It is insisted by the defendant that the instruction is inherently wrong because by a negative definition of the term "reasonable doubt" the burden is shifted upon the defendant. We cannot agree with counsel for the defendant in this contention. The instruction is in accord with the rule laid down in *Bell* v. *State,* 81 Ark. 16, and many other decisions of this court.

The next assignment of error is that the court erred in refusing to give, at the request of the defendant, instruction No. 10, which is as follows:

"The court instructs the jury that, if the evidence fails to show any motive upon the part of the accused to commit the crime charged against him, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict."

There was no error in refusing to give this instruction. It was argumentative in form and tended to invade the province of the jury. It was proper to introduce testimony of facts tending to show motive or absence of motive for the commission of the crime by the defendant as tending to establish his guilt or innocence. The court is not required, however, to single out the evidence on this point and give a special charge upon it in favor of the defendant. *Ince* v. *State,* 77 Ark. 418, and *Scott* v. *State,* 109 Ark. 391.

The case was submitted to the jury upon instructions which were full and complete. They fully presented to the jury the respective theories of the State and of the defendant.

We find no prejudicial error in the record, and the judgment will therefore be affirmed.

BENNETT v. FARABOUGH.

Opinion delivered June 12, 1922.

1. VENDOR AND PURCHASER—FRAUD—SUFFICIENCY OF EVIDENCE.—In an action to rescind a contract for the sale of a farm because of the alleged misrepresentation of the vendor in regard to a drainage tax, evidence *held* to show that no intentional fraudulent misrepresentation was made concerning the tax, and that the purchaser had full knowledge that the land was subject to assessments for drainage before he signed the contract.
2. VENDOR AND PURCHASER—CONTRACT CONSTRUED.—In a contract to rescind a contract for the sale of a farm, which provided that the purchaser may pay the balance of the purchase money in

cash or assume the incumbrances, that the vendor should submit an abstract showing a "good, clear and merchantable title" and execute a warranty deed when the money was paid in whatever manner, *held*, in view of the evidence, that the parties intended that the vendor should present an abstract showing title that would be merchantable when the liens were satisfied from the proceeds of the sale, and that the contract did not require that the abstract should show that the liens were paid and satisfied before the purchaser was required to pay the price, under reasonable safeguards offered by the vendor for the application of the money.

3. CONTRACTS—CONSTRUCTION.—In the construction of contracts, courts have the right to place themselves in the same situation as the parties, in order to ascertain their intention.

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

Henry & Harris, for appellants.

1. Appellee has not met the requirements of law with reference to rescission on the ground of fraudulent misrepresentation, as recognized by this court. 47 Ark. 165; 97 *Id.* 268.

Where the means of information is accessible to both parties so that, with prudence or vigilance, the purchaser might rely upon his own judgment, he will be presumed to have done so. 112 Ark. 498.

The proof to establish fraudulent misrepresentations must be clear, satisfactory and convincing. 202 S. W. (Ark.) 720; 200 *Id.* 139; 112 Ark. 498.

Misrepresentation must be of some fact that is material, the moving cause of the transaction. Black on Res. & Can. 169; *Id.* pp. 306-7; 77 Atl. 409; 94 *Id.* 12.

False and fraudulent misrepresentation may be waived by conduct. 90 Atl. 698; 102 Ark. 79; 98 *Id.* 328; 55 *Id.* 148.

2. The existence of incumbrances is no ground for rescission where the vendor's purpose was to use the purchase money to pay the incumbrances, and the mortgagees were willing to execute releases. Black, Res. & Can. 1043, and cases cited; 81 Neb. 754; 33 N. Y. Sup. Ct. 450.

Streett, Burnside & Streett, for appellee.

As found by the chancellor, the obligations to furnish the abstract showing a good, clear and merchantable title, and to place of record the satisfaction of all liens against the lands, were, by the terms of the contract and the intention of the parties, conditions precedent to the right to demand of plaintiff the payment of the balance of the purchase money or that it be placed in escrow. 6 R. C. L. 904; Bishop on Contracts, Enlarged Ed., 319; *Id.* 320; 134 Ark. 419; 121 *Id.* 487; 119 *Id.* 418.

The drainage tax covers a period of fourteen years. The assessment of benefits has the force and effect of a judgment. Appellants have not only not offered to discharge this lien, but specifically refuse to do so. 27 R. C. L. 542; 6 *Id.* 1021; 18 La. 510; 54 Pa. St. 203; 93 Ark. 447; 76 Ill. 493; 27 R. C. L. 517.

WOOD, J. On the 16th day of March, 1920, J. A. Bennett and W. S. Daniel (hereafter called appellants) entered into a written executory contract with G. M. Farabough (hereafter called appellee) by which appellants agreed to sell and the appellee agreed to buy one hundred and twenty acres of land in Drew County, Arkansas, for the consideration of $10,200. The contract provided that $1,000 of the above sum was to be paid in cash as earnest money. The balance was to be paid in "either of the following manners": $4,200 within thirty days from the date of the contract, and the balance by assuming existing incumbrances on the land in the sum of $5,000, or cash, at the option of the appellee. After setting forth the agreement for the sale and purchase and terms of payment thereon, the contract contains, among others, the following recitals: "* * * it being understood and agreed by the first party hereto that all liens and mortgages against said land shall be satisfied and placed of record before the balance of the $5,000 shall be paid over to the first party. It is further agreed and understood and the first party (Bennett and Daniel) binds himself, his heirs and assigns, that, in the event of

the payment of the sums above described in either of the manners set forth, then he shall execute his warranty deed conveying said lands in fee simple to the party of the second part (Farabough). It is further agreed and understood that the said party of the first part will submit to the second party an abstract to said lands showing a good, clear and merchantable title, and the second party shall have ten days in which to examine said abstract and to report his approval or to file his objections thereto. Then the first party shall have a reasonable length of time in which to meet any objections that said second party may find to said title.

"It is further agreed and understood that, should the said first party be unable to establish a good, clear, merchantable title to said lands, then the earnest money herein acknowledged shall be returned to the said second party upon demand, it being also understood that, after a merchantable title has been established, should the second party fail to meet the payments according to the terms of this contract, then the earnest money shall be forfeited to the said first party at his option." The contract further provided that, when the deed had been delivered and accepted, the rents for said place during the year 1920 would be paid to the appellee.

On October 1, 1920, the appellee instituted this action in the chancery court of Drew County against the appellants, Bennett and Daniel, partners doing business under the firm name and style of Bennett-Daniel Company. In this complaint he set up the contract, alleged that he had performed the same and that appellants had failed to perform the contract in the following particulars: (a) They had not within a reasonable time furnished the appellee an abstract of title showing a "good, clear and merchantable title to said land." (b) They had failed and refused to satisfy and place of record all liens and mortgages against said land before the balance of the $5,000 purchase money under the terms of the contract was to be paid.

The appellee further alleged in his complaint that the appellants had falsely and fraudulently represented to the appellee that the lands were free from local assessments for drainage purposes; that appellee relied upon these representations and would not have entered into the contract if such representations had not been made. The appellee prayed that the contract be rescinded, and that he have a decree against the appellants in the sum of $5,200, the amount paid them, with interest thereon; that he have judgment for damages in the sum of $150, which he had expended in endeavoring to have appellants carry out their contract.

In their answer the appellants denied all the material allegations of the complaint, and, by way of cross-complaint, they admitted the execution of the contract alleged in the complaint, and averred that the contract was entered into with the appellee after he had been put in possession of all the facts concerning the location and desirability of the land, and after appellee knew that the land was subject to assessment for drainage improvements. They alleged that, after clearing up all the defects in the abstract of title to the lands, they had tendered to the appellee a deed which he refused to accept; that, after the payment by the appellee of the sums mentioned in his complaint, he notified the appellants that he preferred to pay the remainder due under the contract in cash rather than to assume the incumbrances mentioned; that it was understood between them that upon appellee's election to pay this amount the appellants might use the balance so paid in cash to them in paying off the incumbrances; that the appellants thereupon requested the appellee to deposit the balance of $5,000 due them in the Dermott Bank & Trust Co. or some other bank in the State, for the purpose of paying off these debts and having the incumbrances released; that the appellants agreed to deposit with the same bank a good and sufficient warranty deed conveying to the appellee the lands in question, together with such other money as

would be necessary, in addition to the $5,000 balance due on purchase money, to satisfy the debts and remove the incumbrances; that the appellants had the holders of the incumbrances execute full releases of the incumbrances and notified the appellee that release deeds had been deposited with the Dermott Bank & Trust Company, and that appellants were ready to consummate the sale when the appellee should pay the balance of the purchase money; that appellee refused to do this and therefore failed and refused to comply with his contract. Appellants prayed that the appellee be required to specifically perform the contract on his part by paying into court the sum of $5,000, with interest, and that, upon his failure to do so, the title be declared vested in him; that appellants have judgment against appellee for the balance of the purchase money due them under the contract, and that the lands be sold to satisfy the same, or else that the appellee be required to accept title subject to the incumbrances.

The cause was heard upon the depositions of the witnesses, the contract and other documentary evidence, which was duly identified and introduced. The trial court found that the evidence presented in support of plaintiff's contention that he had been misled with reference to the drainage taxes is not sufficient to support such contention, and that his offer to take the land in the event that defendants cleared same of all outstanding liens and furnished abstract showing good, clear and merchantable title, often repeated, shows that he had waived this objection; that the evidence submitted in support of plaintiff's contention that he suffered damages in the sum of $175 is too uncertain and indefinite. The court found that the contract was executed as set up in the pleadings, and that the "plaintiff paid the $4,200 in accordance with his agreement, and elected to pay the $5,000 balance due on the lands in cash, and called upon defendants to satisfy all outstanding liens and furnish him with an abstract showing good, clear and merchant-

able title. The defendants then demanded that plaintiff first pay over to some bank the said $5,000 as a condition precedent to clearing the title. This plaintiff refused to do, and, when the defendants made no further effort to satisfy the liens outstanding on the lands, plaintiff declared a forfeiture and brought this suit for rescission and for recovery of the money already paid, and for damages. The court declared "that the defendants, after the election of plaintiff to pay the $5,000 balance purchase price in cash, should have satisfied the outstanding liens against the lands and offered an abstract of title thereto showing a good, clear and merchantable title; that it was their duty as imposed by the contract to do this, and that they had no right to demand of plaintiff the payment of this sum either to themselves or in escrow until they had so discharged the liens and exhibited such title."

The court thereupon entered a decree in favor of the appellee against the appellants in the sum of $5,200, the amount paid by appellee to appellants on the purchase price, with six per cent. interest from the date of the payment of the several sums aggregating that amount, and decreed that, unless the judgment be satisfied within sixty days, the lands be sold to pay the same. From that decree is this appeal.

1. The issue as to whether or not the appellants made false and fraudulent representations to the appellee to the effect that the land was not subject to assessment for local improvements in order to induce the appellee to purchase same is purely an issue of fact. The appellee testified that, in a circular issued by the appellants advertising the lands in controversy, among other lands for sale, it was represented that the lands in controversy "were ideally drained, with no drainage tax;" that this was a material part of the consideration; that he would not have purchased the land at the price demanded had he been apprized of the fact that the land was subject to a drainage tax extending over a

period of fourteen or fifteen years; that he first learned of this drainage tax on the lands when he received the abstract of title, and that he immediately directed the attention of appellants to the same; that appellants had not offered to adjust the matter or given appellee credit for the amount of the drainage tax on the purchase money he had paid, but on the contrary had demanded full payment of the balance due with no deduction.

The witness further testified that appellant Daniel told him at the time of the sale that there was no drainage tax on the property, and that fact controlled his purchase of the land.

Appellant Daniel, on the contrary, in his testimony denied that he told the appellee that the land was not subject to drainage tax. He got out all the circulars describing the various tracts of land which they had for sale, but had no personal recollection of this particular tract being advertised as not subject to a drainage tax. In a letter written by the appellee to appellants after the contract was entered into, and after he had received the abstract of title, appellee called attention, among other things, to the drainage tax. In answer to this letter appellant Daniel stated that they were under the impression that there was no drainage tax on the land, but found that it was assessed, and that it would amount to about ten cents per acre per year and would run fourteen years. When asked to explain this letter, appellant Daniel said that it was written with reference to the amount of the drainage tax; that at the time the deal was consummated appellee may not have known the exact amount of the tax and the abstract did not show the amount, and he wrote the letter in explanation of the amount of the tax. He further testified that he first met the appellee on March 15, 1920, when he came into witness' office and wanted to look at farms in that section with a view to purchase. On that day witness showed appellee several tracts, among others the land in controversy, and advised him to buy the same. The next day, and before the deal was consum-

mated and the written contract entered into, witness showed the appellee the land in controversy on the map, and explained to appellee that it was in the last zone of a drainage district, and that the taxes on same would amount to less than ten cents per acre per year.

A young lady who was the stenographer in the office of the appellants testified that she was present before the execution of the contract and heard the appellee mention the subject of taxes and inquire if the tract of land was included in the drainage district, and that Mr. Daniel referred him to the map hanging on the wall showing that the land was located in the drainage district, and that the appellee consulted that map before he signed the contract.

Both of the appellants testified that in the latter part of September, 1920, appellee, after looking over the land in controversy, came into their office and told them that he wanted his money back. He was asked on what grounds, and replied that they had not cleared the in cumbrances. Appellee stated that he wanted the money refunded because the deed of trust and vendor's lien against the property had not been satisfied. In the correspondence between the appellee and the appellants concerning the abstract of title it is shown clearly by some of appellee's letters that when his objection had been met as to the satisfaction "of all liens and mortgages and a record showing the satisfaction of such liens and mortgages" he was ready at once to pay over the $5,000 upon "delivery of the deed and rental contract as per our contract."

We conclude, therefore, that a decided preponderance of the evidence shows that there was no intentional fraudulent misrepresentations made by the appellants to the appellee concerning the drainage tax on the lands in controversy; that the representations made by them concerning this in the advertising circulars were not a material inducement to the appellee in executing the contract. We are convinced that a preponderance of the evi-

dence shows that the appellee had full knowledge that the land was subject to local assessment for drainage before he signed the contract.

This court has often announced rules of law to be applied in determining whether there should be a rescission of a contract on the ground of alleged fraudulent representations, and it is unnecessary to reiterate them here. Appellee has not established a cause of action for rescission of the contract under these rules. *Yeates* v. *Pryor*, 11 Ark. 66; *Matlock* v. *Reppy*, 47 Ark. 165; *Evatt* v. *Hudson*, 97 Ark. 268; *English* v. *North*, 112 Ark. 498.

2. The appellee contends that the appellants had failed at the time of the institution of this suit to furnish him with an abstract showing "a good, clear and merchantable title" to the lands in controversy, and that such an abstract as was contemplated by the contract could not be furnished until the appellant had satisfied all liens and mortgages on the land and had recorded the satisfaction and brought such record into the abstract, which was not done; that these were conditions precedent to the performance of the contract on the part of the appellee, and that the failure of appellants to comply with the contract in this respect entitled the appellee to a rescission. This presents a mixed issue of law and fact.

The only defects in the abstract of title of which appellee complains are the following, which appellee contends were unsatisfied incumbrances against the land in controversy, to-wit:

(a) Drainage tax, $168.

(b) Mortgage to New England Securities Company, assigned to First Congressional Society to secure $1,000, due May 1, 1926.

(c) Interest thereon from May 7, 1919.

(d) Deed of trust to T. C. Alexander, trustee, of May 7, 1919, due May 1, 1926, $209.55.

(e) Interest on the above from May 7, 1919.

(f) Vendor's lien retained in deed to secure notes to the amount of $2,666.

(g) Vendor's lien retained in deed to secure four notes of $1,000 each, the last due Jan. 10, 1924, $4,000.

(h) Interest on above, making a total of outstanding liens in the sum of $8,043.55, exclusive of interest. We will dispose of the above in the order presented.

(a) We have already disposed of the drainage tax.

(b) (c) (d) (e) Of the remaining alleged outstanding incumbrances appellants concede that the mortgage to the New England Securities Company, assigned to the First Congressional Society, for $1,000, is an outstanding lien.

The land which the appellants by the contract agreed to convey to the appellee is described in the contract as the N½ of SE¼ and the SW¼ of the SE¼ of section 13, township 14 south, range 4 west, containing 120 acres. The SW¼ of the SE¼ of section 13, T. 14 S., R. 4 W., containing forty acres, is therefore involved in this litigation. But the SE¼ of the SW¼ of section 13, T. 14 S., R. 4 W., upon which the counsel for the appellee claims the Mercantile Trust Co. holds a lien, was not embraced in the contract, and the record shows that it was not involved in this litigation. It appears that the deed of trust executed May 7, 1919, for $209.55 to T. C. Alexander, trustee, for the New England Securities Company, was an outstanding lien which the appellants concede.

(f) The contention by the appellee that there is an outstanding indebtedness of $2,666 evidenced by promissory notes, which amount is a lien upon the land in controversy, is not borne out by the facts as disclosed by the sheets of the abstract of title brought into the record, for the reason that these sheets, when considered together, show, first, that one J. J. Dicken conveyed to one Bryant Reed certain lands not involved in this controversy upon which a lien was retained in the sum of $2,666. Dicken also conveyed to Bryant Reed the SW¼ of the SE¼ of section 13, upon which no lien was retained. Reed conveyed both tracts, including the tract not in controversy in this case, and upon which a lien was retained, and also

the tracts in controversy upon which the lien was not retained, and appellants assumed the lien of $2,666 on the tract which is not involved in this litigation. Dicken had a lien of $2,666 on the lands not in controversy, which he, in a second deed, conveyed free of incumbrance. Even if there were an outstanding lien on forty acres of the land in controversy in favor of Dicken, the uncontroverted testimony of appellant Daniel shows that Dicken, upon the payment to him of $4,000 with interest, was willing to release the lien, and had prepared a release deed for that purpose, which was not placed on record because the deal was not consummated.

(g) (h) The appellants concede that the $4,000 vendor lien notes held by Dicken and the interest thereon constituted an outstanding lien on the land in controversy.

It thus appears that at the time of the institution of this action the only outstanding unsatisfied liens against the property were the notes for $4,000 due Dicken and the amount due on the note to the New England Securities Company in the sum of $1,209.55. The contract mentioned these notes, and it is evident from the terms of the contract that the parties contemplated that these were the only unsatisfied liens, and that the amount of these notes at that time would be virtually paid by the balance of the purchase money, $5,000, which the appellee had the option to pay in cash or to assume the notes.

The undisputed testimony shows that on May 11, 1920, the appellants prepared a warranty deed and tendered the same to the appellee, but appellee refused to accept the same and to pay the balance of the purchase money. At that time and later, on October 1, when the action was instituted, the amount of the principal and interest of the outstanding liens was less than $5,500. After the institution of the action appellants again tendered the deed to the appellee and also tendered in court the sum of $520, being more than the difference between the amount of the incumbrances with interest, and the

sum of $5,000, the balance of the purchase money on the contract. The undisputed testimony shows that it was the purpose of the appellants to use the balance of the purchase money due under the contract to pay off the unsatisfied liens and to pay any additional amount necessary for that purpose, and to have the same satisfied of record, and to deliver to the appellee their warranty deed with an abstract showing the complete record title in the appellee at the time the deal was thus consummated.

The court, without finding that there were any other unsatisfied liens than those above discussed, and without finding the amount of the unsatisfied liens, determined as a matter of law that it was the duty of the appellants to satisfy the outstanding liens against the land and to offer appellee an abstract showing that these liens had been satisfied of record before it was incumbent upon the appellee to pay the balance of the purchase money.

This brings us to the issue of law as to whether or not the appellee, under the above facts, is entitled to a rescission of the contract. It will be observed that the contract bound the appellants to submit to the appellee "an abstract to said lands showing a good, clear and merchantable title." The contract gave the appellee ten days in which to examine the abstract and to file his approval or objections thereto. The contract further provided that if the appellants were unable to furnish a good, clear and merchantable title, then the earnest money was to be returned to the appellee. There was further provision to the effect that the appellee "shall not be required to pay over to the appellants the $5,000 until the liens and mortgages are satisfied and placed of record." The contract also contains the following provision: "It is further agreed and understood and the first party hereby binds himself, his heirs and assigns that, in the event of the payment of the sums above described in either of the manners set forth, then he shall execute his warranty deed conveying said lands in fee simple to the party of the second part." It is certain that under the paragraph

last quoted appellants were not to execute the warranty deed until the appellee had paid the purchase money. It is equally clear that, under the paragraph, just preceding the appellee was not to pay over the balance of the purchase money before the mortgages were satisfied and placed of record.

Now, the above provisions of the contract and the preponderance of the testimony, as we view the record, show that the parties contemplated at the time the contract was entered into that the appellants should present the appellee a "good, clear and merchantable title," that is, one that would be clear, merchantable and good, when the outstanding liens were satisfied; that appellee was then to pay the balance of the purchase money, $5,000, or to assume the incumbrances mentioned in the contract, and the appellants then should satisfy the incumbrances, if the balance of the purchase money were paid in cash, and execute and deliver to appellee their warranty deed. There is no other way to reconcile the otherwise inharmonious provisions of the contract. Courts have the right to place themselves in the same situation as the parties to the contract in order to ascertain the intention of the parties. *Wood* v. *Kelsey,* 90 Ark. 272; *Ft. Smith L. & T. Co.* v. *Kelly,* 94 Ark. 461; *Ford Hardwood Lbr. Co.* v. *Clement,* 97 Ark. 522.

The preponderance of the evidence shows that such was their intention. The correspondence between the appellee and the appellants and their respective attorneys is too lengthy to set forth, but it shows that the appellants had furnished an abstract which was satisfactory to the appellee's attorney. In the course of the correspondence, the attorney for the appellee, in a letter to the appellee, pointed out various objections to the abstract, and in regard to the satisfaction of the liens stated: "Of course, the mortgages can be paid when you close the matter. They (appellants) probably want to make these payments from the purchase price." And in a letter of appellants' attorney to the appellee concerning this matter he stated

as follows: "The mortgages are to be satisfied out of the purchase money. Your attorney admits that this will be satisfactory." The appellee did not indicate that this would not be satisfactory until he had visited the lands on September 29th and found the condition of the crop exceedingly unfavorable. Then, for the first time, he expressed dissatisfaction with the contract, demanded the return of his money, and gave as a reason for wanting to rescind the contract that the liens had not been satisfied. When such objection was made, the appellant Bennett, who had $9,000 available in cash in the banks at Dermott, proposed to deposit the sum of $5,000 if the appellee would deposit the same sum, and that if appellant did not clear the incumbrances the appellee could take the $5,000 deposited by Bennett as a bonus. Whereupon the appellee still declined, saying that he wanted his money back. This testimony of appellant Bennett was not controverted by the appellee.

While the appellee testified that he had at all times been ready, able and willing to pay the $5,000, and had kept that sum on deposit in Rogers for the purpose of completing the deal when the abstract was certified down to date showing the satisfaction of the outstanding liens, it occurs to us that his real objection to the consummation of the contract was not the mere failure upon the part of the appellants to satisfy the mortgage liens and to have the satisfaction thereof placed of record. The appellants give a satisfactory explanation of why they were not willing to do this unless they knew that the appellee intended to pay the balance of the purchase money and thus consummate the deal, the reason being that the mortgages were advantageous to the appellants, and they preferred to continue them rather than to pay them off unless the appellee was going to complete the transaction.

The appellee is in a court of conscience seeking to rescind a contract for alleged failure upon the part of the appellants to comply with the provisions of such con-

tract. As we construe all the provisions of the contract, taken in connection with the conduct of the parties showing the interpretation and meaning which they had given such contract prior to the institution of the suit, we have reached the conclusion that the appellants have not failed to comply with its terms. On the contrary, they have in good faith done all they were required to do to complete the contract. They had furnished to appellee an abstract showing a "good, clear and merchantable title," as contemplated by the parties when they entered into the executory contract for the sale and purchase of the land in controversy. *Hinton* v. *Martin*, 151 Ark. 343. We do not discover any provision in the contract which requires that the *abstract* must show that the liens had been satisfied of record, as a condition precedent to the consummation of the deal. The liens had to be satisfied and placed of record, to be sure, but there is no provision that the *abstract* must show this, before the deal should be closed. The appellee, under the circumstances, is not entitled to rescission, but, on the other hand, must be required to perform his contract.

When the appellants presented the appellee with an abstract showing a "good, clear and merchantable title" and tendered him their warranty deed, it was his duty to pay the balance of the purchase money. If he desired not to pay same direct to the appellants, then he should have met the proposition of appellant Bennett and deposited the sum in escrow in the bank to be paid over to the appellants after the liens were satisfied of record and brought into the abstract.

In *Martin* v. *Stone*, 79 Mo. 309, there was an executory contract for the sale of lands. The vendee agreed to pay the vendor $250 cash in hand, and the vendor agreed to give peaceable possession to the vendee at a subsequent date, on which day the vendee agreed to pay the sum of $4,500 in cash, the balance of the consideration of the sale, and upon condition that the vendor deliver to the vendee a warranty deed for the property. It was

afterwards ascertained that the land was incumbered by a deed of trust. The vendor expected to use a portion of the remaining purchase money in discharging the mortgage debt, and he had the holder of the mortgage lien present on the day the balance of the purchase money was to be paid for the purpose of executing a release, which the holder of the lien was willing to do upon the receipt of the money due him. The vendor executed and tendered to the vendee a warranty deed and demanded payment of the remainder of the purchase money. The vendee refused to accept the deed, and instituted an action at law to recover the cash payment he had made. In passing upon the above facts, the court said: "It is undisputed that the defendant's purpose was to pay the incumbrance out of the remainder of the purchase money, and that the owner of it was present and was willing to accept the money and release the lien. To predicate a right of rescission on the part of plaintiff on such a ground is too technical for serious consideration, especially as the defendant, at the trial, proffered to deliver the deed and have the incumbrance removed if plaintiff would pay the balance due under the contract." So we say. The action in the above case was at law, but the facts are sufficiently similar to make the doctrine there announced on the issue of rescission applicable here.

It follows that the decree must be reversed and the cause will be remanded, with directions to enter a decree in favor of the appellants, and requiring the appellee to pay into court the balance of the purchase money with interest thereon from the 11th of May, 1920, and that the appellants be required to satisfy of record all existing incumbrances, except the drainage tax, upon the lands in controversy, and furnish the appellee an abstract of title showing such satisfaction, together with their warranty deed conveying the land in controversy to the appellee; and that the appellants be required to pay the appellee all rents and profits that may have accrued since the execution of the contract, and for such other and

further proceedings according to the rules of equity and not inconsistent with this opinion as may be necessary to protect and enforce all the rights of the parties under the contract.

MISSOURI PACIFIC RAILROAD COMPANY v. BERRY.

Opinion delivered June 12, 1922.

1. APPEAL AND ERROR—WEIGHT OF EVIDENCE.—It is not within the province of the Supreme Court to pass upon the weight of evidence.
2. CARRIER'S NEGLIGENCE—QUESTION FOR JURY.—In an action by a passenger for injuries received on defendant's local freight train caused by a violent jerk of the train while moving on after it had stopped near plaintiff's destination, and while she was preparing to alight, the question whether the train stopped with an unusual jerk *held* under the evidence for the jury.
3. TRIAL—INSTRUCTIONS ALREADY GIVEN.—It was not error to refuse an instruction covered by one already given.
4. RELEASE—VALIDITY.—In an action for personal injuries, evidence *held* sufficient to sustain a finding that plaintiff did not know what she was doing when she signed a release.
5. CONTINUANCE—SURPRISE.—The complaint alleged that plaintiff was injured while in the act of alighting from defendant's train by the sudden starting and stopping of the train. Eye witnesses testified in accordance with this allegation, but plaintiff testified that she was struck in the back by another train which going out of the coach door. *Held* that refusal to grant a continuance because of surprise at plaintiff's testimony was not error, in view of the fact that the testimony was practically undisputed that plaintiff was injured by falling on her back while alighting and that the case was submitted on that theory alone.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; affirmed.

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

The court erred in overruling defendant's motion for continuance on the ground of surprise and variance. 71 Ark. 197.

The court should have instructed the jury that the release executed by the plaintiff was binding. 107 Ark.

202. By cashing the check and accepting the money she ratified the transaction. 115 Ark. 238.

Geo. W. Johnson, David Partain and *G. L. Grant,* for appellee.

There was no settlement or release. It was proper to submit to the jury the qestion of whether or not the plaintiff was capable of transacting business, and whether or not an unfair advantage had been taken of her. 137 Ark. 293.

HART, J. Martha Berry sued the Missouri Pacific Railroad Company to recover damages for injuries received while alighting from one of the defendant's local freight and passenger trains at Greenwood, Ark. She recovered judgment, and from the judgment rendered, the railroad company has duly prosecuted this appeal.

Martha Berry was seventy years of age at the time she was injured. She boarded one of the defendant's local freight trains, which also carried passengers, to go from her daughter's home in Van Buren, Ark., to her own home in Greenwood, Ark. There were nineteen cars in the train. Fifteen of these cars were empty coal cars. Two of them were merchandise cars, and two of them passenger coaches. The train stopped about two cars length before it came to its regular stopping place. Some of the passengers alighted from the coaches. Mrs. Berry arose from her seat and started to go out of the coach. Before she reached the door, the brakeman, who had got off of the train, signaled the engineer to go ahead. The train lunged forward, and Mrs. Berry was thrown down on her back.

Two or three witnesses for the plaintiff testified that the train moved up about a car's length and suddenly stopped again. One of the witnesses testified that when the train stopped the first time, Mrs. Berry got up and started to get off of the train. About the time she got to the door of the coach, the train pulled up about a car's length and then was stopped suddenly. He said that the first stop did not seem to be rough, but that the

second stop was really out of the ordinary. The train moved up about a car's length slowly and stopped rather suddenly.

Mrs. Berry was a witness for herself. She did not recall whether the station was called when they got to Greenwood. She started to get off while the train was standing still. She started out of the door of the coach and was struck in the back.

The jury might have legally inferred from this testimony that the train had come to a standstill at the station at Greenwood, and that Mrs. Berry had walked to the front door of the coach in which she was riding for the purpose of alighting from the train, and that the train was started and stopped again with a sudden jerk, which caused her to be thrown violently on her back, whereby she was injured.

It is true that the defendant adduced evidence tending to show that there was no unusual jerk in stopping the train, but it is not within our province to pass upon the weight of the evidence, and the evidence for the plaintiff was sufficient to submit the question to the jury. *St. L. I. M. & S. R. Co.* v. *Richardson,* 87 Ark. 101; and *St. L. I. M. & S. R. Co.* v. *Brabbzson,* 87 Ark. 109.

It is also insisted by counsel for the defendant that the court erred in refusing to give instruction No. 5, which is as follows: "You are instructed that if, at the time Mrs. Berry entered into a release, she knew what she was doing, your verdict must be for the defendant, although you may believe that she has since forgotten."

The court did give at the request of the defendant the following instruction: "You are instructed that, if you believe from the evidence that plaintiff and Mr. Davidson, representing the defendant, entered into an agreement whereby she released the defendant from all liability for damages, and that she accepted $100 and retained it, your verdict must be for the defendant, unless you find that she did not know what she was doing at the time."

A comparison of these instructions will show that they cover practically the same ground. The jury is told in each of them that if, at the time Mrs. Berry signed the release, she knew what she was doing, the verdict should be for the defendant.

At the request of the plaintiff, the converse of the proposition was submitted. At the request of both the plaintiff and the defendant, the law of ratification by cashing the check on another day than Sunday was submitted to the jury. The jury was plainly told that its verdict must be for the defendant unless it should find that Mrs. Berry did not know what she was doing at the time she signed the release. This was equivalent to telling it that if, at the time Mrs. Berry signed the release, she knew what she was doing, the verdict must be for the defendant, although the jury might believe that she had since forgotten the occurrence. Her right to avoid the execution of the release is predicated upon the fact that she did not know what she was doing at the time she signed it.

The jury were the judges of the credibility of the witnesses, and their belief, from the evidence, that the plaintiff had forgotten that she signed the release was included in the question of whether or not she knew what she was doing when she did sign it.

Finally, it is insisted that the evidence is not legally sufficient to warrant a finding that the plaintiff did not know what she was doing when she signed the release.

The undisputed evidence shows that the plaintiff was in a hospital controlled by the railroad company at the time the release was signed. The claim agent admits that her son-in-law, who was also an employee of the company, had requested him not to obtain her signature to a release without his presence. The claim agent says that he did not comply with her son-in-law's request because the plaintiff said that she was capable of attending to her own business, and that she knew what she was doing when she signed the release.

The claim agent is corroborated by the attending physician and the nurses, but this did not, as a matter of law, overcome the testimony given on this point by the plaintiff and her witnesses. According to her testimony, she was badly injured, suffered great pain, and did not remember anything at all about signing the release. She was kept in the hospital for ten days.

It is true that the plaintiff's own testimony that she did not remember the occurrence at all is a very general statement, but when we consider her nervous and excited condition, together with her advanced age, it cannot be said that her testimony is without weight. She is corroborated by the testimony of her daughter, who said that she visited her mother every day while she was in the hospital and that she was in a very nervous condition all the time. She stated further that her mother was out of her head for a part of the time. The plaintiff signed a release for $100, and the claim agent admits that she was contending all the time that she was badly hurt. This release did not include her hospital expenses, which amounted to $55. When all these matters are taken into consideration, it cannot be said that the evidence on this phase of the case is not legally sufficient to sustain the verdict. *Truman Cooperage Co.* v. *Crye,* 137 Ark. 293.

Finally, it is insisted that the judgment should be reversed because the court refused to grant the defendant a continuance because of surprise at the plaintiff's testimony. The alleged surprise came about in this way: the plaintiff's complaint alleged that she had been injured while alighting from the train by the negligent jerk of the train, which threw her down. Eye-witnesses of the accident testified for the plaintiff in accordance with this allegation of negligence, and told how she was injured by being thrown on her back by a sudden starting and stopping of the train while she was walking out of the coach door with a view of alighting from the train.

The plaintiff finally took the stand in her own behalf. She testified that she started out of the door of

the coach, and that another train hit her in the back, thereby causing her injury. The defendant's attorney then moved for a continuance on the ground of surprise. The plaintiff's attorney then announced that the plaintiff did not rely for a recovery upon the fact that she had been struck by another train, but based her right to recovery solely on the ground that she had been thrown upon her back by a sudden jerk of the train. The case was submitted to the jury on this theory. Indeed, the testimony is practically undisputed that the plaintiff was hurt by the train starting and stopping suddenly, thereby causing her to fall on her back. The only dispute in the testimony on this point is whether or not the train stopped with a sudden jerk, or whether it was stopped in the usual way. The brakeman testified that he knew the plaintiff and had told her to keep her seat until he told her to leave. This testimony is disputed by the evidence for the plaintiff; but, as we have said, there was no dispute in the testimony about the plaintiff's being hurt by falling on her back. All of the evidence showed she was thrown down on the platform of the coach as she walked out of its front door. It would have been impossible for her to have been injured by another train, and we do not think there was any possibility of the jury having been misled by her testimony.

Therefore the court did not abuse its discretion in refusing to grant the defendant a continuance.

We find no reversible error in the record, and the judgment will be affirmed.

BURNS v. STATE.

Opinion delivered June 12, 1922.

INTOXICATING LIQUORS—MAKING MASH FOR DISTILLATION—EVIDENCE.—In a prosecution for making mash, wort or wash fit for distillation of intoxicating liquors, where defendant testified that he made mash to feed hogs, proof by the officers searching the premises that his wife emptied vessels through the kitchen floor into

a garbage can and that they found several bottles and a jug smelling of whiskey, four barrels of mash in a state of fermentation, a trough with worm and pipe, under which there had been a fire, a still, etc., was competent and sufficient to support a finding of guilt.

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

No brief for appellant.

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

SMITH, J. Appellant was indicted and convicted for having made a "mash, wort, or wash fit for and to be used in the distillation of alcoholic, vinous, malt, spirituous, and fermented liquors," and has appealed. No brief was filed on behalf of appellant; but the Attorney General has set out and discussed all the assignments of error contained in the motion for a new trial. These are, chiefly, that the evidence is not sufficient to sustain a conviction; and that error was committed in admitting testimony. These assignments of error will be discussed together.

The sheriff, accompanied by three deputies, went to appellant's home to serve a search warrant. They arrived after dark, and were told by appellant that his wife had retired for the night, and the officers consented to delay the search until appellant's wife had dressed. After waiting some time the officers discovered that appellant's wife was busily engaged in emptying some vessels through a hole in the kitchen floor; so they shoved the door of the kitchen open and found appellant's wife in the act of pouring a mash into a garbage can on the outside. Some of the mash had also been poured through a hole in the kitchen floor. Several bottles and a jug were found, all smelling of whiskey. Three barrels of mash were found, which had been made of chops and water and sweetened with molasses. One barrel of the mash was sweetened with sugar. The mash was in a state of fermentation, and was just such mash as wit-

nesses had seen used in making whiskey. Pieces of Irish potatoes were found in some of the mash, and one of the officers, who testified that he was familiar with the process of making whiskey, stated that the potatoes were used to hasten fermentation.

The sheriff and the other officers found a gallon of white whiskey and several empty vessels which had contained whiskey. They searched the premises, and on a little branch, about a hundred yards from the house, down a pathway leading from appellant's house, they found a trough upon a rack, and the trough had a pipe through it, and there had been a fire under the trough. The next morning the officers found a little mound in a cornfield, into which they dug and found a still. The officers had seen similar stills used in making whiskey, and the still which they found showed that it had had a fire under it and smelled of the mash which had been boiled in it. Tracks were found leading from appellant's house to the trough and to the mound in the field. A worm was found in the trough in the branch. The officers testified that they tasted the mash and that it was in a state of fermentation, and that it tasted and smelled like whiskey. One of the officers saw appellant's wife pouring whiskey out of a fruit jar at a window. The officer, who was familiar with the process of manufacturing whiskey, testified that the different barrels of mash would not all make the same kind of liquor; that some would make whiskey; and other barrels would make rum; while the barrel which contained the chops, sugar and potatoes would make what the witness called a "Duke's mixture," but he testified that it would all be alcoholic and intoxicating.

Appellant admitted that he made the mash, but testified that he made it for, and fed it to, his hogs, and that he had made no whiskey. Appellant owned a sow and seven small pigs, and he testified that he fed them sour mash, and that the mash on hand had been prepared for that purpose.

An exception was saved to the action of the court in permitting a witness named Burns to testify that on another occasion he had found a slop which resembled the mash in question at appellant's house.

On his cross-examination appellant was asked, over his objections and exceptions, about the whiskey in his house at the time it was raided. He did not deny having whiskey in his possession, but he did deny having made it or having made a mash to be used for that purpose. Some of the barrels of mash found in his house were covered with cloths. He explained that this had been done to keep the dust out of it.

We think the testimony set out was competent; and that it is sufficient to sustain the conviction. Appellant was accused of having made a mash, wort or wash fit for distillation; and the testimony objected to tended to show that he had committed that crime. In the case of *Logan* v. *State,* 150 Ark. 486, we defined the phrase, "fit for distillation," contained in the statute under which appellant was convicted, as meaning that the mash was intended for use in making alcoholic liquors, and not as meaning merely that it was adapted to or capable of being used for such purposes. Appellant testified that he had made the mash for a lawful purpose, to-wit: as feed for his hogs. The testimony objected to tended to show that the mash had been made for use in making whiskey, and it was therefore competent, and, as we have said, is sufficient to support the judgment, which must therefore be affirmed. It is so ordered.

HOUSE v. ROAD IMPROVEMENT DISTRICT NO. 4.

Opinion delivered June 12, 1922.

1. STATUTES—AMENDMENT BY REFERENCE TO ANOTHER STATUTE.—Under Const. Ark. 5, § 23, providing that no law shall be amended, or its provisions extended by reference to its title only, but so much as is amended or extended must be reenacted and published at length, *held* that Road Acts 1919, No. 597, as

amended by Acts 1920, No. 462, creating the St. Joe and Witt Springs Road Improvement District of Searcy and Newton counties, is void by reason of adopting provisions of Acts 1915, No. 338, by reference merely, instead of reenacting them at length; also because the latter act, so referred to, makes no provision for improving roads where the lands to be taxed therefor are situated in more than one county.

2. STATUTES—AMENDMENT BY REFERENCE TO ANOTHER STATUTE.—Const. Art. 5, § 23, providing that no law shall be amended or its provisions extended or conferred by its title only, but so much as is revived, amended, extended or conferred shall be reenacted and published at length, does not apply to statutes which are in themselves complete, though they refer to and adopt preexisting statutes.

3. STATUTES—VOID ACT NOT VALIDATED BY SUBSEQUENT ACT.—Where an act creating a road improvement district was void and inoperative, a subsequent act cannot validate assessments for road improvement work made under the original act.

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

STATEMENT OF FACTS.

Walter E. Orthwein brought this suit in equity against Road Improvement District No. 4 of Searcy and Newton Counties to recover the sum of $2,000, the amount of a certificate of indebtedness issued to him by the commissioners of said district for preliminary expenses, and to have the same declared a lien upon all the lands of said district.

The commissioners of the improvement district filed an answer in which they admitted the execution of the certificate of indebtedness, and stated that it was issued for the purpose of defraying the preliminary expenses of said district.

W. F. Cash and other property owners in the district filed an intervention and denied liability in the premises. The case was tried upon an agreed statement of facts substantially as follows: The improvement district in question was created by act No. 597 of the Acts of the General Assembly of the State of Arkansas for the year 1919, and act No. 462 of the Acts of the Special Session

of the same General Assembly in 1920, amendatory thereof.

The commissioners provided for in the act qualified, and for the purpose of defraying the preliminary expenses of said road improvement district borrowed the sum of $2,000 from Edgar J. Hahn and executed and delivered to him the certificate of indebtedness sued on herein for that sum. The certificate recites that said district is indebted to Edgar J. Hahn for money advanced for preliminary expenses in the sum of $2,000 and contains a promise to pay the same on or before the 1st day of January, 1920. The certificate of indebtedness was duly assigned to Walter E. Orthwein. No part of the same has been paid.

On the 2nd day of July, 1920, the chancery court of Searcy County, in a suit wherein W. F. Cash and other property owners were plaintiffs and said improvement district was defendant, entered a decree of record holding said improvement district void and enjoining said commissioners from borrowing money, selling bonds, or doing any other act for the purpose of carrying out the proposed improvement. No appeal was prosecuted from that decree.

During the pendency of the proceedings Walter E. Orthwein died and the cause was revived in the name of J. W. House, Jr., as special administrator of his estate.

The court found that the act under which said district was attempted to be created was void, and entered a decree dismissing the complaint of the plaintiff for want of equity. The case is here on appeal.

Coleman, Robinson & House, and *Saye & Saye,* for appellant.

Act No. 597 is an original act, complete in itself, and because it provided that the terms of the Alexander Road Law should govern in the affairs of the district, this was not an attempt to extend the general act by reference to its title only, and does not come within the inhibition of art. 5. sec. 23, Const. See also, 102 Ark. 411; 103 Ark.

299; 125 Ark. 64; 120 Ark. 167; 131 Ark. 59; 131 Ark. 291; 132 Ark. 609; 133 Ark. 380; 134 Ark. 30.

The Legislature can, of course, create a road district which shall include lands in two counties. 130 Ark. 507. By following the accepted practice of adopting a construction which will give effect to a statute if possible, rather than hold it void (25 R. C. L. secs. 242-243 Statutes) and bearing in mind that there is also authority for extending the singular number mentioned in the statute to apply to several persons or things (25 R. C. L. sec. 225, Statutes; Ann. Cas. 1913-C 266) we find ample authority in the Alexander Road Law to make assessments in both counties, and for the collection thereof.

No brief for appellee.

HART, J. (after stating the facts). The Legislature of 1919 passed a special act for the creation of Road Improvement District No. 4 of Searcy and Newton Counties, Ark., to be known as the St. Joe and Witt Springs Road Improvement Distict. Road Acts of Ark. of 1919, vol. 2, p. 2211. Sec. 1 of the act describes the territory embraced in the district. It contains lands in both Searcy and Newton counties in the State of Arkansas.

Sec. 2 of the act provides that the district shall be a local improvement district under the terms of act 338 of the General Assembly of the State of Arkansas for the year 1915, entitled, "An act providing for the creation and establishing of road improvement districts for the purpose of building, constructing and maintaining the highways of the State of Arkansas." Said act was approved March 30, 1915, and is commonly known as the Alexander Road Law. Acts of 1915, p. 1400.

Sec. 3 names the commissioners and makes it their duty to improve the highways designated in the act.

Sec. 5 provides that said commissioners shall have the power to borrow money and issue negotiable bonds for the purpose of carrying out the work and to do all acts necessary for making the improvement in accordance with the provisions of said act 338.

The commissioners proceeded with the construction of the improvement as contemplated in the act.

The legality of the district was attacked by landowners of the district, and it was held void by a decree of the chancery court entered of record on July 2, 1920. The same holding was made in the chancery court in the present case, and no recovery was allowed on the certificate of indebtedness sued on.

It is first contended that the chancery court erred in holding that the act in question violates art. 5, sec. 23 of the Constitution of 1874, which provides that no law shall be revived, amended, or the provisions thereof extended, or conferred by its title only; but so much as is revived, amended, extended or conferred shall be reenacted and published at length.

The prohibition of the Constitution referred to is directed against the practice of amending or revising statutes by additions or other alterations which, without the presence of the original act, are usually unintelligible and misleading.

There is, however, a class of statutes known as reference statutes, which do not encroach upon this or any other constitutional provision. They are statutes in original form and in themselves complete; but refer to and by reference adopt pre-existing statutes. The two statutes are separate and distinct legislative enactments, each having its appropriate sphere.

But it is not necessary, in order to avoid a conflict with the section of the Constitution just referred to, to reenact a general law wherever it is necessary to resort to it to carry into effect the provisions of a special statute. In such cases the general statute is not made a part of the special statute. The right, power, or duty is given by the special statute; but the direction or enforcement thereof is made to conform to the method of procedure of the general statute.

As we have already seen, the act under consideration designates lands in both Newton and Searcy counties

within the boundaries of the proposed road improvement district. It refers to the provisions of our general statute relative to the creation and establishment of road improvement districts to carry out its provisions. This general statute is known as the Alexander Road Law, and contains forty-four sections.

We need not set out the provisions of this act. It will be readily ascertained by reading it as a whole that its provisions in clear and unmistakable language show that it was the purpose of the framers of the act to confine the road improvement districts formed or constructed under it to the borders of a single county. It makes no provisions for improving roads where the lands to be taxed therefor are situated in more than one county.

In the present case the lands to be taxed to construct the improved road are situated in both Searcy and Newton counties, and on that account the road could not be constructed under the provisions of our general statute for the creation and establishment of road improvement districts known as the Alexander Road Law. Acts of 1915, p. 1400.

The case called for the application of the rule laid down in *Wood* v. *Willey,* 139 Ark. 586. In that case it was held that an act of the General Assembly of 1919 intending to create the Grady and Arkansas River Road Improvement District of Lincoln and Jefferson counties was void for the failure of the act to provide any machinery to assess against the betterment of the Jefferson County lands their proportionate share of the cost of the improvement. The special act under consideration provides that it shall be the duty of the commissioners to improve highways laid out heretofore or hereafter by the county court of Searcy County. It provides that vacancies shall be filled by appointment by the county court of Searcy County.

As we have said, it contemplates that the improvement shall be made in accordance with the provisions of the Alexander Road Law. It provides that the commis-

sioners shall cause an assessment of benefits to be made and the levy of the lands of the district for the taxes to be made in accordance with the method set forth in that act. No other method is provided in the act for constructing the improved road contemplated by the terms thereof, and it necessarily follows that the act is inoperative and void. This results, as we have already seen, because no authority is given by the special act to the county court of Searcy County to levy a tax on the lands included within the boundaries of the district in Newton County, and the provisions of the Alexander Road Law do not contemplate that the county courts of two counties shall act together in constructing an improved road under the provisions of that act.

The special act passed at the special session of the Legislature in 1920 for the purpose of confirming and validating the assessments under the original act creating the district could not affect the purpose for which it was intended. If act No. 597, passed at the regular session of the General Assembly of 1919, was inoperative and void, the Legislature in special session in 1920 could not give validity to a void act. In other words, if the original act attempting to create the improvement district was dead because it was inoperative, a subsequent act could not vitalize it or validate void assessments for road work attempted to be made under it. *State* v. *Little Rock, Mississippi River and Texas Rd. Co.,* 31 Ark. 701, and *Sembler* v. *Water & Light Imp. Dist.,* 109 Ark. 90.

It follows that the decree will be affirmed

NICHOLS v. BRINKLEY MERCANTILE COMPANY.

Opinion delivered June 12, 1922.

1. CORPORATIONS—REPRESENTATION BY MANAGER.—Where the manager of a corporation, who was also a partner in an independent business, made up a statement of the indebtedness of the partnership to others who took over the business and assumed the debts of the partnership, his knowledge that the corporation's claim was not included in the statement could not be imputed to the corporation.
2. PARTNERSHIP—LIABILITY ON DEBT ASSUMED.—Where defendants, who assumed the debts of a partnership on its dissolution, are sued by a creditor of the firm, they could not postpone collection of such claim until they could litigate a claim against one of the former partners for misrepresentation in making up a statement of the debts assumed which did not include plaintiff's claim.

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

Mathis & Trice, for appellant.

Where a person intentionally or by culpable negligence induces another to act upon his representations he will be estopped from denying the truth. 91 Ark. 141; 89 Ark. 349; 55 Ark. 296.

Ordinary prudence and diligence do not require one to test the truth of representations made to him by another. 89 Ark. 321.

Bogle & Sharp, for appellee.

Equitable estoppel is the effect of voluntary conduct of a party whereby he is precluded from asserting rights which might perhaps have otherwise existed, as against another person in good faith relied upon such conduct. 21 Corpus Juris 1113.

No man shall be held bound by a proceeding to which he was not a party. 13 Ark. 214.

A corporation may not be bound by the representations of its manager, even though his representations are untrue. 63 Ark. 212; 63 Ark. 268.

A principal is not estopped by the conduct of his agent unless it be a matter in which the agent had authority to act. 72 Ark. 62; 97 Ark. 43.

An estoppel bars the truth to the contrary; the party setting it up must prove it strictly. 65 N. W. 604; 83 Fed. 725.

A written contract cannot be contradicted or altered by parol evidence. 3 L. R. A. 308; 1 Greenleaf on Evidence, sec. 275; 34 Fed. 239; 63 U. S. 22; 64 U. S. 23; 96 U. S. 544; 104 Ark. 475; 83 Ark. 283.

SMITH, J. Appellee is a domestic corporation, and filed a complaint containing the following allegations: In February, 1920, Elmo Chaney and J. Harvey Nichols were copartners in the business of constructing roads. Nichols and certain other persons made defendants herein entered into an agreement with Chaney under which the copartnership of Nichols & Chaney was dissolved, and Nichols and the other persons made defendants purchased the assets of the firm. The defendants, as a part of the purchase price, agreed to assume all of the obligations of the firm of Nichols & Chaney. At the time of such purchase the firm of Nichols & Chaney was indebted to plaintiff for merchandise in the sum of $523.70, and judgment was prayed for that amount.

The defendants filed their answer, which was accompanied by a motion to transfer to equity, and a motion to have Chaney made a party. The motions were overruled and exceptions saved.

The answer admitted the agreement under which the firm of Nichols & Chaney was dissolved; but alleged that, preliminary to the making of that agreement and as a part thereof, the defendants demanded of Chaney a statement of the different accounts which the firm of Nichols & Chaney owed. Chaney, who kept the books of Nichols & Chaney, undertook to, and did, furnish what purported to be a complete statement of the indebtedness of Nichols & Chaney, and the statement so furnished did not include the account sued on. At the time the agreement was made under which defendants acquired the assets of Nichols & Chaney, Chaney was the manager of plaintiff. Defendants alleged that they relied on the statement

furnished by Chaney as to the indebtedness of the firm, that they were induced to purchase its assets and assume its obligations in reliance on the correctness of said statement. Defendants alleged that Chaney, as bookkeeper for Nichols & Chaney and as manager for the plaintiff, knew the account sued on was outstanding and unpaid, and that plaintiff is therefore estopped to maintain this action. There was a prayer that Chaney be made a party and that judgment be rendered against him for the amount of the account.

A demurrer to this answer was sustained, and, upon defendants refusing to plead further, judgment was rendered against them for the amount sued for, and from that judgment is this appeal.

The contract under which the firm of Nichols & Chaney was dissolved is made an exhibit to the complaint, and it appears from it that the consideration to be paid Chaney was something over $19,000, of which $3,000 was paid in cash and the balance to be paid in installments.

It is not alleged that, in making the representations to defendants as to the indebtedness due by the firm of Nichols & Chaney, Chaney was acting for plaintiff. On the contrary, he was acting for himself. It is not alleged what Chaney's authority was as manager, nor is it alleged that defendants contracted with him as the representative or agent of plaintiff. Upon the contrary, they contracted with him as a member of the firm of Nichols & Chaney; and, if it be said that defendants had a right to rely upon the statement of Chaney as to the firm's indebtedness because he was the bookkeeper and in possession of that information, it may be answered that this knowledge is not to be imputed to plaintiff, as Chaney was not purporting to act for plaintiff in furnishing this information. Plaintiff was not called upon for a statement of the account due it. The statement furnished was prepared by Chaney as a member of the firm of Nichols & Chaney and as bookkeeper for that firm. There is no allegation that Chaney is insolvent. It appears, from

the pleadings and the exhibits thereto, that defendants are indebted to him in a large sum of money, and if they were induced by the false representation of Chaney, as they alleged, to take over the assets of the firm of Nichols & Chaney and to assume its obligations, they have their action against Chaney.

Plaintiff's cause of action is present and complete. The account is due and unpaid, and defendants, in their answer, admit that, for a valuable consideration, they assumed its payment. There is therefore no reason why plaintiff should be postponed in the collection of its account until defendants have litigated with Chaney the question of his liability to them on account of his alleged false representations.

The demurrer was properly sustained, and the judgment is affirmed.

SCHWEITZER v. BEAN.

Opinion delivered June 19, 1922.

1. WILLS—CONTEST OF WILL PROBATED IN ANOTHER STATE.—The will of a person who had domicile in another State in which the will was probated, so far as it relates to the devolution of either real or personal property in this State, may be contested without violating Const. U. S. Ark. 4, § 1, providing that full faith and credit shall be given by each State to the public acts, records and judicial proceedings of every other State.
2. WILLS—INSANITY OF TESTATOR—EVIDENCE.—In a will contest, evidence that a testator thought his daughter had slandered him, and that such was not true, *held* insufficient to show mental incapacity of testator.
3. WILLS—MENTAL DELUSION.—A groundless belief manifest under suddenly aroused emotions and which lacks persistence and continuity affords no evidence of mental delusion, and the existence of such a groundless belief only settles into a disqualifying mental delusion when it is persisted in and pursued by a logical process of reasoning to an insane conclusion.
4. WILLS—MENTAL DELUSION.—A belief, though unfounded, unreasonable or extravagant, does not constitute an insane delusion if based upon any evidence, however slight.

5. WILLS—INSANE DELUSION.—Where one conceives something extravagant and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such a one is possessed of an insane delusion.

Appeal from Boone Circuit Court; *J. M. Shinn,* Judge, reversed.

E. G. Mitchell and *Shouse & Rowland,* for appellant.

Full faith and credit shall be given to the judgments of sister States. Art. 4, sec. 1, Const. U. S.; 134 U. S. 607; 193 Fed. 332; 40 Cyc. 1237; 52 S. W. 296; 45 S. W. 677; 27 S. W. 1009. The judgment of probate in Dade County, Florida, was conclusive as to all matters of personal property, the doctrine of *"lex domicilii"* controlling. 143 Ark. 192; 103 Tenn. 1; 52 S. W. 296.

The action of the court to vacate and testify was both arbitrary and prejudicial.

Instructions 2, 3, 4, 5, 6, 7, 8 and 9, given by the court were abstract and misleading. A belief based on evidence, however slight, is not a delusion. 87 Ark. 280.

Every man has a right to dispose of his property by will, as he pleases, within statutory limitations. 87 Ark. 243.

The evidence was not sufficient to sustain a verdict against the will. 160 S. W. 1071; 62 Pac. 605; 169 S. W. 852; 66 N. E. 371; 192 Ill. 525; 61 N. E. 652; 25 Pac. 769; 31 Pac. 453; 33 Pac. 542.

George J. Crump, for appellee.

The motion to dismiss and the demurrer to the jurisdiction of the court were properly overruled. 143 Ark. 192.

McCULLOCH, C. J. This is a contest, originating in the courts of Boone County, of the will of L. H. Schweitzer, who died on November 16, 1920, in the State of Florida, where he resided.

The testator owned property, both real and personal, in Boone County, and after the last will and testa-

ment was regularly probated in the State of Florida it was filed for probate in the probate court of Boone County.

Appellee, Mrs. Elsie Bean, who was the daughter of the testator, appeared and contested the will, and the cause was tried in the circuit court of Boone County on appeal. The trial before a jury resulted in a verdict against the validity of the will, and a judgment was rendered accordingly, from which an appeal has been prosecuted by the proponents of the will.

The ground of the contest is that the testator was mentally incapacitated to execute a will, in that he labored under an insane delusion that appellee, his daughter, had made statements derogatory to his moral character and had slandered him.

The first point urged by appellants is that the devolution of the personal property owned by the testator in this State is governed by the laws of the domicile of the State where the testator resided, and that, since the will had been duly admitted to probate in that State, a contest of the will, so far as it concerns the personal property, cannot be had in this State, for the reason that this would be in violation of the requirement of the Federal Constitution (Art. IV, sec. 1, Constitution of the U. S.) which provides that "full faith and credit shall be given by each State to the public acts, records and judicial proceedings of every other State."

This question has been decided against the contention of appellants by this court in the recent case of *Selle* v. *Rapp,* 143 Ark. 192. It is true that real estate only was involved in that case, but the court construed our statute to give the right of contest here with respect to any property in this State. It necessarily follows from that decision that a testament relating to personalty as well as real property in this State may be contested here.

It is also contended that the evidence is not sufficient to sustain the verdict.

It appears from the testimony that Schweitzer formerly resided at Harrison, in Boone County, and that many years ago he and his wife, the mother of appellee and two other children, were separated and were divorced. Appellee and the other children took sides with their mother and went away with her, first removing to the State of Kansas and later to the State of Missouri. The testator and his wife divided all of the property he had at that time in an amicable adjustment made between them. The only complaint made about that incident was that appellee claims now that the testator took from her the sum of one hundred dollars which she had earned in raising and selling pigs from a sow which her father had given her.

It also appears that Schweitzer visited appellee once in Missouri and that, to a certain extent, better relations were restored between them, but that there was no complete restoration of confidence and affection.

During the spring and summer of the year 1916, which was about fifteen years after the separation between Schweitzer and appellee's mother, Schweitzer sustained a fracture of one of the bones of his leg, and was confined to his room and bed for a considerable time. He was unmarried at that time and was living in Harrison with a family named Minyard, but the members of that family were not related to him. Appellee heard of her father's misfortune, and came to Harrison for the purpose of making a visit. She stayed there about a week, and she testified in the trial below that during that period she spent about half the time with her father, and that she endeavored to induce him to take possession of another home and furnish it and permit her to stay with him and nurse him, and that he declined to move from the home of the Minyards. She denied that anything unfriendly took place between herself and her father during that visit. Appellee never saw her father again after she left Harrison on that occasion. She went back to her home in Missouri, and she introduced two letters which

he wrote to her during the autumn after her visit to Harrison. Those letters seem to be the basis of appellee's contention that her father was laboring under an insane delusion and they are of sufficient importance in the discussion to copy them in full. The date of each letter is shown and they read as follows:

"THE HOME INSURANCE COMPANY

"NEW YORK

"(SEAL)

(Letterhead)

"Harrison Insurance Agency.

"Harrison, Ark., Nov. 16, '16.

"Dear Elsie:

"Since writing you this a. m., I have changed my will, and I thought you ought to know how—as it was, Walter's estate would share equally with you, and I did not think we wanted it that way. I have made a codicil to my will giving Rose Elsie $500, and since I expect to keep my estate intact and at present value if not more,—I thought you would not feel hurt at my giving little Louie Schweitzer Winsted (my only namesake) $500. I had you made executrix—in Walter's stead—(place) to act with L. F. Eoff, who was an executor with Walter.

"While—with care—I may live to a ripe old age—yet my complaint—high blood pressure—is liable to take me off at any moment—this is why I am fixing my affairs, while I can. I hope you are not only satisfied with my arrangement, *but that you are pleased*—you get all now instead of ½ after the several $500 bequeathed to my nieces, the children, and Rose Elsie and little Louie—My friends here are just as good to me as they can be, and I owe them some recognition. I believe you will agree with me in this.

"Your loving

"FATHER."

"Harrison, Arkansas, Dec. 8, 1916.

"Mrs. Elsie Bean, Clarksdale, Mo.

"My daughter: I am sending you what I presume will be a little surprise. I have learned of your treachery and your attempt to blacken my good name and character, and too, when I was helpless; and hoping the possibility of another opportunity, I have in a just, newly made will disinherited you, giving you $1 only, with instructions to the administrator to mail to your address, and I ask you not to be at my funeral. I do not want any one as deceitful as you seem to have become pretending to mourn over my remains.

"The Schweitzer blood must in some way have all oozed out of your veins. I do not understand how you could under *any influence* show the deceit you have, and be a Schweitzer.

"You need not ask for explanations. You know the false and slanderous representations you made while here, while I was helpless. What should I expect if I were dead of one that would take such chances while I was alive? I want to say, however, that your statements did not injure me one whit; but on the contrary made sympathy for me, and lessened the respect they had for you, feeling that if your representations were true (and they knew they were false), you, if a true daughter, would have tried to hide.

"I am in perfect health, and have regained my usual weight. The doctor says 'there is not a man in ten in as good health at my age.' I expect to live ten or fifteen years yet and fight evil and the devil wherever I meet them.

"Your slandered Father."

Appellee testified that she answered the last of these letters and protested her innocence of the charge of having slandered her father, and that she expressed to him continued affection and pleaded for his affection in return. She never heard from her father after the last letter copied above, and never saw him again.

It is inferable from the statements of these letters and the letters writen by Schweitzer to appellee that he had made a will in which she was, to some extent, the beneficiary, and that he made a slight change in this will at the time of the first letter, and made another change disinheriting her at the time he wrote the last letter. But the testament now proposed for probate was not executed until September 15, 1919. Schweitzer had married again in the meantime, and this will was executed in the State of Florida, where he was then residing.

Appellee seems to rely entirely upon the effect of these two letters and her own testimony to the effect that the charge against her of slandering her father or saying anything derogatory to his moral character was unfounded. There is nothing else in the record tending in any degree to prove that the testator was, at the time he made this will, laboring under an insane delusion. We think that this testimony, standing by itself, is wholly insufficient to justify the finding by the jury of mental incapacity upon the part of the testator.

The last letter written by the testator to his daughter is sufficient only to show that he entertained a violent feeling of anger, dislike and resentment, but it does not, of itself, even coupled with the testimony showing that this feeling was unfounded, establish the existence of mental unsoundness.

The law on this subject was fully discussed by this court in the case of *Taylor* v. *McClintock*, 87 Ark. 243, and in the opinion it was stated that "a perversion of the sentiments and affections—manifested in jealousy, anger, hate or resentment, however violent and unnatural, will not defeat a will unless the emanation of a delusion." Nor is it shown that the testator persisted in the belief indicated in his letter that his daughter had slandered him, unless it is the fact that he never responded to her letters and finally made the will now proposed disinheriting his daughter. But this will was made under such

circumstances that the inference is not warranted, in the absence of further proof, that he persisted in his belief concerning his daughter's conduct towards him. The will was, as before stated, made nearly three years later and under wholly different circumstances, the testator having married again and removed to the State of Florida.

A mere groundless belief manifested under suddenly aroused emotions, and which lacks persistence and continuity, affords no evidence of mental delusion. The existence of such a groundless belief only settles into what the law recognizes as a disqualifying mental delusion when it is persisted in and "pursued by a logical process of reasoning to an insane conclusion." *Taylor* v. *McClintock, supra;* 1 Wharton & Stille Med. Jur. sec. 1020 *et seq.*

In addition to that, there is nothing in the record to show that this unfounded charge made by the testator against his daughter was not based on some evidence. Appellee testified herself that she was innocent of the charge, but this does not show that the testator himself had no evidence of such misconduct. Several witnesses, in fact, testified that appellee while visiting in Harrison at the time that her father was afflicted made serious charges reflecting upon his moral character, and there is nothing in the evidence which justifies a finding that these charges were not communicated to her father. Appellee denied that she made these statements concerning her father, and the truth of that matter was, of course, a question for the determination of the jury. But, as before stated, this does not show that the testator did not receive some evidence that his daughter had, in fact, made such statements derogatory to his character.

A belief, however unfounded, unreasonable or extravagant, does not constitute an insane delusion if it is based upon any evidence, however slight. In *Taylor* v. *McClintock, supra,* it was said: "A belief founded on evidence, however slight, necessarily involves the exercise of the

mental faculties of perception and reason; and where this is the case, no matter how imperfect the reasoning process may be, or how erroneous the conclusion reached, it is not an insane delusion."

The definition of an insane delusion, which we must take as a guide in the present case, was definitely and concisely stated in *Taylor* v. *McClintock, supra,* is as follows: "Where one conceives something extravagant, and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such a one is possessed of an insane delusion." In support of the correctness of this definition we cited many authorities, among which is the leading English case of *Dew* v. *Clark,* 3 Add. Ecc. 79; and there are many other authorities which might be cited giving the definition in substance the same. For instance, the Kentucky Court of Appeals in a comparatively recent decision stated the following definition: "An insane delusion is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact; it is distinguishable from a belief which is founded upon prejudice or aversion, no matter how unreasonable or unfounded the prejudice or aversion may be. If it is the product of a reasoning mind, no matter how slight the evidence upon which it is based, it cannot be classed as an insane delusion." *Coffey* v. *Miller,* 160 Ky. 415, 169 S. W. 852.

The evidence in this case fails to come up to the requirements of that definition. The groundless belief was not shown to have been permanently persisted in, nor is it shown that there was no evidence upon which it was based. There was no other evidence in this case by way of expert witnesses or otherwise to establish mental weakness or incapacity on the part of the testator. Not a single witness testified that he had any eccentricities, much less indications of insanity, either partial or gen-

eral. On the contrary, numerous witnesses, one of whom qualified as an expert on the subject, testified that they had known Schweitzer for many years and that he gave no indications of lack of mental capacity.

If the verdict in this case be sustained, it must be upon bare inference from the fact that he stated in his letter to his daughter his belief in the groundless charge and subsequently made his will disinheriting her, that he persistently labored under this belief, unsupported by any evidence whatever, and against all arguments and proof to the contrary.

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

SANDERS v. BOONE.

Opinion delivered June 19, 1922.

1. INJUNCTION—TRESPASS.—Equity will not restrain a mere trespass where there are no other elements of irreparable injury, unless the trespasser is insolvent.
2. QUIETING TITLE—TITLE OF PLAINTIFF.—In suits to quiet title the plaintiff must succeed upon the strength of his own title, and cannot rely on the weakness of his adversary's.
3. QUIETING TITLE—BURDEN OF PROOF.—Where defendant, in a suit to restrain trespass, claimed title in himself and asked affirmatively that his title be quieted, but did not show that his vendor was the owner of the land or had any interest therein, he failed to prove his title and was not in position to ask equitable relief, his remedy at law being adequate.

Appeal from Cross Chancery Court, *A. L. Hutchins* Chancellor; reversed in part.

J. C. Brookfield, for appellant.

The decree should be reversed upon the showing made by the cross-complaint. In suits to quiet title the plaintiff must prevail upon the strength of his own title. 95 Ark. 447; 90 *Id.* 154; 74 *Id.* 386; 87 *Id.* 211; 15 Cyc. 39, 40, and note 48.

The answer and cross-complaint were properly responded to by motion to strike. 15 Cyc. 112.

Adverse possession is not only defensive, but bestows title which may be enforced by suit. 38 Ark. 181; 92 *Id.* 30; *Medlock* v. *Jones*, 152 Ark. 57; 39 Ark. 158; 47 *Id.* 301; 46 *Id.* 25.

Equity has jurisdiction to restrain trespass. 22 Cyc. 825.

Killough, Lines & Killough, for appellee.

The unlawful detainer theory upon which appellee proceeded eliminates and renders abstract the law relied on by appellant in regard to suits in ejectment. The results attained by the decree are correct, and it should be affirmed.

McCULLOCH, C. J. Appellant was the plaintiff below in the action in the chancery court of Cross County to enjoin appellee from trespassing upon a certain tract of land, to which appellant asserts title and possession. Appellant alleged in his complaint that he was the owner of the tract of land in question by adverse occupancy for more than seven years; that he was in possession of the land at the time of the commencement of the action, and that appellee had repeatedly committed trespass by coming upon the premises and erecting a fence thereon, which appellant had torn down as often as erected.

Appellee answered, denying that appellant was either the owner or in possession of the land, and presented a cross-complaint, in which he asserted title to the tract of land and asked that the title be quieted.

The court dismissed appellant's complaint for want of equity and entered a decree in favor of appellee, quieting appellee's title to the land in controversy.

Appellant claims to have entered into possession of the land in controversy under an oral contract of purchase with the agent of a certain railroad company, which was the owner. The evidence is not sufficient to show either that the railroad company was the owner of the land or that the alleged agent had authority to sell it. Appel-

lant's testimony tends to show that he had been in possession for the statutory period of limitation, but there is a conflict in the testimony on this point, and we find it unnecessary to determine whether or not the title is complete by adverse possession for the statutory period of limitation.

Appellant shows in his testimony that appellee has, on several occasions, entered upon the land in controversy and erected a fence, and that appellants tore down the fence. The sole basis of his right of action is the threatened repetition of the trespass.

It is the settled doctrine of this court that equity will not restrain a mere trespass where there are no other elements of irreparable injury, unless the trespasser is insolvent. *Meyers* v. *Hawkins,* 67 Ark. 413; *Hall* v. *Wellman Lbr. Co.,* 78 Ark. 408; *Boswell* v. *Jordan,* 112 Ark. 159.

The court was therefore correct in dismissing appellant's complaint for want of equity, and that part of the decree is affirmed.

On the other branch of the case it is sufficient merely to invoke the principle, often announced by this court, that "in suits to quiet title the plaintiff must succeed, if at all, as in actions of ejectment, upon the strength of his own title, and cannot rely upon the weakness of his adversary's title." *Bullock* v. *Duerson,* 95 Ark. 447.

Appellee was the moving party by asking affirmative relief in the quieting of his title, but he failed to prove his title. He testified that he purchased the land from a certain individual and received a deed, but he did not show that his vendor was the owner of the land or had any interest therein. Nor is there any evidence that appellee was in possession of the land at the time of the filing of the cross-complaint, and for this additional reason he is not in position to seek equitable relief, for his remedy at law is complete.

Whatever remedies either party to this suit may have are complete at law, and neither has shown any right to equitable relief.

The decree in appellee's favor for the quieting of the title is therefore reversed, with directions to dismiss his cross-complaint for want of equity.

HART and SMITH, JJ., dissent.

HART, J., (dissenting). I deem it proper to state briefly my reasons for dissenting in this case.

The plaintiff purchased the land from the Rock Island Railroad and held adverse possession of it for sixteen years, thereby establishing his title. The defendant put a wire fence through the plaintiff's field and claimed that part of the plaintiff's field within the inclosure of the fence. The plaintiff removed the fence. The defendant caused his arrest for so doing, but he was not convicted. The defendant put up the fence a second time. The plaintiff removed it, and was arrested again. He then filed this suit.

The act of the defendant in erecting the fence and having the plaintiff arrested for tearing it down interfered materially with the plaintiff's use of his land. In my opinion the continued occupation and threatened use of the plaintiff's land to the extent and for the purpose thus indicated by the acts of the defendant is such an injury to the property rights of the plaintiff as a court of equity may properly restrain and prevent.

If courts of equity do not interfere in cases of this sort, there would be a great failure of justice and an encouragement for neighborhood brawls and lawsuits. The jurisdiction of equity to restrain continued or repeated trespasses rests on the ground of avoiding a repetition of similar actions. Very often the injury is irreparable because it is continuous or repeated, when it would not be, if temporary; and in such cases injunction will issue as a matter of course. 5 Pomeroy's Equity Jurisprudence, sec. 496.

I think our own decisions are in accord with this rule. *Ellsworth* v. *Hale,* 33 Ark. 637, and *Western Tie & Timber Co.* v. *Newport Land Co.,* 75 Ark. 286.

I do not think that our timbering cases are in point. In the early days, our policy was to subdue the forests and to regard standing trees as an incumbrance and obstacle to the growth and development of agriculture as a pursuit. *Pardee* v. *Camden Lumber Co.*, 70 W. Va. 68, 43 L. R. A. (N. S.) 262. Hence, where parties entered the land for the purpose of cutting down the timber only, the courts held that the injury was not irreparable, and that courts of equity would not interfere. Timber having become scarce and of great value, the trend of modern authorities, as pointed out in the case last cited, is to restrict rather than to extend the doctrine of the earlier cases. Where the defendant manifests by his continued acts an intention to take possession of a substantial part of another's land and to prevent the owner from cultivating it, an entirely different case is presented. In such a case the defendant manifests a purpose to continue in his unlawful acts and the vexation, expense, and trouble of prosecuting actions at law make the legal remedy inadequate and justify a plaintiff in coming into equity for an injunction.

Judge SMITH concurs in this dissent.

HAWKINS v. HUDSON.

Opinion delivered June 19, 1922.

1. PARTITION—COLLATERAL ATTACK ON SALE.—The validity of a decree in partition for the sale of land cannot be attacked collaterally, in an action on a note given in payment of the purchase price at sale thereunder, for failure of the record to show that the land could not be divided in kind, this being a mere error or irregularity which could be corrected only by appeal; the court having jurisdiction.
2. PARTITION—COLLATERAL ATTACK—ERROR IN DISTRIBUTION OF PROCEEDS.—Any error in distribution of the proceeds of a sale in partition does not, on collateral attack in an action to recover on a note given for the purchase price, affect the validity of such sale.

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

Smith & Gibson, for appellant.

The partition decree was void. Not only should the original complaint have affirmatively alleged that the lands could not be divided in kind, but that fact should have been found by the court to be true, before the chancery court had jurisdiction to order a sale; and if it had no jurisdiction, its order was void and may be attacked in this proceeding. 77 Ark. 317; 91 S. W. 184; 81 Ark. 674.

W. M. Ponder, for appellee.

Appellant was one of the petitioners for the sale or partition, and sponsored every step in the proceedings. He cannot be heard to say that the sale was void, whether it was valid or not. The decree can now be attacked only for fraud, and none is shown. It is valid and binding, because rendered upon proof, and was never appealed from.

McCULLOCH, C. J. This is an action instituted by a commissioner of the chancery court of Lawrence County to recover on a note executed for the purchase of land which was sold by the commissioner under a decree of the court. It is sought to enforce a lien against the land for the payment of the amount of the note.

One of the defendants, W. M. Hawkins, was the purchaser of the land at the sale made by the commissioner, and the other two defendants, Covington and Schwegman, were the sureties on his note.

The decree under which the sale was made was rendered in an *ex parte* proceeding instituted in the chancery court of Lawrence County asking for the partition or sale of a certain tract of land in that county. Hawkins was one of the parties to the petition, which was filed by the widow and children of the former deceased owner, and it concluded with a prayer that the land be divided, or that it be sold for partition if it be found that there

could be no division without material injury to the rights of the parties.

The court rendered a decree for the sale of the land, which, as before stated, was made by the commissioners, and the land was purchased by Hawkins.

There was a demurrer to the complaint in the present action, which the court overruled, and defendant failing to plead further, final judgment was rendered against him.

The contention is that the original decree under which the sale was made is void for the reason that the record does not affirmatively show that the land could have been divided in kind. Counsel for appellant cite *Moore* v. *Willey,* 77 Ark. 317, in support of their contention, but it will be observed in the case cited that there was a direct appeal from the decree, whereas, in the present instance, the attack on the validity of the original decree is collateral. In disposing of the question in *Moore* v. *Willey, supra,* the court said: "We may admit that the court had jurisdiction, and that the order was not void, but this is a direct attack by appeal, and the question is, was there error in the proceedings?"

In a collateral attack on a decree directing the sale of property, mere errors or irregularities do not affect the validity of the sale. If the court had jurisdiction, errors could only be corrected by appeal from the decree itself, and a collateral attack on the decree is not available for the correction of the error.

It is also contended that the decree is void for the reason that it awards to the widow a child's part in the land ordered sold, but that, too, was a mere error which could only be corrected by appeal.

The court had jurisdiction to order the sale for partition among the owners, it being conceded that all parties in interest were before the court. Any error of the court with respect to the distribution of the proceeds does not, on collateral attack, affect the validity of the sale.

Decree affirmed.

B. A. COLLINS & COMPANY v. GUS BLASS COMPANY.

Opinion delivered June 19, 1922.

1. SALES—TIME OF SHIPMENT.—In an action for the purchase price of goods ordered on February 3d, to be shipped in "March or at once as ready," which were not shipped until April 30, *held* that the purchaser was justified in refusing to accept the shipment, as the language quoted meant that the shipment should be made in February or March, but not later.
2. CONTRACTS—CONSTRUCTION.—A written contract should be construed to give effect to every part therein where it can be done.

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

STATEMENT OF FACTS.

The circuit court, sitting as a jury on appeal from the municipal court of Little Rock, Ark., rendered judgment in favor of The Gus Blass Company in a suit against it by B. A. Collins & Company for the sum of $55.11 alleged to be due for merchandise. The defendant denied owing the plaintiff any amount whatever.

On the 3rd day of February, 1920, The Gus Blass Company of Little Rock, Ark., signed an order for a bill of goods purchased by it from B. A. Collins & Company of Springfield, Mass. The order contained a direction of shipment as follows: "March or at once as ready." The greater part of the goods contained in the order were shipped on March 31, 1920. The balance of the order, amounting to $55.11, was shipped on April 30, 1920. The defendant refused to accept this consignment on the ground that it was shipped too late, and the goods were returned to the plaintiff.

The court found the issue in favor of the defendant, and from the judgment rendered dismissing its complaint, the plaintiff has duly prosecuted an appeal to this court.

Rogers, Barber & Henry, for appellant.

The shipping instruction "March, or at once as ready," can only have one meaning, and that was that the

goods were to be shipped during March, or as soon as possible thereafter. "As soon as possible" and "at once" are synonymous and mean within a reasonable time. See Words and Phrases, 2nd series, Vol. 1 p. 286; 96 N. Y. Supp. 978, 110 App. Div. 525.

Joe H. Thompson, for appellee.

The plain meaning of the shipping instruction is that the goods might be shipped at once if ready, but as qualified by the word "March", means that shipment must be made at some time not later than March 31st.

HART, J. (after stating the facts). Counsel for the plaintiff seek to reverse the judgment upon the authority of *Williams* v. *Gridley,* 96 N. Y. Supp. 978. In that case the contract provided for the purchase of bicycles, and the shipping directions were, "all to be filled by April 1st, or as soon as possible." The court held that this provision indicated that the order was to be filled by April 1st or as soon thereafter as possible. The court said that unless the phrase, "or as soon as possible," related to a time subsequent, it was without force and may as well have been omitted from the contract.

We do not think that that case has any bearing on the present case, even if it be assumed that it was correctly decided. The shipping directions in the present case, when construed as a whole, do not show that the phrase, "March or at once as ready," refers to a subsequent time. If it did the word "March," might just as well have been omitted. The words, "at once" are usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing. *Lucas* v. *Western Union Tel. Co.,* (Iowa) 6 L. R. A. (N. S.) 1016; and *Georgia Agr. Works* v. *Price,* (Ct. of Appeals, Ga.) 74 S. E. 718, and cases cited.

The order was dated February 3, 1920. The shipping directions were "March or at once as ready." The date of the order and the shipping directions contained

in it would seem to indicate that it was the intention of the parties that the shipper might proceed with the shipment at once if ready to do so. In other words, the shipment might be made during the month of February. If the words, "or at once as ready," are construed to mean a time subsequent to March instead of a time prior to it, it is plain that the word "March" need not have been used at all. If the word should be used to denote the time previous to March, effect may be given to every word contained in the shipping directions. In construing a written instrument effect must be given to every part therein where it can be done.

It follows that the judgment will be affirmed.

KELLEY v. STATE.

Opinion delivered June 19, 1922.

1. HOMICIDE—INSANITY—EVIDENCE.—In a prosecution for murder, where defense was made that accused was partially insane at the time he committed the crime, evidence as to defendant's conduct may be admitted as showing or failing to show general insanity, as an inquiry into one phase of insanity necessarily opens up an inquiry into others, even though such phases may be entirely distinct.
2. HOMICIDE—INSANITY—BURDEN OF PROOF.—In a prosecution for murder where the defense of insanity is set up, the burden is on the accused to establish his insanity by a preponderance of the evidence.

Appeal from Logan Circuit Court, Southern District; *James Cochran,* Judge; affirmed.

Jno. P. Roberts and *Evans & Evans,* for appellee.

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

McCULLOCH, C. J. Appellant was indicted by the grand jury of Logan County (Southern District) for the crime of murder in the first degree, alleged to have been committed by killing one Abe Quinalty by shooting him with a pistol, and on the trial of the case appellant was

convicted of murder in the second degree. On appeal to this court the judgment was reversed on account of an erroneous ruling of the court in admitting evidence concerning the character of the deceased, and also for errors in the court's charge to the jury. 146 Ark. 509. On the remand of the cause, appellant was put on trial for murder in the second degree and was convicted of that degree of homicide.

On the trial below appellant claimed that he acted in self-defense, and it was also claimed in his behalf, as a matter of defense, that when he committed the homicide he was partially insane—that he was afflicted with paranoia or delusional insanity concerning improper relations between his wife and Quinalty. These issues were correctly submitted to the jury, and no error is assigned with respect to the court's charge except as to one of the instructions which related to the question of burden of proof, and that instruction will be discussed later.

The principal assignment of error relates to the ruling of the court in admitting certain testimony of Dr. Armstrong, a physician, who was introduced as an expert witness by appellant himself. There was propounded to Dr. Armstrong by appellant's counsel a very lengthy hypothetical question, which detailed the previous conduct of appellant according to his counsel's theory of the testimony, and stated as one of the facts to be considered by the expert that appellant "has a hereditary taint of insanity," and the question concluded with the inquiry "whether or not the man with the hereditary taint of insanity was sane or insane at the time of the killing." Dr. Armstrong answered as follows: "I would believe that the man was insane." The prosecuting attorney was then permitted, on cross-examination of the witness, to elicit the statement, in substance, that the witness had been well acquainted with appellant for many years, and that from his observation of appellant's conduct he had never considered the latter to be insane or that he did not know right from wrong, and that appellant had never shown any evidence of insanity.

The contention of appellant is that this testimony was incompetent because it related solely to the question of general insanity of appellant, whereas the claim made in his defense is that he was suffering only from partial insanity. Learned counsel for appellant cite in support of their contention many decisions of this court discussing the distinction between general and partial insanity, but the discussion in all of those cases relates to proper instructions to the jury in considering these questions. *Bolling* v. *State,* 54 Ark. 588; *Taylor* v. *McClintock,* 87 Ark. 243; *Bell* v. *State,* 120 Ark. 530; *Hankins* v. *State,* 133 Ark. 38; *Woodall* v. *State,* 149 Ark. 33.

Nothing in any of those case justifies the conclusion that the fact that where one of the parties to the controversy claims that he acted under an insane delusion the other party is absolutely cut off from all inquiry as to general sanity or insanity. We have recognized in our decisions that there is a distinction between the two phases of insanity and that one may exist without the other to such an extent as to relieve a person from responsibility for his conduct, yet we have never held that in determining the question of partial insanity as an issue of fact there may not be an inquiry concerning general insanity and its relation to the claim of partial insanity. In other words, the jury may consider the conduct of the party as showing, or failing to show, general insanity in order to determine whether or not he is laboring under a delusion. An inquiry into one phase of insanity necessarily opens up an inquiry into the others, even though such phases may be entirely distinct.

It will be noted also that the answer of the witness was broad enough to include general insanity, and for this reason, if no other, the prosecuting attorney was entitled to cross-examine him on that subject. We are of the opinion that no error was committed in that respect.

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

"The defendant sets up as one of his defenses that he was insane at the time he committed the offense. The law presumes that he was sane and to have intended the ordinary and natural consequence of his acts. The burden is upon him to prove by a preponderance of the evidence at the time of the commission of the killing he was insane, but if he proves to your satisfaction that he was insane at the time the offense was committed he should be acquitted on that ground."

This instruction is, substantially, in accordance with the law as declared by this court in many cases. *McKenzie* v. *State,* 26 Ark. 334; *Casat* v. *State,* 30 Ark. 511; *Coates* v. *State,* 50 Ark. 330; *Williams* v. *State,* 50 Ark. 511; *Bolling* v. *State, supra; Bell* v. *State, supra.*

In the case last cited the court said: "The law presumes that every man is sane, and that he intends the natural consequences of his act. Therefore, when one is charged with murder in the first degree, and it is admitted that if sane he is guilty as charged, and the plea of insanity is interposed as his defense, in such cases the burden is upon the accused to establish his insanity by a preponderance of the evidence."

The language of the instruction is inaccurate in using the term "to your satisfaction" but when construed as a whole the instruction merely declares that the burden was on the accused to prove insanity by a preponderance of the testimony.

Counsel ask us to overrule those cases and to hold with the line of decisions in certain other States to the effect that the question of sanity of the accused is a part of the State's case and must be proved like all other material allegations. The rule which we have adopted has been long followed and is not only firmly established in our jurisprudence, but it seems to us to be the correct rule, for if there is a presumption of sanity it is not a part of the State's case to prove it, and where the defense of insanity is set up the burden is upon the accused to prove it by a preponderance of the testimony.

These are the only assignments of error discussed by counsel, and are the only ones we deem it necessary to refer to in this opinion.

The record is free from error, and the verdict is abundantly sustained by the testimony.

Affirmed.

RING v. STATE.

Opinion delivered June 19, 1922.

1. INDICTMENT AND INFORMATION—FOLLOWING LANGUAGE OF STATUTE.—Indictment for keeping in possession a still without having registered the same with the proper United States officer *held* to charge the offense in substantially the language of the statute.
2. INTOXICATING LIQUORS — SUFFICIENCY OF EVIDENCE. — Evidence *held* sufficient to sustain a conviction of keeping in possession a still contrary to Acts 1921, p. 372.
3. INTOXICATING LIQUORS—KEEPING STILL IN POSSESSION.—Testimony tending to prove that defendant consented to a still being operated on his place and helped to put it up there, and furnished the fuel for its operation, and that he was receiving part of the product, constitutes keeping a still in his possession within the prohibition of Acts 1921, p. 372.
4. CRIMINAL LAW—ADMISSION OF EVIDENCE HARMLESS WHEN.—Since defendant, on a charge of having in his possession an unregistered still, has the burden of shownig that the still was registered, any error in the admission of proof by the State to show that it was not registered was harmless.
5. INTOXICATING LIQUORS—BURDEN OF PROOF.—One charged with keeping a still not registered with the proper United States officer contrary to Acts 1921, p. 372, has the burden of proof on the issue of registration.
6. INTOXICATING LIQUORS—POSSESSION OF STILL.—Under Acts 1921, p. 372, providing that no person shall keep in his possession any still without registering it with the proper United States officer, the act of taking or holding possession must be voluntary, but the possession need not be permanent.
7. CRIMINAL LAW—INSTRUCTIONS.—While ordinarily either party is entitled to an instruction stating the converse of a given proposition, yet where in one instruction the court declared what acts

were essential to constitute the offense under the statute, another requested instruction that certain other conditions would not constitute a violation thereof need not be given.

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

W. P. Strait, for appellee.

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

McCULLOCH, C. J. Appellant was indicted and convicted under the statute which reads as follows:

"No person shall keep in his possession any still-worm or still without registering the same with the proper United States officer, and no person shall set up to be used as a distillery any still-worm or substitute therefor and a still or substitute therefor, such as a kettle, washpot, metal tank, or any other vessel of any kind for the purpose of using same, or which, after being so set up, may be used for the production of distilled spirits." Acts of 1921, p. 372.

The language of the charging part of the indictment is that the accused "did wilfully, unlawfully and feloniously keep and possess a certain stillworm and still to be used for the production of ardent, vinous, malt, spirituous and fermented liquors and alcoholic and distilled spirits; the said Nick Ring not having registered the same stillworm and still with the proper United States officers," etc.

There was a demurrer to the indictment, which the court overruled, and there is an assignment of error with respect to that ruling, but no argument is made here in support of the contention, and we are unable to discover any reason for holding that the indictment failed to charge an offense under the statute. The indictment may not be in the precise language of the statute, but it was sufficient to charge the acts constituting the offense substantially in the language of the statute.

It is contended that the evidence is insufficient to sustain the verdict of the jury, and that, according to the

undisputed evidence, appellant was not guilty of the offense with which he is charged.

The State introduced as a witness one Neal, who was confessedly an accomplice of appellant, if the latter was guilty of the offense at all. Neal testified that he had been operating the still for about a month at or near a place called Sandtown, and that he frequently talked with appellant about operating the still; that the latter knew about it and was getting some of the product of the still. He testified that he found it necessary to move the still, and obtained permission of appellant to use the latter's wagon and team in hauling it; that he got appellant's wagon and team in the latter's absence and went down and got the still and hauled it up to appellant's house at night and put it in the barn-yard, the still being covered with hay in the bed of the wagon; that next morning he and appellant drove the wagon down to a thicket on appellant's place, unloaded it, and that it was set up and put into operation at that place. He testified that appellant helped put up the still and furnished the fuel for its operation.

Another witness, Gordon by name, testified that he lived near appellant's farm, and that Neal, in appellant's presence, pushed aside the covering of hay and showed him the still.

The two officers who arrested appellant testified that they found the still in full operation in a thicket on appellant's farm, a short distance from the end of the rows where appellant was plowing. They testified that they could smell fumes from the still, and that when the wind was right a person could see the smoke and smell the fumes from the still at the place where appellant was plowing.

Appellant denied that he lent the team to Neal, and said that he refused to have anything to do with the still, and that Neal took his (appellant's) team during his absence and hauled the still at night. He testified that he refused to have anything to do with the same, and he ex-

plained the fact of the still being hauled away next morning by saying that he was going down to the field to work and he merely consented for Neal to drive the team down there so as to get away from the house, and to get his team down there in the field where he could use them at work. He denied that he consented for the still to be erected or operated on his place, and said he did not know it was there until he was arrested.

The evidence was, we think, sufficient to sustain the conviction. It is true that the testimony came principally from Neal, who was an accomplice, but there is abundant corroboration in the fact that the still was being operated on appellant's farm, at a place where he was bound to have known that it was being operated.

It is undisputed that the still was carried to appellant's place and kept over night in his barn-yard, and then taken to the thicket where it was set up and put into operation. It is also undisputed that he saw the still in the wagon, and that he consented for it to be hauled to the thicket in his wagon. The only question, therefore, is whether or not his connection with the transaction was voluntary, or whether it was forced upon him, as he claims, by the conduct of Neal.

There is evidence tending to show that appellant consented for Neal to use his team to haul the still from Sandtown, and that he drove the wagon in which the still was hauled next morning from his barn-yard down to the thicket. There are also circumstances in the case which warrant the conclusion that appellant knew of the presence of the still and that he was interested in operating it there on his farm. This constituted keeping a still in his possession within the meaning of the statute.

Appellant also has an assignment of error with reference to the method of proof of the fact that the still was not registered, but since the burden was on appellant himself to make an affirmative showing that the still was registered, and no such proof was made, it was unim-

portant whether the State introduced the right kind of certificate or not. *Moore* v. *State, ante* p. 13.

Appellant assigns as error the refusal of the court to give an instruction telling the jury that it devolved upon the State to prove beyond a reasonable doubt that the still was not registered. This instruction was properly refused, for, as before stated, the burden was not on the State, but it was on appellant, to prove that the still was registered.

Appellant requested the court to give an instruction telling the jury that "temporary possession of the still in question or hauling for another the still in question from one place to another" did not constitute the keeping of a still within the meaning of the statute. The instruction was incorrect, and the court properly refused it, because the statute does not limit the offense to permanent possession. The act of taking or holding possession must be voluntary, but it will not be permanent. To hold otherwise would be to read something into the statute which is not found in the language of the lawmakers. The court gave an interpretation of the meaning of the statute in the following instruction, which, we think, is correct:

"You are instructed that the defendant in this case is indicted for keeping in his possession the still in question, without having same registered as required by law. The language 'keep in his possession,' as used in the statute, means the possession, control and management, either alone or jointly with Neal, by defendant, of the still, and the exercise in some way of control or dominion thereof."

This instruction is a literal copy of instruction No. 9, requested by appellant, except that appellant's instruction contained the statement that the possession must be permanent.

Appellant requested the following instruction, and the refusal to give it is assigned as error:

"If you find or believe that the still in question belonged to Vestal Neal, and that he had the exclusive control and possession and disposition thereof, to the exclusion of the defendant, Ring, then the defendant would not be guilty of keeping in his control or possession the still within the meaning of the law."

This instruction is correct, but we think the substance of it was sufficiently covered in instruction No. 8, quoted above, and which the court gave. Ordinarily, either party is entitled to an instruction stating the converse of a given proposition, but instruction No. 8 in effect states both sides of the question by correctly defining what the language of the charge means. It is not an instance where the court stated facts which would constitute guilt of the charge and then refused to give the converse, but it is an instance where the court in one instruction correctly declared what acts were essential to constitute the offense under the statute.

There are other refused instructions, which we deem it unnecessary to discuss, for we are of the opinion that the court's charge covered every phase of the case, and the court was not bound to give the requested instructions which singled out facts and submitted them separately to the jury.

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

GRADY v. DIERKS LUMBER & COAL COMPANY.

Opinion delivered June 19, 1922.

1. CORPORATIONS—ABSTRACT INSTRUCTION.—In an action on an oral agreement to pay plaintiff for supplies furnished persons having a logging contract with defendant lumber company where the contract relied on was made by defendant's woods foreman, whose authority to make it was denied, refusal to submit the question of ratification by defendant was not error, in the absence of any proof that defendant or its authorized officers or agents knew of such contract.

2. FRAUDS, STATUTE OF—COLLATERAL UNDERTAKING—INSTRUCTION.—In an action on an oral agreement to pay plaintiff for supplies furnished persons having a logging contract with defendant, it was not error to refuse to instruct to the effect that, if defendant's promise to pay was the sole and inducing cause of the sale, it would be an original undertaking and not within the statute, since, if the contract was collateral, the statute applies, even though it was the sole and inducing cause.

3. FRAUDS, STATUTE OF—COLLATERAL UNDERTAKING.—The fact that defendant's agent only promised to stand for the account of a third person, or to see the account paid, is not conclusive that such promise is collateral, but in determining whether or not said contract was original or collateral the jury should not only take into consideration the words of the promise, but should consider the intention of the parties at the time the contract was made, the situation of the parties and all other facts and circumstances surrounding the transaction.

4. FRAUDS, STATUTE OF—COLLATERAL AGREEMENT.—A contract to "stand for" the debt of another, without anything else being shown from which a different meaning may be inferred, makes the contract collateral in form and within the statute.

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

Johnson & Shaver, for appellant.

The issues raised by the evidence were (1) the terms of the contract, (2) whether or not McCurry had authority to make it, and (3) if he did not, whether or not defendant by its acts and conduct ratified it.

Instructions 2-A, 3-A and 12, requested by the appellant, submitted the main issues in the case and should have been given as well as instruction 4-A, which latter instruction was intended only to give a definition of the statute of frauds as construed by this court on former appeal. 232 S. W. (Ark.) 23. Appellee's requested instruction No. 5 is in direct conflict therewith, and therefore erroneous. 215 S. W. (Ark.) 651.

The court erred in refusing to submit the question of ratification. 96 Ark. 505.

It was palpable error to instruct the jury, as in instruction three given for defendant, that "the mere fact that defendant paid plaintiff on the accounts of

Sanders & McWhorter would not amount to a ratification, as proof of such payments made a question for the jury to decide as to whether or not they amounted to ratification. 96 Ark. 505; Art. 7, § 23, Const. 1874. Instructions upon the weight of the evidence are erroneous. 43 Ark. 289; 45 *Id.* 165; *Id.* 292; 49 *Id.* 165; 53 *Id.* 381; 58 *Id.* 504.

Defendant's instruction is both incorrect as a declaration of law, and argumentative. 216 S. W. (Ark.) 18; *Id.* 1054; 82 Ark. 425; *Id.* 499; 120 *Id.* 1; 87 *Id.* 243; 124 *Id.* 588; 194 S. W. 873; *Id.* 510.

Lake & Lake and *Abe Collins,* for appellee.

The instruction 2-A requested by plaintiff was not only erroneous in assuming that McCurry was authorized to make the contract, but also in telling the jury that the alleged promise would be an original undertaking on defendant's part if its promise to pay for the goods was the sole and inducing cause of plaintiff's lending credit to the parties. 12 Ark. 174; 88 *Id.* 592; 102 *Id.* 435; 125 *Id.* 240. Requested instructions which do not correctly state the law are properly refused. 19 Ark. 346; 20 *Id.* 583; 87 *Id.* 528; 92 *Id.* 6; 94 *Id.* 511. Instructions 3-A and 4 were defective in the same way. The issue is not what induced the sale, but to whom was the credit extended.

McCurry was a special agent with limited authority. Instruction 4 ignored that fact and erred in assuming that he was a general agent of appellee. Persons dealing with him were bound to take notice of the limitations in his authority, and to ascertain what his real authority was. 140 Ark. 306.

Instructions requested by appellant on the question of ratification were properly refused, not only because they were abstract, but also because there was no proof showing, or tending to show, any knowledge on the part of appellee of the alleged contract between McCurry and appellant. Authority of an agent either to make or ratify a contract so as to bind his principal will not be presumed, but must be proved. 132 Ark. 155; 14-A C.

J. 375, 376. Instruction 5 requested by appellee was a correct declaration of the law, for McCurry's agreement that appellee would stand for the men who made the accounts or would pay said accounts if the men did not, even if made, was within the statute of frauds. 125 Ark. 240; 113 *Id.* 542.

McCULLOCH, C. J. This is an action on account for merchandise sold and delivered, instituted by appellant Grady, as the successor of the firm of Holcomb & Grady, against appellee. The contention of appellant in the trial below was that the goods sold were delivered to Cheshire, Sanders & McWhorter, but that the credit was extended solely to appellee.

Appellee was engaged in the manufacture of lumber, and employed Cheshire, Sanders & McWhorter to haul logs from lands situated near the place of business of Holcomb & Grady.

McCurry was appellee's woods foreman, having supervision of the cutting and removal of timber, and appellant testified that McCurry, as agent for appellee, entered into an agreement with Holcomb & Grady to furnish supplies to the parties named on the credit of appellee, and the goods were to be charged to the parties to whom they were to be delivered, but bills were to be made out and presented to appellee periodically at its office and paid by appellee. This course of business was pursued for several months; the goods were charged to the parties to whom they were delivered, and later Holcomb & Grady made out bills showing the amount of merchandise furnished each party, and these bills were presented from time to time at appellee's office and checks given for the amount, payment being made out of sums due by appellee to the parties named.

Appellee denied that McCurry had any authority to enter into contract for the purchase of merchandise for the employees of the company, or for any one else, and also denied that McCurry made any such agreement to pay for the goods so furnished.

Appellee also pleaded that, if there was any contract made at all, it was within the statute of frauds, being a collateral undertaking to answer for the default of the parties named, and was not in writing.

The former trial of the case resulted in a verdict in favor of appellee, directed by the court, and on appeal to this court it was found that there was sufficient evidence to justify a submission of the issues to the jury, and the judgment was reversed and the cause remanded for a new trial. 149 Ark. 306. The case was tried again on remand to the lower court, the issues were submitted and the verdict was again in favor of appellee.

There was testimony, as in the former trial, sufficient to support a finding that McCurry, appellee's agent, entered into a contract with appellant's firm, as contended by him, for the sale of the goods on appellee's credit and delivery to Cheshire, Sanders & McWhorter.

Appellant requested several instructions submitting to the jury the question of McCurry's authority to bind appellee by such a contract, but all of those instructions were refused by the court except one, which was given. Several of the instructions given at the instance of appellee also submitted the issue of McCurry's authority. The instructions are numerous, and it is unnecessary to set them out, as we deem it sufficient to say that this issue was submitted in the instructions given, and there was no error in refusing appellant's instructions on that subject.

It is contended that the court erred in refusing to submit to the jury the question of ratification by appellee of McCurry's act in making the contract. We think that the court was correct, for the reason that there was no evidence of ratification. It is not shown that it was ever brought to the knowledge of any of appellee's authorized officers or agents that McCurry had entered into a contract in appellee's name for the purchase of merchandise. The most that is shown is that appellee paid the bills of Cheshire, Sanders & McWhorter out of their own earnings as the bills were presented from time to time by ap-

pellant. According to the undisputed evidence, the goods were charged on the books of Holcomb & Grady to the parties to whom they were delivered, and generally the bills were approved by those parties before being presented at appellee's office for payment. In the absence of proof of knowledge on appellee's part of McCurry's act in making the contract, all that it did was to pay the debts of Cheshire, Sanders & McWhorter out of their own earnings, and this did not constitute ratification of McCurry's unauthorized contract. It is elemental law that there is no ratification without knowledge of the facts, or such information as would lead to knowledge on the subject.

Since the jury found, or may have found under proper instructions, that McCurry had no authority to make the contract, it was not error for the court to refuse to submit the question of ratification, because, as before stated, there was no evidence of ratification if McCurry had no authority originally to bind appellee by such a contract.

The testimony adduced by appellee tended to show that McCurry was simply a woods foreman, with authority to direct the work of the men engaged in hauling, and that he had no authority to make contracts in appellee's name.

There are numerous other assignments of error with respect to rulings of the court in giving and refusing instructions concerning the effect of the contract between McCurry and Holcomb & Grady—whether it was an original undertaking to pay for the goods, or whether it was a collateral undertaking within the statute of frauds.

One of the instructions refused by the court, and which is the basis of counsel's argument for reversal, contains a statement of the law to the effect that if appellee's agent directed Holcomb & Grady to sell the goods in controversy "and that defendant's promise, if any, to pay for the goods, was the sole and inducing cause of plaintiff lending credit to the parties, then this would be an

original undertaking on the part of the Dierks Lumber & Coal Company," and would not be within the statute of frauds.

This statement was incorrect, and the court properly refused to make it in the instruction. If the undertaking was, in fact, a collateral one, the answer for the default of the parties who purchased the goods, the fact that the promise was the "sole and inducing cause" did not transform the contract into an original undertaking.

Appellant requested the court to give the following instruction, which the court modified by striking out the portion italicized and giving the remainder:

"The court instructs the jury that the mere fact, if you find it to be a fact, that defendant's agent, McCurry, only promised to stand for the accounts or to see the accounts paid, is not conclusive that such promise is collateral, but in determining whether or not said contract was original or collateral you should not only take into consideration the words of the promise, but you should consider the intention of the parties at the time the contract was made, the situation of the parties and all other facts and circumstances attending the transaction; *and if you determine from the evidence that defendant's promise, if any, was the sole and inducing cause of the sale, then the contract would be an original one and not collateral, and this is true notwithstanding you may find the actual words were that they would stand for the accounts or see the accounts paid.*"

It will be observed that this instruction as given by the court, inferentially at least, submitted the question of McCurry's authority, and it also correctly submitted the issues as to the character of the undertaking in accordance with the decision of this court on the former appeal. In fact, the instruction is almost identical with the language used in that opinion. There was no error in the modification, for the reason, already stated, that it expressed to the jury the idea that the reliance upon the promise as the sole and inducing cause was the test in

determining the character of the undertaking, whether collateral or original.

It is contended that the court erred in giving the following instruction at the request of appellee:

"You are instructed that, even though you may believe and find from the evidence that John McCurry, acting within the scope of his authority, agreed with the firm of Holcomb & Grady, or either of them, that the Dierks Lumber & Coal Company would stand for the men who made the accounts sued on or would pay said accounts if the men did not, your verdict must be for the defendant, for such contract would be within the statute of frauds and must be in writing and signed by some one authorized to sign by the defendant, before the defendant can be held bound thereby."

It is insisted that this instruction is in conflict with the other instruction just quoted and given at the instance of appellant. We do not think that there is any conflict between the two instructions, that they can be read together in perfect harmony, and when so read they declare the whole of the law on this phase of the case.

There is evidence from which the jury might have found that the only agreement made by McCurry was to "stand for" the persons who were purchasing goods from Holcomb & Grady. Now the use of this term, without anything else being shown from which a different meaning may be inferred, makes the contract collateral in form, and if nothing else is shown to warrant a different interpretation it is a collateral and not an original undertaking. It was so held by this court in *Millsaps* v. *Nixon,* 102 Ark. 435. The case of *Pake* v. *Wilson,* 127 Ala. 240, is another case directly in point on that subject, and holds that the use of such a term is collateral in form, and in the absence of other attending circumstances it constitutes a collateral contract.

We are of the opinion that all of the issues properly went to the jury and that the evidence was sufficient to sustain the verdict.

Judgment affirmed.

AMERICAN RAILWAY EXPRESS COMPANY v. HAMMOCK.

Opinion delivered June 19, 1922.

1. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Under Rule 9 requiring appellant to file an abstract setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented, where the abstract does not show that exceptions were taken to the overruling of demurrers, to the admission of certain evidence and to the exclusion of other evidence, and to the giving of certain instructions, such questions will not be considered on appeal.
2. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where alleged leading questions complained of were omitted from appellant's abstract, they will not be reviewed.
3. APPEAL AND ERROR—NECESSITY OF EXCEPTIONS.—Where the abstract does not show that exceptions were taken to instructions given by the court, errors in giving them will not be considered.
4. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—On appeal where the abstract does not show that there was no testimony to sustain the verdict, the ruling of the court in sustaining the verdict will be presumed to be correct.
5. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—In the absence of an abstract complying with Rule 9, the judgment of the lower court will be presumed correct.

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

Wm. T. Hammock, for appellant.

M. E. Vinson, for appellee.

WOOD, J. The appellees (plaintiffs below) filed their respective complaints in the Cleburne Circuit Court against the appellant (defendant below) to recover the following sums:

R. Hammock, for value of carpenter tools and container	$ 90.00
Also damages for alleged delay in transit	214.69
Aggregating	$304.69

M. H. Spurlin, for value of carpenter tools and container	$ 60.00
Also damages for alleged delay in transit	$152.13
Aggregating	$212.13
Allen Patchell, for value of carpenter tools and container	$ 85.00
Also damages for alleged delay in transit	$152.43
Aggregating	$237.43

To each of these complaints the defendant filed separate demurrers, and the same were overruled. The defendant then filed separate answers in denial and alleging delivery of the tools and containers sued for. The causes were consolidated and tried before a jury on September 21, 1921, on the testimony of the plaintiffs in their own behalf and of G. W. Musick in behalf of the defendant, and resulted in verdicts and judgments in favor of R. Hammock in the sum of $200, M. H. Spurlin in the sum of $150, and Allen Patchell in the sum of $150. On the following day, September 23rd, the defendant filed its motion for a new trial, which was overruled, exceptions saved and noted. Defendant was granted an appeal and given ninety days in which to file a bill of exceptions. The bill of exceptions was filed in due time in the court below, and also a transcript lodged in due time in this court.

Upon the above meagre abstract the appellant contends that the judgments should be reversed for the following errors:

1. That the court erred in overruling the demurrers to the complaint.

2. That the court erred in permitting the plaintiffs, Hammock, Spurlin and Patchell, over objections of defendant, to testify as to special and consequential

damages in expense of travel, board and loss of time incurred by alleged delay in transit of tools.

3. That the court erred in overruling defendant's motion to exclude from consideration of the jury all testimony of the plaintiffs, pertaining to such expenses of travel and board and damage for alleged loss of time consequent upon the delay complained of.

4. That the court erred in permitting plaintiffs' attorneys to lead, over the objection of the defendant, the witness R. Hammock testifying in behalf of himself and other plaintiffs.

5. That the court erred in giving to the jury, over objection of the defendant, plaintiffs' instructions Nos. 1 and 2.

6. That the verdicts are contrary to the law and the evidence, and that the court erred in refusing to set same aside and grant a new trial.

We will dispose of these assignments of error in the order presented.

The appellees contend that none of the alleged assignments of error can avail the appellant, for the reason that the appellant has not complied with rule 9 of this court. The appellees are correct in this contention.

First. Rule 9 of this court requires that appellant shall file an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to the court for decision. *Jett* v. *Crittenden,* 89 Ark. 349. The abstract does not show that appellant excepted to the ruling of the court in overruling its demurrers.

Second. The appellant next contends that the court erred in permitting appellees to testify as to special and consequential damages, but there is nothing in the appellant's abstract to show that the appellant at the time excepted to the ruling of the court in permitting the in-

troduction of such testimony. *Meisenheimer* v. *State*, 73 Ark. 407; *Commercial Fire Ins. Co.* v. *Belk*, 88 Ark. 506; *American Ins. Co.* v. *Haynie*, 91 Ark. 43.

Third. The appellant also urges that the court erred in overruling appellant's motion to exclude from the jury the testimony of appellees pertaining to expenses of travel, board and damages for alleged loss of time consequent upon the delay complained of. But appellant's abstract fails to show that the appellant excepted to such ruling of the court.

Fourth. The appellant insists that the court erred in permitting plaintiff's attorney to propound leading questions to plaintiff Hammock. We do not discover in appellant's abstract any alleged leading questions propounded by appellee's attorney to the appellee Hammock. There is nothing, therefore, in this assignment that we can review.

Fifth. The appellant predicates error upon the ruling of the court in granting appellees' prayers for instructions Nos. 1 and 2. These prayers are set forth in appellant's brief, which is a sufficient compliance with rule 9 of this court as to the setting forth of these instructions, and the statement that these instructions were given over objection of defendant would also be sufficient to show appellant's objection to the instructions. But neither in appellant's abstract, nor brief, does it appear that the appellant excepted to the ruling of the court in giving the above instructions. If the court erred in granting these prayers for instructions, the error was waived by failure of appellant to save its exceptions thereto. *Plumlee* v. *St. L. S. W. Ry. Co.*, 85 Ark. 488-495.

Sixth. In the last place, appellant urges that the verdict and judgments were contrary to the law and the evidence. Learned counsel for the appellant says "that the verdicts resulted from the error of the trial court in admitting evidence of the special damages without foundation and over objection of the defendant; and by the court's further error in overruling defendant's mo-

tion to exclude such evidence from consideration of the jury." But, as we have already shown, if the court erred in these respects, the appellant does not set forth that it excepted at the time to the rulings of the court in admitting this testimony, or in overruling its motion to exclude the same. Assuming, therefore, as we must, that the appellant waived or abandoned any exceptions to the ruling of the court in admission of testimony tending to show special damages, and, in the absence of any abstract showing that there was no testimony to sustain the verdicts, or that same were excessive, we must presume in favor of the ruling of the trial court that there was testimony to sustain the verdicts.

In conclusion, we are not able to determine from the abstract of appellant, without exploring the record, what were the real issues submitted and determined by the trial court. In the absence of an abstract complying with rule 9 of this court presenting the error for review, we must indulge the presumption that the judgments are in all things correct. *St. L. I. M. & S. R. Co.* v. *Evans,* 80 Ark. 19; *Eddy Hotel Co.* v. *Ford,* 90 Ark. 393; see also *Dobbins* v. *L. R. Ry. & Elec. Co.,* 79 Ark. 85; *Keller* v. *Sawyer,* 104 Ark. 375, and other cases cited in appellees' brief.

The judgments are affirmed.

HART, J., dissents.

KEATING v. MICHAEL.

Opinion delivered June 19, 1922.

1. LANDLORD AND TENANT—DEFINITENESS OF LEASE.—Lease contracts upon real estate must be definite in their terms, in order to bind the parties.
2. LANDLORD AND TENANT—COVENANT TO RENEW LEASE.—A general covenant to renew a lease is sufficiently certain, because it imports a new lease upon the same terms and conditions as the old one.

3. LANDLORD AND TENANT—COVENANT TO RENEW LEASE.—A covenant to renew a lease upon such terms as may be agreed upon is void for uncertainty.

4. LANDLORD AND TENANT—TENANT HOLDING OVER.—Where a contract between lessor and lessee to renew the lease was void for uncertainty, a lessee, in holding over after termination of the lease, was liable to the lessee for rental value of the premises.

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

STATEMENT OF FACTS.

This is an action for damages on a breach of covenant for an agreement to give a lease at the suit of the lessee against the lessor. The suit was defended on the ground that the terms of the contract were too uncertain to be enforced.

A. Michael also filed a cross-complaint in which he asked to recover damages for the unlawful holding over by Keating of the west half of said lot after the expiration of his lease.

It appears from the record that on the 8th day of September, 1920, A. Michael and Edna Michael, his wife, executed a lease to G. S. Keating to the west half of a certain lot in El Dorado, Ark., for a term from October 1, 1920, to August 1, 1921, for a monthly rental of $125. The lease contained a clause as follows:

"It is agreed that at the end and termination of this lease and of the lease to the front or east end of said entire lot which is now leased to A. G. Griffin, that said G. S. Keating shall have the refusal of a lease on the entire or any part of said property, if he shall pay or agree to pay the same price therefor as is now being paid therefor under the terms of said lease to A. G. Griffin."

On the 30th day of June, 1920, A. Michael and Edna Michael, his wife, executed a lease to A. G. Griffin to the east part of said lot for the term of one year, commencing on the 1st day of August, 1920, and ending on the 1st day of August, 1921. Griffin agreed to pay rent at the rate of $125 per month in advance.

The lease also contained a clause as follows: "It is agreed and understood that the said A. Michael and Edna Michael reserve for themselves the west one-half of said lot of land, and, upon their moving out and vacating said part, then the said A. G. Griffin is to have the refusal of renting said lot at whatever figure they can agree upon."

On the 23rd day of June, 1921, Keating gave a written notice to A. Michael and all tenants occupying any part of the lot above described, that under and by authority of the lease executed to him by A. Michael and Edna Michael, dated September 8, 1920, he, "G. S. Keating, will elect to continue his lease, or to exercise his rights conveyed in said lease to the entire property under the terms and conditions of said lease, paying therefor the contract rentals as agreed upon in said lease."

The notice concludes with the following: "He therefore demands that he be given and delivered full possession of said property on August 1, 1921, which includes the entire lot known as the Michael lot, and brick house wherein the Salley Brothers are conducting their meat market at this time."

A. Michael and his tenants refused to recognize that G. S. Keating had any rights in the premises after the expiration of his lease on August 1, 1921. G. S. Keating continued in the possession of the west half of the lot under his original lease. It was agreed between the parties that if there should be a recovery upon the cross-complaint, the rental value of the west half of said lot should be fixed at $75 per month payable in advance.

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

A jury trial was waived by the parties. The circuit court found that the option to give a lease to G. S. Keating, executed by A. Michael and his wife, was too indefinite and uncertain to be enforced. Judgment was

therefore entered dismissing the complaint of the plaintiff, Keating.

On the cross-complaint of A. Michael, judgment was rendered in his favor against G. S. Keating for the rental value of the west half of the lot in the amount agreed upon by the parties.

Judgment for the possession of the west half of the lot was also rendered in favor of Michael against Keating, and the latter has appealed.

W. S. Goodwin and *George M. Le Croy,* for appellant.

The circuit court erred in holding the contract void for indefiniteness and uncertainty. The identical question was decided in *Bankers' Trust Co.* v. *Hudson,* 149 Ark. 472, and controls this case.

Jesse B. Moore, for appellee; *Mahony & Yocum,* of counsel.

The case cited by appellant is not in point, as that was a suit on an executed contract, whereas there is only an executory contract at most in the present case.

The essential element of an agreement as to the price to be paid is lacking, and is left to future agreement. The writing is only an option for a lease, term unspecified, and is void for uncertainty. See 36 Cyc. 543 A-3; *Id.* p. 587-8, citing 23 Ark. 704; *Id.* p. 598; 24 Cyc. p. 991-2 C-2; *Id.* 999 C; *Id.* 1007, 3b; 94 Ark. 130. The writing itself must be accepted as the sole evidence of the agreement, which cannot be varied by parol testimony. 102 Ark. 575; 112 Ark. 1; 120 Ark. 366.

An executory contract cannot be made the basis of an action at law. 24 Cyc. 1005, c, f.

HART, J. (after stating the facts). Generally speaking it may be said that lease contracts upon real estate must be definite in their terms in order to bind the parties, and that a general covenant to renew a lease is sufficiently certain because it imports a new lease like the old one upon the same terms and conditions. *Nakdi-*

men v. *Atkinson Imp. Co.,* 149 Ark. 448, and *Felder* v. *Hall Bros. Co.,* 151 Ark. 182, 235 S. W. 789.

That rule, however, has no application under the facts of the present case. In the case last cited the court quoted with approval the definition of the word "renew," in *Cunningham* v. *Pattee,* 99 Mass. 248. It was there said that it imports the giving of a new lease like the old one, with the same terms and stipulations and at the same rent, and with all the essential covenants.

It is manifest that the clause relied upon by the plaintiff as the foundation of his action is not a covenant to renew his original lease. The covenant in question is copied in our statement of facts, and only its substance need be repeated here. Michael had leased the west half of the lot to Keating and the east part thereof to Griffin. The term of each lease was to August 1, 1921. The lease to Keating provided that he should have the refusal of a lease on the entire, or any part of said lot, if he should pay or agree to pay the same price therefor as is now being paid therefor under the terms of said lease to Griffin.

This clause evidently contemplated that a new lease should be executed. This is so because Keating only had a lease on the west half of the lot, and the clause in question provided that he should have a refusal of a lease on the entire or any part of the lot. This provision then was not for the renewal of the old lease, because it contemplated that additional property might be in the new lease and that new terms should be imposed. It will be noted that the provision is that Keating shall have the refusal of a lease of the entire, or any part of the lot, if he should pay the same price therefor as is now being paid under the terms of the lease to Griffin. The clause of the Griffin lease referred to is also copied in our statement of facts. It will be observed that the provision in question in it shows that Michael had reserved the west half of the lot and that Griffin was to

have the refusal of renting the whole of said lot on whatever figure the parties might agree upon. This is the provision that must govern as to the amount of rent in the lease contract sued on. The parties having adopted the terms of the lease between Michael and Griffin, must be governed thereby.

A covenant to renew upon such terms as may be agreed upon is void for uncertainty. *Tracy* v. *Albany Exchange Co.*, 7 N. Y. (3 Selden) 472, 57 Am. Dec. 538 and cases cited. There is nothing in the contract to bring the case within the maxim that "a thing is certain which is capable of being certain", as was the case in *Nakdimen* v. *Atkinson Imp. Co.*, 149 Ark. 448. There the parties provided that a board of arbitrators should fix the rental value and by that means rendered the terms of the contract certain. Here no provision was fixed in the contract except such rental value as the parties might agree upon. They might never agree, and so the case falls squarely within the general rule announced above, and the contract is too uncertain and indefinite to be enforced.

Keating in the notice given demanded possession of the entire lot, and thus evinced his intention to treat the agreement to give him a lease on the entire lot or any part thereof at his option as an entire contract and not a severable one. Therefore we need not consider the question of whether or not he might have elected to have taken a new lease on that part of the lot occupied by Griffin because the rent was fixed thereon. Having elected to treat the contract as an entire one, he is bound thereby, and the court was right in not allowing him damages for the alleged breach of a contract which was too uncertain to be enforced.

There was practically no dispute between the parties as to the issue arising upon the cross-complaint. If the agreement to give a new lease to Keating was void because it was too uncertain to be capable of enforcement, Keating had no right to hold over after the

termination of his lease, and was liable in damages to Michael on this account. The parties having agreed upon the amount that Michael should recover on his cross-complaint, no further discussion of this branch of the case is necessary.

It follows that the judgment must be affirmed.

MORGAN v. STATE.

Opinion delivered June 19, 1922.

1. BANKRUPTCY—INJUNCTION AGAINST FILING PETITION IN BANKRUPTCY.—The bankruptcy laws of the United States being paramount and exclusive, a State court, having jurisdiction over a corporation alleged to be insolvent and having appointed a receiver to wind it up, has no jurisdiction to enjoin the directors from filing a petition in bankruptcy.
2. INJUNCTION — VOID ORDER — PUNISHMENT.—Where the chancery court had no jurisdiction to issue an injunction, it had no authority to punish the disobedience thereof as for a contempt.

Certiorari to Jefferson Chancery Court; *John M. Elliott,* Chancellor; judgment quashed.

STATEMENT OF FACTS.

S. R. Morgan, M. B. Morgan and E. E. McIndoo filed a petition for certiorari in this court to review the action of the Jefferson Chancery Court in the case of *Security Bank & Trust Company and G. L. Roth, plaintiffs,* v. *Consumers' Ice & Coal Company et al., defendants,* wherein they were adjudged guilty of contempt of court, and the punishment of each one was fixed at a fine of $500 and a term of thirty days in jail.

It appears from the record that the Security Bank & Trust Company, a corporation organized and doing business under the laws of the State of Tennessee, and G. L. Roth brought suit in the chancery court of Jefferson County against the Consumer' Ice & Coal Company of Pine Bluff, Ark., a corporation organized and existing under the laws of the State of Arkansas, and other parties, for the purpose of having a receiver ap-

pointed to take charge of the assets and affairs of the Consumers' Ice & Coal Company.

The complaint alleges that the plaintiffs brought this suit as stockholders for the benefit of the creditors of the Consumers' Ice & Coal Company and for the benefit of all other stockholders of said company.

The complaint also alleges that the Consumers' Ice & Coal Company was organized for the purpose of furnishing ice to consumers from its place of business in Pine Bluff, Ark.; that in the year 1919 S. R. Morgan purchased nearly all of the stock in said corporation; that subsequently other stockholders acquired a substantial amount of stock in said corporation and asked for an accounting of the assets and affairs of the corporation; that S. R. Morgan, M. B. Morgan and E. E. McIndoo were all directors of said corporation; that E. E. McIndoo was its manager and S. R. Morgan was its president; that S. R. Morgan is insolvent and is not the proper person to be in charge of said corporation, and that the directors are insolvent and are employees of S. R. Morgan; that said directors are handling all the money of said corporation, and unless restrained will hold a meeting of the stockholders of said corporation on March 14, 1922, in Pine Bluff, Ark., for the purpose of re-electing themselves as directors of said company.

The plaintiffs further allege that there are now judgments against said corporation, and that, unless something is done to conserve the assets and to prevent their further dissipation through the mismanagement of said officers, the said creditors and stockholders of the said corporation will become greatly involved and the corporation will become insolvent. Other acts of mismanagement on the part of the directors were alleged in the complaint.

The prayer of the complaint was for the appointment of a receiver, and that if, upon proper investigation by the receiver, the court finds that the Consumers' Ice & Coal Company is insolvent, its affairs be settled

under our statutes relating to insolvent corporations. Crawford & Moses' Digest, secs. 1798-1800.

The plaintiffs further prayed for an accounting between the officers of said corporation and the plaintiffs, and that if, upon final hearing, said corporation was insolvent, a decree of dissolution should be made and its assets sold and divided among the creditors and stockholders in accordance with law.

On March 4, 1922, Joe Nichol was duly appointed receiver by the court and a restraining order was issued as follows:

"It is therefore considered, ordered and adjudged and decreed that the said officers, S. R. Morgan, and each and every one of the directors of the Consumers' Ice & Coal Company, and employees, attorneys and agents, are enjoined and restrained from attempting to control or have anything to do with the assets and management of the Consumers' Ice & Coal Company, or calling any meeting for any purpose, either as directors or as a board of directors, or as stockholders, or a stockholders' meeting, and they shall desist from doing anything relative to the affairs of the Consumers' Ice & Coal Company, except under orders of this court."

On the same day Joe Nichol duly qualified as receiver and took charge of the assets of said corporation. Said order appointing a receiver and restraining the defendants in the matters above stated was issued by the court without notice or service of summons upon any of the defendants. The defendants, however, were informed of the proceedings of the court, and at a directors' meeting of said corporation held in the city of Little Rock later in the day on March 4, 1922, the following resolution was passed:

"A motion was duly made and seconded that, on account of financial embarrassment of the company and its inability to meet obligations, and on account of the fact that some of the stockholders have filed a petition for receiver, that the president be authorized to take

such steps as may be necessary to immediately place the company in voluntary bankruptcy. The said motion was duly carried and adopted, and the president was authorized, empowered and directed to immediately take such steps."

S. R. Morgan and M. B. Morgan were present and secured the passage of the resolution. Pursuant to its terms, S. R. Morgan late Saturday afternoon directed his attorney to file a petition in bankruptcy in the Federal court for the Consumers' Ice & Coal Company. G. E. Garner, his attorney, filed such petition on March 6, 1922, at ten o'clock in the morning, which was a short time before the injunction above referred to was served upon S. R. Morgan and the other petitioners.

Because of the resolution of the directors, S. R. Morgan caused a voluntary petition in bankruptcy to be filed in the Federal court asking that the Consumers' Ice & Coal Company be adjudged a bankrupt, and on this account the chancery court of Jefferson County issued a citation for contempt against S. R. Morgan, M. B. Morgan and E. E. McIndoo in the case above referred to, in which a receiver was appointed to take charge of the assets of said corporation, and said petitioners were enjoined from having anything to do with the assets of said corporation or calling a meeting for any purpose of its directors and stockholders.

On hearing the citation for contempt, the chancery court adjudged that S. R. Morgan, M. B. Morgan and E. E. McIndoo be adjudged guilty of contempt, and the punishment of each one was fixed at a term of thirty days in the county jail and a fine of $500.

Other facts are set out in the transcript, but the above facts, we think, are sufficient to present the issue raised by the writ of certiorari and upon which our opinion and decision will be based.

G. E. Garner and *Danaher & Danaher* for appellants.

The court was without jurisdiction to issue the order of injunction on account of lack of service. 13 C. J.

13-14, sec. 14; 91 Ark. 533; 81 Ark. 462; 55 Ark. 205; *Id.* 565; 93 U. S. 274.

The court was without jurisdiction of the subject matter. Sec. 5798 C. & M. Dig.

A State court cannot enjoin a person from applying to a court of bankruptcy to be adjudged a bankrupt. 7 C. J. 42; 49 Ga. 384.

J. S. Utley, Attorney General, *Elbert Godwin* and *Wm. T. Hammock,* Assistants.

Secs. 1484-1485 C. & M. Digest give the chancery court the power to punish for contempt. The court has jurisdiction. 123 Ark. 341.

After the appointment of a receiver by a State court, the directors of a corporation are without power to authorize the filing of a petition in voluntary bankruptcy and the surrender of its property to the bankrupt court. 271 Fed. 788.

HART, J. (after stating the facts). It will be observed from the statement of facts that at the time the chancery court of Jefferson County appointed a receiver of the assets of the Consumers' Ice & Coal Company, a domestic corporation, in the suit of some of its stockholders, the directors of said corporation were enjoined from calling a meeting for any purpose and from doing anything relative to the affairs of the corporation, except under the orders of the court. S. R. Morgan and the other directors were not served with notice of the application for the appointment of the receiver, but were informed by friends of the proceedings in the chancery court. Later on in the day a meeting of the directors of the corporation was called at Little Rock, Ark., and a resolution was passed authorizing the president to take the necessary steps to place the corporation in voluntary bankruptcy. The resolution recites that this was done on account of the inability of the corporation to meet its obligations and of the further fact that some of the stockholders had filed a petition in a State chancery court for the appointment of a receiver.

Pursuant to the terms of said resolution, S. R. Morgan directed his attorney to take the necessary steps to have said corporation adjudged a voluntary bankrupt, and a petition was duly filed in the Federal court in bankruptcy for the purpose.

The chancery court duly cited S. R. Morgan and other petitioners for contempt on account of their action. Upon a hearing in the chancery court they were adjudged to be guilty of contempt in violating the injunction order of the chancery court wherein they were restrained from calling any meeting as directors, or from doing anything relative to the affairs of the Consumers' Ice & Coal Company except under orders of the chancery court. This raises the question of whether the chancery court had the right to make any such order.

The allegations of the complaint in the case wherein the receiver was appointed and the injunction restraining S. R. Morgan and the other directors of the corporation as aforesaid issued were to the effect that the officers and directors of the corporation were mismanaging its assets. The complaint also contained a prayer for an accounting, and that, if the corporation be found to be insolvent, it be wound up under the statutes of the State relating to insolvent corporations.

Art, 1, sec. 8, of the Constitution of the United States provides that Congress shall have power to pass uniform laws on the subject of bankruptcies throughout the United States. Congress has exercised this power and enacted a general bankrupt law for the United States, and business corporations like the Consumers Ice & Coal Company may become voluntary bankrupts under its provisions. See Barnes' Federal Code, 1919, sec. 9089.

In construing this act in the case of *In re Watts and Sachs, petitioners,* 190 U. S. p. 1, the court held that the operation of the bankruptcy laws of the United States cannot be defeated by insolvent corporations applying to be wound up under State statutes. The court

said the bankruptcy law is paramount and the jurisdiction of the Federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive.

In *Hickman* v. *Parlin-Orendorff Co.,* 88 Ark. 519, this court held that our State insolvency act has been superseded by the bankruptcy act of Congress, in so far as they relate to the same subject-matter and affect the same persons. So, too, in *Roberts Cotton Oil Company* v. *F. E. Morse & Company,* 97 Ark. 513, this court held that the Federal bankruptcy act does not repeal or abrogate a State law in conflict with it, but supersedes and suspends its operation for the time being upon persons or cases within the purview of its provisions. All these cases and many others bearing on the subject are cited by Judge TRIEBER in the case of *In re Weedman Stave Co.,* 199 Fed. 948.

In that case it was held that our statute authorizing a chancery court of the State to take possession of the assets of an insolvent corporation and distribute the same through its receiver *pro rata,* among its creditors, after payment of wages and salaries, which constitute preferred claims, requiring all creditors to prove their claims within a stated time or be barred, and dissolving all preferences obtained within ninety days, constitute a State insolvency act which was suspended by the bankruptcy act of Congress.

It was further held that the appointment of a receiver for a corporation thereunder is absolutely void for want of jurisdiction, and that such a receiver may be required to turn over the assets of the corporation to a receiver or trustee appointed by the bankruptcy court at any time thereafter, whether in four months or not.

The Attorney General raises the point that these decisions do not apply because it is claimed that the appointment of a receiver by the chancery court of Jefferson County, Ark., was made upon the allegations of

mismanagement by the directors of the corporation and not upon the ground of insolvency.

The Attorney General relies upon the case of *In re Associated Oil Co. Inc.*, 271 Fed. 788. In that case it was held that after a receiver has been appointed for a corporation by a State court, under authority of the laws of the State, with power to take possession of and hold the property of the corporation, its directors are without power to authorize the filing of a petition in voluntary bankruptcy and the surrender of its property to the bankruptcy court.

It is true that in that case, as in the present one, the petition in bankruptcy was filed pursuant to a resolution of the board of directors of the corporation, declaring that the affairs of the corporation were in a precarious state, owing to the pendency of a suit in the State court for a receiver; but there the analogy ends. The State court in that case did not enjoin the directors from filing a petition in bankruptcy and did not attempt to punish them for contempt in so doing. The receiver appointed by the State court appeared in the bankruptcy court and contested the right of the directors to file a voluntary petition in bankruptcy. The bankruptcy court was of the opinion that the appointment of a receiver by the State court took the control of the assets out of the corporation, so that there was nothing to surrender to a trustee in bankruptcy. Furthermore, in the exercise of discretion the bankruptcy court declined to interfere with the State court in the matter. The reasoning was that to allow an adjudication in bankruptcy would undo all that had been accomplished in the State court to prevent the mismanagement of the affairs of the corporation.

This was a decision of the Federal bankruptcy court which has, as we have already seen, exclusive jurisdiction in bankruptcy matters. It is one thing for a bankruptcy court to declare under what circumstances it will exercise its discretion in matters relating to the

bankruptcy law and quite a different thing to say that this discretion may be exercised by State courts. To hold that State courts have any jurisdiction to adjudicate under what circumstances a person or corporation entitled to the benefit of the bankrupt laws may file a voluntary petition in bankruptcy would be to oust the Federal bankruptcy courts of that exclusive jurisdiction vested in them by the Constitution of the United States and declared by the Supreme Court of the United States.

To say that a State court may enjoin a person from filing a petition in bankruptcy for any reason is to that extent to take away the exclusive jurisdiction of the bankruptcy court in the matter. In other words, it was a question for the Federal court in bankruptcy and not for the chancery court to declare under what circumstances the corporation was entitled to be adjudged a bankrupt, or whether it was entitled at all to be declared a bankrupt.

Again, it may be said that the complaint in the suit in the chancery court of Jefferson County by the stockholders of the corporation asks for an accounting on the part of the directors of the corporation. M. B. Morgan and other directors were made defendants to the action. There was a direct prayer that, if the corporation be found to be insolvent upon such accounting, its affairs be wound up under secs. 1798-1800 of Crawford & Moses' Digest relating to winding up the affairs of insolvent corporations.

This allegation brings the case squarely within the decisions of the Supreme Court of the United States and of this court cited above. The order of the chancery court, in so far as it enjoins S. R. Morgan, M. B. Morgan and E. E. McIndoo from holding a directors' meeting for the purpose of filing a voluntary petition in bankruptcy in the Federal court, was void. The chancery court had no jurisdiction to make such order, and therefore no jurisdiction to punish the disobedience thereof as for contempt of court.

It follows that the decree of the Jefferson Chancery Court holding S. R. Morgan, M. B. Morgan and E. E. McIndoo guilty of contempt of court was error, and the decree adjudging them guilty of contempt will be set aside and quashed.

PEOPLE'S BANK OF WALDO v. MENDENHALL.

Opinion delivered June 19, 1922.

1. PLEDGES—AGREEMENT OF PLEDGEE TO INSURE—EVIDENCE.—In an action on a note secured by pledged cotton, which was destroyed by fire without insurance, evidence *held* sufficient to authorize submission of an issue as to whether plaintiff agreed to keep the cotton insured.
2. PLEDGES—FAILURE OF PLEDGEE TO INSURE—DAMAGES.—Where cotton, pledged as security for a note, is destroyed by fire without insurance, the measure of damages for pledgee's failure to keep it insured, as agreed, is the insurable value of the cotton at the time of its destruction.
3. PLEDGES—FAILURE OF PLEDGEE TO SELL.—A bank with which cotton was pledged as security for a note would be liable, if it agreed to sell the cotton on pledgor's direction, for any loss sustained by a decline in price, after failure to sell when directed, such agreement imposing on the pledgee the duties of an agent or factor as well, but, in the absence of such agreement, such duty could not be imposed by the pledgor's subsequent direction.
4. PLEADING—INCONSISTENCY OF DEFENSES.—In an action on a note secured by pledged cotton, which was destroyed by fire, there was no inconsistency between defenses that plaintiff failed to insure the cotton as agreed, and that it failed to sell it and apply the proceeds on the debt when directed by defendant, as liability might arise from failure to perform either duty, though the measure of damages would not be the same.
5. PLEDGES—FAILURE TO SELL—MEASURE OF DAMAGES.—The measure of a pledgee's liability for failure to sell, or to permit the pledgor to sell the pledged property and apply the proceeds on the debt secured, as agreed, for an unreasonable length of time after being directed to sell by the pledgor, where the property was destroyed by fire before sale, is not the value thereof when instructed to sell, but the loss in value caused by the failure to sell or to permit the pledgor to sell.

6. PLEDGES—INSTRUCTION.—Where, in an action by a bank on a note for which it had held in pledge cotton that was subsequently destroyed by fire, the pledgor claimed damages both for failure of the pledgee to insure the cotton as agreed and for its failure for an unreasonable length of time to sell the cotton after direction to do so, an instruction that, upon failure to sell as directed, the pledgor was liable for the full value of the cotton at the time the pledgee was instructed to sell was prejudicial, in view of a verdict for the full value of the cotton.

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

Tompkins, McRae & Tompkins, for appellant.

After a contract of pledging is made, neither can by anything he alone may do vary the duties or powers attaching to the relation. 21 R. C. L. 663; 4 L. R. A. 194. The duty of the pledgee is to exercise ordinary care, and he is liable only for neglect of such care. 44 N. W. 5.

The law imposed no duty upon the bank to sell the cotton. It would not be liable for its loss except for negligence. 50 Ark. 229; 17 L. R. A. 193.

Bush & Bush, for appellee.

SMITH, J. This is an appeal from a judgment in favor of the defendant in a suit by the People's Bank of Waldo against T. J. Mendenhall on a promissory note for $1,030.42.

On August 29, 1918, when defendant first borrowed the money represented by the note sued on, he deposited nine bales of cotton in pledge with the bank as collateral to his note, and, by way of defense to the suit on the note, he alleged that the bank had agreed to keep the cotton insured, and had failed to do so, and that the cotton had been destroyed by fire. The value of the cotton at the time of the fire was alleged to be $605.64, and a credit for that amount was prayed.

It is insisted that there was no testimony upon which to submit this issue to the jury. But we think there was. The defendant testified that when he applied for a loan the cashier of the bank told him the

loan would be made upon the condition that the bank be authorized to insure the cotton and to keep it insured until the cotton was sold, and defendant be charged with the cost of the insurance. The defendant agreed to this arrangement, and the loan was made on these terms. Three separate policies of insurance were taken out by the bank, the last of which expired September 20, 1920. The premiums on all these policies were charged to defendant, and were paid by him when he paid the interest on the notes. The last renewal of the note was on June 23, 1920, and this is the note sued on. This was a note payable on demand, and defendant says it was so made payable because he then gave orders that the cotton be sold without further delay.

On this phase of the case the court, at defendant's request and over plaintiff's objection, gave instruction numbered 1, reading as follows: "You are instructed that, if you find from the evidence that the defendant deposited with the plaintiff the warehouse or compress receipts for cotton as a pawn or pledge for the security of the defendant's debt to the plaintiff, and that it was the contract between the plaintiff's agent and the defendant that the plaintiff should keep said cotton insured, and it failed to do so, and the cotton was destroyed by fire without insurance, then the plaintiff would be liable to the defendant for the insurable value of the cotton at the time of its destruction by fire." This instruction is a correct declaration of the law, and we think it is not abstract.

The court gave, at defendant's request and over plaintiff's objection, an instruction numbered 2, reading as follows: "You are further instructed that, if you find from the evidence that the defendant turned over to the plaintiff the receipts for his cotton which had been pledged to the plaintiff as security for his debt, with instructions to the plaintiff to sell said cotton and apply the proceeds on defendant's debt to plaintiff, and if you further find that the plaintiff negligently

failed to sell said cotton, as requested by the defendant, for an unreasonable length of time, or to permit defendant to do so, and the same was destroyed by fire before sale, then you are instructed that the plaintiff would be liable to the defendant for the value of the cotton at the time the plaintiff was instructed to sell the same, and you will so find." Numerous objections were offered to this instruction. The first was that the answer alleged no breach of contract on the part of the bank to sell the cotton, and this objection is well taken. It is insisted, however, that testimony on this phase of the case was offered without objections until after the case had been closed and the court was engaged in settling the instructions, and that the answer should therefore be treated as amended to conform to the unobjected-to testimony. It is insisted that the defenses of a failure to insure and of a failure to sell are inconsistent, and that the instruction dealing with the failure to sell is abstract, in that the testimony does not show an agreement on the part of the bank to sell the cotton on the order of the defendant, and that, in the absence of such an undertaking on the part of the bank, that obligation could not be imposed by a mere direction from the defendant.

We do not feel called upon to decide whether objection to the admission of testimony in regard to a breach of a contract to sell was offered in apt time or not, as the judgment must be reversed for the reason hereinafter stated, and the testimony on the part of the defendant is sufficient to raise that issue.

The defendant testified that the cashier of the bank agreed to sell the cotton upon defendant's order, and on one occasion excused his failure so to do by stating that the market was unfavorable, and that sale would be made when the market was up. Defendant stated that he then renewed the direction to sell, but this direction was not obeyed; that the cotton could have been sold when the direction to sell was first given at from thirty to thirty-

two cents per pound, but it depreciated in value until it was worth only about fourteen cents at the time of the fire.

If the representative of the bank agreed to sell the cotton upon the direction of the defendant, the sale should have been made when the direction was given, and the bank would be liable for any loss sustained by a subsequent decline in price, for this agreement to sell would impose on the bank not only the duties of a pledgee, but the additional duties of an agent or factor. Sec. 65 Lawson on Bailments. If, however, the bank assumed no obligation to sell the cotton as a part of the contract whereby it was pledged, then the duty to sell could not be imposed on the bank by the subsequent direction of the defendant. Jones on Collateral Securities (Pledges) 3rd Ed., § 606, p. 727; 21 R. C. L., title "Pledge," §§ 26 and 49; *Minneapolis and N. Elevator Co.* v. *Betcher,* 44 N. W. 5; *Cooper* v. *Simpson,* 42 N. W. 601, 4 L. R. A. 194; see also *Lake* v. *Little Rock Trust Co.,* 77 Ark. 53; *Robinson* v. *Hurley,* 11 Iowa 410; *Granite Bank* v. *Richardson,* 7 Metcalf's Reports (Mass.) 407; Story on Bailments (8th Ed.) § 320, p. 270.

There is no testimony that the bank refused to permit defendant to sell, and we need not therefore consider the law of that situation.

We do not think there is any inconsistency between the defenses interposed by defendant, that the bank failed in its duty to insure and also to sell. As we have said, liability might arise out of a failure to perform either duty; but the measure of damages would not be the same in both cases.

Instruction numbered 1 correctly told the jury that, if the plaintiff was liable for failure to insure the cotton, under the facts there hypothetically stated, the plaintiff would be liable for the *insurable* value of the cotton.

Instruction 2, set out above, deals with liability for failure to sell, and, as we have said, the testimony of de-

fendant makes a case for the jury on this issue which should be submitted in instructions declaring the law as herein announced. It may be said, in this connection, that the declaration in regard to the measure of damages in instruction numbered 2 is incorrect. This instruction tells the jury to find for the defendant for the value of the cotton at the time plaintiff was instructed to sell, if the finding was made that plaintiff had negligently failed to sell the cotton as requested by defendant for an unreasonable length of time, or to permit the defendant to sell; whereas the measure of this liability would be only the loss in value consequent upon the failure to sell or to permit defendant to sell. The effect of the instruction given on this subject is to treat a mere failure to sell as tantamount to a conversion of the cotton.

The bank was not responsible for the fire; but if it was liable for failure to insure, then the measure of that liability would be as stated in instruction numbered 1—the insurable value of the cotton at the time of the fire.

Included in the answer was a prayer for judgment for one-half the face of a note which belonged to defendant and one R. R. Fairchild jointly, and which had been deposited with the bank as additional collateral to the note sued on. The bank had collected this note, and did not question defendant's right to one-half the proceeds of the collection, amounting to $303.32. The verdict and judgment was in defendant's favor for this amount, thus indicating that the jury found the bank's liability, on account of the cotton, equaled the principal and interest of the note sued on. The note with interest to the time of the trial amounted to $1,142, and as there were only 3,764 pounds of the cotton, the jury must have assessed its value at something more than thirty cents per pound, whereas the answer had alleged its value to be only $605.54. This verdict may indicate a finding of liability against the bank both for a failure to sell and a failure to insure, as the verdict equals the

value of the cotton at the time defendant claims he directed the cotton to be sold; but we cannot know that this was true, as instruction numbered 2 authorized this verdict upon the finding only that there had been a failure to sell pursuant to directions to that effect.

For the error, therefore, in giving the instruction numbered 2, the judgment must be reversed and the cause remanded for a new trial.

JONES v. STATE.

Opinion delivered June 19, 1922.

1. HIGHWAYS—ROAD IMPROVEMENT DISTRICTS—ANNUAL REPORTS.—Acts 1915, No. 338, § 33, requiring all boards of commissioners of road improvement districts to file an annual report during the month of September, applies only to road improvement districts created under that act, and not to road improvement districts created under special acts.
2. STATUTES—SPECIAL SESSION OF LEGISLATURE—PROCLAMATION.—Act 151 of Special Session of 1919 (Crawford & Moses' Dig., §§ 5645, 5646), requiring all road, drainage and improvement districts where bonds are sold to file an annual report, is void under Const., art. 6, § 19; such act not being within the purview of the Governor's proclamation, and not having been passed at an extension of the special session.
3. CRIMINAL LAW—JUDICIAL NOTICE OF LEGISLATIVE RECORDS.—Judicial notice is taken of legislative records.

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

Lake & Lake, J. W. House, Jr., and *J. G. Sain,* for appellants.

Nothing can be taken by intendment to supply the necessary allegations in an indictment. 94 Ark. 242; 29 Ark. 68; 38 Ark. 519; 67 Ark. 308. Criminal statutes are to be strictly construed, and no case can be brought within the statute unless it is within its words. 38 Ark. 521. The requirements of the statute that the report shall be filed on the first Monday in January is mandatory. The indictment to be sufficient must allege that

they failed to file it on that day. 236 S. W. 619. The enactment of this statute was not within the proclamation convening the Legislature. 15 L. R. A. 847. The Governor's subsequent approval of the act cannot be substituted for those earlier steps which the fundamental law prescribes. 2 Heisk. 575; 90 Mo. 646; S. W. 769; 19 S. W. 531. Legislation not embraced in the Governor's call is unauthorized and void. 19 S. W. 531. The case should be reversed and dismissed. 115 Pac. 696. The Legislature is limited to the business named in the proclamation. 161 S. W. 1006.

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

The exact date laid in the indictment is not material further than as a statement that it was committed before the time of the indictment. 110 Ark. 171; 52 Ark. 270; 26 Ark. 260; 31 Ark. 676; 32 Ark. 215. The indictment is substantially in the words of the statute and is sufficient. 85 Ark. 195; 97 Ark. 5; 98 Ark. 575.

SMITH, J. Appellants are commissioners of a road improvement district in Howard County created by act No. 628 of the Acts of the regular session of the 1919 General Assembly (1919 Road Acts, vol. 2, page 2399), and they have been convicted under an indictment charging them with failure "to file a detailed, full and correct report and statement of the moneys collected and expended, the character of the improvement made and other details necessary to a full and thorough understanding of things done by said commissioners, said Howard-Sevier Road Improvement District Number 1 having previously issued and sold bonds and expenditures being made."

It was stipulated, in the agreed statement of facts on which the case was submitted to the court sitting as a jury, that the commissioners did not file a report on the first Monday in January, 1922, but that their report was not filed until the 21st day of February, 1922.

The prosecution in this case was had under act No. 151 of the acts of a special session 1919 of the General

Assembly, which was an act entitled, "An Act requiring the commissioners of all road districts, drainage districts, and improvement districts of all kinds, to file an annual report on the first Monday in January of each year hereafter."

Section 1 of this act provides "that hereafter all commissioners of road districts, drainage districts and improvement districts of every kind where bonds are sold, shall be required to file a report on the first Monday in January of each year, during the time expenditures are being made, and said report shall contain a detailed, full and correct statement of everything done by said commissioners up to the date of the filing of their report, including the amount of money collected, the amount of money expended, showing the date and number and amount of each voucher, to whom issued, and for what purpose, the character of the improvement made, the amount of the improvement, and every other detail necessary to a full and thorough understanding from the report of everything done or accomplished by said commissioners and district. Said report shall be filed with the clerk of the county court of the county in which said improvement district is organized, or, if the district or any part of it is in more than one county, then in each county of said district; and said report when so filed shall be kept by said clerk, subject to the inspection of any taxpayer in said district."

Section 2 of the act provides that a fine of $500 shall be imposed upon a conviction of a violation of section 1.

This act appears as sections 5645 and 5646, C. & M. Digest.

It is insisted, on behalf of the State, that section 5645, C. & M. Digest, applies to all road improvement districts, and therefore supersedes section 5452, C. & M. Digest. This last-numbered section was section 33 of act No. 338, approved March 30, 1915 (Acts 1915, p. 1400) commonly known as the Alexander Road Law.

This section 5452 requires the filing of an annual report during the month of September by all boards of commissioners of road improvement districts, but it quite obviously applies only to the road improvement districts created under that act.

It becomes necessary, therefore, to determine whether act No. 151, set out above, is a valid enactment, as the conviction appealed from was had under its provisions.

Act No. 628 of the Acts of 1919 creating the road improvement district in question does not require the filing of an annual report by the commissioners; and the conviction cannot therefore be sustained unless act No. 151 is a valid statute.

We have reached the conclusion that this wholesome act is not a valid law; but its validity must be tested, not by any consideration of its beneficial safeguards, but solely upon a consideration of the provisions of the Constitution pursuant to which it was enacted.

This act No. 151 was passed at an extra session of the General Assembly which was convened pursuant to a proclamation of the Governor, which reads as follows:

"Know ye that, whereas, an extraordinary occasion has arisen which makes it necessary so to do, I, Charles H. Brough, Governor of the State of Arkansas, by virtue of the power and authority vested in me by section 19, article 6, of the Constitution of the State of Arkansas, do by these presents call a special session of the General Assembly of the State of Arkansas, to meet and convene at the State House, at the hour of twelve o'clock noon, on the 22nd day of September, 1919, and I specify the purposes for which the General Assembly is convened to be as follows, to-wit:

"1. To enact such laws as may be necessary to decrease the high cost of living.

"2. To enact such laws as will enable cities and towns to collect an additional tax for motor vehicles, to be used for street purposes.

"3. For the purpose of enacting laws for establishing local road, bridge, drainage, school and levee improvement districts, and amending and curing defects in existing special local laws for the same, and ratifying, confirming and validating local improvement districts organized under general or special laws, and to enact such laws as will permit the reconstruction or extension through improvement districts of waterworks systems, to the end that cities and towns or new territory taken therein may be supplied with adequate service.

"4. To appropriate a sufficient sum to pay for services rendered and expenses incurred during the biennial period ending March 31, 1919.

"In testimony whereof, I have hereunto set my hand and caused, as Governor of the State, the Great Seal of the State of Arkansas to be affixed, this 15th day of September, 1919."

It is shown, from the certificate of the Secretary of State, based upon an examination of the legislative records—of which we would, of course, take judicial knowledge—that House Bill No. 134, which became act No. 151, was introduced at this special session while other business within the Governor's proclamation was being transacted, and that other bills within the Governor's proclamation were introduced both prior and subsequent to the introduction of House Bill No. 134, and that the purpose of the call of the Governor had not been completed when House Bill No. 134 was introduced, and that there was no vote of the two houses entered on the journals thereof extending the session for the purpose of considering matters not included in the Governor's call.

Section 19, article 6, of the Constitution, under which the extra session was convened, is as follows: "The Governor may, by proclamation, on extraordinary occasion convene the General Assembly at the seat of government, or at a different place, if that shall have

become, since their last adjournment, dangerous from any enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

At section 56 of the article on Statutes in 25 R. C. L. p. 806, it is said: "Constitutional provisions limiting the scope of legislation at special sessions are mandatory, and any law enacted at a special session is void if it is not the subject or subjects designated by the executive's call or message, even though it has been approved by the Governor."

At section 65 of Lewis' Sutherland, Statutory Construction (2nd ed.), p. 111, it is said: "Extra or special sessions of the Legislature are usually provided for in the Constitution, and in such cases the Legislature is also usually limited to the transaction of such business as is mentioned in the call. Where this limitation exists, legislation relating to other subjects will be void. In order to determine this question the courts will take judicial notice of the Governor's proclamation. The Legislature may act freely within the call; may legislate upon all or any of the subjects specified, or upon any part of a subject; and every presumption will be made in favor of the regularity of its action." See also, Cooley on Constitutional Limitations (7th ed.), p. 222; and cases collected in the note to *Long* v. *State,* 21 A. & E. Cases, page 405.

Inasmuch as the session of the General Assembly was not extended by the vote of the two houses after the completion of the business embraced in the Governor's call, the act under review must fall as having been passed without Constitutional authority, unless authorization for its enactment is found in the Governor's proclamation,

If authorization for act 151 exists, it must be found in the third paragraph of the proclamation. The first phrase of this paragraph reads as follows: "For the purpose of enacting laws for establishing local road, bridge, drainage, school and levee improvement districts." The second phrase of the third paragraph reads: "and amending and curing defects in existing special local laws for the same." The remaining portions of this third paragraph are so obviously inapplicable that they need not be discussed.

The first phrase of this third paragraph of the proclamation authorizes the enactment of laws for establishing local road, bridge, drainage, school and levee improvement districts. The title of act 151, quoted above, shows that act has no relation to this phrase of this third paragraph.

Concerning the second phrase of the third paragraph, we think it quite obvious that it only authorizes legislation amending and curing defects in existing local laws which established road, bridge, drainage, school and levee improvement districts. The first phrase of paragraph three of the proclamation authorizes legislation for the purpose of establishing local road districts, local bridge districts, local drainage districts, local school districts and local levee districts; and then follows, in the second phrase, authorization for legislation amending and curing defects in existing special local laws which had created such districts. Only local legislation is included in either the first or second phrase.

This second phrase of paragraph three of the proclamation authorizes the enactment of legislation amending and curing the defects in existing local legislation and was used advisedly and discriminatingly. This is shown by the phrase immediately following, "and ratifying, confirming and validating local improvement districts organized under *general* or *special* laws." This last phrase authorized legislation ratifying, confirming or validating local improvement districts, whether organized under general or special laws.

Act 151 is not a local law. It does not purport to amend any local bill. It covers not only the improvement districts mentioned in the first phrase of the third paragraph of the proclamation, but applies to "improvement districts of every kind where bonds are sold." It applies not only to districts created under the special laws to which the proclamation referred, but it applies to districts created under general laws. It is a general law, and not a special one, and applies to all districts theretofore or hereafter created, and for these reasons act 151 is not within the purview of the Governor's proclamation.

It is true the Governor approved act 151, but that action on his part does not supply the lack of authorization for its enactment in his proclamation. See the authorities cited above.

Having reached the conclusion that act 151 is not a valid statute, it necessarily follows that the conviction based upon it cannot stand, and the judgment of the court below must therefore be reversed, and the cause will be dismissed.

HART, J., (dissenting). My views of the law are well expressed by Judge REESE in construing a similar provision of the Constitution of the State of Tennessee in the case of *Mitchell* v. *Franklin and Columbia Turnpike Co.*, 3 Humph. 456, as follows: "This undoubtedly is a very salutary provision, tending somewhat to check over-legislation, and to render laws a little more stable, by furnishing a period of two years, during which they may be in some degree subjected to the test of a brief experiment. And cases may sometimes arise, it is to be sincerely hoped but seldom, in which it may become the duty of the court to declare a law, passed under such circumstances, beyond the scope of the legislative commission out of this provision of the Constitution."

The intention of this constitutional provision is to prevent the enactment of laws having no connection or relation to the subjects embraced in the call. The constitutional provision should be given a practical and liberal construction to carry out its evident purpose,

and this is in the application of the maxim of construction that all doubts shall be reserved in favor of an act of the Legislature.

I think the act in question relates to one of the subjects embraced in the call of the Governor, and that its provisions are germane to that subject. One of the subjects of the call is "for the purpose of enacting laws for establishing local road, bridge, drainage, school and levee districts," etc. In other words, one of the subjects of the call was to enact local improvement district laws of the character enumerated.

In the general road law there was already a provision providing for the filing of reports by the commissioners. This is a salutary provision, and is plainly intended for the protection of the property owners. Such a provision seems to have been left out of all the special improvement district laws passed at the regular session of 1919.

It could not be said that the passage of an act relating to all such local improvement districts for the construction of roads should be considered a plain and manifest departure from the subjects named in the call. On the other hand, such a provision is germane to the subject of enacting local road improvement district laws, and may be said to be an appropriate part of such legislation.

The Constitution only intended to require the Governor by his call to confine legislation to particular subjects and not to restrict the details springing out of the subjects enumerated in the call.

Therefore I respectfully dissent from the majority opinion.

BIRD v. STATE.

Opinion delivered June 19, 1922.

1. HOMICIDE—ABSTRACT INSTRUCTIONS HARMLESS WHEN.—In a prosecution for murder in the second degree, instructions usually given in trials for murder in the first degree were abstract and improper, but were not prejudicial where the instructions as a whole made plain the charge on which the cause was submitted, and defendant was found guilty only of voluntary manslaughter, which was included in the allegations of the indictment.
2. CRIMINAL LAW—IMPROPER ARGUMENT.—In view of Crawford & Moses' Dig., § 804, providing that persons under 18 convicted of a felony may be sent to the penitentiary if the trial judge deems such course expedient, argument of counsel assisting the State in a prosecution of a 13-year-old boy for murder in the second degree that defendant, if convicted, would not be sent to the penitentiary but would serve his term in the reform school, at least until he was 21, when sanctioned by the court, was erroneous and prejudicial.

Appeal from Conway Circuit Court; *J. T. Bullock,* special judge; reversed.

W. P. Strait, for appellant.

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

SMITH, J. Appellant, a thirteen-year-old boy, was tried under an indictment charging him with the crime of murder in the second degree, and was convicted of voluntary manslaughter and his punishment fixed at two years in the penitentiary, and he has appealed.

His defense was that the killing was an accidental one, and the case was tried on that theory. Certain assignments of error relate to the admission and exclusion of testimony; but we find no error in these respects. Other assignments of error relate to the giving of and refusal to give certain instructions; but we think the case was submitted under instructions fully and correctly declaring the law. It does appear that several of the instructions given were those usually given in the trial of persons charged with murder in the first degree. They were therefore abstract, and should not have been given,

but they were not prejudicial, as the instructions, considered as a whole, made plain the charge upon which the cause was submitted to the jury, and the defendant was found guilty only of the offense of voluntary manslaughter, a charge included in the allegations of the indictment.

In the argument before the jury special counsel representing the State referred to appellant's age, and stated the fact to be that a convicion would not mean a sentence to the penitentiary or service of a term therein, but that it meant only a term in the reform school. An objection to this argument was overruled. Before concluding his argument special counsel said: "Gentlemen of the jury: If you convict the defendant he will not be sent to the penitentiary, for under the law he would serve his term in the reform school; he would never see the penitentiary. If he was convicted for a long term he would go to the reform school until he was 21 years old and then be transferred to the penitentiary." Counsel for appellant renewed his objection to this argument, whereupon the following colloquy occurred: "COURT: Mr. Gordon, I think you have gone far enough in that argument." Mr. Gordon turned to the court and said: "That is the law; will the court not permit me to state the law to the jury?" And the court replied: "I have permitted you to state it once, but think that is sufficient." To this statement and the ruling thereon appellant at the time objected and saved his exceptions.

In view of the record which we have set out, it appears that the court sanctioned, as a declaration of the law, the statement of the special counsel for the State that, if appellant were convicted it did not mean a term in the penitentiary but only a term in the reform school, and the ruling was tantamount to an instruction by the court. *Briggs* v. *Jones,* 132 Ark. 455; *Davie* v. *Padgett,* 117 Ark. 551.

Was error committed in this ruling?

Counsel did not correctly state the law. By section 804, C. & M. Digest, it is provided that "all convicts in

the penitentiary now, and all persons hereafter sentenced to the penitentiary, under the age of eighteen years, * * * * shall be committed to and placed in said reform school by said board; provided, said persons under eighteen years of age convicted of a felony may be sent to the penitentiary, if, in the judgment of the trial judge, such course may be expedient * * * * * ".

The ruling of the court on the argument of counsel presents the same question considered by the court in the case of *Pittman* v. *State,* 84 Ark. 292, where Judge BATTLE, speaking for the court, said: "The instruction does not conform to this statute. Under the statute disposition that will be made of the defendant, if convicted, is not determined nor intended to be known until after his conviction. He may be committed to the reform school by the 'board of commissioners to manage the penitentiary' or may be sent by the trial judge to the penitentiary. Under the law his punishment, if convicted of murder in the second degree or manslaughter, should be fixed in the manner it would be if it was known he would suffer it in the penitentiary." An error in this quotation appears in the official report of this case in 84 Ark., but we give the quotation as it appears in the original opinion and in 105 S. W. 874.

So here it was erroneous to tell the jury that appellant would be sent to the reform school, and not to the penitentiary, for the statement to that effect, sanctioned by the court, may have influenced the jury in returning a verdict of guilty; whereas appellant was entitled, under the law, if convicted, to have his punishment assessed as it would have been if it had been known he would suffer it in the penitentiary.

Other assignments of error are discussed; but inasmuch as they relate to matters not likely to recur at the trial on the remand of the cause, we pretermit a discussion of them.

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

HURST v. COSBY.

Opinion delivered June 19, 1922.

1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN ON CLIENT'S PAPERS.—In a suit in equity by an attorney against his client to have his lien fixed on proceeds of an insurance policy, a complaint which alleged that plaintiff had in his possession papers and proofs necessary in a settlement of the claim, without alleging that the policy was in his possession, was insufficient to entitle plaintiff to enforce a common-law lien in equity.
2. APPEAL AND ERROR—FORMER OPINION.—On a second appeal, the former opinion is the law of the case.

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

Sullins & Ivie, for appellant.

John Mayes, for appellee.

SMITH, J. This is the second appeal in this case, the opinion on the former appeal being reported in 149 Ark. 11. As appears from that opinion, this is a proceeding to enforce an attorney's lien. In the former appeal, as in the present one, the decree was rendered on the pleadings. The first decree, which declared a lien in favor of the attorney, was reversed by us because he had not "set forth in his complaint a state of facts which would confer a lien, in that he does not allege that the policy or other evidence, if any, of appellant's claim against the insurance company was turned over to him and still remains in his possession." As a reason for that ruling we said: "Such a lien at common law was, as we understand, on the evidence of indebtedness in the hands of the attorney, and not on the debt itself. This being true, appellee has not shown in the complaint that he had in his possession any papers on which he was entitled to a lien."

On the remand of the cause the plaintiff amended his complaint to allege "that the said defendant, G. A. Cosby, turned over and delivered to this plaintiff, as his attorney, all of his papers, proofs, etc., which were necessary in making said adjustment, settlement and collection

as aforesaid, and this plaintiff remained in possession of same at all times until the filing of his original suit herein, and is still in possession of same."

After this amendment to the complaint had been filed, defendant filed a motion to make the complaint more definite and certain by alleging what papers he claims to have in his possession; but this motion does not appear to have been acted upon by the court or responded to by the plaintiff.

The defendant also filed the following demurrer:

"1. That said complaint does not contain matter or state facts sufficient to constitute a cause of action within the jurisdiction of this court.

"2. That said complaint and each and every paragraph thereof, taken separately or collectively, fail to contain matter or state facts sufficient to constitute a cause of action against the defendant within the jurisdiction of this court.

"He therefore says this court is without jurisdiction to hear and determine this cause, and that same should be dismissed."

Upon the hearing thereof this demurrer was sustained. The court then offered to transfer the cause to the law docket, but that offer was declined, and, as plaintiff elected to stand upon his amended complaint, the same was dismissed, and plaintiff has appealed.

It is quite obvious that the paper which evidenced the claim of the client against the insurance company was the policy of insurance. There could be no lien on the proofs of death, or papers of that character, for these do not evidence the debt sought to be enforced. The policy of insurance was the paper which evidenced the claim, and there is no allegation that plaintiff ever had possession of that paper. In construing the amendment to the complaint it must be remembered that the decree in plaintiff's favor was reversed because he had not alleged possession of the papers evidencing the claim against the insurance company. The motion made to

make the complaint more definite and certain, which was filed before the demurrer was sustained, called attention to the failure of the complaint to allege possession of the policy by asking that plaintiff be required to allege the papers which he claims to have in his possession. We think therefore that the complaint should not be treated as alleging the plaintiff's possession of any papers except those made necessary after the death of the insured to make the adjustment, settlement and collection of the policy of insurance, and not as having alleged the possession of the policy itself—the evidence of the indebtedness.

The attorney had no lien on the affidavits, or depositions, or other proofs of death of the insured, although these papers may have been necessary in making the adjustments, settlement and collection of the policy; and there was no lien on the policy because it is not alleged that the policy came into plaintiff's possession in the course of his employment.

The former opinion is the law of the case, and we there said that "the court erred in refusing to transfer the cause to the circuit court, and for that reason the decree is reversed and the cause is remanded with directions to transfer the cause, unless further grounds are stated for equitable relief."

As we have just said, the further grounds for equitable relief recited in the amendment to the complaint, which we set out above, are not sufficient to entitle the plaintiff to the common-law lien of an attorney on his client's papers which he seeks to assert, and the cause should therefore have been transferred to the circuit court. This the court below offered to do, and as plaintiff declined to accept that offer, nothing remained to be done but to dismiss the complaint, and the decree so ordering is affirmed.

WOOD and HUMPHREYS, JJ., not participating.

FUQUAY v. DESHA BANK & TRUST COMPANY.

Opinion delivered June 26, 1922.

1. ESTOPPEL—INCONSISTENT CLAIMS.—Where the owner of property mortgaged it to a bank to secure funds to pay debts of his business, and had the proceeds placed to his wife's credit in the bank, after becoming bankrupt, on his claim of exemption out of the funds in the bank, he was estopped to assert a claim to have the funds applied in satisfaction of the mortgage debt.
2. BANKRUPTCY—RIGHTS OF THIRD PARTIES.—Where a husband and wife mortgaged their homestead to secure credit at a bank, and the money was placed to the wife's credit, to be used in paying certain debts of the husband, an order in a voluntary proceeding by the husband in bankruptcy did not bind the interest of the wife in the bank account or affect her right to have it apply on the mortgage debt.
3. HOMESTEAD—CONSIDERATION FOR CONVEYANCE.—Where a husband and wife mortgaged their homestead to secure credit at a bank to use in paying certain debts of the husband's firm, the wife's signature to the mortgage was sufficient consideration for an agreement that the proceeds should be deposited to her account, constituting a valid contract, as against the claims of the creditors of her husband after he became bankrupt.
4. MORTGAGES—PRIORITY.—Where a husband and wife mortgaged their homestead to secure credit at a bank which lent the money on condition that it should be used in the payment of the debts of the husband's firm, and which money was deposited to the wife's account, on the husband's becoming bankrupt, the bank had a right to the payment of the debt due by the copartnership out of the fund before same should be applied to the mortgage debt.

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

Taylor & Jones, for appellants.

The record is clear that the money was borrowed for the express purpose of paying the creditors and for no other purpose; that Mrs. Fuquay executed the mortgage on the homestead only on condition that the money so borrowed should be so applied and that it be deposited in her name, subject to her check, for that purpose. This having been done, and the purpose for which the loan was obtained having failed, she had the right to have the money used for the purpose of canceling the mort-

gage. 181 N. W. 628; 31 Ill. App. 353, 358; 87 S. W. 178; 99 Tex. 546, 91 S. W. 106. She was not a party to any of the attachment and garnishment proceedings nor to the proceeding in bankruptcy, and her rights are not affected thereby.

E. E. Hopson and *De Witt Poe,* for appellee.

The facts in this case do not bring it within the rule laid down in *Kittle* v. *Straus,* 181 N. W. 628, relied on by appellant. The evidence clearly shows that Mrs. Fuquay had no agreement with the bank or any of its agents, but only with her husband.

The lower court was justified in finding the agreement between Mr. Fuquay and the bank to be as stated by Mr. Thane, and the former and his wife never attempted to enforce the agreement. After the garnishment had been served, innocent parties' rights attached. Moreover there was an adjudication of the Federal court that this money belonged to the creditors, and the bank had no alternative but to obey the mandates of that court. If Mrs. Fuquay can be classed as an innocent party, the rule laid down in *Desha Bank & Trust Co.* v. *Doran,* 147 Ark. 177, should apply. See also 62 Ark. 325; 107 *Id.* 16.

McCULLOCH, C. J. J. W. Fuquay is the owner of certain real estate, which constitutes his homestead, in the town of Arkansas City, and on May 22, 1917, he executed a mortgage thereon to appellee to secure a loan of money in the sum of two thousand dollars, evidenced by a promissory note of that date, bearing interest at ten per cent. per annum from date until paid. His wife, Lizzie Fuquay, joined in the execution of said mortgage and note, and she is also one of the appellants. This is an action instituted by appellee against appellants in the chancery court of Arkansas County to foreclose said mortgage.

Appellee is a banking corporation doing business in Arkansas City, and the sum loaned to appellants was

deposited in appellee bank to the credit of Mrs. Fuquay, where its still remains thus deposited.

Appellants answered the complaint, setting up the defense that the loan had been repaid by a check drawn by Mrs. Fuquay on said fund and delivered to appellee.

On the hearing of the cause the court rendered a decree foreclosing the mortgage for the full amount of the original debt and accrued interest.

J. W. Fuquay and T. L. Pertius were in copartnership, engaged in the mercantile business in Arkansas City under the firm name of Model Grocery & Meat Market, and became considerably involved in debt. Fuquay applied to Mr. Thane, the president of appellee bank, for a loan of three thousand dollars to use in paying the copartnership debts. The firm owed the bank a debt of two hundred dollars, and Thane agreed to make a loan of two thousand dollars to be used for the purposes mentioned. He testified that Fuquay represented to him that the stock of merchandise and fixtures were of the market value of about $3,800, that the debts of the firm amounted only to about eighteen hundred dollars, and that he made the loan for the bank on the faith of those representations.

When the note and mortgage were executed, J. W. Fuquay delivered the same to Mr. Thompson, the cashier of the bank, and the amount of the loan was, at the request of Fuquay, placed to the credit of Mrs. Fuquay, and she was given a depositer's book showing the deposit in her name. Thane testified that he did not know that the money was thus deposited until after it was done. A short time afterwards Mrs. Fuquay gave a check on the fund for seventy dollars to pay a personal debt, and the bank refused to honor the check. This check was presented for payment on June 11, 1917, and two days earlier the Dermott Grocery Company sued the members of the copartnership for debt and caused a garnishment to be served on the bank. On June 19, 1917, Mrs. Fuquay drew a check on the bank, payable to its own order, for the full amount of the deposit, and J. W. Fuquay de-

livered the check to Thane with instructions to credit the amount on the mortgage debt to the bank. Thane refused to do that on the ground stated that "the matter was in the hands of the court," and he stated that he would hold the check until the matter was decided by the court. Thane still holds the check, and the money is still on deposit to the credit of Mrs. Fuquay.

On June 25, 1917, J. W. Fuquay filed a voluntary petition in bankruptcy and was adjudged to be a bankrupt. Thane was appointed trustee for creditors and receiver to take charge of the property. On the day of the adjudication of bankruptcy, the referee made an order adjudging that the said funds in bank had been wrongfully transferred by the bankrupt to his wife as a gift without consideration, and the order restrained the bank from disposing of the funds, and also restrained the bankrupt and his wife from disposing of the funds. It does not appear that this order was served on Mrs. Fuquay, or that she otherwise became a party to the bankruptcy proceedings. Subsequently an order was made by the bankruptcy court allowing Fuquay's claim for exemptions in the sum of five hundred dollars out of said funds in bank and out of the proceeds of the sale of merchandise by the receiver, and the remainder was ordered distributed to creditors. This order has not been complied with as to funds in the bank, and, as before stated, the funds still remain there. The bankruptcy court also allowed the bankrupt's claim of homestead in the mortgaged property, subject to the mortgage. There are other details which will be referred to later in this discussion so far as found to be material.

Fuquay, the bankrupt, is, by his act in claiming exemptions out of the funds in bank, estopped from asserting the right to have the funds applied in satisfaction of the mortgage debt. The rights of Mrs. Fuquay stand, however, on a different basis. She was not a party to the bankruptcy proceedings and is not bound by the order of the bankruptcy court as to her individual rights in the

property. The funds were not in the hands or under control of the receiver or trustee, but were deposited in the bank to her credit, nor was she holding the funds as the agent of her husband. She held the funds in her own right to perform the conditions upon which the execution of the mortgage were based. The bankrputcy court had no jurisdiction to adjudicate her rights in the property. If the funds in her hands really belong to the estate of the bankrupt, a suit against her by the trustee in a court of competent jurisdiction is the appropriate proceeding to adjudicate her rights. I Collier on Bankruptcy, pp. 523-527. She testified that she refused to sign the mortgage except on condition that the borrowed money should be placed in her hands for use only in discharging the whole of the copartnership debts, so that the business of her husband could continue unmolested by creditors, and this was agreed to by her husband to procure her signature. The mortgage on the homestead could not have been legally executed without her signature, and this formed a valid consideration for the aforesaid agreement with reference to the disposition and use of the funds. *Hershy* v. *Latham,* 46 Ark. 542; *Baucum* v. *Cole,* 56 Ark. 259; *Davis* v. *Yonge,* 74 Ark. 161.

The mortgaged real estate being the homestead, the creditors could not complain of any disposition made of it, and the husband had the legal right to mortgage it for her benefit. The money borrowed was paid directly to her—did not pass to her husband and then come to her from him. So the general creditors could not complain unless they became parties to the transaction. None of the creditors except the bank was privy to this transaction, hence when the plan failed because it was found that the fund was insufficient to pay all of the debts, so as to comply with the conditions upon which Mrs. Fuquay joined in the mortgage, she had the right to apply the funds in discharge of the mortgage debt so as to restore the property in its former unincumbered condition.

The bank bears a different relation to the transaction and was in privity therewith. It lent the money on condition that it should be used in payment of the copartnership debts. This is in accordance with Thane's testimony, which we should accept as true, since it was accredited by the chancellor and is not overcome by a preponderance of the testimony. The bank has the right to insist that its own debt due by the copartnership be paid out of this fund before it is applied in satisfaction of the mortgage debt.

The decree of the chancery court was therefore erroneous in foreclosing the mortgage as to the whole of the debt, and it is reversed with directions to credit the mortgage debt with the remainder of this fund as of the date of the check, after deducting the amount of the debt due to the bank from the copartnership, and to decree a foreclosure of the mortgage for the amount of the balance due, with interest together with any amount of taxes on the land shown to have been paid by the bank.

JONES v. COOPER.

Opinion delivered June 26, 1922.

PURLIC SERVICE COMMISSION—JURISDICTION.—A proceeding to restrain a mayor and city council from revoking a franchise to a railroad to maintain a switch track connecting two lines of railroad over a street involves a judicial question which is not within the jurisdiction of the Railroad Commission, and an appeal from its decision gives the circuit court no jurisdiction.

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

James E. Hogue, for appellant.

The Railroad Commission and the circuit court of Pulaski County had no jurisdiction to restrain the officers and agents of the city of Hot Springs from doing any act in the premises. Act No. 124, Acts 1921, covers the entire subject-matter in controversy, and that act

confers no such jurisdiction. See §§ 17, 19 and 23 thereof; 101 Ark. 223, 142 S. W. 165; 64 Ark. 152, 41 S. W. 555.

L. E. Sawyer, for appellees.

McCULLOCH, C. J. This is a proceeding which originated before the Railroad Commission to restrain the mayor and city council of Hot Springs from revoking a franchise or right-of-way heretofore granted by the city council to the Memphis, Dallas & Gulf Railroad Company to construct a track over and along one of the streets of the city for use as a switch-track between the line of railroad of said company and the tracks of the Chicago, Rock Island & Pacific Railroad. The petition was filed before the Commission by certain citizens, property owners and business men of the city of Hot Springs, who asserted that the interchange switch-track was constructed with funds donated by the business men of Hot Springs, who were patrons of said railroad company, and that they were, for that reason, interested in the maintenance of the track. It was also alleged that this track furnished the only connection between the different railroads running into Hot Springs, and that a disconnection would operate as a serious injury to the business interests of the city, and to the interest of the petitioners in particular.

It is further alleged in the petition that the city council had enacted an ordinance repealing the former ordinance granting the right-of-way or franchise for the construction of the interchange track, and that, unless restrained, the city would proceed to tear up the track.

Upon hearing the petition, the Railroad Commission entered an order restraining the city of Hot Springs and the mayor and city council, their agents and officers, from "removing, tearing up, molesting, breaking connection, or in any way interfering with the track of the M. D. & G. Railroad Company as it is now connected and laid on the streets and alleys of the said city of Hot Springs."

The mayor and city council prosecuted an appeal to the Pulaski Circuit Court, and they tendered an an

swer in that court setting forth the consideration upon which the franchise or right-of-way was granted to said railway company, and the failure of said company to perform the conditions and pay the consideration. The answer was tendered after the court had overruled a demurrer to the original petition, and the court also refused to permit the answer to be filed. The matter was then heard by the circuit court upon the record made before the Railroad Commission, and the decision of the Railroad Commission was affirmed, and an appeal has been prosecuted to this court.

We pretermit discussion of the question argued *pro* and *con* by counsel, whether the interchange switch-track in controversy constituted a local utility within the regulatory power of the city council, or whether it was one falling within the jurisdiction of the Railroad Commission.

This is not a proceeding which falls within the power of regulation conferred by the Constitution and statutes of the State upon the Railroad Commission, as the Commission is a board created for the regulation and control of public utilities, and its functions are administrative in character, though its decisions and orders are *quasi*-judicial in the exercise of the powers conferred for the purpose of regulating and controlling public utilities. None of its functions are strictly judicial in the sense that it is empowered to adjudicate property or contractual rights. *Thomas-Bowman Cooperage Co.* v. *M. & N. A. R. Co.*, 151 Ark. 589; *Public Service Electric Co.* v. *Utility Commissioners*, 88 N. J. Law, 603.

The question of interference with the use of the track along the streets of the city is not one involving the regulation of a public utility, but involves the question of controverted rights between the city and the railroad company. This is purely a judicial matter, which falls within the judicial power conferred and parceled out by the Constitution among the various courts. *Public Service Electric Co.* v. *Utility Commissioners, supra.*

If the railroad is rightfully using the switch-track in controversy, or if the petitioners in this proceeding have rights therein which would be violated by interference by the city, the remedy must be sought in a court exercising proper jurisdiction. The Railroad Commission has no authority to adjudicate those rights, nor did the circuit court of Pulaski County acquire such jurisdiction on appeal.

The city council has no power to grant a charter to a railroad corporation or to exercise regulation and control over its operations, but the city has control over its own streets, and the question involved in this controversy is a judicial one—whether the rights have been properly granted by the city council, or whether the threatened interference with the operation of the track on the part of the city is in violation of contractual rights.

The judgment of the circuit court is therefore reversed and the cause is dismissed.

CRAWFORD v. PULASKI ROAD IMPROVEMENT DISTRICT NO. 10.

Opinion delivered June 26, 1922.

1. HIGHWAYS—CHANGES IN ROUTE OF ROADS TO BE IMPROVED.—Under Road Acts 1919, p. 1814, creating Road Improvement District No. 10 of Pulaski County, the county court could make changes in the routes of the roads to be improved where they were comparatively inconsequential and did not lessen the beneficial effects on the contiguous property, especially since the statute only designates the established roads by name, and the changed routes fall within the statutory description.
2. HIGHWAYS—DISCRETION OF COMMISSIONERS.—Road Acts 1919, p. 1814, creating Road Improvement District No. 10 of Pulaski County, vested in the board of commissioners discretion as to the extent and character of the improvement to be made, and permitted them to eliminate parts of the roads mentioned, and did not require them to repair roads already sufficiently improved or repaired.

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

Emerson, Donham & Shepherd and *Will G. Akers,* for appellant.

Commissioners of improvement districts have such powers only as are conferred by the express terms of the statutes under which they act, or such as are necessarily implied therefrom. 130 Ark. 410.

Neither expressly, nor by necessary implication, are appellees given by the statutes involved here, the authority to abandon any part of the roads which they are required to improve, nor is there any discretion invested in them with respect to changes of routes. On the contrary, these statutes evidence the legislative intent to provide for a construction upon certain well established highways and in no other places. See §§ 1 and 2 of the original Act, 436, Acts 1919; §§ 1 and 2 of Act 189, Acts 1920, Special Session, amendatory of §§ 2 and 4 of Act 436; § 6 of Act 436. The legislative intent is further evidenced by the fact that it did not, in the amendatory act, give the commissioners the power to make the improvement upon the described route, or *upon a route substantiating the same as the described route,* as was the case in the act involved in *Sikes* v. *Douglas,* 147 Ark. 469-473.

If the act is susceptible of a construction permitting the levy of special improvement district taxes upon lands which derive no direct, local or special benefit from the making of the improvement, then it is void as being arbitrary, unjust and discriminatory. 130 Ark. 70; 139 *Id.* 574; 142 *Id.* 73. The commissioners have no power to abandon the construction of a part of section No. 1, known as the Crystal Hill Loop road. 145 Ark. 487. Also they are without authority to build any portion of the Perryville road outside the limits of section No. 6. 50 Ark. 116; 133 *Id.* 64; 142 *Id.* 439; *Id.* 509.

Rose, Hemingway, Cantrell & Lougborough, for appellee.

The statute conferring power on the commissioners says: It shall be the duty of the commissioners to *con-*

struct, repair or improve the roads, or parts of roads hereinbefore described, by grading, draining and surfacing them in *such manner and with such materials as the commissioners deem best for the interest of the district,* etc. Under the broad powers thus conferred, the commissioners are not required to improve every part of the entire length of the road in each section, without regard to the lack of need to make the improvement in some parts and the lack of economy of improving such parts.

The assessment of benefits follows the plans and can only be such as will flow from the carrying out of the plans. Every part of each section would be benefited to some extent by the improvements shown on the plans, and what this extent will be is for the assessors to ascertain, subject to notice to the property owners and hearing, with rights of appeal. 125 Ark. 325.

The act does not attempt to specifically lay out the exact route of the roads to be improved, but they are described by name, with the provision that the public roads are to improved. The situation is essentially different from that of a district organized under the general road improvement law, wherein the investigation period is passed when the district is organized, and the property owners petition for definite improvements on a fixed route. 125 Ark. 325; 139 *Id.* 192; *Id.* 524; 147 *Id.* 469; 120 *Id.* 284.

As to the loop road mentioned as part of the Fort Smith road, the record shows that the commissioners should refrain from making improvements on this part of the road, and the Legislature gave them this power. The act is essentially different from that involved in the Phillips case, 145 Ark. 487. As to the small part of the Perryville road outside of the district, the decisions of this court are adverse to appellant's contentions. 103 Ark. 67; 125 *Id.* 330; 133 *Id.* 390; 139 *Id.* 524; *Id.* 160.

McCULLOCH, C. J. Road Improvement District No. 10 of Pulaski County was created by special statute enacted by the General Assembly at the regular session in

the year 1919, and there were subsequent amendments which do not affect the questions involved in the present litigation. Road Acts 1919, p. 1814.

The effect of the statute was to create six (6) subdistricts or sections, numbered, respectively one to six, which were tantamount to six separate districts, all operating under the same board of commissioners and other agencies. The statute was held to be valid by a decision of this court, *Cumnock* v. *Alexander,* 139 Ark. 153. Subdistrict No. 4 was eliminated from the statute by later enactment.

The statute provides, in substance, for the improvement in subdistrict No. 1 of the public road known as the Fort Smith road from a certain point in North Little Rock to the Faulkner County line at Palarm Creek bridge; and also provides for the improvement of a road in the same subdistrict designated as the River Loop road, branching off from the Fort Smith road and running along the established public road through Crystal Hill to a point of junction with the Fort Smith road south of Palarm Creek bridge.

There is a provision for improvement in subdistrict No. 2 of the public road known as the Baucum road, beginning where it intersects the road known as the Galloway pike and running through Baucum and over the bridge at Ashley Bayou to Scott's pike, and thence south and west to the Lonoke County line.

There is provision for improvement in subdistrict No. 3 of the road known as the Pine Bluff road, running out East Ninth Street in Little Rock from Main to Barber, thence south on Barber to the city limits, and thence south though Sweet Home and Wrightsville to the county line.

There is provision for improvement in subdistrict No. 5 of a road designated as the Twelfth Street pike, running out Twelfth Street from Main to the city limits, thence west to Ferndale.

There is provision for improvement in subdistrict No. 6 of a road designated as the Perryville road, run-

ning out Markham Street from Main to Victory, thence south on Victory to Third, thence west past Forest Park, and thence northwesterly to Cross Roads; and there is also provision for improvement in the same subdistrict of a lateral road, running northward from the main road at a certain designated point to Roland.

All of the roads designated were established public highways.

The statute declares that it shall be the duty of the commissioners to "construct, repair or improve the roads or parts of roads hereinbefore described, by grading, draining, and surfacing them in such manner and with such material as the commissioners deem best for the interests of the district, with full power to construct bridges, culverts and all necessary appurtenances of said roads." The commissioners formed plans for the several improvements to the extent of such improvement or repairs as they decided to make, and reported the plans and estimates to the county court, and the same were approved by the court. Certain changes in the routes of established roads were planned, and the county court made such changes in the manner provided by statute.

The present action was instituted in the chancery court by appellant, who is a citizen and owner of real property, to restrain the commissioners from carrying out the plans of improvement, on the alleged ground that the proposed plans constitute departures from the authority contained in the statute. The case was heard below on the pleadings, plans for the improvements, and other record evidence, and on oral testimony, and a decree was rendered dismissing the complaint for want of equity.

The basis of the several attacks on the proceedings of the commissioners are the following features of the proposed plans:

The route of the Fort Smith road is slightly changed in two places, and there is a slight change in the route of the road designated as the Roland lateral of the Perry-

ville road; that is to say, the routes of these roads have been changed by orders of the county court since the enactment of the statute now under consideration, and the plans of the commissioners conform to the changes of routes made by the court; the improvement of the River Loop road in subdistrict No. 1 is eliminated from the plans, and likewise the improvement of that part of the road in subdistrict No. 2 from the intersection with the Baucum road south and west of the Lonoke County line, the improvement of that part of East Ninth Street in subdistrict No. 3, the improvement of that part of Twelfth Street from Gaines to Lewis, in subdistrict No. 5, and the improvement of that part of Markham and Victory Streets in subdistrict No. 6.

The evidence in the case shows that the proposed changes are highly expedient from a standpoint of economy and practicability. The changes in the route of the Fort Smith road were made to eliminate dangerous railroad crossings, on account of which Federal Aid funds for the district would be denied; and the changes in the Roland lateral were made to obviate steep grades. The improving of East Ninth, Markham, Victory and Twelfth Streets was eliminated because they are now paved and in a fair state of repair. The River Loop road is now a good graded country road, running through a sparsely settled, rough territory, and the cost of two high-priced roads in the same territory is not justified, the main Fort Smith road, to be made a hard-surface road, having been selected as a primary road by the State Highway Commission. The road in subdistrict No. 2, running south and west to the Lonoke County line, is a macadam road in good state of repair. The Baucum road is also a macadam road somewhat out of repair, and this part of the road is to be repaired under the proposed plans, and this improvement, when completed, will make the whole of the designated road in that subdistrict a macadam road of the same quality and state of repair.

The proposal to change the routes of certain of the roads is attacked on authority of the previous decisions of this court. *Pritchett* v. *Road Improvement District,* 142 Ark. 511; *Nunes* v. *Coyle,* 148 Ark. 365. Those cases are not in point for two reasons: first, that the changes in route referred to in those cases were substantial, whilst in the present case the changes are comparatively inconsequential and do not lessen the beneficial effects on the contiguous property; and second, in those cases the districts were organized under general statutes on petitions of property owners, wherein the routes of the roads were specified, whereas, in the present instance the statute only designates the established road by name, and the changed routes still fall within the statutory description. We are of the opinion that the changes were not sufficiently material to destroy the identity of the project with the authority given in the statute.

It is next contended that the elimination of certain parts of the roads is unauthorized, and counsel for appellant relies on the decision of this court in *Phillips* v. *Tyronza and St. Francis Road Imp. District,* 145 Ark. 487. We must look to the language of the statute now under consideration, which contains the sole authority of the commissioners, and we find that different from the authority conferred by the statute dealt with in the case cited. There the statute described the road to be improved, including laterals, as a unit, and conferred no discretion concerning the portions to be improved. In the present instance the statute confers discretion on the commissioners either to construct anew or to repair the roads which were duly established highways, and such materials are to be used "as the commissioners deem best." Now this does not require the commissioners to improve roads already sufficiently improved, or to repair roads already in a good state of repair, sufficient for the practical uses of travel. Of course the assessment of benefits will be more or less affected by the extent and cost of the improvements or repairs and the proximity of the

lands to those portions of the roads which are to be improved or repaired, but the statute gives the commissioners authority to exercise discretion as to the character and extent of the improvement. We do not think that the authority conferred by the statute has been exceeded.

There is one other feature of this case which needs only to be briefly mentioned. It is shown that the proposed plans contemplate the improvement of the Perryville road a short distance beyond the limits of the district. The cost of this extension is very little—about one hundred dollars, the evidence shows—and now, since objection is made by a property owner, it is conceded that the extension is unauthorized, and it is to be fairly inferred that the commissioners have abandoned this extension.

Decree affirmed.

WOOD v. MILLER.

Opinion delivered June 26, 1922.

1. PLEADING—DEMURRER.—On demurrer to a complaint the facts stated therein must be taken as true.
2. OFFICERS—RIGHT TO HOLD OVER.—Where the incumbent of an office is authorized by law to hold over at the expiration of his term until his successor is elected and qualified, the period of his holding over is as much a part of the term as the term of the regular period fixed by law, and he has the legal right to protect his incumbency from one who unlawfully invades it or to sue a usurper to recover it.
3. OFFICERS—DISQUALIFICATION OF STATE REPRESENTATIVE TO HOLD OFFICE.—Under Const., art. 5, § 10, providing that no senator or representative shall, during the time for which he shall have been elected, be appointed or elected to any "civil office under this State," a representative could not be elected during his term of office to the office of municipal judge in a city of the first class, as municipal offices created by statute are civil offices under the State.

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

Reinberger & Reinberger, for appellant.

Appellant had the right to maintain the suit, his successor not having been elected and qualified. Acts 1917. Act 209, sec. 3 p. 1127. The period between the expiration of his term and the election and qualification of his successor is as much a part of his term as the fixed statutory period. 14 L. R. A. 858.

Appellee was not eligible to hold the office, as his doing so would contravene art. 5, par. 10 of the Constitution.

The office is a civil office under this State. Words and Phrases, Vol. 2, p. 1198, citing 102 Iowa 639; 41 Mo. 29 and 18 Sou. 157.

Caldwell, Triplett & Ross, Taylor & Jones, Powell & Alexander, and *Danaher & Danaher,* for appellee.

The office of municipal judge is not "an office under this State." 72 Ark. 180; 72 Ark. 230.

Appellant had no right to maintain the suit, being in the nature of *quo warranto* proceedings, which can only be brought by the Attorney General. 1 Ark. 279; 27 Ark. 12; 22 L. R. A. (N. S.) 810.

Appellee, assuming to act under an election authorized by law, had color of title to the office and could not be an usurper within the meaning of the statute. 133 Ark. 519, therefore the action could not be maintained under sec. 10326, C. & M. Digest.

McCULLOCH, C. J. This is an action instituted by appellant against appellee in the circuit court of Jefferson County to recover the office of judge of the municipal court of the city of Pine Bluff. The action is founded on the statute commonly known as the usurpation statute, which reads as follows:

"Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise." Crawford & Moses' Digest, sec. 10326.

Appellant was elected to the office in question for a term of two years at the regular municipal election on April 6, 1920, and holds over until his successor is elected and qualified.

Appellee was elected to the office at the regular municipal election on April 4, 1922, and claims the office and the right of exercising the functions thereof under said election.

Appellee was duly elected at the regular election on the.....day of November, 1920, as representative from Jefferson County in the General Assembly, and the contention of appellant is that appellee is ineligible to the office of municipal judge by reason of the fact that he was so elected to the office of representative and that the time for which he was elected has not expired.

There is no dispute as to the facts, for the court sustained a demurrer to the complaint, and the facts stated therein must be taken as true.

The Constitution (art. 5, § 10) reads as follows: "No senator or representative shall, during the time for which he shall have been elected, be appointed or elected to any civil office under this State."

The first question presented is, whether or not appellant has the right, under the facts stated, to maintain a suit challenging appellee's right to take the office.

The usurpation statute was a part of the Civil Code of Procedure enacted in 1868, and in the case of *Lambert* v. *Gallagher,* 28 Ark. 451, this court held that the statute was sufficiently broad in its terms and effect to include ordinary election contests for office. Subsequently, exclusive and original jurisdiction in contested election cases for county and township offices was conferred upon county courts (Crawford & Moses' Digest, § 3850), and this court held that the later statute amended the usurpation statute to the extent only that it relates to contested county and township offices, but that it is still in force, as construed in *Lambert* v. *Gallagher, supra,* as to contests for municipal offices where no other jurisdic-

tion is conferred by statute. *Whittaker* v. *Watson,* 68 Ark. 555.

In the case of *Wheat* v. *Smith,* 50 Ark. 266, construing the usurpation statute, this court said: "The design of these provisions is to enlarge the remedy formerly afforded by information in the nature of *quo warranto.* * * * * It opens the way for the person who would have been the relator in an action by the State under the common-law practice to institute the proceedings to test his title to an office in his own name, without leave of court, or the intervention of the State or one of her officials, as a party. * * * * It is operative in so far as it is not inconsistent with the jurisdiction conferred on the county courts."

This is not, in fact, a contest of an election, for, as said in *Wheat* v. *Smith, supra,* there is nothing to contest concerning the result of the election. Appellee was elected, as conceded, but appellant is contesting his eligibility to hold the office, and he has the right to do so.

Where the legal incumbent of an office is authorized by law to hold over after expiration of the term until his successor is elected and qualified, the period of his holding over is as much a part of the term as the regular period fixed by law. *Kimberlain* v. *State* (Ind.), 14 L. R. A. 858. He has the legal right during that period to protect his incumbency from one who unlawfully invades it or to sue an usurper to recover it.

Counsel for appellee rely on the decision in *Ferguson* v. *Wolchansky,* 133 Ark. 516, but that case does not support the contention. That was a contest for the office of school director, and we held that it was a county office within the meaning of the statute conferring jurisdiction on the county court. We held also, in *Condren* v. *Gibbs,* 95 Ark. 478, that a road overseer was a county officer, and that a contest for that office fell within the jurisdiction of the county court. The case of *Lucas* v. *Futrall,* 84 Ark. 540, is also decisive of appellant's right under the statute to bring this action.

Counsel also contend that appellant has surrendered the office to appellee, that he has abandoned the office and thereby relinquished his right to claim it. This is not so under the allegations of the complaint, which must be taken as true for the purpose of testing the sufficiency of the complaint on demurrer.

This brings us to consideration of the question whether or not appellee is eligible to the office of judge of the municipal court.

Counsel for appellee rely on the decisions of this court in *Murphy* v. *Townsend,* 72 Ark. 180, and *Peterson* v. *Culpepper,* 72 Ark. 230. In each of those cases there was involved the right of a person to hold a county office and a municipal office at the same time. The court decided in each case that there was no incompatibility in the discharge of the duties of the two offices, and that the Constitution did not prohibit it. These cases involved the application of a clause of the Constitution (art. XIX, § 6) which provides that no person "shall hold or perform the duties of more than one office in the same department at the same time." The effect of the language used in those opinions must, of course, be confined to the question involved in the cases for decision. We are now dealing with a provision of the Constitution altogether different from the one quoted above. It applies only to senators and representatives in the General Assembly and provides that they shall not, during the time for which they shall have been elected, "be appointed or elected to any civil office under this State."

The purpose of this provision of the Constitution is plain. In many of the States the Constitution merely prohibits legislative representatives, during their terms, from holding an office created during that term, or where the salary of the office is increased during the term. But the language of our Constitution is broader. There is no uncertainty about what constitutes a civil office within the meaning of the Constitution. Our own decisions define it. *Lucas* v. *Futrall, supra.* "A civil office is a grant

and possession of the sovereign power." *State* v. *Spaulding,* 102 Iowa, 639.

The Supreme Court of Mississippi, in the case of *Shelby* v. *Alcorn,* 36 Miss. 273, held that under a provision of the Constitution identical with our constitutional provision on that subject, a member of the Legislature could not, during his term, hold the office of levee inspector, and in the opinion said: "It follows, hence, that whether an office has been created by the Constitution itself, or by statute enacted pursuant to its provisions, the incumbent, as a component member of one of the bodies of the magistracy, is vested with a portion of the power of the government, whether the portion of the power of the government which he is thus entitled to exercise is legislative, judicial, or executive in its character."

Mr. Mechem in his work on Public Officers (§ 24) says: "Any officer who holds his appointment under the government * * * is a civil officer."

The words "under this State," as used in the Constitution, mean under the laws of this State or by virtue of or in conformity with the authority conferred by the State as sovereign. It embraces all offices created by the laws of the State as contradistinguished from other authority. Municipal offices are created by the statutes of the State and are therefore civil offices "under this State."

Our conclusion is that appellee is ineligible to hold the office in controversy.

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

NEAL v. STATE.

Opinion delivered June 26, 1922.

1. INTOXICATING LIQUORS—INDICTMENT—DUPLICITY.—An indictment under Acts 1921, No. 324, § 1, charging that defendant did unlawfully make mash, wort or wash, *held* to charge but one offense.
2. INTOXICATING LIQUORS—LANGUAGE OF STATUTE.—Acts 1921, No. 324, forbidding the making of mash, wort or wash "fit for" distillation of intoxicating liquors, meant that the wash was intended for use in making alcoholic liquors, and not merely a mash which is adapted to or capable of being used for that purpose.
3. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—In a prosecution for unlawfully manufacturing intoxicating liquors, evidence held to sustain a verdict of guilty.

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

No brief for appellant.

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

WOOD, J. The indictment on which the appellant was tried and convicted, omitting formal parts, is as follows:

"The grand jury of Lafayette County, in the name and by the authority of the State of Arkansas, accuse Walter Neal of the crime of manufacturing, making and fermenting mash, committed as follows, to-wit: The said Walter Neal, in the county and State aforesaid, on the 20th day of February, A. D. 1922, did unlawfully, wilfully and feloniously make and ferment 25 gallons of mash, wort or wash fit for and to be used in the distillation, making and manufacturing of alcoholic, vinous, malt, spirituous and fermented liquors; said Walter Neal not being a person authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages or spirits for other than beverage purposes," etc.

The appellant demurred to the indictment on the ground that it charged more than one offense. The court overruled the demurrer, and the appellant duly excepted to the ruling.

The testimony on behalf of the State tended to prove that the mayor and other officers of the town of Stamps, Arkansas, suspected that the appellant was engaged in violating the liquor law and made a raid upon his home on the night of August 20, 1921, with a view of discovering evidences thereof, if possible. In passing through the main room of appellant's dwelling they smelled whiskey and mash. Just on the outside of the door on a rack they found a 16-gallon keg running over with mash. They followed evidences of where the mash had been dripped along until they found where it had been poured out over the yard fence. The mash smelled like it was about ready to run. It contained chops or shorts, and had been sweetened. They found in the house a keg and a jar which had contained shorts and chops. The keg and jar were still damp, and there was a great pile of chops where appellant had emptied the keg of mash. The mash found in the jar and keg in the house was the same kind as that found poured out on the weeds. The officers had been informed that a still was buried in the yard. They found a hole in the yard under a board or plank walk. From the looks of the mash that had been poured out, and the container, there must have been 20 or 25 gallons of the mash. The officers asked the appellant how he came to have the chops there and he said that he was saving it for Brother Somebody's hogs. The appellant denied that he had poured out the chops over the back fence, which was about fifty feet from his back door. The officers found fruit jars and bottles about the size of Wine of Cardui bottles, which contained a small quantity of whiskey. This all happened in Lafayette County.

The appellant was not present when the search of his premises was made. Witnesses were positive that whiskey had been in the jars found in appellant's residence. The only whiskey found on his place was that found in the container mentioned. The hole found in his yard under the plank walk was about two feet deep and a foot or fourteen inches wide. There was testimony to the

effect that the stuff found in the jar and keg at appellant's residence was the same as that poured out over the back fence and the same kind as that found by the officers at other places where whiskey was being made. The officers didn't find any still, but the hole at the back of appellant's house looked like a still or oil can had been buried in it.

One witness testified that he had been a farmer and had fed hogs, but never fed his hogs on high-class stuff made of shorts, sugar and meal. He tasted the mash and knew that it had been sweetened with sugar. The State also introduced a certificate of the internal revenue collector to the effect that the records of his office did not show that the appellant was authorized under the laws of the United States to make and ferment mash, wort, or wash for the distillation of spirits, alcoholic, vinous, malt, spirituous and fermented liquors.

The appellant testified in his own behalf, and his testimony and the testimony of other witnesses tended to prove that he was not guilty of the crime charged. The court read to the jury sec. 1 of act 324 of the Acts of 1921, as follows: "No mash, wort, or wash fit for distillation or for the manufacture of beer, wine, distilled spirits or other alcoholic liquors shall be made or fermented by any person other than a person duly authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages, or spirits for other than beverage purposes."

The court also read to the jury the statute prescribing the punishment for violation of the above act, and then instructed the jury as follows: "So in this case, gentlemen, if you find from the testimony, beyond a reasonable doubt, that this defendant did make or ferment mash—any quantity thereof, as alleged in the indictment—of mash, wort or wash fit for and to be used in the distillation, making and manufacturing of alcoholic, vinous, malt, spirituous or fermented liquors, and that the defendant was not a person authorized under the laws of the United States to manufacture sweet cider, vinegar,

non-alcoholic beverages, or spirits for other than beverages, you will find him guilty and assess his punishment at imprisonment in the penitentiary for some period of time not less than one or more than five years. If you entertain a reasonable doubt growing out of the evidence, you will give him the benefit of that doubt and acquit him."

The appellant asked the court to instruct the jury as follows: "The jury is instructed that, before they can convict the defendant of the crime of making and fermenting mash, they must find beyond a reasonable doubt that defendant made and fermented mash fit for distillation of intoxicating liquors and that he intended same for distillation of intoxicating liquors."

The court refused this prayer, and appellant excepted to the ruling.

1. The indictment follows the language of the statute and is sufficient. *Wolfe* v. *State,* 107 Ark. 33, and cases there cited. Webster gives the definition of "mash" when used in brewing and distilling as follows: "Crushed malt, or meal of rye, wheat, corn, etc., steeped and stirred in hot water to form wort." "Wort," says he, is "essentially a dilute solution of sugar, which by fermenting produces alcohol and carbon dioxide;" "the sweet infusion of malt which ferments and forms beer; hence any similar liquid in incipient fermentation." "Wash," he defines as "a fermented wort from which spirit is distilled." It is clear therefore that the Legislature used these terms synonymously, and when they are used in an indictment in precisely the language of the statute they do not charge separate and distinct offenses, but only one offense.

2. The court did not err in its instructions. These instructions conform to the law as announced by this court in two recent cases. See *Logan* v. *State,* 150 Ark. 486, 490, 491; *Burns* v. *State, ante* p. 215. In these cases we held: "The phrase 'fit for distillation,' contained in the statute, as meaning that the wash was intended for

use in making alcoholic liquors, and not as merely meaning a mash which is adapted to, or capable of, being used for that purpose."

The testimony on behalf of the State was sufficient to sustain the verdict. Under the evidence the issue of guilt or innocence of the crime charged was one of fact for the jury. The record presents no error in the rulings of the trial court. The judgment is therefore affirmed.

LITTLE RED RIVER LEVEE DISTRICT NO. 2 *v.* THOMAS.

Opinion delivered June 26, 1922.

1. INJUNCTION—CUTTING TIMBER.—As a general rule, equity will not grant injunction against cutting timber, unless an irreparable injury to the property will result, or the destruction of the timber will render the freehold less susceptible of enjoyment, or the acts of trespass are of such a nature to establish a nuisance, or the defendant is insolvent.
2. JUDICIAL SALE—NECESSITY AND EFFECT OF CONFIRMATION.—A sale of land for taxes by a commissioner under a decree of court is not complete until confirmed, but on confirmation all objections to the sale are concluded, and the rights of the purchaser relate back to the date of sale.
3. TAXATION—RIGHTS OF PURCHASER AT TAX SALE.—During the period of redemption a purchaser at a tax sale has no right to the possession of the land, and therefore no remedy at law against the former owner for cutting and removing growing timber from the land.
4. INJUNCTION—IRREPARABLE INJURY.—Injunction will be granted where the injury is of such a peculiar nature that compensation in money cannot atone for it.
5. EQUITY—ADEQUATE REMEDY AT LAW.—An adequate remedy at law means a present remedy, not one that might be exercised at some time in the future.
2. INJUNCTION—CUTTING OF TIMBER.—Where land chiefly valuable for its timber was sold under a tax sale, the purchaser, though not entitled to possession because the redemption period had not elapsed, was entitled to an injunction restraining the wrongful cutting of the timber.

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

STATEMENT OF FACTS.

This is a suit brought in equity by the Little Red River Levee District No. 2 against A. E. Thomas to restrain him from cutting and carrying away timber on certain lands claimed by it as purchaser under a foreclosure sale in chancery to collect the levee taxes due on the lands.

It appears from the record that certain levee taxes on the lands were not paid; that Little Red River Levee District No. 2 was duly organized under the statutes of this State, and brought a suit in chancery to foreclose its lien against said lands for the nonpayment of the levee taxes; that a decree was rendered in its favor for the taxes, penalty, and costs against the lands mentioned in the complaint; that said lands were ordered sold by a commissioner appointed for that purpose; that, pursuant to the terms of the decree, they were sold for the nonpayment of said levee taxes, penalty, and costs; that plaintiff became the purchaser at said sale, and a certificate of purchase was duly issued to it by said commissioner; that since the purchase by the plaintiff at said sale, the defendant and his servants have unlawfully entered upon said lands and are cutting and carrying away the growing timber therefrom; that said timber is of great value, and that said defendant is threatening to continue to cut down and remove said timber, in disregard of the plaintiff's rights; that said lands are chiefly valuable on account of the growing timber thereon; that plaintiff has no reasonable way of ascertaining the quantity and value of the timber being removed by the defendant, and that an investigation to determine that fact is prohibitive on account of the expense thereof; that plaintiff has no right to the possession of said lands until the period of statutory redemption in favor of the original owner expires, and the plaintiff is therefore without adequate remedy at law.

The prayer of the complaint is that the defendant be enjoined from cutting and removing the trees from said lands.

The defendant filed a demurrer to the complaint, which was sustained by the chancery court. The plaintiff elected to stand on its complaint and declined to plead further. The chancery court dismissed the complaint for want of equity, and plaintiff has duly prosecuted an appeal to this court.

Culbert L. Pearce, for appellant.

In seeking a reversal of the chancellor's denial of injunctive relief in this case, we are not unmindful of the declarations by this court in *Meyers* v. *Hawkins,* 67 Ark. 413; *Western Tie & Timber Co.* v. *Newport Land Company,* 75 Ark. 287, and *Hall* v. *Wellman,* 78 Ark. 408; but the facts of each case should be considered, and the rule most suitable to the facts applied, as is the inclination of the courts at the present time, to the end that justice and equity may prevail. Certainly, under the facts alleged in the complaint, appellant is entitled to equitable relief, and should not be remitted to a court of law. 4 Pomeroy on Equity, 4th Ed. 3239; 5 *Id.* p. 4332; 14 R. C. L., 443, 455, 457, 459; 84 Fed. 546; 92 Mo. App. 510; 43 L. R. A. (N. S.) 262; L. R. A., 1917-C, 232; 122 Fed. 735; 43 Ore. 400, 49 Am. St. Rep. 759.

Brundidge & Neelly, for appellee.

Appellant gives no reason why the court should overturn its long established rule relative to injunctions to prevent trespass to real property, unless he means to contend as a reason for reversal that there was a continuing trespass; but there are no allegations in the complaint to support that contention. If appellant has any right to equitable relief at all, the suit is prematurely brought, since, in a case of this kind, as in ejectment, the plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's. 14 R. C. L. 450; 73 Ark. 201.

In support of the chancellor's ruling, in addition to the three decisions first cited by appellant, see 144 Ark. 94.

HART, J., (after stating the facts). The general rule in this State is that equity will not grant relief by injunction against the cutting of timber unless it is shown that an irreparable injury to the property will result, or that the destruction of the timber will render the freehold less susceptible of enjoyment, or that the acts of trespass are of a nature to constitute a nuisance, or that the defendant is insolvent. *Meyers* v. *Hawkins*, 67 Ark. 413, and *Hall* v. *Wellman Lumber Company*, 78 Ark. 408.

The decree of the chancellor was based upon his belief that the facts alleged in the complaint brought the case within the general rule just announced.

We cannot agree with the learned chancellor in this conclusion. According to the allegations of the complaint, the levee district purchased the lands in question at a foreclosure sale in chancery for the nonpayment of the levee taxes, and received a certificate of purchase. The lands are chiefly valuable for the growing timber on them, and the defendant commenced to cut and remove the timber from the lands during the period of time for redemption under the statute allowed the original owner of the lands. The defendant threatened to continue his trespass in cutting and removing the timber from the lands. Without confirmation, a sale made by a commissioner under a decree of court is not complete so as to pass the title to the lands sold, and the sale may be set aside upon valid grounds. When, however, a confirmation of the sale is made, all objections thereto are concluded, and the rights of the purchaser springing therefrom relate back to the date of the sale which was made by the commissioner. *Robertson* v. *McClintock*, 86 Ark. 255, and *Brasch* v. *Mumey*, 99 Ark. 324.

The trespasses in the present case were committed during the time for redemption allowed the original owner of the lands.

During the statutory period of redemption the levee district had no right to the possession of the lands, and therefore no remedy at law against the defendant during

this period of time for cutting and removing the growing timber from the lands.

In the first case cited above, injunctive remedy was denied because the plaintiff's remedy at law was adequate and complete. On this point the court said:

"They can sue in ejectment for possession of the land, recover the timber already cut, and that may be cut, in replevin, if it can be found, and, in case the timber already cut has been removed and cannot be found, they can recover its value; for it does not appear that appellee is insolvent." *Meyers* v. *Hawkins,* 67 Ark. 413.

In *Hall* v. *Wellman Lumber Company,* 78 Ark. 408, an injunction was granted to the plaintiff on the ground that his remedy at law was not adequate and therefore his loss would be irreparable. The peculiar facts of that case were that the plaintiff had purchased the timber from the owner of the land and had erected a mill near the land to manufacture the timber into lumber. Its loss could not be compensated by the market value of the timber, and on this account it was held that its remedy at law was inadequate.

As we have already seen, insolvency is an element in determining whether or not the court should act in granting an injunction in a case like this. It is also manifest, from the cases cited, that any injury of such a peculiar nature that compensation in money cannot atone for it will be considered an irreparable injury and therefore remediless at law. An adequate remedy at law means a present remedy, and not one that might be exercised at some time in the future. For instance, in the present case the defendant might cut and remove all the timber from the lands and leave the State, or become insolvent, during the statutory period for redemption given the owner. It is true that when the period of redemption has expired without that right having been exercised by the owner, the rights of the purchaser will relate back to the date of the sale, but in the meantime the defendant will have denuded the lands of the timber, and the plain-

tiff would have no redress at law. The complaint shows that the chief element of value to the lands is the growing timber on it. Therefore, the remedy of the plaintiff at law would be inadequate and incomplete, and his loss would be irreparable.

This brings the case under the general rule that an injunction will lie to restrain trespass in cutting and removing timber from land where the injury done or threatened would result in irreparable loss to the plaintiff.

It follows that the decree must be reversed, and the cause will be remanded, with directions to overrule the demurrer to the complaint, and for further proceedings in accordance with the principles of equity.

BAGGETT v. STATE.

Opinion delivered June 26, 1922.

1. TIME—MODE OF COMPUTATION.—Where on March 9th, after motion for new trial overruled, defendant was granted 45 days to file a bill of exceptions, the filing of such bill on April 24th following was not valid; the time being computed by excluding the first and including the last day of the period allowed.
2. CRIMINAL LAW—MATTERS REVIEWABLE.—The overruling of a motion for a continuance will not be considered, in the absence of a bill of exceptions containing the motion and showing that an exception to the court's ruling was saved.

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

Appellant *pro se*.

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

HART, J. Kelsey Baggett prosecutes this appeal to reverse a judgment of conviction against him for the statutory crime of deserting his wife without good cause.

He was given forty-five days within which to prepare and file his bill of exceptions. There is in the transcript what purports to be a bill of exceptions in the case.

It was not filed within forty-five days, according to the rule laid down in the case of *Early & Co.* v. *Maxwell & Co.,* 103 Ark. 569.

In that case the court held that where time is allowed by the trial judge for filing a bill of exceptions beyond the term, for a given number of days, the rule for computing the time allowed is to exclude the day on which the order granting the time is made and include the last day.

The motion for a new trial was overruled, and the defendant granted forty-five days to prepare and file his bill of exceptions on March 9, 1922. The purported bill of exceptions was not filed until the 24th day of April, 1922. This was not within the time given, and we cannot, therefore, consider the assignments of error in it.

One of the alleged assignments of error is that the court erred in refusing to grant the defendant a motion for a continuance.

In *Johnson* v. *State,* 142 Ark. 402, it was held that the overruling of a motion for a continuance will not be considered on appeal where the bill of exceptions does not contain the motion or show that any exceptions were saved to its overruling.

The other alleged assignments of error relate to the admissibility of evidence and the instructions given or refused by the court. That we cannot consider these matters in the absence of a bill of exceptions is so well settled in this State that no citation of authorities on the point is necessary.

There is no error on the face of the record, and the judgment must therefore be affirmed.

INDIAN BAYOU DRAINAGE DISTRICT *v.* WALT.

Opinion delivered June 26, 1922.

1. DRAINS—NEW DRAINAGE CANAL NOT AUTHORIZED.—A new and independent drainage canal exceeding in cost the whole system originally contemplated and completed was an improvement so extensive and so different from that originally planned that it would have to be accomplished through the formation of a new district, and not as an extension of the canal as originally constructed nor as a widening or deepening of the ditch already completed.
2. DRAINS—RIGHT TO ALTER PLANS.—Where a drainage district was organized under Crawford & Moses' Dig., § 3607 *et seq.*, and the work completed, any plan of improvement thereafter contemplated would be a new plan, and not the original plan altered and changed, and no authority is conferred by § 3625, *Id.*, to file or change plans after the work originally contemplated has been completed.

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

Chas. A. Walls, for appellant.

Drainage districts continue to exist for the purpose of preserving the same, keeping the ditches clear from obstruction, and for extending, widening or deepening the ditches as may be found advantageous. Sec. 3630, C. & M. Digest. The commissioners may at any time alter the plans of the ditches and drainage. Sec. 3625, C. & M. Digest. The court has held under the drainage act then in force that the county court might establish a ditch on a different route from that mentioned in the petition when it was better and less expensive to do so. 64 Ark. 555. The alternative drainage system did not repeal the other drainage laws, and drainage districts can be established under either system. 126 Ark. 518.

Clifton Gray and *Murphy, McHaney & Dunaway,* for appellees.

The commissioners have power to alter the location of the ditches at any time before constructing the work. Sec. 3625, C. & M. Digest; 91 Ark. 30; *Id.* 79; 147 Ark. 546.

Section 3630, C. & M. Digest, applies only where the item of expense is small, such as cleaning out the ditches. But where the change involves heavy expense the property owner is entitled to be heard.

WOOD, J. The appellees, who were landowners in the Indian Bayou Drainage District of Lonoke County, Arkansas (hereinafter called district) instituted this action against the district and its commissioners. Appellees alleged that the district was established in September, 1912, under act No. 279 of the Acts of 1909 and the amendments thereto; that the commissioners, under the authority of the general drainage laws, constructed a drainage system twenty-five miles in length, consisting of a main canal and many laterals leading into same; that the benefits to the lands in the district were assessed and bonds issued and sold in the sum of $147,000, and that taxes were levied and collected and were still being collected from the landowners of the district; that in December, 1921, the commissioners filed with the clerk of the county court of Lonoke County what was called "report of board of commissioners on changes in plans, and plans for extending, deepening, widening, straightening, cleaning, and otherwise improving the system of drainage in said district, and transmitting plans, specifications and estimates of the cost of the proposed work," in which it is proposed to construct an additional canal generally paralleling Old Indian Bayou main canal from the point where lateral 8 of the original drainage system enters Snow Brake, through said brake, thence in a southeasterly direction through the lowlands lying west of Indian Bayou main canal, and across the main canal on the east line of said section 1, at a point south of the quarter section line, and to construct an additional outlet through the old channel of Indian Bayou at a point about one thousand feet south of the village of Tomberlin, where the banks of the Indian Bayou are very steep and the channel well defined. It is alleged that the proposed improvement will cost the landowners, in addi-

tion to the taxes already levied in said district, a sum of from one hundred and fifty to two hundred thousand dollars, and that it is contemplated that the commissioners will reassess the benefits and call on the county court to levy additional taxes to cover the cost of making the proposed improvement. The appellees further alleged that the proposed improvement is for the digging of another main canal of more than five miles in length within the boundaries of the district. It is alleged that the county court is without jurisdiction to make the improvement in the manner proposed; that the canal proposed would be of no benefit to the lands in the district, but, on the contrary, would result in great damage, and would be a taking of appellee's property without due process, in violation of sec. 22, art. 2 of the Constitution of the State, and of the Constitution of the United States.

The appellees prayed that the appellants be enjoined from taking any further steps in the proposed proceedings. Attached to the complaint as an exhibit is a copy of a map or blue-print showing the boundaries of the district, with the location of the ditches already constructed and the proposed changes.

The appellants demurred to the complaint on the following grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court has no jurisdiction of the subject-matter; and third, that the plaintiffs have an adequate remedy at law.

At the hearing on the demurrer the court sustained the demurrer to all parts of the complaint "except that part relating to the contruction of a parallel ditch indicated on the map as from stations 'A' to 'O', and overruled the demurrer as to that part of the complaint. The court entered a decree restraining the commissioners from constructing the additional canal as shown on the copy of the blueprint from stations 'A' to 'O'," From that decree is this appeal.

Section 22 of act No. 279 of the Acts of 1909, digested as sec. 3630, C. & M. Digest, reads as follows: "The district shall not cease to exist upon the completion of its drainage system, but shall continue to exist for the purpose of preserving the same, of keeping the ditches clear from obstruction and of extending, widening, or deepening the ditches from time to time, as it may be found advantageous to the district. To this end the commissioners may from time to time apply to the county court for the levying of additional taxes. Upon the filing of such petitions, notice shall be published by the clerk for two weeks in a newspaper published in each of the counties in which the district embraces lands, and any property owner seeking to resist such additional tax levy may appear at the next regular term of the county court and urge his objections thereto, and either such property owners or the commissioners may appeal from the finding of the county court."

Section 2 of act No. 177 of the Acts of 1913, digested as sec. 3625, C. & M. Digest, reads as follows: "The commissioners may at any time alter the plans of the ditches and drainage, but, before constructing the work according to the changed plans, the changed plans, with accompanying specifications, showing the dimensions of the work as changed, shall be filed with the county clerk, and notice of such filing shall be given by publication for one insertion in some newspaper issued and having a *bona fide* circulation in each of the counties in which there are lands belonging to the district. If, by reason of such changes of plans, either the board of commissioners or any property owners deem that the assessment on any property has become inequitable, they may petition the county court, which shall thereupon refer the petition to the commissioners hereinbefore provided for, who shall reassess the property mentioned in petition, increasing the assessment if greater benefits will be received, and allowing damages if less benefits will be received or if damages will be sustained. In no event shall a reduction

of assessments be made after the assessment of benefits has been confirmed, but any reduction in benefits shall be paid for as damages, and the claim for such damages shall be secondary and subordinate to the rights of the holders of bonds which have heretofore been issued. From the action of the commissioners in the matter the property owners shall have the same right of appeal that is herein provided for in the case of the original assessment."

The appellants invoke the above sections of the digest of the drainage laws as authority for the proposed improvement. It will be observed that sec. 3630, *supra,* provides that the district, after the completion of the improvement for which it was created, shall continue to exist for the purpose, among other things, of "extending, widening, or deepening the ditches from time to time, as may be found advantageous to the district." Additional taxes are authorized for such purpose.

The allegations of the complaint, which the demurrer admits to be true, are that the proposed improvement is for the digging of another main canal of more than five miles in length within the boundaries of the present Indian Bayou Drainage District which was established many years ago and completed; and further, "that the board of commissioners * * * * is now seeking to construct and put into operation at an estimated cost of from one hundred and fifty to two hundred thousand dollars an entirely new and independent drainage canal practically parallel to the Indian Bayou main canal." An examination of the map which is brought into the record showing the location of the proposed canal from stations "A" to "O" confirms the admitted allegation of the complaint that the proposed canal which the commissioners now propose to dig is not an extension of the canal originally constructed, nor a widening or deepening of the ditches that were already completed, but is in very truth, as alleged and admitted, a new and independent drainage canal. It is a new improvement not in the nature of extending, widening, or deepening the ditches that had

been constructed according to the plans originally contemplated in the formation of the district. Specific authority for making an improvement of this character must be found in the law, and it is impossible to find in the language of sec. 3630, *supra,* giving the words "extending, widening, or deepening," their plain and natural meaning, any authority for the construction of a new and independent improvement such as is shown by the facts of this record.

Sec. 3630, *supra,* clearly confers upon the commissioners of the drainage district created thereunder the power to preserve the drainage system, after the same has been completed as contemplated, by keeping the ditches clear from obstruction, and the power to extend, widen and deepen the same. But certainly these words cannot be stretched in meaning so as to confer power upon the commissioners to construct a new and independent drainage canal, which, according to the admitted facts, would exceed in cost the whole system of drainage originally contemplated and completed. An improvement so extensive and so radically different from that originally planned and completed, however expedient and desirable, would have to be accomplished through the formation of a new district or subdistrict. Secs. 3570, 3650, C. & M. Digest. At any rate, such improvement cannot be effectuated under the guise of "extending, widening, or deepening" the ditches already constructed. The canal here proposed is not incidental to the original drainage system, but is itself original and independent. It is too wide a departure from the original drainage system to be embraced within the authority conferred upon the commissioners to "extend, widen, or deepen" the ditches. See *Rayder* v. *Warrick,* 133 Ark. 491; *Hout* v. *Harvey,* 135 Ark. 102; *Carson* v. *Rd. Imp. Dist.,* 150 Ark. 379; *Higginbotham* v. *Road Imp. Dist., ante* p. 112.

To give the county court jurisdiction to make such an improvement, the procedure would have to be inaugurated by property owners in the manner pointed out in

the statute, and not by the commissioners of an already created district. Secs. 3607-3608, C. & M. Digest. The district was organized in September, 1912, under the alternative system of drainage districts. Secs. 3607 *et seq.* Sec. 3625, *supra,* under that system, providing that the commissioners may at any time alter the plans of the ditches and drains, has no application here, for the reason that that section contemplates that the commissioners may alter or change the plans of the ditches or drains before the drainage system contemplated by the creation of the district has been completed. Obviously, after the original drainage system contemplated in the creation of the district has been completed, it would be a contradiction in terms to say that thereafter the commissioners would have the power to alter the plans. After the original plans had been carried out, of course it would be too late to alter same. Any plan of improvement thereafter contemplated would necessarily be a new plan, and not the original plan altered or changed.

Here the record shows that the original drainage district organized in 1912 began the work for which it was created in the year 1913 and completed the same in the year 1916. In December, 1921, about five years thereafter, the commissioners filed with the clerk of the county court of Lonoke County a report called "Report of board of commissioners on changes in plans, and plans for extending, deepening, widening, straightening, cleaning, and otherwise improving the system of drainage in said district." Sec. 3625, *supra,* expressly authorized the commissioners to alter the plans of the ditches and drains before constructing the work for which the district was organized. But there is no authority conferred under this section to file plans, or change plans, after the work originally contemplated has been completed. See *Protho* v. *Williams,* 147 Ark. 535, 546.

The decree of the court therefore, overruling the demurrer to the allegations of the complaint which set up the construction of a new drainage canal from stations

"A" to "O," and restraining the commissioners from inaugurating proceedings looking to the completion of the proposed canal, is in all things correct, and it is affirmed.

JACKSON v. MUTUAL FIRE INSURANCE ASSOCIATION OF ARKANSAS.

Opinion delivered June 26, 1922.

1. INSURANCE—LIABILITY BEFORE LICENSE SECURED.—Where plaintiff made application and paid the premium on a fire insurance policy with a mutual company, but the premises were burned before the company secured a license to do business in the State, and the company returned the premium, plaintiff has no enforceable claim, as the company, under Crawford & Moses' Dig., §§ 6019-6023, had no right to enter into a binding contract of insurance before securing a license.
2. INSURANCE—UNLAWFUL CONTRACT—RATIFICATION.—Where plaintiff applied for a fire insurance policy and paid the premium, but the premises burned before the company had secured a license to do business, the subsequent conduct of the company in recognizing plaintiff's claim could not create a contract; that company having no authority to make such a contract.

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

Bogle & Sharp, for appellant.

There was a parol contract, binding appellee to pay appellant for any loss she might sustain, and said contract is enforceable. 26 C. J. 45; 63 Ark. 205; 67 Ark. 433; 35 N. D. 160; 209 Ill. A. 557; 94 U. S. 621; 124 Ark. 505.

A parol contract of insurance, evidenced by a binder intended to cover the property until the issuance of a policy, is not invalidated by the fact that a standard form of policy is prescribed by statute. 26 C. J. 48.

Emerson, Donham & Shepherd and *S. A. Jones,* for appellee.

Appellee had no legal capacity to enter into a contract until about five months after appellant's loss, hence there could have been no binding contract.

The writing held by appellant was an application for insurance, with a receipt for the money paid.

Bogle & Sharp, for appellant, in reply.

A contract made by the promoters of a corporation before it was formed becomes the contract of the corporation. 14 C. J. 257; 37 Ark. 164; 91 Ark. 367; 97 Ark. 248.

WOOD, J. This is an action by the appellant against the appellee to recover the sum of $685 which the appellant alleged was due her from the appellee on a contract of fire insurance. She attached as an exhibit to her complaint, which was in evidence before the jury, the following document: "Application and Receipt. $1,600. No. 41-42. Mutual Fire Insurance Association of Arkansas. Camden, Arkansas. We are responsible only for statements made in accordance with our printed literature. It is understood and agreed that the policy is to follow this receipt.

"April 17, 1920.

"GREETINGS:

"I hereby make application for insurance in said Mutual Fire Insurance Association of Arkansas, for which I agree to pay premium $35.80, thirty-five and 80/100 dollars. It is further agreed that in case the said Mutual Fire Insurance Association of Arkansas fails to comply with all laws governing the organization of such fire insurance within twelve months from date, I am to receive back the money I pay for such insurance.

"Cash value of building $1,500; premium $35.

"Cash value of H. H. Goods $900; due $3.40.

"Cash value of stock———. Agent, C. W. Williams.

"Received of Mary G. Jackson, City of Brinkley, Street or Box No.——

"State of Arkansas.

"T. S. Sandefur Georgia E. Bowie"

"President Secretary."

On the back of the receipt was the following: "Application and Receipt, Mutual Fire Insurance Association of

Camden, Arkansas, to Mary Gaines Jackson, amount of receipt $22.40, amount of premium $35.80, value of insured items $1,600; location Brinkley, Arkansas; premium due $13.40; Agent, C. W. Williams, address, Camden, Arkansas. It is understood and agreed that policy is to follow in twelve months or that money paid will be refunded."

Appellant alleged that the appellee was a mutual fire insurance association of Arkansas organized under the laws of the State, and that she had paid the premium mentioned in the above receipt and that her household goods were insured by the appellee in the sum of $900, and that by virtue thereof she was entitled to and had insurance on her household goods, in the sum of $900, which goods were destroyed by fire on December 20, 1920, to the value of $685, for which she prayed judgment.

The answer of the appellee admitted that it was a mutual fire insurance association duly organized under Act No. 652 of the Acts of 1919, approved April 3, 1919. The answer denied all other material allegations of the complaint and denied liability. The facts are substantially as follows:

The appellee was organized as a mutual fire insurance association and was licensed as such by the Insurance Commissioner to do business in the State of Arkansas on the 11th of May, 1921. See secs. 6019 to 6036, C. & M. Digest, inclusive. On April 17, 1920, one C. W. Williams, representing those who duly incorporated the appellee under the above act, solicited and obtained from the appellant her application for insurance and issued to her the document styled Exhibit "A" to the complaint, as above set forth. On December 20, 1920, household goods covered by the above document were destroyed by fire to the value of $685. The appellant testified identifying the application and receipt as above set forth, and stated that she had paid the amount of the premium named therein, and she identified and introduced certain letters, written after the fire but before the appellee was

licensed to do business in this State, signed by the president of the appellee relating to her claim for the loss which she had sustained. In one of these letters the president of the appellee acknowledged the receipt of $3 sent by the appellant to the appellee, and in another of these letters, among other things, he stated: "You need not fear anything, for we are just as sure to see after you as we live to satisfy the State, and we will have some one of our officers to come up there just as soon as I return home from Little Rock."

The appellant further testified that Mr. Sandefur, the president of the appellee, stated to her the latter part of May that he would settle with her in a few days. He stated they had not sent the policy, but that he would fix up the policy and everything would be all right in a few days. On June 29, 1921, after Sandefur had seen witness, they wrote her a letter and sent her back the amount of the premium. That letter was as follows:

"June 29, 1921.

"Mrs. Mary G. Jackson,

"Brinkley, Arkansas.

"Dear Madam: Please find inclosed check for $35.80, the amount of premium you paid this company. We hope this will be satisfactory to you.

"Very truly,

"I. A. CLARK, Treasurer."

The cause was by consent of parties submitted to the court sitting as a jury, and the court found that the application for insurance was taken in April, 1920; that the property was destroyed in December, 1920, and that the license authorizing the appellee to do business was granted on the 11th day of May, 1921. The court declared the law to be that under the above facts the appellant was not entitled to recover, and entered a judgment in favor of the appellee, from which is this appeal.

Sections 6019, 6020, 6021 and 6022, C. & M. Digest, provide for the organization or incorporation of mutual insurance companies. Those sections show that, after

these companies are incorporated and the articles of incorporation are submitted to and approved by the Insurance Commissioner, he shall issue to them a certificate which constitutes their authority "to begin business."

Section 6023, C. & M. Digest, reads as follows: "The company shall have legal existence from and after the date of such certificate of incorporation. The board of directors named in such articles may thereupon adopt by-laws, accept applications for insurance, and proceed to transact the business of such company; provided, that no insurance shall be put into force until the company has been licensed to transact insurance as provided by this act. Such by-laws and any amendments thereto shall within thirty days after adoption be filed with said commissioner."

Section 6025, C. & M. Digest, provides in part as follows: "No such company shall issue policies or transact any business of insurance unless it shall hold a license from the Commissioner authorizing the transaction of such business, which license shall not be issued until and unless the company shall comply with the following conditions: (a) It shall hold *bona fide* applications for insurance upon which it shall issue simultaneously, or it shall have in force, at least twenty policies to at least twenty members for the same kind of insurance upon not less than two hundred separate risks, each within the maximum single risk described herein. * * * (c) It shall have collected a premium upon each application, which premium shall be held in cash or securities in which insurance companies are authorized to invest, and shall be equal, in case of fire insurance, to not less than twice the maximum single risk assumed subject to one fire not less than ten thousand dollars," etc.

Reading all these sections together, it is obvious that after the organization or incorporation, the companies so incorporated have their legal existence from the date of the certificate of incorporation, and they have authority to begin the business of soliciting applications for in-

surance from the date that the insurance commissioner issues his certificate showing his approval of the articles of incorporation. But such companies have no authority to enter into binding contracts of insurance until the commissioner has licensed them to transact an insurance business. The provisions of secs. 6023 and 6025 in express terms prohibit the issuing of policies or putting into force insurance prior to that time. The appellant contends that it was the intention of the Legislature to authorize the companies to enter into binding contracts of insurance from the date when the applications were received and the premiums collected; that any other construction would enable these companies to perpetrate a fraud upon those applying for insurance by enabling the companies to accept the premiums in advance of a binding and completed contract of insurance.

The act is vague and incomplete in not defining the kind of business that the insurance companies are authorized to begin after their incorporation and after the Insurance Commissioner has approved their articles of incorporation; but, as we have said, when we construe the sections together, that is, sections 6023 and 6025, it is manifest that the purpose of the lawmakers was to allow the companies, after the Commissioner approved their articles of incorporation, to begin to solicit applications for insurance and the collection of premiums preliminary to, and as the basis upon which, the Commissioner is authorized to license them to transact business; that is, to enter into binding contracts of insurance. It is certainly true that this act of April 3, 1919, does not afford applicants for insurance who have paid advance premiums any protection in the way of a binding contract of insurance before the companies are licensed by the Commissioner to transact the insurance business and to issue binding policies of insurance. Nor does it afford them adequate protection by requiring such mutual insurance corporation to refund the premiums paid with interest, etc., in the event they are not licensed by the Commissioner to trans-

act an insurance business or issue policies of insurance. But it is not the province of the court to *piece out* defects in the law in these particulars. This is peculiarly a legislative and not a judicial function. We may say, in passing, that the Legislature of 1921 recognized the defect in the law in not guaranteeing to the applicant for insurance who had paid advance premiums the return of such premiums, and attempted to afford them adequate protection in this respect by amendment of sec. 6020, C. & M. Digest. Act 493 of March 5, 1921, now requires that the incorporators of mutual insurance companies shall file with the Insurance Commissioner a qualified bond in the sum of $15,000 conditioned for the prompt return to members of all premiums collected in advance, if the organization of the company is not completed within one year from the date of the certificate of incorporation.

The facts show that the premium paid by the appellant in advance was returned to her by the appellee before the institution of this action. That is all she was entitled to under the document designated "application and receipt" upon which she predicates her right of action. This document is at most but an executory contract by which the appellee, after the 11th of May, 1921, might have been bound to issue its policy of insurance if, in the meantime, the household goods, the subject-matter of the insurance contract, had not been destroyed by fire. But before the contract could be executed by the appellee under the the law and before it was authorized to enter into a completed contract of insurance under the law, the property which was the subject-matter of the insurance was destroyed by fire, thus rendering the execution and completion of the contract for insurance impossible. Since the appellant had no binding contract of insurance with the appellee at the time of the destruction of her household goods by fire, the court was correct in holding that the appellant was not entitled to recover. It follows also that, since there was no contract between the appellant and the appellee whereby appellee had insured appel-

lant's property before the same was destroyed by fire, the conduct and the letters of the president of the appellee, admitting or recognizing appellant's claim, under the policy, could not create a contract which the appellee was not authorized under the law to make.

Learned counsel for appellant relies upon a line of authorities which hold that "a contract made by the promoters of a corporation before it was formed becomes the contract of the corporation, so that it is both entitled to the benefits thereof and liable thereon, if it expressly or impliedly ratifies and adopts the same as its own, or, in most jurisdictions, ratifies it, after it comes into existence, provided it is a contract which the corporation has the power under its charter to make." 14 C. J. 257; 7 R. C. L. 559; *L. R. & Ft. Smith Ry. Co.* v. *Terry,* 37 Ark. 164; *Bloom* v. *Home Ins. Co.* 91 Ark. 367; *Jones* v. *Dodge,* 97 Ark. 248. But these authorities, as we construe the act of April 3, 1919, under which the appellee was incorporated, have no application, for the reason that the liability of the appellee must be predicated upon a contract which it was authorized to make under that act. The undisputed facts of this record show that under that act, at the time of the destruction of appellant's property by fire, there was no completed and binding contract of insurance whereby the appellee had become liable to appellant for the loss of such property.

The judgment of the trial court is in all things correct, and it is affirmed.

BAHLAU v. BLOOM.

Opinion delivered June 26, 1922.

MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—CONSENT OF PROPERTY OWNERS.—Where, under Crawford & Moses' Dig., § 5733, additions were made to an improvement district within a city, without the consent of the property owners in the original district, under Const., art. 19, § 27, requiring property owners to consent to local improvements, the board of improvement had no

power to make one contract and one bond issue for improvements in the original district and the annexed territory, even though this method would be less expensive for the property owners in the original district.

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

STATEMENT OF FACTS.

Appellant, a property owner within a proposed street improvement district in the city of Pine Bluff, Ark., brought this suit in equity against appellees, the members of the board of said improvement district, to restrain them from enforcing the collection of assessments levied against the property of appellant and of all the other property owners within the boundaries of the original improvement district.

The case was tried upon an agreed statement of facts which is substantially as follows: G. A. Bahlau is the owner of the property described in the complaint, and E. B. Bloom, F. D. Willingham and M. H. McGehee were duly appointed as a board of improvement for Paving District No. 52 of the city of Pine Bluff, Ark., which was created for the purpose of paving certain streets in that city. The boundaries of the district are specifically described and the district was organized in the manner provided by the statute. Thereafter, under the provisions of sec. 5733 of Crawford & Moses' Digest, which provides for the annexation of territory to improvement districts in cities and towns, contiguous territory was added to the original improvement district. Six different additions were made to the original district under the section of the digest referred to, and each addition comprised several blocks in the city of Pine Bluff, Ark. An assessment roll of all the several lots and blocks of land comprised in the original district and in all the additions thereto was filed in the office of the city clerk of the city of Pine Bluff, Ark. This assessment roll did not separate the property included in the original district from that included in the various annexations

and contained no separate extension of benefits by reason of the improvement contemplated in the original district, and of any benefits which might accure by reason of the improvements contemplated in the annexations.

The ordinance of the city council assessed the cost of the entire improvement against all of the property in the original district and in the various annexations thereto as if said improvements were one entire improvement. The contract for constructing the paved streets was let as a whole as if the improvements contemplated in the original district and annexations thereto were one improvement. The board contracted to sell an issue of $107,000 of bonds bearing interest at the rate of 6% per annum for the purpose of constructing the original improvement and the various additions thereto as if a single improvement. It was shown by the testimony of witnesses that the cost would be less by letting one contract for the whole work than if separate contracts were let for the original improvement and the various additions thereto.

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

The chancellor was of the opinion that the proceedings of the board were in all respects valid and binding upon the property owners of the original district, and the complaint of the appellant was dismissed for want of equity. The case is here on appeal.

Rowell & Alexander, for appellant.

1. The board of improvement adopted only one set of plans and specifications, incorporating the work to be done in the original district and in all of the annexations, whereas, according to law it should have adopted separate plans and specifications for the original district and for each of the annexations.

2. It received bids on all of the work and let a contract therefor, as if the entire work was one project, when, according to law, separate contracts should have been made for the original district and each annexation.

3. It contracted for the sale of one issue of bonds to cover the cost of all the work to be done, contrary to law.

4. Only one assessment roll was prepared and filed containing the assessment of benefits against all of the property both in the original district and the annexations, contrary to law, which requires separate assessment rolls for the original district and each annexation. If the effect of the annexation of property is to place an additional burden upon the property owners in the original district, such annexation cannot be made without their consent. 125 Ark. 57.

Coleman & Gantt, for appellees.

1. If the statute means what it says, and the annexed territory becomes a part of the district, the improvements thereafter should be treated as one project; but the record shows that the commissioners had before them at all times all the details necessary to preserve the identity of the various parts. The statutory provision for reporting the plans to the council is directory and not mandatory. *Ingram* v. *Thames,* 150 Ark. 443. Since the making of the report is not jurisdictional, the subsequent proceedings cannot be invalidated because of the form of the report, even if it should be held to be improper.

2. Assuming, as appellant contends, that each annexation must be treated throughout as a separate entity, that would not make it necessary to let separate contracts. 125 Ark. 57; 81 *Id.* 286.

3. This is true with reference to the contract for the sale of bonds.

4. No additional burden could have been put on the property owners in the district as originally organized by the method adopted in the assessment of benefits.

The cost of improvement does not exceed the statutory limit if, when spread over the entire property of the district, including that which has been annexed, it does not exceed the percentage named in the statute. 125 Ark. 57; 143 Ark. 625.

HART, J., (after stating the facts.) It is sought to uphold the decree of the chancery court upon the authority of *White* v. *Loughborough,* 125 Ark. 57. In that case the court upheld the validity of a statute providing for the annexation of territory to an improvement district, and held that the assent of the property owners in the original district to the annexation was not required, because no additional burdens would be placed upon their property, and that the cost of making the additional improvement must be borne by the property within the limits of the annexed territory.

That case does not support the decision of the chancellor, but on the contrary is an authority against it. The court in that case expressly said that, if the effect of the annexation was to place an additional burden upon the owners of real property in the old district, it could not be done without their consent. The reason given was that art. 19, sec. 27, of our Constitution provides, in substance, that local improvements in cities and towns shall be based upon the consent of a majority in value of the owners of real property in the proposed district.

It is true that in the instant case, the evidence tends to show that the method adopted would cost the property owners of the original district less than if a contract had been let and an assessment of benefits made to pave the streets within the boundaries thereof. This, however, is not the test, for the Constitution makes the right to levy assessments for local improvements in cities and towns depend upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected. Where additions are made to the boundaries of an improvement district already organized without the property owners in it having a voice in the annexation, and additional burdens are placed upon their property, it is evident that the constitutional provision just referred to has been disregarded. It does not make any difference that witnesses may think the method adopted will cost the property owners in the original dis-

trict less; for under the Constitution they must have a voice before their lands can be taxed to make a local improvement.

The wisdom of the provision is manifest. To illustrate: the property owners in the original district in the present case are liable for the whole of the bond issue, and their property is liable for assessments to pay the whole cost of the improvement, and that without their having any voice in the matter. A devastating fire might destroy all the improvements in the various annexations and render it necessary to increase the burdens on the property in the original district. Again, if the property in the various annexations were so situated that it should cave into the river, this would greatly add to the burden upon the property in the original district. It does not make any difference that this has not happened. The test is not what has happened, but what might be the consequences to the old district.

The provision of the Constitution under discussion plainly means that no burdens shall be added to the property owners in the original district without their consent. It is true that the agreed statement of facts shows that the annexations were made in the manner provided by the statute, but the board of improvement, under the principles above announced, could not let one contract for making the improvement in the old district and the various annexations thereto. Neither could it make one bond issue serve as if it was an entire improvement. In short, the assessment of benefits in the original district must be made, the contract let, and the bonds issued for the improvement in that district as a single improvement and without any relation to the various annexations thereto.

It follows that the decree must be reversed, and the cause will be remanded for further proceedings in accordance with this opinion and according to the principles of equity.

THOMAS v. ARKANSAS LIME COMPANY.

Opinion delivered June 26, 1922.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—On appeal from a judgment founded on a verdict directed in defendants' favor, in determining whether the evidence made a case for the jury, the testimony will be viewed in the light most favorable to plaintiff.
2. FERRIES—NEGLIGENCE IN OPERATION—EVIDENCE.—In an action by a father against a ferryman for the death of his child, drowned by falling off a ferry, evidence of negligence on the ferryman's part *held* insufficient to go to the jury.

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

Williamson & Williamson, Vaughan & Rector and *Taylor Roberts*, for appellant.

It was error to direct a verdict, as there was evidence from which a jury might reasonably find that the child lost its life through the negligence of appellee. 148 Ark. 66; 120 Ark. 208; 98 Ark. 344; 105 Ark. 526. Where a verdict is directed the court will take that view of the evidence most favorable to appellant. 115 Ark. 166.

It was the duty of the ferryman to keep the approach to the ferry in proper condition. Case note 68 L. R. A. p. 159. As a carrier of passengers he is held to the highest degree of care. 82 Ark. 507; 102 S. E. 300; 88 S. W. 935. The ferryman was negligent in not supplying the lifeboat with paddles. 2 Hutchinson, Carriers, par. 911.

The inference of care on the part of plaintiff may be drawn from the absence of appearance of fault. 5 Cal. 360; 136 Mass. 366. The question of negligence of a child of tender years is a question of fact for the jury and not a matter of law. 100 Ark. 76, as is the question of whether proper appliances were used and properly managed. R. C. L. Vol. 2, p. 933; 85 Ark. 474; 55 N. Y. S. 266. It was not necessarily negligence for the child to be near the apron pole. 2 R. C. L. p. 935.

The mother was a competent witness in behalf of the father, who sued in a representative capacity. 90 Ark. 486.

Samuel M. Casey, for appellee.

Two causes of action were improperly joined in the one and only paragraph of the complaint. It would have been improper to allow Mrs. Thomas to testify for plaintiff where he was suing in his individual right. 90 Ark. 485; 59 Ark. 180. She refused the offer of the court to permit her to testify on the claim where plaintiff was suing as administrator.

Appellee was only bound to provide suitable and safe accommodations. 38 Am. Rep. 533. The death of appellant's intestate was due to pure misadventure ,for which no one was responsible. 18 A. R. p. 327-328. Plaintiff himself was guilty of contributory negligence which would bar a recovery. 72 Ark. 1; 59 Ark. 180; 77 Ark. 398; 143 Ark. 357.

McCULLOCH, C. J. Appellant, the plaintiff, in his own right and as administrator of the estate of his daughter, Rovelda Thomas, brought this suit against appellee, a corporation engaged in operating a ferry across White River, between Ruddells, in Izard County, and Mountain View, in Stone County, for damages to compensate for the death of his intestate daughter. The complaint was not divided into counts, and the prayer for judgment was in a single paragraph, damages being asked by the administrator for the pain and suffering of his intestate, and by the plaintiff, as the father of the child, for loss of services.

At the conclusion of the plaintiff's testimony, a verdict was directed in favor of the defendant, and this appeal is from the judgment pronounced thereon.

Among the witnesses offered was the plaintiff's wife. Objection was made to her testimony because she was plaintiff's wife. Thereupon the court ruled that the witness was competent in the suit of the plaintiff as administrator, but was not competent in his suit for loss of services, and refused to permit the witness to testify unless plaintiff would first take a nonsuit in his individual case wherein he prayed judgment for the loss of the

child's services. Plaintiff declined this offer, and then inserted in the record what the testimony of the witness would have been had she been permitted to testify.

We have concluded that it is unnecessary to decide whether the court erred in imposing the condition stated, as, in our opinion, the excluded testimony, in conjunction with the testimony of the other witnesses, failed to make a case for the jury, even when viewed in the light most favorable to the plaintiff, as it must be, inasmuch as the verdict was directed in defendant's favor.

The testimony is to the following effect: On May 19, 1921, plaintiff, his wife, his daughter Rovelda, and a four-year-old son, were driving in a Ford car from Stone to Izard County, and their journey took them to the ferry operated by defendant. On approaching the ferry it was discovered that the bank was steep and was thought to be dangerous, so Mrs. Thomas and the little girl got out of the car and walked on the ferry-boat. The car was driven onto the ferry, and following it a two-horse wagon, loaded with staves, was also driven on the boat. The boat was between fifty and fifty-five feet long, and the car and wagon and team made a load, so far as the transportation of vehicles was concerned. After the car had been driven onto the boat, Mrs. Thomas got into the car with her husband, and they, with their son, were seated in the car when the child fell, or was thrown, overboard and was drowned.

The ferry was somewhat primitive and was operated by a single ferryman, whose entire time and attention were fully occupied in propelling the ferry over the river by using a cable extending across the river for that purpose. There was an apron at each end of the boat which served as a short stage or gang-plank. There aprons were about three feet wide and extended across each end of the boat, and were raised and lowered by means of a pole known as an apron-pole. The aprons were raised before the boat started across the river, and the poles were held in place by having the ends thereof shoved under a hasp,

or catch, fastened to the gunwales of the boat. Plaintiff described the poles as being about as big around as his arm. The apron-pole was not intended to be securely fastened, as the apron was raised and lowered each trip of the boat, and the undisputed testimony shows that a weight or pressure of not more than a hundred pounds would unlatch the pole. The latch on defendant's boat was a segment of a wagon tire, and this appears to have been about the kind of latch used on other ferries on White River, and the boat itself was of the same general kind as other ferries; indeed, a witness testified that it had been made after the pattern of another boat. There were banisters on each side of the boat. The banisters were higher in the center and sloped to the ends, where they were only about twenty-six inches above the floor of the boat. The little girl was seen sitting on the pole just before she fell into the water, and plaintiff testified that he saw her just as she went over the banister at the end of the boat, the inference being that the weight of the child unlatched the pole, thereby releasing the apron, the weight of which, as it fell, threw the child over the banister into the water.

By the cross-examination of plaintiff's witnesses, defendant sought to show that the child's weight would not unlatch the pole, and that, if thus released, the pole would not have thrown the child over the banister, and that the child, in its unattended play, fell out of the boat. Inasmuch as it does not appear physically impossible for the child to have unlatched the pole and to have been hurled over the banister, we must assume that the inference to that effect, deducible from plaintiff's tetimony, would have been accepted by the jury as true.

Mrs. Thomas would have testified, had she been permitted to do so, that she and the little girl walked onto the boat because of the dangerous condition of the approach; that, after they were on the boat, the ferryman did not request them to get in the car; that the child was in no unusual place when she sat down on the apron-pole;

that when the child sat down on the apron-pole she was immediately flung into the river by said apron-pole.

The boat was in midstream when the child fell or was thrown into the river, and consternation prevailed. Attached to the ferry-boat was a canoe, which was fastened to the ferry-boat by a trace-chain. The ferryman undertook to unfasten the canoe, but his efforts to do so were impeded by Mrs. Thomas, who first attempted to leap into the river after the child, but was restrained by her husband. She then frantically attempted to unfasten the canoe, and her effort to do so interfered with the ferryman's attempt to unfasten it. The canoe had no paddles or oars in it, but the driver of the wagon loaded with staves threw a stave down to the ferryman, to be used as a paddle. By the time the ferryman had released the canoe the child had floated down stream a distance estimated by the witnesses at from eight to fifteen feet, when she sank and was seen no more for three days, when her body was found several miles down stream.

Negligence is predicated upon the condition of the approach to the ferry, necessitating or making prudent the act of Mrs. Thomas and the child in getting out of the car; also upon the failure of the ferryman to rescue the child by swimming to it; and also by the failure to provide paddles or oars for the canoe, as well as upon the failure to securely and safely fasten the apron-pole.

No recovery could be sustained because of the approach to the ferry, for the reason that it was not the proximate cause of the drowning. The car was driven safely onto the boat, and it, of course, required no one's attention during the passage over the stream.

Negligence cannot be predicated upon the failure of the ferryman to leap into the river and rescue the child. It was not made to appear that the ferryman could swim, and it is mere conjecture that the child could have been rescued in this manner. The father himself did not attempt to rescue the child by swimming, and it is unreasonable for him to insist that the ferryman should

have risked the danger which the child's own father would not assume.

We think that negligence cannot be predicated on the failure to provide the canoe with oars or paddles. No witness explained why the canoe was fastened to the ferry-boat. It was certainly not as safe as the ferry-boat, and there is nothing in the testimony to support the inference that due care would have required the ferryman to provide the canoe with oars or a paddle to promote the safety of the passengers by providing such means for rescuing any one who might fall, or be thrown, overboard.

As we have said, the ferryman operated the ferry-boat without assistance, and, according to the testimony of the driver of the wagon, he was on the opposite side of the boat from the child and could not have seen her from the place where she fell, or was thrown, overboard. This witness also stated that it would not have been possible to have saved the child, even though the canoe had been provided with paddles.

The real question in the case is, whether negligence is shown in the manner of fastening the apron-pole. As we have said, defendant's ferry is similar to other ferries operated on White River, and the manner of fastening the apron-pole is the same on them all. A witness for plaintiff who operated another ferry testified that passengers would sit just anywhere while crossing the river; that he had seen them sit on the apron-pole, but that this was dangerous, and he had always run them off when he observed anyone doing so, but the danger consisted in being struck by the pole as it was released, and there is no testimony from which it appeared reasonable to conclude that the ferryman should have anticipated that the premature releasing of the pole might throw one off the boat. Nothing of the kind had ever occurred before. The pole was not provided as a place for passengers to sit down, nor is it shown that it was so used with such frequency or with the acquiescence of the ferryman as to make it a place where passengers were invited to sit.

The child was of tender years and was accompanied by the mother, hence the ferryman had the right to assume that the mother would exercise proper care for the child's safety. There is no proof that the ferryman saw the child sitting on the pole, and, as before stated, it was not reasonably to be anticipated that the mother would permit the child to leave her immediate presence and take a dangerous position on the boat. Nor can it be said that the pole was a contrivance especially attractive to children, but even if it could be so treated, the ferryman had the right to assume that the mother would guard the child from danger.

It appears from the cross-examination of the driver of the wagon that the child fell through the banisters, and not over them, as he said there was no noise when the child fell into the water, and that she could not have fallen over the banisters into the water without making a splash. But the jury may not have believed this witness, and, as we have said, it does not appear to have been physically impossible for the child to have been thrown over the banisters. It does appear, however, from the testimony of B. C. Cross, a witness for plaintiff, who had operated another ferry using the same method of suspending the apron, and who had also operated the ferry in question, that it would have been impossible for the pole to hang on the edge of the hook and hold the apron up. This witness is mistaken if plaintiff's version is true, but his testimony does show that extreme improbability.

Our conclusion is therefore that, viewing the testimony in the light most favorable to plaintiff, it was not sufficient to establish negligence on the part of the ferryman.

Affirmed.

MORSE v. BURKHART MANUFACTURING COMPANY.

Opinion delivered June 26, 1922.

PARTNERSHIP—LIABILITY OF ORGANIZERS OF CORPORATION.—Persons who have associated themselves together for the purpose of conducting business as a corporation are liable individually as partners on contracts made by them before filing the articles of incorporation with the Secretary of State.

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

Rogers, Barber & Henry, for appellant.

When this suit was filed Morse Brothers Lumber Company was a *de facto* corporation, and Jeter Morse and S. J. Morse are in no wise liable as individuals on this account.

The burden was on the appellee to prove the partnership, and the same being denied in the testimony, it raised an issue of fact for the jury.

Judgment should not have been rendered against appellants as partners, even if the organization had not been completed by filing articles of incorporation with the Secretary of State prior to judgment. 134 Ark. 23; 114 Ark. 358; Fletcher on Corporations, 1921 Suppl., § 298; *Id.* § 305.

Poe, Gannaway & Poe, for appellee.

Appellant cannot now complain that there was an issue of fact as to the existence of a partnership which should have been submitted to the jury, since they requested no instruction on that issue, hence there could be no reversible error in failing to submit it. 75 Ark. 76, 85; 84 *Id.* 399; 76 *Id.* 164; 81 *Id.* 561; 102 *Id.* 591; 95 *Id.* 597. Appellants did not object or save any exception to the giving of the peremptory instruction. They connot now complain that it was erroneous. 91 Ark. 43; 73 *Id.* 407; 88 Ark. 506.

2. The record does not show that Morse Bros. Lumber Company was a corporation, *de facto* or otherwise. Appellants raised this question for the first time at the

trial, and the burden was therefore on them to prove that they were a *de facto* corporation. Appellee agreed that appellants might file as a part of the record, the originals or certified copies of the alleged articles of incorporation, but that was never done. The natural conclusion is that they were not incorporated. 1 Thompson on Corporations 311; 59 Fed. 746.

Three things are essential to the existence of a *de facto* corporation:

(1) A valid law under which a corporation with the powers assumed may be incorporated. 2() A bona fide attempt to organize such corporation under that law, and (3) an actual exercise of corporate powers. 7 R. C. L. 61-66. See also 168 Fed. 187.

The burden of proof was upon the appellants to show that the alleged corporation had exercised actual corporate powers. 59 Fed. 746-748.

If, however, it should be held that Morse Bros. Lumber Company was a *de facto* corporation, appellants, who were the original incorporators, are liable as partners for a debt contracted by the *de facto* corporation. 35 Ark. 144, 146. *Bank of Midland* v. *Harris,* 114 Ark. 358, relied on by appellants, has no application to this case.

HUMPHREYS, J. Appellee, a Missouri corporation, instituted this suit in the Pulaski Circuit Court, Third Division, against Jeter Morse, Wesley Morse, J. M. Morse, and S. J. Morse, alleged copartners trading as Morse Bros. Lumber Company, to recover $2,389.89 for lumber sold and delivered to the firm. Service was obtained on Jeter Morse and S. J. Morse. They filed separate answers denying that the several parties sued, including themselves, were copartners trading as Morse Bros. Lumber Company, but on the contrary were stockholders in a *de facto* corporation by that name; also denying individual liability on account of lumber sold and delivered to the corporation.

The cause was submitted upon the pleadings and testimony. At the conclusion of the testimony the court

instructed a verdict in favor of appellee for the amount claimed, and upon return of the verdict, rendered judgment in accordance therewith for $2,466.76 against Jeter Morse and S. J. Morse as individuals, from which is this appeal.

The record reflects that Jeter Morse, S. J. Morse, Wesley Morse, and J. M. Morse associated themselves together under the name of Morse Bros. Lumber Company for the purpose of conducting a lumber business as a corporation. The concern filed articles of incorporation in 1916 with the clerk of Yell County. The articles of incorporation were not filed with the Secretary of State until July or August of 1921. In the meantime, Morse Bros. Lumber Company conducted a manufacturing wholesale lumber business at Little Rock, Arkansas. Its letters and invoices were signed Morse Bros. Lumber Company, by Jeter Morse, President. The items of lumber embraced in the account sued upon were ordered from appellee by letter signed in this way, dated March 8, 1921.

The question, squarely presented for determination on this appeal, is whether, under the laws of this State, individuals may associate themselves together for the purpose of organizing a corporation and conduct business in the corporate name before perfecting the incorporation, without rendering themselves individually liable as partners. In the case of *Garnett* v. *Richardson,* 35 Ark. 144, the court ruled they could not. It was said in that case, "appellants could not do business as a corporation until their articles of association were filed in the office of the Secretary of State, as provided by the general act of incorporation. For purchases made by them before then, they were personally liable as partners." The doctrine announced in this case, although contrary to the apparent weight of authority, has been approved without extension in the cases of *Bank of Midland* v. *Harris,* 114 Ark. 358; *Breitzke* v. *Tucker,* 129 Ark. 401,

and *Wesco Supply Co.* v. *Smith,* 134 Ark. 23. The instant case is ruled by *Garnett* v. *Richardson, supra,* as the cases are in substance identical.

No error appearing, the judgment is affirmed.

TARKINGTON *v.* STATE.

Opinion delivered June 26, 1922.

1. CONTINUANCE—ABSENT WITNESS.—It was not error to refuse a continuance for an absent witness who had disregarded a subpoena and disappeared, in the absence of a showing as to her whereabouts or that her testimony could be procured at the next term of court.
2. CRIMINAL LAW—INCOMPETENT EVIDENCE—INVITED ERROR.—In a prosecution for robbery for which defendant was indicted with another, who had absconded, where defendant introduced evidence of the statements, acts and conduct of the other accused person, after his arrest, the admission of testimony of the flight of the other was not error, since defendant lost his right to complain by introducing incompetent evidence in relation to the other's conduct.
3. CRIMINAL LAW—DUTY TO GIVE WRITTEN INSTRUCTIONS.—Under Const. art. 7, § 23, it is the duty of the trial court to give written instructions to the jury when requested.
4. CRIMINAL LAW—BYSTANDERS' BILL OF EXCEPTIONS.—Under Crawford & Moses' Dig., § 1322, providing that if the party excepting is not satisfied with corrections of the bill of exceptions by the trial judge, he may procure "the signatures of two bystanders attesting the truth of his exception," a bill of exceptions attested by appellant's attorneys is insufficient, since they are not "bystanders."
5. ROBBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution for robbery evidence *held* sufficient to support a verdict of guilty.

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

Mitchell & Williams, Robert Bailey and *Patterson & Ragon,* for appellant.

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

HUMPHREYS, J. Appellant was jointly indicted with Bill Chronister in the Pope Circuit Court for the crime of robbery, and on January 17, 1922, at an adjourned term of the November, 1921, term of said court, was separately tried, convicted and sentenced to serve three years in the State Penitentiary as punishment therefor. He was first separately tried at the November, 1921, term, but the jury failed to agree. The cause against both Chronister and appellant was continued and set for December 20, 1921. On that date an unsuccessful attempt was made to obtain a continuance of the cause against Chronister on the ground that he was ill at home near Benton. The court declared a forfeiture on Chronister's bond and ordered the issuance of an alias warrant for him. The cause against both was then continued until January 16, 1922, to which time court was adjourned. During the interim it was discovered that Chronister had absconded, and the circuit judge notified the parties that the cause against appellant would stand for trial on January 16, 1922. When the court reconvened, all the witnesses theretofore subpoenaed were present except Mrs. Bill Chronister, wife of appellant's codefendant. None of the witnesses knew what had become of Bill Chronister and his wife. He had disappeared and was a fugitive from justice. Appellant thereupon filed a motion for continuance on account of the absence of Mrs. Chronister, who had been duly subpoenaed and for whom an attachment had been issued but who could not be found. She had testified in the first trial, and her evidence was material as tending to establish an alibi for appellant. No showing was made in the motion for continuance as to the whereabouts of Mrs. Chronister, and no showing that her presence or testimony could certainly be procured by the regular April term of court. She had disregarded the subpoena, suddenly disappeared, and her husband had absconded. We think, under the circumstances, the court did not abuse its discretion in concluding that the absent witness had gone with her hus-

band, and that appellant could not obtain her presence or deposition if accorded a continuance. Error was not committed in overruling the motion for continuance. *Allison* v. *State,* 74 Ark. 450; *Coppersmith* v. *State,* 149 Ark. 597.

Appellant next contends that the court committed reversible error in permitting the State to prove that his alleged accomplice, Bill Chronister, was a fugitive from justice. This court said in the case of *Benton v. State,* 78 Ark. 290, that "the law is well settled that the acts and declarations of coconspirators, in the absence of the defendant, after the consummation of the criminal enterprise, cannot be admitted in evidence." Appellant, however, is not in position in the instant case to invoke this rule. He not only acquiesced but assisted the State in getting the statements, acts and conduct of Chronister immediately after his arrest before the jury. After the State had shown that Chronister and appellant were taken to the scene of the robbery for the purpose of identification, and that Chronister's shoes were compared with tracks made by the robbers, appellant drew out of the witness, C. C. Hurdlow, on cross-examination, that Chronister had requested, when arrested, to be taken before his accusers that they might have an opportunity to say whether he was the guilty man, and also a statement of Chronister to the officer who was measuring and comparing the tracks, that he owned two pairs of shoes. Appellant followed this up by introducing Wheeler Morgan, who gave direct testimony to the same effect tending to establish frankness on the part of Chronister. The issue of whether Chronister was guilty or innocent, as tested by his conversation and conduct after his arrest, was willingly accepted and acquiesced in by appellant until Chronister's flight was touched upon. Then for the first time he objected. The rule of evidence is that one who introduces incompetent testimony himself cannot complain when his adversary introduces in rebuttal testimony of the same character. *Beck* v. *Biggers,* 66 Ark.

292; *Mitchell* v. *Smith,* 86 Ark. 486. It was not error, under the circumstances, to permit the State to show the flight of Chronister.

Appellant next insists that the court erred in instructing the jury orally when requested to instruct them in writing. The Constitution of this State makes it the duty of the trial court to instruct the jury in writing when requested to do so. Article 7, sec. 23, of the Constitution of 1874. There appears in the bill of exceptions a request by appellant for written instructions. Immediately following the request is an affidavit of the circuit judge to the effect that no such request was filed or called to his attention in any manner or form. This was tantamount, on the part of the judge, to refusing or striking out the exception. Two affidavits of appellant's attorneys appear in the bill of exceptions tending to show that the written request for instructions was presented to the judge, but these affidavits do not meet the requirements of the law for correcting the bill of exceptions. When the judge refuses to certify a bill of exceptions, it can only be certified by bystanders who are not directly concerned in the controversy. Attorneys in the case are not bystanders in the meaning of the law. *Gay Oil Co.* v. *Akins,* 100 Ark. 552. No error was committed in orally instructing the jury.

Appellant's last insistence for reversal is that the evidence is insufficient to support the verdict. The record reflects that on the night of October 16, 1921, two masked men entered the home of Mrs. Scarbrough and her daughter, Dessie Smith, who resided about 12 miles north of Russellville, and, at the point of a pistol, robbed them of $545. The men had a large flashlight which lighted the room more brightly than a lamp. After they obtained the satchel containing the money from Mrs. Scarbrough, Dessie Smith engaged in a struggle with one of them for the money, but was overpowered. She got a good view of the eyes and general make-up of the robbers. She became convinced that one of them was Bill Chronister, and

so notified the officials. After the arrest of Chronister and appellant, they were taken before the women for identification. Dessie Smith identified Chronister, and said, judging from his eyes and general make-up, according to her best judgment and belief, appellant was the other participant in the robbery. The undisputed testimony showed that appellant and Bill Chronister were together during the entire night of the robbery, and that they had been close companions and associates for some time. Chronister's flight indicated a guilty conscience, and, as the two were admittedly together the entire night, it is hardly probable that appellant is innocent if Chronister was guilty.

After a careful reading of the record we are convinced that there was sufficient substantial evidence to support the verdict. No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* GEREN.

Opinion delivered June 26, 1922.

RAILROADS—NEGLIGENCE—RUNAWAY LOCOMOTIVE.—Where a railway locomotive, with steam up, was left in charge of a watchman whose other duties took him elsewhere, and during his absence some one opened the throttle, causing the engine to run off the track and into plaintiff's wagon, the railway company was guilty of negligence, as, under the circumstances, the engine was a dangerous agency, and a constant watch should have been kept over it.

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

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

The court should have directed a verdict for the defendant. Section 8562, Crawford & Moses' Digest, does not apply. There was no presumption of negligence on the part of the defendants. 70 Ark. 481.

A. A. McDonald, for appellee.

Railroads shall be responsible for all damages to persons and property done or caused by the running of

trains in this State. C. & M. Digest, sec. 8562. This statute cast upon the company the burden of showing due care on its part. 57 Ark. 136; 65 Ark. 325; 83 Ark. 217. There was no error in giving or refusing instructions. 99 Ark. 226; 91 Ark. 97; 90 Ark. 524.

HUMPHREYS, J. Appellees instituted suit against appellants in the circuit court of Sebastian County, Fort Smith District, to recover $193.95 for damage to an ice wagon, on account of alleged negligence in permitting an engine to leave appellant's track and run across a street into appellee's wagon. The particular negligence alleged consisted in appellants leaving an engine on a side-track with steam up and in condition to be operated, without sufficient control or supervision.

Appellants filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings, testimony, and instructions, which resulted in a verdict and judgment against appellants in the sum of $170.95, from which is this appeal.

Appellants contend that the trial court committed reversible error in not instructing a verdict for them at the conclusion of the evidence, and in giving and refusing certain instructions. We deem it unnecessary to set out or discuss the instructions, for we have concluded that the undisputed facts show that the wagon was demolished through the negligence of appellants. The facts are as follows: Appellees owned an ice plant across the street from the end of the switch-track of the Arkansas Central Railroad Company. The platform of the ice plant was about 90 feet from the end of the track. Between nine and ten o'clock p. m. on April 20, 1921, a Missouri Pacific engine, No. 14, was placed on the switch one-half block from the end of the track, in charge of a night watchman, whose other duties carried him out of sight and hearing of this and other engines left in his charge. The engine was fired and had up 60 pounds of steam. The reverse lever was on the center and the throttle closed. The effect of

this was to lock the engine so it could not move unless the lever was moved and the throttle opened. The lever worked upon a quadrant, and could be moved in forward or backward motion. The engine could be operated by moving the reverse lever off of center and opening the throttle. At one o'clock a. m. the watchman examined and left the engine locked in this manner. He then went forward about a block from the engine to clean a passenger coach on the same track. Other cars were between the coach and the engine, which obstructed his view and prevented him from hearing the engine should it move. The same morning about two o'clock the engine was discovered by W. A. Recon, fireman on the yard engine, off the track and across the street next to the ice factory, where it had run into and crushed the wagon against the platform. The engine had run across the street, and in doing so the wheels had cut deep into the ground. When found, the reverse lever was in forward and the throttle partly open.

The engine, with steam up, was in condition to be operated by a movement forward or backward of a lever and the opening of a throttle. Anyone who passed, if inclined, could do this. In the condition and place left, it was a dangerous agency and a constant watch should have been kept over it. It was left in charge of a watchman but other duties were assigned him that carried him out of sight and hearing of the engine. In his absence, some one released the engine and permitted it to run away. Such a dangerous agency should not be intrusted to a watchman in name only. It was negligence to leave a live engine, so easy to release, practically unprotected and unguarded.

The judgment is therefore affirmed.

CROUTHERS v. STATE.

Opinion delivered June 26, 1922.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—In a prosecution for larceny evidence of defendants' possession of recently stolen property, together with contradictory and suspicious explanations thereof, *held* sufficient to sustain a conviction.
2. LARCENY—ALLEGATION OF OWNERSHIP—VARIANCE.—Testimony, in a prosecution for stealing automobile casings and accessories, that the alleged owner of the car from which the property was taken had not paid the entire purchase price did not constitute a variance; the buyer having an interest in the car which constitutes such a special ownership as entitled him to the possession thereof.
3. CRIMINAL LAW—SURPRISE—REFUSAL OF NEW TRIAL.—It was not an abuse of discretion to refuse a new trial in a criminal case on the ground of surprise in the introduction by the State of testimony impeaching defendant as a witness, though he did not put his reputation for honestly in issue, as he must be held, by becoming a witness, to have subjected himself to the same cross-examination and impeachment as any other witness.
4. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE.—It was not an abuse of discretion to refuse a new trial on the ground of newly discovered evidence that was merely cumulative.

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

J. Allen Eades and *Hays & Ward*, for appellant.

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

SMITH, J. Appellant was convicted of the crime of grand laceny, alleged to have been committed by stealing two automobile casings, two innner tubes, an automobile headlight, and one automobile wheel, of the value of $35, the personal property of A. Z. Mitchell.

It is insisted, for the reversal of the judgment, that the testimony is not sufficient to support the verdict; that there is a variance between the testimony and the allegation of the indictment as to the ownership of the stolen property; that the court erred in permitting defendant to be impeached as a witness when he had not put his

good character in issue; and that the court erred in failing to grant a new trial on account of newly discovered testimony.

Mitchell testified that he resided about a mile and a half from Plumerville, in Conway County, and that in June, 1921, he was the owner of a Ford automobile, which he had purchased a short time before from A. B. Payne, a merchant in Plumerville. There were Racine casings on the car at the time of the purchase, but shortly thereafter witness purchased a Goodyear casing for the right front wheel. Witness had put a new inner tube in the Racine casing on the rear right wheel, and had also put a new tube in the Goodyear casing. On the night of June 16, 1921, someone stole the casing and tubes from the right front and rear wheels of the car, and also the right front wheel and the right headlight. Witness Mitchell lived near the road running north from Plumerville, and between eight and nine o'clock on the night of the larceny he saw someone pass his house driving a car without lights, going north. Soon thereafter he saw someone driving a car without lights going south. Witness went to Plumerville the day after the larceny and reported his loss to Payne, and about two weeks later was notified by Payne that the stolen articles had been found. Witness and Payne drove to where appellant's car was standing, and when they arrived there appellant and two boys had taken the rear casing off of appellant's car, and were taking off the front casing. There was no inner tube in the rear casing, and witness commented on that fact, whereupon appellant stated that he did not get any inner tubes but had only purchased the casings, and that he had bought new inner tubes and had put them in the casings. Before the inner tube was taken out of the front casing witness told appellant that if the inner tube was his it would have two small patches on it, and after the inner tube was removed from the front casing the patches were found just as witness said they would be, whereupon appellant said, "I reckon maybe that is

yours." Witness did not get the wheel, the headlight, nor the inner tube for the rear casing; but he did get the two casings and the inner tube for the front casing, although appellant stated at the time that he had purchased only the casings, and that he had got them from a traveling man. Witness testified that he identified the right front wheel on appellant's car as the one stolen from his car, but appellant refused to surrender it.

Payne testified that when he sold Mitchell the car he made a notation of the serial numbers of the casings, and that about a week after they had been stolen he saw the right rear casing on appellant's car. He spoke to appellant and told him that he had Mitchell's casings, and appellant stated that he had bought them from two boys, but that Mitchell could have them if they were his.

As a witness in his own behalf, appellant testified that one morning between seven and eight o'clock two young men, unknown to him, came to his store and stated that they were broke but that they had two casings and an inner tube for sale. He asked no explanation of the young men as to how they came to have the property but no money, and, although he had never seen them before, he paid them $15 for the casings and inner tube. He denied buying or having any other article of the stolen property; and he denied that Mitchell asked him about the other articles; and he denied that he had told Payne that he made the purchase from a traveling man.

Appellant stated that he was at home on the night of the larceny, but admitted he might have driven his car out on the road where Mitchell lived after his washing, but denied that he made that trip on the night the articles were stolen or that he came back by the hotel, and he denied seeing Mr. Nesbit at the hotel that night.

Appellant was corroborated relative to the purchase in June, 1921, of some casings and an inner tube by a negro named Jones and a white man named Tucker.

In rebuttal Nesbit testified that on the night of the larceny he saw appellant between ten and ten-thirty driv-

ing a car without lights coming from the direction in which Mitchell lived, and that appellant drove the car under a light near the hotel, where he plainly saw him. He stated that the top of the car was down and that he did not see any of the stolen articles in the car.

We think this testimony is sufficient to sustain the conviction. We have here the possession of recently stolen property, and explanations of that possession which are contradictory and, of themselves, calculated to arouse suspicion. *Shepherd* v. *State,* 44 Ark. 39; *Blankenship* v. *State,* 55 Ark. 244; *Duckworth* v. *State,* 83 Ark. 192; *Douglass* v. *State,* 91 Ark. 492; *Wiley* v. *State,* 92 Ark. 586; *Jackson* v. *State,* 101 Ark. 473; *May* v. *State,* 135 Ark. 400; *Long* v. *State,* 140 Ark. 417; *McFall* v. *First National Bank,* 138 Ark. 379.

It is said the testimony shows Mitchell did not pay the entire purchase price of the car, and that the title thereto was retained by Payne, and that this fact constitutes a variance, inasmuch as the indictment alleges Mitchell to be the owner of the car. On behalf of the State it is insisted that the testimony does not present this question of fact. But we pretermit a discussion of the testimony on this point, as we think there is no variance even though the title had been retained by Payne.

Mitchell was in possession of the car under a contract of sale entitling him to the possession thereof. He had an insurable interest in the car. *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475. A thief has no right to demand a trial of the title to the stolen property of the person from whom it was stolen. It is sufficient if the indictment alleges one to be the owner who has such a special ownership as to entitle him to the possession and control of the stolen property. *Wells* v. *State,* 102 Ark. 627; *Cook* v. *State,* 80 Ark. 495; *Merritt* v. *State,* 73 Ark. 32;*McCowan* v. *State,* 58 Ark. 17; *Blankenship* v. *State,* 55 Ark. 244; *Scott* v. *State,* 42 Ark. 73; *Brown* v. *State,* 108 Ark. 336; *Gooch* v. *State,* 60 Ark. 5; *State* v. *Esmond,* 135 Ark. 168.

Testimony was offered by the State impeaching appellant as a witness. He did not put his reputation for honesty in issue and claims to have been surprised that the State should have impeached him as a witness. Accompanying the motion for a new trial were the affidavits of a number of persons that the reputation of appellant for truth and veracity was good and that upon his reputation he was entitled to be believed.

We think no abuse of discretion was shown by the trial court in refusing a new trial on the ground of surprise. The defendant must be held to have known that if he became a witness he did so subject to the right of the prosecution to impeach him if that testimony was available. He knew that his reputation for honesty could not be made an issue unless he first raised the issue. But he also knew whether he intended to testify as a witness, and he must be held to have known that if he did become a witness in his own behalf he was subject to the same cross-examination and impeachment as is available against any other witness. *Shinn* v. *State,* 150 Ark. 220; *Pearrow* v. *State,* 146 Ark. 205.

The motion for a new trial set up certain newly discovered testimony. But it was cumulative to other testimony offered at the trial, and there appears to have been no abuse of discretion in this respect. *Cravens* v. *State,* 95 Ark. 321.

No error appearing, the judgment is affirmed.

McCarroll v. Grand Lodge of the I. O. O. F. of Arkansas.

Opinion delivered June 26, 1922.

Charities—cy pres doctrine applied.—Under Stat. 43 Eliz., c. 4, establishing the *cy pres* doctrine applicable to charitable bequests, where a testator disinherited his heirs and devised certain land as a site for an orphans' home to be under the direction of a certain benevolent order, and the rest of his property to establish and maintain a sanitarium to be under the control of the same

lodge, after a compromise of a contest of the will by which the lodge obtained land and property insufficient to carry out the purposes of the devise, in view of the fact that the land was bringing in a small income and depreciating in value, a decree of specific performance of a contract of sale of the land and that the proceeds be applied to the upkeep of a home for widows and orphans maintained by the same order for charitable purposes was proper.

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

W. E. Beloate, for appellant interveners.

The will creates two charitable trusts, first, a sanitarium fund for treatment of diseases, and, second, a site for an orphans' home by providing certain described lands, known as the Robbins farm, as the *situs.* These are recognized by our courts as "charities" and entitled to protection as such. 97 Ark. 532.

Under a will ordered to trustees for a public charity, with or without prohibition therein against a sale, if a sale would defeat the object of the charity, the trustees would have no power to sell. *Id;* 17 Ark. 483; 79 Ark. 550; 86 Ark. 218.

The decree with reference to the charity for sanitarium purposes should be reversed for want of proper parties, as there is no one in court representing them or asking any relief. 34 Ark. 391.

When trustees, with knowledge of the charitable use, and there being no reasonable excuse for mistake, have misappropriated the whole or any part of the income, they will be held to account for it during the whole period of the misappropriation. The trustees must carry out the scheme outlined by the donor. 10 Allen, 98; 128 Mass. 258.

The *cy pres* doctrine is not now recognized in many of the States, and where recognized it applies only where an apparent charitable intention has failed. It is not applicable so long as the original scheme of the testator is applicable. 87 Me. 414; 3 Gray 280; 151 Mass. 364.

The collateral heirs had no interest. There was no condition that would warrant their intrusion. 5 Wall. (U. S.) 119; 17 Ark. 483; 2 Barb. Ch. (N. Y.) 242-290. Nonuse of the trust property does not forfeit to the grantor heirs. 5 A. & E. Enc. 915, sub. 2 V.

Z. M. McCarroll, pro se.

Adopts brief of intervener pertaining to the Robbins farm, and says that the May Bryant judgment of $10,000, pleaded by the plaintiff, is one of the probate court, and as Shirey has been dead for more than 12 years, the same cannot be asserted against the lands. 37 Ark. 155; 79 *Id.* 570.

A. H. Rowell, H. W. Applegate and *Samuel M. Casey,* for appellees.

1. The chancery court had jurisdiction because (1st) this is a suit for specific performance against Z. M. McCarroll, and (2d), it calls for a construction of the will of W. A. Shirey.

2. The decree of the court below may be justified on either of two grounds, viz: (1) The decree of the chancery court in 1910 wherein these lands were set apart to the grand lodge in a suit where all the heirs of A. W. Shirey, and the widow, were parties, in which decree these lands to the grand lodge to be used as it deemed best. (2) Under the *cy pres* doctrine. This doctrine is well established in the jurisprudence of this country, and has received the favorable recognition of most of the States which have had occasion to pass on it. Perry on Trusts, 6th ed., § 723; *Id.* 725; 2 Story, Equity Jurisprudence, 14th d. §§ 1557, 1571; I Words and Phrass, 1189; 79 Atl. 837, 76 N. H. 96; 82 Atl. 435; 109 Me. 32; 95 S. W. 369, 375, 196 Mo. 234; 3 L. R. A. (N. S.) 237-238; 217 N. Y. 454, 112 N. E. 177; Ann. Cases, 1917-E, 853; 5 R. C. L. "Charities" 364-370, § 113; 11 C. J. 358-364.

Smith, J. This appeal involves the construction of the will of A. W. Shirey, the relevant portions of which are as follows:

"KNOW ALL MEN BY THESE PRESENTS:

"That I, Arthur W. Shirey, being of sound and disposing mind and memory do make, publish and declare the following to be my last will and testament, hereby revoking all testamentary dispositions heretofore made viz:

"1. It is my desires and will that all my just debts be paid by my executors.

"2. I give, devise and bequeath to all persons who upon my death if dying intestate would be entitled under the law to any share or interest in my property, either real or personal, each the sum of one cent in money, and no more.

"3. I give devise and bequeath to Fair Bell Shirey who is now my wife one cent and no more.

"4. I give and bequeath to each child born or hereafter born of said Fair Bell Shirey the sum of one cent and no more and more particularly I give, devise and bequeath to her child now born, the sum of one cent in money and no more, this child not having been begotten by me and it being unknown to me by whom begotten and the name so far as its Christian surname, nomen or cognomen is concerned of said child being to me unknown and said child is identified and named as fully and completely as above mentioned or my information can furnish a basis for so doing."

The testator then names the persons who would have been his heirs had he died intestate, and he gave to each of them "one cent and no more, to be paid in money."

After having thus disposed of all persons who would have taken an interest in his estate had he died intestate, the will reads as follows:

"8. Subject to the payment of the foregoing bequeaths, I will, devise and bequeath to the Independent Order of Odd Fellows of the State of Arkansas all my property, boath real and personal, that I may have title to or any interest in at the time of my death in trust

perpetually for the following uses and purposes, to-wit: (a) All my property, boath real and personal, and the revenue and income thereof except the real estate hereinafter particularly described shall be used and devoted to the establishing and maintenance of a sanitarium under the perpetual management and control of said Grand Lodge of the Independent Order of Odd Fellows of the State of Arkansas. It is my will and dessies that this sanitarium be located and established and maintained at the city of Hot Springs, Arkansas, if that is expedient and practical, or otherwise at such place as shall be expedient and practicable in the judgment of said fraternal order herein named for the following purposes, in said sanitarium, I will and devise that all kinds of diseases be treated (except veneral diseases, such shall be excluded), under the controle of one electic physician and surgeon authorized by the board of the State of Arkansas to practice in said said State this physician and surgeon may be one and the same person, and he shall be acquainted with and approve the following methods of treating diseases and the magnetic treatment and the Yogi phylosophy and the Hindew Oriental phylosophy of curing diseases, electic treatment of diseases and Hypnotism as a treatment of diseases and Hydrophy cure in all its forms of baths and nature cure, cold and hot and all other forms and methods that are successful without drugs and medicines to be added and all future and newly developed methods of treating diseases without the use of drugs. I feel sure that humanity will be largely benefited as soon as these methods of treatment are adopted and the drug treatment abandoned. To this end I have appropriated all my life earnings, and I desire it to be so carried out and to the foregoing method of treatment I desire that baths of all kinds and descriptions be added to assist in eradicating the practitce of drug treatment for the human system. I believe that when my immortal self is in the Great Future Existence that I can and will return to earth to see what I have left for the good of humanity and

to assist in purfecting my plans which originated in me while in the body, and I have confidence in the Brotherhood of the Fraternal Order of I. O. O. F. that they will carry out my desier.

"(b) The following real estate situate in Lawrence County, Arkansas, to wit: All of the Roben farm the SW¼ section twenty-two (22), W½ NW¼ section 27, E½ NE sec 28 SW NE sec. 28, and NE SE sec 28, all in township 17 N. range 1 E. 400 acres and this is to be used as a location and site for an orphan's home to be established and maintained thereof under the perpetual controi of said Grand Lodge of the Independent Order of Odd Fellows of the State of Arkansas and for such purposes as may be expediently connected with said orphans' home for the good of that order, to-wit: To care for orphan children and learn them to work and economize, and that they may be educated for a practical business life a school in said home and that widows of sixty years old and been the wives of odd fellows in good standing be admitted to its fraternal protection all for the good of that order to carrie out and execute my expressed intentions herein above witnessed.

"It is my will, intention and devise that the executor or executors of this my last will and testament shall be such person as may be proposed by the Grand Lodge of the Independent Order of Odd Fellows of the State of Arkansas, and I do hereby appoint as the sole executor of this my last will and testament the person who shall at the time of my death be the Grand Master of said Grand Lodge of the Independent Order of Odd Fellows, and he shall act as such executor until said fraternal order shall in its discretion recommend and appoint some other person or persons as such executor or executors."

The will was signed and duly attested, and there appeared thereon the following notation:

"I Desier and request each and every Odd Fellow in the State of Arkansas to pay into this sanitarium fund

not less than one nore more than Ten Dollars as a nominal sum merely to connect this entier fraternity with the interest and progress of this great institution set up for the health and longevity of our people and for the future good and well fair of all their families and for the future generation. I respectfully solicit you all."

The will was dated June 23, 1905, and on March 8, 1910, Shirey was assassinated. Shirey left an estate which at the time of his death was supposed to be worth approximately $300,000, and had this sum been realized both the hospital and the orphanage mentioned in his will could have been established.

The widow promptly repudiated the will; and the collateral heirs, who had each been given one cent, prepared to contest the will on the ground that Shirey lacked testamentary capacity. After a time the widow, the heirs, and the Grand Lodge of the Odd Fellows compromised their conflicting interests by a decree, under the terms of which the widow took 40 per cent. of the estate; the heirs 20 per cent.; and the Grand Lodge 40 per cent. The widow, by a bill of review, sought to set aside this decree. *Byrkett* v. *Grand Lodge,* 131 Ark. 476.

Many vicissitudes have attended this estate since this compromise decree was entered, and its appears there have been more than fifty lawsuits of different kinds concerning this property. It appears that title to some of the lands has failed, and one very substantial judgment was recovered against the estate. *Josephs* v. *Briant,* 115 Ark. 538; *Josephs* v. *Briant,* 108 Ark. 171.

The testator was assassinated, and the grand lodge undertook to discover the assassin, and for that purpose employed a well-known detective agency to investigate the case, and acting upon the investigation and report of that agency, caused the reputed assassin to be prosecuted. This prosecution resulted in an acquittal, but a large expense was incurred in this investigation and prosecution.

The affirmative showing is made that the litigation in regard to the estate was unavoidable on the part of the grand lodge, and resulted from its effort to protect the estate and hold it intact.

At present the grand lodge claims title to about 2,100 acres of land, of which about 500 acres are in cultivation, and at the annual meeting of the grand lodge in 1921 a resolution was adopted directing the trustees of the grand lodge to sell these lands.

The lands were advertised in the newspapers of several cities, and after receiving and considering all the bids it was decided that the offer of Z. M. McCarroll was the highest and best bid, and a contract was entered into with him for the purchase of these lands. An abstract of the title was furnished, and upon an examination thereof McCarroll's attorney raised the objection to the title that the grand lodge had no right to sell.

Thereupon the officers and trustees of the Grand Lodge brought this suit in the chancery court to enforce the contract of sale. The jurisdiction of the chcancery court is predicated upon the ground, first, that this is a suit for specific performance of a contract, which is, of course, an established ground of equity jurisdiction. The court was asked also to assume jurisdiction upon the ground that it involved the construction of a will and sought to determine the scope of a trust, which is also a well recognized ground of equity jurisdiction. *Morris* v. *Boyd,* 110 Ark. 468.

The suit made the widow of one Odd Fellow and the orphan of another parties defendant as representatives of two of the classes of the beneficiaries under the will. These parties and all others filed answers, putting in issue all of the allegations of the complaint. Before the final submission of the cause one J. A. McCarroll, a member of the Grand Lodge of Odd Fellows, filed an intervention, and thereafter the lawsuit lost its characteristics as a friendly suit to try out the title.

J. A. McCarroll alleged in his intervention that the grand lodge, as trustee under the will, had been guilty of neglect of duty; that it had made no effort to carry out the trust, and had used funds derived from the Shirey estate for purposes not authorized by the will; that a contract had been made to sell the lands at a grossly inadequate price. He further alleged that it was practicable and feasible to erect the orphanage on the Robbins farm, and he prayed that the trustees be required to do so.

These issues were all inquired into and numerous witnesses testified, and we have a voluminous record before us, and it would protract this opinion to an undue length to attempt to review the testimony.

The decree contains a recital of the findings of fact made by the court, and we think the testimony supports these findings. We summarize them as follows: Shirey devised all of his estate to the Grand Lodge of the Independent Order of Odd Fellows as trustee for the purpose of erecting a sanitarium at Hot Springs and an orphans' home for indigent orphans and widows on lands known as the Robbins farm. Through no fault of the grand lodge, the larger part of this estate was lost to the grand lodge. On account of the small amount of property realized from said estate, the grand lodge, as trustee, is unable to carry out the provisions of the will of the testator by erecting either the sanitarium or the orphanage. The court found that before the death of the said Shirey the grand lodge had erected and was maintaining at Batesville, Arkansas, a home for widows and orphans of the same class and character as that mentioned in the will, and that it is still maintaining the same and intends to do so. That it is a charitable institution exclusively devoted to charity. That after the death of the said Shirey, in a certain proceeding and decree, as well as by a contract previously made with the collateral heirs the grand lodge was awarded the lands involved in this litigation, and all interest of the heirs and the widow was divested.

The court further found that at the annual meeting of the Grand Lodge a resolution was passed authorizing the sale of the lands, as the same were paying no dividends, with the intention and purpose of using the proceeds of the same for the support of the widows' and orphans' home at Batesville, and that it is the intention to use the proceeds of the sale to Z. M. McCarroll for that purpose.

The court found that the trustees of the grand lodge were duly authorized and empowered to sell the lands, and that, pursuant to this authorization, they had entered into a contract with Z. M. McCarroll for the sale of said lands for the sum of $52,000, and that the lands which are there described barely yield enough income to pay for the repairs and taxes and other expenses necessary to keep them up, and that they are depreciating in value, and will likely be lost to the grand lodge unless sold.

The court specifically found that, on account of the failure of the grand lodge to receive the title to all of the property devised to it, it is impossible to carry out the terms of the will as to the erection of a home on the Robbins farm, or a sanitarium at Hot Springs. But the court found that, if said property is used by the grand lodge for the support of the orphanage at Batesville, it will be used for a similar bounty and kindred charity to that designated in the will, and will be applied as near as possible to the objects and purposes intended by the said Shirey, and the court found this should be done.

The court decreed that the property could be sold and a good and fee simple title made thereto, and directed the defendant, Z. M. McCarroll, to comply with his contract by making the payments therein required. To this ruling and decree Z. M. McCarroll, the widow and the orphan who had been made parties as representatives of the classes to which they belonged, and J. A. McCarroll, the intervener, excepted, and have all appealed.

These findings of fact, in which we concur, dispose of the questions of fact raised in the pleadings; but the examining attorney insists that, notwithstanding these findings of fact, the court was without authority to direct the completion of the contract of sale when it was alleged and proved that the grand lodge did not intend, with the proceeds of the sale of the lands, to erect either the sanitarium at Hot Springs or the orphanage on the Robbins farm, but intended to consume the estate by expending the proceeds thereof on the orphanage at Batesville.

We have here a case where an estate, which the testator probably thought was worth $300,000, proves to be worth less than a fifth of that sum so far as its use for the purpose intended is concerned. It has become impossible to erect either the sanitarium or the orphanage. What becomes of the property devised to the grand lodge? And can the grand lodge sell the lands as it proposes to do? As has been shown, the compromise decree vested in the collateral heirs 20 per cent. of the estate as their share thereof, and in the widow and her son 40 per cent. thereof as their share, and the grand lodge took the remaining 40 per cent., and the necessary effect of this decree was to vest this 40 per cent. in the grand lodge free from any claim of the widow or the collateral heirs.

It is quite obvious that this compromise decree gave to both the widow and the collateral heirs an interest which the testator did not intend them to have. It is equally obvious that the testator intended to devote his entire estate to charity; but for the reasons stated this cannot be done. Shall the devise to charity wholly fail because the intention of the testator cannot be wholly performed? Or shall the manifest purpose of the testator to devote his estate to charity be executed "*cy pres,*" or as nearly as may be?

In the case of *Matter of MacDowell* (*Westchester Trust Co.* v. *Gibson*), 217 N. Y. 454, 112 N. E. 177, a testatrix had attempted to create a charitable trust which

could not be carried out because the fund provided was not sufficient for that purpose. SEABURY, J., for the Court of Appeals of New York, said: "The money that she directed be devoted to this purpose may be inadequate to carry out her purpose in the precise manner contemplated, but that fact of itself furnishes no reason why the class that she intended to aid should not receive the benefit of the aid which it was her intention to give. (*Jackson* v. *Phillips,* 14 Allen [Mass.] 539, 586; *Atty. Gen.* v. *Ironmongers' Co.,* 2 Beav. [Eng.] 313; *Norris* v. *Loomis,* 215 Mass. 344, 102 N. E. 419).

"No general rule can be enunciated as to the manner in which the *cy pres* doctrine will be applied. Each case must necessarily depend upon its own peculiar circumstances. Inadequacy of the trust fund to accomplish the purpose of the testator in the manner originally intended may, however, justify the scheme of the charity being changed. If the Supreme Court cannot cause this trust to be carried out in the precise manner contemplated by the testatrix it will apply the trust fund to other charities as nearly as possible like that specifically mentioned in the will. (*Sailors' Snug Harbor* v. *Carmody,* 211 N. Y. 286, 300, 105 N. E. 543)."

The case is annotated in Ann. Cas. 1917-E, 853, and at page 870 the note deals with the question of the inadequacy of the gift to maintain the charity attempted to be created. The case note is that "the inadequacy of a charitable trust fund for the establishment of a home for persons of a particular class does not in any way affect the validity of the gift," and among the cases cited is the case of *Kemmerer* v. *Kemmerer,* 233 Ill. 327, 84 N. E. 256, which case is itself found annotated in 122 Am. St. Rep. 169, where it was said: "In this State the statute of 43 Elizabeth, chapter 4, is a part of the common law (*Heuser* v. *Harris,* 42 Ill. 425; *Andrews* v. *Andrews,* 110 Ill. 223), and the efforts of the courts of this State have always been to sustain a gift for charity if it can be done, and while the courts of this State do not

assume to exercise the prerogative powers which the courts of England have at times exercised, if a trust for charity is sufficiently certain to enable the courts, in the exercise of their ordinary chancery powers, to carry out the donor's charitable intent, they will not allow the trust to fail (*Welch* v. *Caldwell,* 226 Ill. 488, 80 N. E. 1014); and the fact that the fund will be depleted one-half by reason of the fact that the widow has taken under the law and not under the will, will not defeat the trust (*Gilman* v. *Hamilton,* 16 Ill. 225), as other means may be donated toward the erection and maintenance of said orphans' home and the testator's object thereby fully accomplished."

This statute of 43 Elizabeth, chapter 4, was entitled: "An act to redress the misemployment of lands, goods and stocks of money heretofore given to certain charitable uses."

Judge U. M. Rose, as special judge in the case of *Fordyce* v. *Woman's Christian National Library Association,* 79 Ark. 550, said: "The English statute of 43 Eliz., c. 4, is in force in this State. In it schools and free schools are mentioned, but not libraries. The statute was, however, only remedial and ancillary, and did not affect in any wise the jurisdiction of the chancery court as it previously existed. *Ould* v. *Washington Hospital,* 95 U. S. 303; *Biscoe* v. *Thweatt,* 74 Ark. 545."

This English statute mentions the education and preferment of orphans and gifts for or towards their relief.

In the opinion by Judge Rose, *supra,* it was also said: "Devises for charitable purposes that are void at law are often sustained in chancery. 2 Story, Eq., sec. 1170. Where a literal execution of a charitable devise becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose. *Id.,* sec. 1169. The court will supply all defects of conveyances where the donor has capacity to convey, unless the mode of donation contravenes some statutory provision. *Id.,* sec. 1171."

There are a vast number of cases which discuss and apply what is commonly called the *cy pres* doctrine, and the annotated cases herein cited collect many of them. See sec. 113 of the article on Charities in 5 R. C. L. at p. 370; *Tincher* v. *Arnold,* 147 Fed. 665. See also, note c, par. IV, to the case of *Hadley* v. *Forsee,* 14 L. R. A. (N. S.) 49; sec. 74 *et seq.* of article on Charities in 11 C. J. 358; *Grand Prairie Seminary* v. *Morgan,* 49 N. E. (Ill.) 516; *Grimke* v. *Malone,* 91 N. E. 899; 2 Perry on Trusts (6th Ed.) secs. 723, 725; 3 Story's Equity Jurisprudence, (14th Ed.) secs. 1557, 1571; *Mackenzie* v. *Trustees of Presbytery of Jersey City,* 3 L. R. A. (N. S.) 227; *Sailors' Snug Harbor* v. *Carmody,* 211 N. Y. 286, 105 N. E. 543.

A case in which the facts are very similar to those of the instant case is that of *Weeks* v. *Hobson,* 150 Mass. 377. In that case the donor had devised a certain lot of land "to be used as a site for a hospital," and the reasoning of that case is so applicable to the facts of this that we quote the following paragraph: "The original bill alleges that the land devised is not a suitable site for a hospital building. We can think of causes which may have come into existence since the will was made, or even since the death of the testator, which, combined with other causes inherent in the land, make it now an unsuitable place for a hospital, even though the testator might well have thought it suitable when he made his will. We must treat this allegation, and the decree founded on the evidence in support of it, as establishing the proposition that it is now impracticable to carry out the purpose of the testator in the precise mode which he contemplated. Since the trustees cannot properly build a hospital on the land devised, the question presented to the court is whether the charity must fail, and the property revert to the residuary legatees, or whether the court can apply the doctrine of *cy pres* and change the mode of disposing of the property so as to carry out the general purpose and intent of the testator. That depends

upon what we find to have been his intent in making the devise. It is to be noticed, first, that he makes a single gift of land and money, to be used for the establishment and maintenance of a hospital. The land is to be used as a site, and the money is to be expended in the erection of buildings and in defraying the current expenses of the hospital. His obvious purpose was to provide, and, to the extent of his gift, to maintain a hospital for the sick and maimed of the city of his residence. We cannot believe that he intended to make his gift dependent on the occupation of a particular lot as a site for the buildings, so that if it became impracticable or impossible to use that lot he would utterly fail to accomplish his purpose. His language indicates that he had in mind a charitable scheme of great importance to the people of the neighborhood, which involved the occupation of a lot by hospital buildings, but to which the location of the buildings in the place named, instead of some other proper place, was of no consequence."

We have concluded therefore that the chancery court had jurisdiction to make the order directing the specific performance of the contract of sale, and that, pursuant to its right to supervise and control the administration of trusts, and to prevent the failure of the testator's purpose to devote his estate to charity, a proper order was made, and the decree is therefore affirmed.

McCulloch, C. J., (dissenting). All of the authority which the Grand Lodge, as trustee, possesses in regard to the property in controversy, and any interest which it has in the property is derived solely from the last will and testament of Shirey. Under the compromise with the widow and heirs the Grand Lodge was shorn of a great deal of its interest in a considerable portion of the property, but it derived no interest or benefit other than a settlement of the lawsuit. It received, under the terms of the agreement, no new interest in the land devised in trust by the will.

In the Shirey will there are two purposes clearly expressed; one to create a trust in the four hundred acres of land known as the Robbins farm, which was "to be used as a location and site for an orphans' home to be established and maintained thereof under the perpetual control of said grand lodge"; and the other to create a trust in the remainder of the property of the testator for the purpose of establishing a sanitarium to be located and maintained at the city of Hot Springs for the purpose of the treatment of certain diseases by certain methods and without the use of drugs.

There are now 2,100 acres of land held by the grand lodge under the will, including the four hundred acres constituting the Robbins farm. The declared purpose of the trustee now is to sell all of the property and devote the proceeds to the maintenance of an orphans' home at the city of Batesville, which prior to the death of Shirey had been established by the Grand Lodge. The right to dispose of the property for the purpose mentioned is the point at issue in the present litigation, and the majority of the court now sustain the asserted authority of the Grand Lodge under the principles known as the *cy pres.* doctrine—the doctrine of nearness or approximation.

The doctrine of *cy pres* originated in the common law of England as a part of the royal prerogative which the chancellor exercised by the sign-manual, and for obvious reasons this phase of the ancient doctrine has never obtained in America. The other, or judicial, phase of the doctrine, which was merely one of construction by courts of equity in order to effectuate the real intention of a testator, has always been admitted and freely exercised by the courts of this country. There are many decisions which give an interesting account of the origin, progress and limitations of this doctrine, notably the case of *Jackson* v. *Phillips,* 96 Mass. 539, which is cited in the majority opinion.

"This power of disposal by the sign-manual of the crown in direct opposition to the declared intention of

the testator," said the Massachusetts court in the case cited above, "whether it is to be deemed to have belonged to the king as head of the church as well as of the State, * * * or to have been derived from the power exercised by the Roman Emperor, * * * is clearly a prerogative and not a judicial power and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal."

Another interesting discussion of the subject may be found in the opinion of the New Jersey court in *Mackenzie* v. *Trustees,* 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

The substance of the doctrine, as recognized by the American courts, is that the dominant purpose of the testator in the creation of a charitable trust will not be permitted by a court of equity to fail merely because of impossibility of its execution in the manner literally prescribed by the testator, and that other methods will be adopted in order to effectuate the general and dominant purpose of the testator.

In *Jackson* v. *Phillips, supra,* the Massachusetts court stated the scope of the enforcement of this doctrine in the following language:

"It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator become impracticable, or by change of law become illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the tes-

tator's particular directions as possible, to carry out his general charitable intent."

The same court, in a later case (*Teele* v. *Bishop of Derry,* 168 Mass. 341), stated the doctrine and its limitations as follows:

"If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if, by a change of circumstances or in the law, it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of *cy pres* will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. * * * But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, the doctrine of *cy pres* does not apply, and, in the absence of any limitation over or other provision, the legacy lapses."

In a decision of the Kentucky Court of Appeals, Chief Justice ROBERTSON, speaking for the court, said:

"We as satisfied that the *cy pres* doctrine of England is not, and should not be, a *judicial* doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal, or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable, and will effectuate the *declared* intention of the donor, and not arbitrarily and in the dark, *presuming* on his motives or wishes, *declare an object for him.* A court may act judicially as long as it effectuates the lawful intention of the donor. But it does not act judicially when it applies his bounty to a specific object or charity, selected by

itself merely because he had dedicated it to charity generally, or to a specified purpose which cannot be effectuated." *Moore* v. *Moore,* 4 Dana (Ky.) 354.

In the New Jersey case cited above (*Mackenzie* v. *Trustees*), the court said this:

"In all of these instances it is to be observed that the underlying principle is this: Where the testator or donor had two objects in view, one primary or general, and the other secondary or particular, and these are, literally speaking, incompatible, the particular object must be sacrificed in order that effect may be given to the general object according to law and 'as near as may be' to the testator's or donor's intention."

According to the test prescribed in these decisions of courts of the highest respectability, and upon which the majority seem to rely in reaching their conclusion, the *cy pres* doctrine is inapplicable to the facts of the present case. There cannot be discovered in the langauge of the testator or a general purpose other than in the manner expressed in the will, to create a charity in the way of caring for the widows and orphans of members of the fraternity. The only declared purpose is the specific one of establishing a home upon a particular tract of land. There is no general provision for the establishment of an orphans' home, nor is there any provision at all for the maintenance of the home. The language of the devise is susceptible only to the interpretation that the testator had in mind solely the location of an orphans' home upon the site in question, to be operated and controlled by the fraternity mentioned, as trustee; therefore, there was no general charitable intent to which the specific intent with regard to methods or means for its performance must yield. It is not a case like the one relied on by the majority (*Weeks* v. *Hobson,* 150 Mass. 377), where not only the location of the home was provided, but the means for its operation were also provided, and the court held that the trust did not fail merely because the selected location was unsuitable. In the present

case the testator merely provided for the location, and his design ended with that provision. The sale of the property and the devotion of the proceeds to another purpose, even though it be a charity of the same general nature, was not within the design of the testator, and therefore it is not within the power of the court to set at naught his design and use the funds for some other purpose of the same general nature. The facts of the case, I think, fall squarely within the limitation placed upon the doctrine by the Massachusetts court in *Teele* v. *Bishop of Derry, supra.*

What I have said has reference solely to the application of this principle to the four-hundred acre tract known as the Robbins farm. But, conceding that the doctrine applies as to that part of the property so as to permit the sale for use in the maintenance of an orphans' home, it is entirely beyond me to discover any proper application of the doctrine which would permit the trustee to dispose of the property which was specifically devised by the testator for the purpose of establishing a sanitarium at Hot Springs and devote the proceeds to an orphans' home in Batesville. It seems to me that the decision, to that extent, goes the full limit of the ancient doctrine of *cy pres* which the English chancellor long ago exercised under the royal prerogative. No American court has ever gone that far, and I am therefore unable to join the judges in the decision which holds that the Grand Lodge has the authority to use this property or to dispose of it for any purpose other than that prescribed in the Shirey will.

WATSON v. BANKS.

Opinion delivered July 3, 1922.

1. INSANE PERSONS—EVIDENCE OF COMMITMENT.—In an action on account for goods sold, defended on ground of buyer's insanity, where part of the goods were bought prior to his commitment to the State Hospital, and the rest after his discharge therefrom, defendant cannot complain because, after admitting proof of a record of the county court committing defendant to the State Hospital as being insane, the court held that such record was admitted merely as a circumstance tending to show that defendant was insane.
2. SALES—BURDEN OF PROVING INSANITY—INSTRUCTION.—In an action by a seller of goods against a buyer to recover on an account, defended on the ground that the buyer was incapable of making a valid contract because of insanity, a charge that the burden rested on the buyer to establish the fact that at the time he entered into the contract he was insane was correct.
3. INSANE PERSONS—ISSUANCE OF LETTERS OF GUARDIANSHIP BY CLERK.—Under Const., art. 7, § 34, conferring upon probate courts exclusive jurisdiction in matters relating to persons of unsound mind, and their estates, and the statutes providing for appointment of guardians of estates of insane persons by probate courts after an adjudication of insanity, issuance of letters of guardianship by the county clerk without an order of the probate court was unauthorized and void, and raised no presumption concerning the mental incapacity to contract of the person concerning whom the letters were issued.

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

Poe, Gannaway & Poe, for appellant.

Appellant was legally declared an insane person under §§ 9403-9405, C. & M. Digest. Such adjudication is not required by statute to be recorded at all, and the fact that it was recorded in the county court records does not invalidate same.

After lawful adjudication, appellant is presumed to remain insane until his disability is removed by competent authority. One dealing with a supposed insane person must show that he had mental capacity to enter into the contract. 136 Ark. 72; 139 Ark. 223; 14 R. C. L. 622.

It was the province of the jury to find whether or not appellant was insane, and the court erred in taking away this question from them by the instructions given.

Danaher & Danaher, and *Moore & Hester,* for appellee.

The adjudication of insanity was made by the county court, and not the judge thereof, and was done under authority of secs. 5826-5829, C. & M. Digest. The probate court made no finding whatever. The sections of the Digest relied on by appellant had no reference to the regulation of the business affairs of appellant, but refer only to the manner of gaining admission to the State hospital.

A valid adjudication of insanity is *prima facie* evidence, but the burden of proof is upon the one asserting insanity. 304 Mass. 173; 22 C. J. 79; 119 Ark. 179. Appellant failed to request the court to give an instruction to the effect that the adjudication of the county court was *prima facie* evidence of continuing insanity at the time the contract was made, and he cannot now complain.

McCULLOCH, C. J. Appellee is a merchant doing business in Desha County, and he instituted this action in the circuit court of that county against appellant to recover on account for merchandise sold and delivered to one Harvill, upon written orders given by appellant.

In the answer filed in the case, appellant denied the allegations of the complaint with respect to the giving of the orders for the sale of merchandise, and the answer also contained a plea that appellant was insane at the time of the alleged sale of the merchandise, and on that account incapable of executing a contract.

There was a trial of the issues before a jury, which resulted in a verdict in favor of appellee.

It is conceded that the evidence was sufficient to support the finding of the jury in favor of appellee upon the issues whether or not appellant gave the written orders and whether or not the account of appellee was correct. It is also conceded that these issues were

properly submitted to the jury, and there is no assignment of error in regard to that feature of the case.

The only assignments of error relate to rulings of the court with respect to the issue as to appellant's mental capacity at the time the contract is alleged to have been entered into.

The transactions occurred during the year 1920. Appellant was residing in Desha County, and was the owner of a farm. Harvill was his tenant. Appellant gave orders to appellee to make advances to Harvill.

The testimony tends to show that during the month of February, 1920, appellant suffered a nervous breakdown, and on March 21, 1920, he was taken to the State Hospital for Nervous Diseases, at Little Rock. He remained in that institution until April 1, 1920, when he was discharged, and returned home.

One of the orders given by appellant for a small amount was given prior to the time he went to the hospital, and all of the others were given after his return.

There is a conflict in the testimony as to the mental condition of appellant before and after he went to the hospital. There was sufficient evidence to support a verdict either way on that issue.

Appellant offered to introduce in evidence a certified copy of a written order, or judgment, signed by the county and probate judge of the county and entered upon the records of the county court, on March 21, 1920, declaring that appellant was insane and committing him to the State Hospital. The county clerk was introduced as a witness by appellant, and testified that the probate court was not in session on that date and had not been in session since March 10, 1920, but that the county court was in session, and that he placed this order on the records of the county court pursuant to the custom in that regard which had theretofore prevailed in that county. The court admitted the record in evidence as a circumstance tending to show that appellant was insane, and

instructed the jury to that effect. The court also charged the jury that the burden of proof rested upon appellant to establish the fact that at the time he entered into the alleged contract with appellee he was insane, or lacking in sufficient mental capacity to make a contract. The court refused to give an instruction, requested by appellant, telling the jury that the burden was upon appellee to show by a preponderance of the testimony that appellant was mentally capable of making the contract and binding himself at the time he gave the alleged orders.

The contention of counsel for appellant in their argument for a reversal of the case is that the order signed by the "county and probate judge" and entered upon the records of the county court was sufficient to constitute an adjudication of appellant's insanity, irrespective of the question whether it was entered on the records of the proper court, and that it constituted *prima facie* evidence of appellant's insanity, which placed the burden upon appellee to overcome. Counsel for appellee, on the other hand, contend that the order of commitment to the State Hospital was void for the reason that it was not made by the probate court while in session, and that exclusive jurisdiction is vested in the probate court by the Constitution. We deem it unnecessary to go into a discussion of this question for the reason that we do not consider it material to a decision of this case.

None of the orders were given by appellant during the period from his commitment to the State Hospital to his discharge therefrom, and the order of commitment, either by the county and probate judge in vacation, if it be held that the statute confers authority upon him to make such an order; or the county court, if it be held that the court had jurisdiction to make the order, created any presumption of insanity after the discharge from the State Hospital.

The statute governing the admission of patients into the State Hospital for Nervous Diseases provides for an order of commitment by the county and probate judge, made after hearing testimony on the subject (Crawford & Moses' Digest, sec. 9404), and the statute also provides that patients may be discharged from that institution by the superintendent. Crawford & Moses' Digest, sec. 9421. Therefore any presumption arising from the mere commitment was removed by the discharge in the manner prescribed by law.

No evidence was introduced with respect to the method of appellant's discharge from the State Hospital or the circumstances thereof, but the proof is undisputed that he returned home on April 11, 1920, and was not in custody thereafter. Therefore the presumption must be indulged that he was regularly discharged. There is therefore no presumption that he labored under insanity after the time of his discharge or before the date of his admission, regardless of the question of the validity or regularity of the commitment to the State Hospital. It is true that on the day that the county and probate judge made the order of commitment the clerk of the court issued letters of guardianship as for an insane person, but there was no order of the probate court authorizing the issuance of such letters, nor was there any approval of the same by the probate court.

The Constitution (art. VII, sec. 34) confers upon the court of probate exclusive jurisdiction in matters relating to persons of unsound mind and their estates, and the statutes of the State provide for the appointment of guardians of the persons and estates of insane persons by the probate court after an adjudication of insanity. Crawford & Moses' Digest, sec. 5836 *et seq.*

The issuance of letters of guardianship by the county clerk was unauthorized and void, and raised no presumption concerning the mental incapacity of appellant.

We are of the opinion that the court was correct in limiting the purpose for which the record of insanity was

introduced, and was also correct in the instruction telling the jury that the burden was upon appellant to establish his lack of mental capacity at the time the contract in question was entered into.

Judgment affirmed.

CRABTREE v. CRABTREE.

Opinion delivered June 26, 1922.

1. DIVORCE—SINGLE ACT OF CRUELTY.—Where a single act of physical violence is relied on for divorce, under Crawford & Moses' Dig., § 3500, as cruel and barbarous treatment, the evidence must show that the life of the complaining party was endangered.
2. DIVORCE—CRUELTY.—Where a wife, without warning, attempted to cut her husband's throat, and did cut a gash five inches long, and, on his running away from her, followed him and cut his hand severely while he was trying to hold a door between them, his injuries confining him to the hospital for 10 days, he was entitled to a divorce on the ground of cruelty.
3. DIVORCE—DISCRETION IN GRANTING ABSOLUTE OR LIMITED DIVORCE.—Under Crawford & Moses' Dig., § 3500, providing that the chancery court may, for causes enumerated, set aside a marriage contract, not only from bed and board, but from the bonds of matrimony, the discretion of the chancellor is not one to be exercised at his will, but is a judicial discretion to be exercised according to equitable principles and the peculiar circumstances of each case.
4. DIVORCE—GRANT OF LIMITED DIVORCE—ABUSE OF DISCRETION.—Where, in an action by a husband for divorce for cruelty, the chancellor found that plaintiff was without fault, and that defendant was guilty of cruelty, the chancellor abused his discretion in granting a limited divorce, instead of an absolute one.
5. DIVORCE—CUSTODY OF CHILDREN.—In a husband's action for divorce in which he established the ground of cruelty, it was not error to give to the mother the custody of two children, one nine and the other six years old, where they were being properly cared for by her.

Appeal from Sebastian Chancery Court; *J. V. Bourland;* Chancellor; reversed.

STATEMENT OF FACTS.

Marvin M. Crabtree brought this suit in the chancery court against Josephine Crabtree to obtain an absolute

divorce from her. He also asked for the custody of their two children.

His ground for divorce was, that his wife had been guilty of such cruel and barbarous treatment as to endanger his life.

According to the plaintiff's testimony, his wife and himself lived with her mother, and he tried to persuade his wife to leave there and establish a home of their own. He did this because his wife's mother meddled with their marital affairs and made their home life with her unpleasant. On the day in question in this case, his wife's mother accused him of doing things that he had never thought of doing. He went back to his work at noon and returned home about six-thirty or seven p. m. After eating supper he started to go down town. His wife and the children came out of the house with him. He advised his wife that he was not going to live there in a continual row on account of her mother. His wife requested him to come back into the house, and he did so. Shortly after returning to the house, the telephone rang and one of his drivers asked him to come to the office. He told his wife that he had to go to town, and why. He told her she could go with him if she wished. The car was something like 200 feet from the house, and his wife had the switch-key. He was accustomed to turn the switch with a piece of metal on his key-ring. He walked in front of the car and set the crank to start the motor. At this time his wife stepped up behind him and laid her left hand on his left shoulder. She asked him if he would come back, and he replied that he was not making any promises. At this instant his wife cut his throat with a razor. He jerked loose from her and jumped over a big gate. Then, seeing a light in the rear of McCann's residence, about 100 feet away, he hastened there for help, and his wife followed him. He saw her coming, and she showed that she had not accomplished her purpose. He had to act quickly. He grabbed a swinging door and tried to keep

her from getting to him by holding the swinging door with his hand. His fingers stuck out on the side of the door next to his wife, and when she could not push the door open she slashed his hands, cutting four fingers on one and one finger on his other hand, practically severing the leaders in all of them. The cut in his throat was five inches long. He then turned loose the door and ran through the house into the kitchen, where McCann was sitting, and called his attention to what had just happened to him. His wife entered the room, and McCann caught her from behind and held her by the arms. His wife made two desperate attempts to assault him again, but was prevented by McCann. He grew very weak from loss of blood. Finally he sat down on the porch in a swing. His wife begged McCann to let her get to him. She got a little closer to him and struck at him again, hitting him across the face, but by some means the razor turned and only peeled the skin. He then started to run. His wife jerked loose from McCann and slashed him in the back, cutting three holes in his coat. She caught him, and all three of them fell on the floor. Mr. Shaffer came up at this time, and the plaintiff was released. Finally he started off of the porch and his wife ran at him, striking at him with the razor. Shaffer caught her. The plaintiff then got into his car and requested a man to drive him to the hospital. He was in the hospital ten days. The day after he left the hospital his wife called him over the telephone and said, "Well, good morning, old scout, how are you?"

Mrs. Crabtree was a witness for herself. According to her testimony she did most of the ironing and washing for the family, made most of the children's clothes, did the household work, and mowed the yard. When she had spare time she worked in her husband's place of business.

She claimed that her husband was of a sullen disposition and mistreated her in various ways, which she stated. She admitted cutting him on the occasion in

question. When her husband was called to his office over the telephone that night, she asked to go with him, and he replied that she could. She went to the sideboard to get the switch-key to give to her husband. She had on an apron, and dropped the switch-key in one of its pockets. When she got to the car she put her hands in her pocket to get the key, and felt the razor. She had been using it that day in ripping some of her children's clothes. She does not recall anything from the time she felt the razor in her pocket until some time after the assault on her husband was made. She supposed she attempted to cut her husband's throat with the razor, but had no recollection of it.

The plaintiff denied that the defendant was compelled to do any ironing and washing, and stated that the washing had been hired to be done for five years. He admitted that his wife sometimes mowed the yard, but not at his request. He said that he did not want to live with her people, and constantly tried to get his wife to move to another house, but she refused to do so. He denied categorically that he had ever mistreated his wife in any way.

By agreement of counsel, certain evidence which had been used in the trial in the circuit court on the charge against his wife for assault with the intent to kill her husband was made a part of the record in this case.

J. A. McCann was one of the witnesses. He told about the wife following her husband to his house with a razor in her hand. He held her about twenty minutes while she struggled to get away. She appeared very nervous and struggled to get free from him. She had a wild look in her eyes and stared into vacancy. In his opinion she was temporarily insane.

Several witnesses who saw her later in the evening and on the next day testified that she did not appear normal and was very nervous and had a peculiar look. They said that she had always been a peaceable woman

before that time, and they regarded her as temporarily insane when she attacked her husband with the razor and cut his throat.

On the day of the final hearing, the defendant testified that she wanted the plaintiff to become reconciled to her and that she was willing to do anything to bring about a reconciliation. The plaintiff was questioned by the court and said that he would not live with the defendant again; that her assault upon him was without provocation, and that he would not risk his life by living with her again.

The chancellor entered a decree of divorce from bed and board in favor of the plaintiff against the defendant, but refused to grant him an absolute divorce. Their two children were awarded to the custody of the defendant, and the parties settled their property rights by agreement.

The plaintiff has duly prosecuted an appeal to this court:

Earl U. Hardin and *Webb Covington,* for appellant.

HART, J. (after stating the facts). What constitutes a cause of divorce is a matter of law. Whether such conduct exists is a matter of fact to be proved by competent evidence. One of the grounds for divorce under our statute is where either party shall be guilty of such cruel and barbarous treatment as to endanger the life of the other. Sec. 3500 of Crawford & Moses' Digest.

While a single act of physical violence does not always justify a divorce under the statute, still it may be of such violence and danger to the life of the complaining party as to constitute a ground of divorce. Much depends upon the character of the violence and upon the presence or absence of provocation. A serious blow given intentionally and without any provocation will generally give rise to the inference that it is likely to be repeated and thus create a reasonable apprehen-

sion of danger for the future. The evidence must show that the life of the complaining party was endangered.

The question was discussed at length in the case of *De Coito* v. *De Coito,* 21 Hawaii, 339. It was there held that to constitute extreme cruelty there must be such violence or such a course of conduct as tends to endanger life, limb, or health, or create a reasonable apprehension of such result, thus rendering continued cohabitation unsafe.

In *Ford* v. *Ford,* 104 Mass. 198, it was held that where the evidence relied on is that of blows given on a single occasion, the violence must be of such a character as to endanger life, limb, or health, or as to create a reasonable apprehension of such danger.

In *Beyer* v. *Beyer,* 50 Wis. 254, it was held that a single assault and battery constitutes cruelty when committed under circumstances which indicate that the defendant has so little control over his passions that he will be likely to repeat personal violence on any provocation.

In *May* v. *May,* 62 Pa. 206, the court held that a single act of cruelty may be so severe and attended with such corresponding circumstances of atrocities as might, under a fair and liberal construction of the act, justify a divorce. But the court said that no single act of cruelty, however severe, that comes short of endangering life, is sufficient to justify a divorce.

As we have said, our statute names as one of the causes for divorce that either party shall be guilty of such cruel and barbarous treatment as to endanger the life of the other.

While the chancellor did not grant an absolute divorce, still he found the facts for the plaintiff and granted him a divorce from bed and board on the ground that he had the power to grant either kind of divorce under the statute on the same testimony.

It cannot be said that the finding of facts made by the chancellor is against the weight of the evidence.

The husband testified that his wife, without warning, attempted to cut his throat and did cut a gash in it five inches long. He ran away from her, and she followed him to a neighbor's house, where she severely cut his hand while he was trying to keep away from her by holding a door between them. Even after the neighbor caught hold of her, she made repeated attempts to again cut her husband with the razor. She cut him in the back as he ran away from her. His injuries were so severe that he was confined for ten days in a hospital. He made no attempt whatever to strike his wife or in any way to injure her. He merely tried to run away from her.

The husband's testimony is corroborated by that of the neighbor to whose house he ran to escape from his wife. Indeed, the wife admits the cutting, and only seeks to excuse it on the ground that her reason was temporarily dethroned. She introduced witnesses who testified to that fact. However, they all described her appearance, and it is fairly inferable from the surrounding circumstances that she attacked her husband in a sudden fit of anger. In any event, her attack was so severe that she endangered his life, and it would seem that under the circumstances he is justified in not living with her again. There was but little, if any, provocation for the assault.

It is true that the wife testified in a general way about indignities suffered by her at the hands of her husband, but he specifically denied any ill treatment of her, and said that whatever marital troubles they had arose from the fact that she would not live away from her mother in a home which he offered to prepare for her. It was her duty to live with her husband, and the circumstances attending the assault do not show any provocation for it.

Hence we cannot say that the finding of fact made by the chancellor in favor of the plaintiff is against the preponderance of the evidence.

It appears from the record, however, that the chancellor refused to grant an absolute divorce to the plaintiff, not because he was not entitled to such a divorce under the facts, but because the chancellor believed that under the statute he had a right to grant an absolute or limited divorce upon the same testimony as he might deem proper.

In this respect we think the learned chancellor erred. It is true that § 3500 of Crawford & Moses' Digest provides that the chancery court shall have the power to dissolve and set aside a marriage contract, not only from bed and board, but from the bonds of matrimony, for the causes specifically enumerated in the statute. This, however, does not mean a discretion to be exercised at the will of the chancellor; but it is a judicial discretion to be exercised according to equitable principles and the peculiar circumstances of each case.

The subject was thoroughly discussed by Judge FIELD, while a member of the Supreme Court of California, in the case of *Conant* v. *Conant*, 70 Am. Dec. 717. The statute construed in that case provides that the several district courts of the State shall have exclusive jurisdiction to grant a divorce from bed and board and from the bonds of matrimony. Wood's Digest of the Laws of California, Art. 2635.

It will be noted that the statute, in so far as it relates to the discretion of the court in granting an absolute or limited divorce, is substantially the same as our statute. In that part of the decision bearing on this question, the learned justice said:

"The statute says divorces may be granted from bed and board, or from the bonds of matrimony, but it was never intended that either should be indifferently granted, according as the prayer of the applicant asked for one or the other modes of relief. It was intended that a certain discretion should be exercised by the courts, according to the special circumstances of each suit, acting upon the settled principles of the common

law as applicable to this class of cases. And the true rule which should govern the court in the exercise of its discretion in this respect is this, that, to entitle to a decree for an absolute divorce from the bonds of matrimony, the applicant must be an innocent party—one who has faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other; and, on the other hand, where there are circumstances showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground for divorce, the decree should be only for a divorce from bed and board. To obtain a release *a vinculo matrimonii,* the applicant must be without reproach, and, however guilty the defendant, if the applicant is chargeable either with similar guilt or an offense to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, the relief must be limited to a divorce *a mensa et thoro.*"

But it is claimed that this decision is contrary to the rule laid down in *Crews* v. *Crews,* 68 Ark. 158. In that case the chancellor granted the defendant on her cross-complaint a divorce from bed and board, and in discussing the question Chief Justice BUNN said:

"The decree from bed and board and the divorce from the bonds of matrimony both rest upon the same ground, and the same evidence will sustain either, with this qualification: Upon the evidence the chancellor has a sound discretion to grant the one kind of divorce or the other as he may deem best under the circumstances. The text writers generally, and many jurists, declaim against divorces from bed and board as useless, if not absolutely wrong in principle, but we cannot enter upon a discussion like that. The law authorizes divorces of that kind, and the implication, at least, is that circumstances must determine when they should be granted. The chancellor has exercised his discretion, and we can-

not say that his discretion has been abused. His decree is therefore affirmed."

A majority of the court is of the opinion that the rule laid down in that case is in accordance with and not contrary to the principles announced by Justice FIELD. Every opinion must be construed with reference to the facts under discussion.

In *Crews* v. *Crews, supra,* the chancellor found that both parties were to a degree in fault, and that neither was entitled to an absolute divorce, but that a decree of divorce from bed and board should be rendered. It was contended by counsel that this finding was tantamount to a finding that both parties were equally at fault, and that therefore neither was entitled to a divorce. This court said that it did not think that the language of the chancellor had that meaning, but rather that, while neither was blameless, there was a difference in their guiltiness in degree.

The language quoted above shows that this constituted the basis of the affirmance of the decree of the chancery court. It will be noted that the court said that the decree from bed and board and an absolute divorce rests upon the same ground, and that the same evidence will sustain either, with a qualification.

The qualification was that the chancellor has a sound discretion to grant the one kind of divorce or the other, as he may deem best under the circumstances. The circumstances under which the chancellor exercised his discretion in that case were, as we have already seen, that both parties were to a degree in fault, and on that account neither was entitled to an absolute divorce. The defendant was granted divorce from bed and board because the chancellor deemed that she was the less guilty of the two parties. It will be seen from the language quoted that this court will reverse the chancellor where he abuses his discretion in the matter. If the chancellor had the right to grant an absolute or limited di-

vorce indifferently, it is plain that he could never abuse his discretion.

On the other hand, if his discretion is to be exercised according to the principles expressed in *Conant* v. *Conant, supra,* and in accordance with the acts of the chancellor in *Crews* v. *Crews, supra,* it is manifestly an abuse of discretion for the chancellor to grant a divorce from bed and board where the complaining party is without fault and has established his or her grounds for divorce.

Therefore, the chancellor, having found the facts in favor of the plaintiff, abused his discretion in refusing to grant him an absolute divorce, and in granting him a divorce from bed and board.

The property rights of the parties arising from the marital relations were settled by agreement, and that phase of the case is not before us.

Complaint is also made by the plaintiff that the court erred in not granting him the custody of their two children. The court granted the custody of the children to the mother with the right of visitation to the father. One of the children was a boy, age six, and the other a girl nine years old. While the plaintiff asked for the custody of the children, he does not assign any reason why he should have them, and the court can perceive none. It does not follow that, because the wife tried to kill him in a fit of anger, she did not have any parental affection for the children. On the contrary, the record discloses that she loved them and was properly caring for them. The court looks mainly to the comfort and happiness of the children and gives them to the keeping of that parent who can best look after them.

On account of their tender years, it cannot be said that the chancellor erred in giving them to the custody of the mother, with the right of visitation to the father at all proper and reasonable times. Therefore, the decree in this respect will be affirmed.

It follows from the views expressed above that the chancellor erred in not granting an absolute divorce to the plaintiff, and for that error the decree will be reversed and the cause remanded, with directions to grant him an absolute divorce.

HUMPHREYS, J., (dissenting). After a careful reading of the facts in this case, my conclusion is that the attack made upon appellant by appellee was due to temporary insanity. They had lived together for a number of years in peace and harmony. No serious friction existed between them at the time the attack was made. The infliction of the injuries was an isolated act of cruelty, out of keeping with the current of their lives, and without excuse upon any other theory than momentary insanity. The undisputed evidence tended to show that appellee was beside herself, when she so unexpectedly and viciously attacked her husband. She herself testified that she knew nothing of the occurrence until it was all over. The evidence is wanting to show intentional cruelty, so a decree of divorce should have been refused.

I also think the majority have incorrectly construed the statute and, in effect, overruled the case of *Crews* v. *Crews,* 68 Ark. 158. In that case the divorce statutes were interpreted as conferring a sound discretion upon the chancellor to determine whether a divorce absolute, or from her bed and board only, should be granted in any particular case. The effect of the majority opinion in the instant case is to withdraw that power from the chancellor.

For the reasons given, I am impelled to dissent from the majority opinion.

MISSOURI PACIFIC RAILROAD COMPANY v. COCA COLA BOTTLING COMPANY.

Opinion delivered June 26, 1922.

1. RAILROADS—NEGLIGENCE AT CROSSING—QUESTIONS FOR JURY.—In an action for damages to a truck struck by a train at a crossing, where the testimony was conflicting as to whether the statutory signals were given and a lookout kept, the issue was for the jury.
2. RAILROADS—DISCOVERED PERIL—QUESTION FOR JURY.—Whether a truck, struck by a train at a crossing, was in a perilous position when discovered, whether there was any negligence after such peril was discovered, and whether the driver was oblivious to the approach of the train when seen driving the truck, *held* for the jury.
3. NEGLIGENCE—WHAT LAW GOVERNS.—The rights and liabilities of parties to an action for injuries at a railroad crossing in Oklahoma are governed by the law of that State.
4. RAILROADS—DISCOVERED PERIL.—Where a traveler at a crossing was guilty of contributory negligence in Oklahoma, the railroad company was not liable unless, after actually discovering his peril, it failed to use ordinary care to avert the injury, and an instruction which made the company's liability to depend on whether the trainmen discovered, or ought by the exercise of ordinary care to have discovered, the peril of the traveler, was erroneous.
5. TRIAL—INSTRUCTION—GENERAL OBJECTION.—Error in giving an instruction on discovered peril in conformity to the laws of this State, instead of in conformity to the laws of Oklahoma where the injury occurred, was not waived by failure to make a specific objection on the ground that the laws of Oklahoma govern, where the place of injury and the application of the laws of that State were obvious and undisputed facts.

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

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

The court erred in submitting the issue of discovered peril to the jury. 48 Okla. 553; 33 Cyc. 1049; 24 Okla. 764; 198 Pac. 97; 24 Okla. 764; 108 Pac. 361. The court erred in modifying defendant's requested instructions on the question of contributory negligence. 62 Ark. 164; 62 Ark. 235; 48 Ark. 124; 94 Ark. 524; 77 Ark. 401.

Daily & Woods, for appellee.

Smith, J. A truck belonging to appellee, the plaintiff below, was struck and completely demolished by a passenger train of the defendant at a public crossing. The complaint charges the defendant was negligent in that the train was operating at a dangerous rate of speed; that the defendant failed to keep a proper lookout for travelers at the crossing; that the defendant failed to give the statutory signals; and failed to stop the train after discovering the peril in which plaintiff's truck was placed.

The testimony is conflicting as to whether the statutory signals were given as the train approached the crossing; and this conflict in the testimony makes a question for the jury on that issue.

It is earnestly insisted that the undisputed evidence shows that a proper lookout was kept and does not show any negligence after the peril in which the truck was placed was discovered. We think, however, the testimony does present these issues.

The testimony shows that for a mile or more a much traveled road, known as the Albert Pike Highway, paralleled the railroad tracks, and that at the crossing where the collision occurred the road turns at a right angle across the railroad track. The train approached this crossing at a speed of about forty-five miles per hour, and there was a whistling post a quarter of a mile back from the crossing. The engineer testified that he could not see the truck from his side of the cab, but that, as the train came to within about three hundred feet of the crossing, he received warning from the fireman that they were about to strike a truck, and that he immediately blew three short blasts of the whistle and applied the emergency brake, but that the velocity and momentum of the train made it impossible for him to stop the train before striking the truck. The fireman testified that he observed the truck at the whistling-post, which, as has been stated, is a quarter of a mile from the cross-

ing, and that he immediately communicated that fact to the engineer as soon as he saw that the driver of the truck was attempting to cross the track in front of the train. The testimony of the driver of the truck was that the train did not whistle until it was within a rail and a half of the crossing, and the testimony shows that the train only struck the front wheels of the truck.

From this testimony the jury might have found that the fireman did not warn the engineer promptly, or that the engineer did not promptly heed the warning, and that, had he done so, he might have averted the collision either by blowing the whistle or stopping the train.

Exceptions were saved to the action of the court in submitting the question of discovered peril, upon the ground that the testimony, viewed in its light most favorable to the plaintiff, would not support a finding of liability on that issue. But we do not agree with counsel in this contention. The jury might have found, under the testimony of the fireman, that the driver of the truck was in a perilous position when the fireman first observed him, and, the driver was oblivious of the approach of the train, and was in the act of driving upon the track when the fireman first saw him.

It appears that the issues stated were submitted to the jury over the objections of the defendant under instructions declaring the law of this State applicable thereto. But the collision occurred in the State of Oklahoma, and the law of that State, of course, governs as to the rights and liabilities of the parties.

The instructions asked by the defendant, dealing with the contributory negligence of the driver, left out of account the question of discovered peril; and defendant insists that issue should not have been submitted, for the reason that the testimony did not warrant it. But, as we have said, the jury might have found that the truck was in a perilous position when the fireman first observed it, and that there was negligence thereafter on the part of the fireman in warning the engineer or on the

part of the engineer in not acting upon the warning. The question of discovered peril should therefore have been submitted to the jury; but it should have been done in instructions conforming to the laws of the State of Oklahoma, where the collision occurred. The court, however, amended the instructions asked by defendant by adding the words, "unless defendant's servants discovered, or, by the exercise of ordinary care should have discovered, plaintiff's driver in a perilous position in time to have avoided the injury." This modification appears to have been made by the court on its own motion, without suggestion from the plaintiff.

It appears that the law of Oklahoma on the subject of discovered peril is the same as was the law of this State prior to the passage of act 284 of the acts of 1911 (Acts 1911, p. 275; sec. 8568, C. & M. Digest). Prior to this statute railroads were not liable for injuries of this character where the traveler was guilty of negligence contributing to the injury, unless, after discovering the peril of the traveler, the railroad might have averted the injury by the use of ordinary care. *Barry* v. *K. C., Ft. S. & M. R. R. Co.,* 77 Ark. 401, and cases there cited. The act of 1911 imposed liability, not only in those instances where the peril was actually discovered, but in those instances also where, if a proper lookout had been kept, "the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril." The amendment to the instructions made by the court set out above conformed to our amended lookout statute; but, in doing this, a liability was imposed on the defendant which does not exist under the laws of the State of Oklahoma. *St. L. I. M. & S. R. Co.* v. *Gibson,* 48 Okla. 553; *Clark* v. *St. L. S. F. R. Co.,* 24 Okla. 764; *Thrasher* v. *St. L. & S. F. R. Co.,* 206 Pac. 212.

It is said defendant waived the error by failing to make a specific objection at the trial that the laws of Oklahoma, and not the laws of this State, governed. The modification of the instructions was objected to, although it does not appear that the specific objection was made that the laws of Oklahoma governed. But this was one of the obvious and undisputed facts in the case. The complaint alleged that the truck was being operated over and along a traveled public highway in Sequoyah County, Oklahoma, and all the witnesses testified that the accident occurred near Hansen, Oklahoma.

Appellee cites *Fourche R. V. & I. T. Ry. Co.* v. *Tippett,* 101 Ark. 376, as authority for insisting that the absence of a specific objection that the accident had occurred in Oklahoma, and that the laws of that State, therefore, applied, is a waiver of the error in the instructions. In that case, as in numerous others in which we have held that specific objections were required, we have said that the reason of the rule requiring specific objections in certain cases is to prevent the party making the objection from being allowed the benefit of a "masked battery" and to prevent the court from committing some inadvertence which obviously would have been remedied had attention been called thereto. But the modified instructions in this case are not of that character. The place of the injury and the laws of the State where it occurred applicable thereto was one of the obvious undisputed facts in the trial, and we think the modification was sufficiently objected to.

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

RACHELS v. RUSSELL.

Opinion delivered July 3, 1922.

1. ATTORNEY AND CLIENT—LIEN FOR FEES.—A lien for attorney's fees on a judgment under Crawford & Moses' Dig., § 6304, with proof that the fees were for services in various suits but without showing what fees were recoverable in the particular litigation, cannot prevail against the right of the judgment debtor, under § 6323, to set off against the judgment against him a judgment rendered for him against the client.
2. ATTORNEY AND CLIENT—EFFECT OF JUDGMENT CONDITIONALLY CONSENTED TO.—Where consent to a judgment was given by the debtor on condition that a previous judgment in favor of the debtor against the creditors be set-off against the consent judgment, attorneys for the creditor who agreed to the condition cannot dispute the right to set-off under Crawford & Moses' Dig., § 6323, nor assert a lien or assignment in conflict therewith.

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

J. N. Rachels and *H. A. Midyett,* for appellants.

Appellee had knowledge for many months that the cause of action had been assigned to appellants and it was not necessary that the assignment be filed with the papers or noted of record. Sec. 6303, C. & M. Digest; 74 Ark. 552; 98 Ark. 529. In cases of the nature prescribed by statute, an attorney recovering a judgment for his client, where his lien is duly preserved, has such an interest in the judgment that he cannot be deprived thereof on motion. 92 Ark. 388; 117 Ark. 504. His lien cannot be affected by any settlement between the parties before or after final judgment. 120 Ark. 389; 5 Civ. Pro. (N. Y.) 146, 98 N. Y. 660; 128 Ark. 471; 133 Ark. 294; 135 Ark. 22; 140 Ark. 180; 146 Ark. 174; 141 Ark. 369.

Brundidge & Neelly, for appellee.

Appellant did not comply with sec. 6303, C. & M. Digest. Judgment was confessed by appellee with the understanding that same was to be credited on the prior judgment. The finding to the effect that Russell had no actual notice of the alleged assignment is not against the weight of the evidence. 80 Ark. 185.

McCULLOCH, C. J. This is a proceeding instituted under the statute (Crawford & Moses' Digest, § 6323) by appellee to set-off a judgment rendered in favor of appellee against one Blasingame for the recovery of the sum of $2,276, against another judgment rendered in favor of Blasingame against appellee in the sum of $250. Blasingame was brought into court by proper notice, and appellants appeared and intervened for the purpose of resisting the order setting-off the two judgments, one against the other, and as grounds for the intervention they alleged that the cause of action, upon which the judgment in favor of Blasingame against appellee was rendered, had been duly assigned to them by written instrument prior to the rendition of the judgment.

The cause was heard on oral testimony, and an order was entered in accordance with the petition of appellee setting-off the two judgments as prayed for.

According to the testimony adduced at the trial, appellants, who are attorneys at law, represented Blasingame in his litigation with appellee, which involved several different lawsuits, and that Blasingame assigned to them his cause of action against appellee, on which judgment was rendered, in payment of the amount he owed appellants as fees in the various suits. The assignment was in writing, but was not filed and noted on the record, as provided by statute, so as to become notice to third parties. Crawford & Moses' Digest, sec. 6303.

Appellants urge now that they have a lien under sec. 6304, Crawford & Moses' Digest, on the judgment recovered in favor of Blasingame for their fees as attorneys in the litigation, but the proof in the case does not show what amount of fees they were to recover in that particular litigation. The proof merely goes to the fact that Blasingame was indebted to them in the sum of $250 for fees in various suits between him and appellee. It is unnecessary therefore to discuss the question of the right of set-off in favor of appellee as against appellant's statutory lien on the amount recovered in the judgment.

Appellants' claim in this case is nothing more nor less than that of ownership of the cause of action, and the judgment rendered thereon, by assignment under the terms of the statute.

The judgment in favor of Blasingame against appellee was rendered by consent, and the testimony adduced by appellee tended to show that this consent to the rendition of the judgment was given on the express condition that appellee's judgment against Blasingame should be set-off against the judgment to be rendered. There is a conflict in the testimony on this point, as one of the appellants testified that he notified appellee before this judgment was rendered that they owned the cause of action and would assert their rights under the judgment. But it cannot be said that a preponderance of the testimony is against the finding in appellee's favor. If, as shown by appellee, the judgment was rendered by consent upon condition that the two judgments were to be set-off and that this condition was agreed to by appellants themselves, they are in no attitude to dispute appellee's right of set-off under the statute, or to assert a lien or assignment in conflict therewith.

The decree is therefore affirmed.

MORGAN CONSTRUCTION COMPANY v. PITTS.

Opinion delivered July 3, 1922.

1. HIGHWAYS—REPEAL OF STATUTE CREATING DISTRICT—ALLOWANCE OF CLAIMS.—Where, under authority of a special statute creating a road improvement district, the commissioners let a contract to plaintiffs, and the above statute was subsequently repealed, the repealing act providing that all claims should be adjusted and paid if filed within 90 days after passage of the repealing statute, a claim presented after the time allowed was properly disallowed.
2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—A statute abolishing a statutory road improvement district before performance of an executory contract for construction of the improvement and making provision for the discharge of all contract obligations, *held* not invalid as impairing the obligation of the contracts, though it constitutes a breach thereof.

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

G. E. Garner and *Neill Bohlinger,* for appellant.

Rights once vested, privileges once granted or sanctioned by law, may be forfeited, but cannot be arbitrarily divested or withdrawn by future legislation. 3 Ark. 285. The contract was binding on each of the parties alike, and the obligations could not be impaired by subsequent legislation. 115 Ark. 437; 6 R. C. L. sec. 314; 3 Elliott on Contracts, § 2096. The reserved right of alteration and repeal does not authorize the Legislature to impair or destroy contracts of third persons with the corporation. 3 Elliott on Contracts, § 2733. A statute which deprives a party of all remedies as to existing contracts when the statute was enacted is void. 3 Elliott on Contracts, § 2732. A city charter cannot be so amended as to impair the obligation of a contract previously made by the city without violating the contract clause of the Constitution. 3 Elliott on Contracts, § 2724.

Tompkins, McRae & Tompkins, for appellee.

The intervention does not show that appellant has a valid contract. 106 Ark. 39; 119 Ark. 188; 232 S. W. 434. The Legislature had the right to repeal the act creating the drainage district, but could not deprive appellant of an opportunity of presenting its claim. 115 Ark. 437. The right to a particular remedy is not a vested right, and the State has control over the remedies it offers to suits in the courts. Cooley's Const. Lim. 361. One must pursue the remedy provided by law for the redress of his grievance. 113 Ark. 371; 104 U. S. 675. The Legislature has the power to pass or shorten the statute of limitations. 159 N. Y. 188; 45 L. R. A. 118; 3 Elliott on Contracts, 2732; 27 Ark. 425.

McCULLOCH, C. J. The General Assembly of 1919, by special statute, created a road improvement district in Garland County designated as Southwest Arkansas Road Improvement District No. 1. Authority was conferred by the statute upon the commissioners of the

district to construct the improvement described, and for that purpose to employ engineers and let a contract for the construction.

Pursuant to the terms of the statute, appellants, a copartnership under the style of Morgan Construction Company, entered into a contract with the commissioners of the district for the construction of the improvement. But the General Assembly of 1921 (Special Acts 1921, p. 334) repealed the former statute creating the district, and provided for winding up the affairs of the district by a receivership in the chancery court of Garland County.

The statute provides that all claims against the district shall be adjusted upon the same being filed within ninety days after the passage of the statute, and that when the indebtedness of the district is thus adjusted, assessments shall be levied upon the real property in the district to raise the funds to pay the indebtedness.

Appellants presented a claim after the expiration of ninety days from the passage of the statute, and the court refused to allow the same—sustained a demurrer and dismissed the plea.

The statute required, as before stated, the filing of all claims within ninety days. This is a reasonable provision, and the court was correct in refusing to allow a claim not filed within the time specified. The statute does not authorize the allowance of any claim, except those filed within the time allowed.

It is contended that the statute abolishing the district constitutes an impairment of the obligation of the contract between appellant and the district, and for that reason is void.

The abolishment of the district before the performance of an executory contract for the construction of an improvement was, in effect, a breach of the contract—a refusal, in other words, to perform the contract—but it did not impair the obligation, for the reason that ample and reasonable provision was made for the discharge of the obligations of all contracts by the payment thereof

when presented in accordance with the terms of the statute.

There is a distinction between the breach of a contract and the impairment of the obligation of a contract, and where the State enacted a statute which had the effect of annulling or breaking the contract, but contained a provision for payment of the obligation, it does not constitute an impairment of the obligation of the contract. *Caldwell* v. *Donaghey,* 108 Ark. 60; *Morgan Engineering Co.* v. *Cache River Drainage District,* 115 Ark. 437.

It does not appear from the abstract of the record whether the claim of appellants was based upon earned compensation under the contract, or for damages on account of the breach of the contract, but it is unimportant to discuss that feature, for the reason that, whatever the nature of the claim is, the statute required that it must be presented within ninety days, which was not done, and this was a reasonable provision for discharge of the obligations and constituted no impairment of the obligation of any contract.

Affirmed.

WHITTINGTON v. HOOKS.

Opinion delivered July 3, 1922.

1. TRIAL—INSTRUCTION AS TO UNDISPUTED FACTS.—Where the evidence of the parties to an action on a certain point was the same, it was not error to tell the jury that the evidence on that point was undisputed.
2. EXCHANGE OF PROPERTY—RESERVATION OF TITLE—PRIORITY.—Where a mortgagee consented to an exchange of the mortgaged chattel for another chattel, and the third party retained title to the chattel he traded to the mortgagor until the difference in price was paid, the purchaser can enforce his title against the purchaser under the mortgage, notwithstanding an agreement between the mortgagor and mortgagee that the chattel received in the trade would be subject to the mortgage.

3. REPLEVIN—NECESSITY OF DEMAND BEFORE SUIT.—Where plaintiff and another party traded mules, and the other party sold the mule before paying the balance of the purchase money, for which title was received by plaintiff on the mule exchanged by him, it was not necessary for plaintiff to demand possession from one claiming ownership before bringing suit in replevin.

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

STATEMENT OF FACTS.

This was an action in replevin commenced in the justice court by W. H. Hooks against J. J. Whittington to recover a buckskin mule. There was a judgment in favor of the plaintiff in the justice court, and the defendant appealed to the circuit court. On a trial *de novo* in the circuit court there was again a verdict and judgment for the plaintiff.

It appears from the record that F. F. Brunson bought two mules from W. H. Hooks and Sam Quimby, who are dealers in livestock. Brunson mortgaged the mules to the Tobin Mercantile Company. Subsequently Brunson found that one of his mules would not work to suit him, and he obtained permission from the Tobin Mercantile Company to trade the mule for another one. It was agreed between them that the mule he should trade for should be substituted in the mortgage for the one traded off. Brunson then traded mules with Hooks and Quimby.

According to their testimony, Brunson agreed to pay them $37.50 difference between the two mules, and it was agreed between them that the title to the mule they traded to Brunson should remain in them until the $37.50 was paid. They also testified that the $37.50 had not been paid, and that Brunson had turned the mule over to the Tobin Mercantile Company in part payment of his indebtedness to it, and that company had sold the mule to J. J. Whittington.

On the other hand, Brunson testified that there was no reservation of title in the mule at the time he traded for it from Hooks and Quimby. He admitted that he

agreed to pay them $37.50 as the difference between the mules in the trade, and that he still owes them that amount.

The evidence also shows that the title to the mule in question was in Hooks at the time it was traded to Brunson.

The case is here on appeal.

D. A. Bradham, for appellant.

J. C. Clary, for appellee.

HART, J. (after stating the facts). One of the assignments of error is that the court erred in instructing the jury. The court told the jury that the undisputed evidence showed that Brunson was indebted to Hooks in the sum of $37.50, and that the only question for them to decide was whether or not it was understood by both parties that Hooks should retain the title to the mule until the $37.50 was paid.

The court instructed the jury that the burden of proof was on Hooks. The court also instructed the jury that, if the mule was traded merely on an agreement with Brunson to pay the sum of $37.50 without any reservation of title in Hooks, the latter was not entitled to recover the mule.

The instructions given were correct. The evidence of both parties to this lawsuit shows that Brunson agreed to pay Hooks $37.50 as the difference when he traded another mule for the mule in question, and that he has not paid that amount to Hooks. Hence there was no error in telling the jury that the evidence on this point was undisputed.

The point in dispute between the parties was whether or not Hooks retained title to the mule in question until the $37.50 was paid, and this question was submitted to the jury under proper instructions.

It is true that Brunson had mortgaged the mule he traded to Hooks, but this did not make any difference, for two reasons. In the first place, he received permission from the Tobin Mercantile Company to trade the mule,

and in the second place, the title to that mule is not involved in this suit. The title to the mule which Hooks traded to Brunson alone is involved in this lawsuit.

As between the Tobin Mercantile Company and Brunson, the agreement that the mule traded for should be substituted for the one already included in the mortgage was a valid and binding contract.

In *Howell* v. *Walker,* 111 Ark. 362, it was held that an agreement for substitution in a chattel mortgage is valid in equity between the parties, under the maxim that equity treats that as done which the parties intended to be done.

Hooks was not a party to this agreement, and it had no effect whatever on his rights in the premises. He had title to the mule he traded to Brunson, and under numerous decisions of this court he had a right to retain the title to his own property until he was paid therefor.

The jury by its verdict found that Hooks retained the title to the mule he traded to Brunson until the $37.50 balance due on the purchase price was paid. When Brunson turned the mule over to the Tobin Mercantile Company in part payment of his mortgage indebtedness and failed to pay Hooks, as he had agreed to do, the latter had a right to replevin the mule. The Tobin Mercantile Company sold the mule to J. J. Whittington, who claimed the same at the time the present suit was instituted. Therefore it was not necessary for the plaintiff to make demand for the mule before bringing the suit. *Sibeck* v. *McTiernan,* 94 Ark. 1.

It follows that the judgment must be affirmed.

COTTON PLANT LUMBER COMPANY v. ASH GROVE BAPTIST CHURCH.

Opinion delivered July 3, 1922.

SALES—ATTACHMENT.—Where a lumber company furnished materials to a contractor who was constructing a building on a lot for a church on the credit of the contractor, not of the church, the lumber company could not have lumber belonging to the church seized under attachment against the contractor, though most if not all of the lumber had been bought by the contractor from the lumber company.

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

Jonas F. Dyson, for appellant.

Under the merchandise lien law, where materials are furnished a contractor to be used in the construction of a building, the presumption will be that the materials were furnished on the credit of the building and its owners, and such presumption will become conclusive unless rebutted by evidence showing that they were furnished on the personal credit of the contractor. 99 Ark. 293.

The court erred in directing a verdict for the appellees. 119 Ark. 291.

Mathis & Trice, for appellees.

A stranger's property is not subject to attachment. 15 Ark. 459; 45 Ark. 112.

The case of *Pratt* v. *Nakdimen,* 99 Ark. 293, is not in point. In that instance the court passed upon the right of a vendor of building materials to attach materials which had been furnished a contractor at a building site, but which at the time of the levy had not been incorporated in the building and the title to which had not been transferred to the owner of the building.

SMITH J. Appellants, plaintiffs below, sued G. H. Bell for lumber and building material furnished him between May 10 and May 20, 1920, as set forth in an itemized statement which was made exhibit "A" to the complaint, which was filed on May 5, 1921. It was alleged

that the Ash Grove Baptist Church owns the lots upon which said material is located, and that a portion thereof had been used in the construction of the foundation of the church house which Bell had erected on said lots; and it was further alleged "that the said Geo. H. Bell holds legal title to a good portion of the material now lying on the lots owned by said Ash Grove Baptist Church, being lot——in block———, in Carter's subdivision of the town of Cotton Plant, Arkansas." It was alleged that Bell had become a nonresident of the State, and a general attachment issued, which was levied on the lumber piled in the church yard. There was no prayer for a lien on the church building for the material alleged to have been used in its construction.

Bell filed no answer and made no defense, and has not appealed from the judgment rendered against him; but the trustees for the church filed an intervention in which they claimed the attached lumber. At the conclusion of all the testimony the court directed a verdict in favor of the intervener, and this appeal is from that judgment.

Plaintiff's manager testified that he sold Bell a bill of lumber and gravel amounting to $697.04, and that a payment of $184.50 had been made. That he had his dealings with Bell, and that the church was not known in the transaction, and he did not look to the church for payment; did not know what became of the material; and did not know whether any of the material on the church lot was a part of the material plaintiffs had sold Bell.

One of the trustees of the church, who was a member of the building committee, testified that the church had contracted with Bell to erect the building for the sum of $10,800, and the contract, which was in writing, provided that Bell should furnish the materials needed in the construction of the building, and that he should be paid for the materials as they were furnished. The testimony established the fact that the plaintiffs sold to Bell, upon Bell's credit, and it is also established the fact that under

the building contract between Bell and the church the material became the property of the church when it was placed on the church lot. In other words, the plaintiffs sold to Bell, and Bell sold to the church. The building contract provided for an initial payment to Bell of $2,500, with which Bell should buy materials.

It does not affirmatively appear what part of the material, if any, bought by Bell from plaintiffs was attached, but it does appear that most, if not all of the material attached, had not been bought from plaintiffs by Bell.

Appellants cite the case of *Pratt* v. *Nakdimen,* 99 Ark. 293, and quotes as controlling here the following statement of the law from that case: "Under the mechanics' lien law, where materials are furnished a contractor to be used in the construction of a building, the presumption will be that the materials were furnished on the credit of the building and its owner, and such presumption will become conclusive unless rebutted by evidence showing that they were furnished on the personal credit of the contractor."

As has been said, this is not a proceeding under the mechanics' lien law. It is not shown what part, if any, of the materials sued for went into the building, or was found on the church lot, and it does appear that the material was sold on the credit of Bell, and not that of the church.

The verdict was therefore properly directed in favor of the intervener, and the judgment thereon is affirmed.

HOWARD v. STATE.

Opinion delivered July 3, 1922.

1. AGRICULTURE—AUTHORITY OF PLANT BOARD TO PROMULGATE RULES.—Under Crawford & Moses' Dig., §§ 8024-8041, the State Plant Board was authorized to adopt and promulgate a rule requiring cedar trees infected with rust within a certain distance of an orchard to be cut down, and one disobeying such an order is guilty of a misdemeanor.
2. AGRICULTURE—INDICTMENT FOR FAILURE TO CUT DOWN INFECTED TREE.—An indictment charging defendant with failing, after proper notice, to cut down a cedar tree infected with rust on his premises within one and one-half miles of an orchard, contrary to rule No. 51 adopted and promulgated by the State Plant Board, sufficiently informed defendant of the specific offense with which he was charged, under Crawford & Moses' Dig., §§ 8024-8041.
3. CRIMINAL LAW—STATE PLANT BOARD—JUDICIAL NOTICE.—The State Plant Board and its personnel were provided for by § 8026 of Crawford & Moses' Dig., § 8026, and therefore judicial notice will be taken of its existence and of its personnel.
4. CRIMINAL LAW—EVIDENCE.—In a prosecution for failing to cut down a cedar tree infected with rust, prohibited by rule No. 51 of the State Plant Board, after being notified by B. that the tree was infected, testimony of B. that he was chief inspector of the State Plant Board was substantial evidence from which the jury were warranted in so finding.
5. AGRICULTURE—RULE OF PLANT BOARD PROVED HOW.—In a prosecution for refusing to cut down a cedar tree infected with rust, in violation of rule No. 51, adopted and promulgated by the State Plant Board under Crawford & Moses' Dig., §§ 8024-8041, the fact of adoption and promulgation of such rule could be shown by the record of the minutes kept by the board and by evidence showing publication of a notice in various newspapers.
6. CONSTITUTIONAL LAW—USURPATION OF LEGISLATIVE FUNCTIONS.—Rule 51 of the State Plant Board, prohibiting the maintenance of cedar trees infected with cedar rust, promulgated under Crawford & Moses' Dig., §§ 8024-8041, is not a law but a method adopted by the board for carrying the law into effect, and is not void as an attempt to usurp legislative functions.
7. CONSTITUTIONAL LAW—VALIDITY OF RULE OF PLANT BOARD.—The rule of the State Plant Board prohibiting the maintenance of cedar trees infected with cedar rust was not ineffective because no penalty was fixed by such rule; the Legislature having fixed the penalty (Crawford & Moses' Dig., § 8037).

8. AGRICULTURE—VALIDITY OF RULE OF PLANT BOARD.—Rule 51 promulgated by the State Plant Board, prohibiting maintenance of cedar trees infected with cedar rust, is not void as not being within the police power of the State.

9. CONSTITUTIONAL LAW—POLICE POWER.—The State in the exercise of its police power is not restricted to matters of health, morals and municipal government, as all property within the State is held on the implied condition that it shall not be injurious to the equal right of others to the use and benefit of their own property.

10. AGRICULTURE—DISCRETION OF PLANT BOARD.—A rule of the State Plant Board requiring cedar trees infected with rust to be cut down was not unreasonable because there were other methods of preventing or eradicating cedar rust, as the selection of a remedy is necessarily left to the board.

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

Rice & Rice, for appellants.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Benton County Circuit Court, for refusing to cut down a cedar tree on his premises, in Decatur Township, in said county, located within one and one-half miles of an apple orchard, which cedar tree was infected with cedar rust, lawfully prohibited by the provisions of rule No. 51, adopted and promulgated by the Arkansas State Plant Board, after being lawfully notified by George G. Becker, chief inspector for said board, that the cedar tree was infected with cedar rust. It is made a misdemeanor, by the law, to disobey the rules promulgated by said board. Appellant was fined one dollar. From the judgment of conviction, appellant has duly prosecuted an appeal to this court.

Appellant's first insistence for reversal is that the indictment does not charge him with a public offense, but charges him only with a violation of a rule adopted and promulgated by the Arkansas State Plant Board. The indictment charges him with failing to cut down, after proper notice, a cedar tree, infected with rust, on his premises within one and one-half miles of an orchard

in Decatur Township in Benton County, against the peace and dignity of the State of Arkansas, contrary to rule No. 51, adopted and promulgated by the Arkansas State Plant Board. The board was created and authorized to adopt and promulgate the rule in question, and a penalty fixed for a violation thereof, by the laws of this State. Secs. 8024 to 8041 inclusive, Crawford & Moses' Digest. The indictment charged a public offense in charging a violation of said rule, the adoption and promulgation of the rule having been authorized by statute. The language of the indictment sufficiently informed appellant of the specific offense with which he was charged. *Rider* v. *State,* 126 Ark. 501; *Cazort* v. *State,* 130 Ark. 453; *Palmer* v. *State,* 137 Ark. 160.

Appellant's next insistence for reversal is that the record does not show the existence of the State Plant Board or its personnel. The board and its personnel was provided for by section 8026 of Crawford & Moses' Digest. Judicial notice will, therefore, be taken of its existence and personnel. *Williams* v. *State,* 37 Ark. 463; *McCamey* v. *Wright,* 96 Ark. 477.

Appellant's next insistence for reversal is that the official capacity of George G. Becker was not established. Becker himself testified that he was chief inspector of the State Plant Board. This was substantial evidence from which the jury were warranted in so finding.

Appellant's next insistence for reversal is that the record fails to show that rule 51 was adopted or promulgated. The record of the minutes, kept by the State Plant Board, were introduced, which showed the adoption and order promulgating the rule and extending it so as to include Decatur Township. The promulgation of the order consisted in the publication of a notice in various papers of Benton County, setting forth the substance of the rule and declaring that the dissemination of cedar rust shall be prevented in certain territory, including specifically Decatur Township in Benton County.

Appellant's next insistence for reversal is that the rule is a law and that the Legislature had no authority to delegate its lawmaking power. The rule is as follows: "The maintenance of cedar trees infected with cedar rust on any premises located within one and one-half miles of an apple orchard is hereby prohibited in all territory declared in the public notices of the Board to be territory in which the dissemination of cedar rust should be prevented." The Arkansas Plant Act of 1917, makes plant insects, pests, and diseases, and every plant and plant product infested or infected therewith, a public nuisance and authorizes the Board, by ascertainment of the fact, through inspection or otherwise, to control, eradicate, and prevent the dissemination of the pests and diseases by treatment, cutting and destruction of plants and plant products infected or infested therewith. Sections 8027 and 8029 of Crawford & Moses' Digest. It will be observed that the law, making infected plants a nuisance, was enacted by the Legislature and that the power delegated to the Board was the enforcement thereof in infected districts. The rule is not, therefore, a law, but a method adopted by the Board for carrying the law into effect. Rule 51 is not void as an attempt to usurp Legislative functions but is a valid exercise of authority conferred, to enforce a law. *Cazort* v. *State,* 131 Ark. 391.

Appellant's next insistence for reversal is that rule 51 is of no effect because the Board fixed no penalty for a violation thereof. The Legislature could not delegate such authority to the Board. *Davis* v. *State,* 126 Ark. 260. The Legislature exercised that function by fixing the penalty itself. Sec. 8038, Crawford & Moses' Digest.

Appellant's last insistence for reversal is that the rule is void as being unreasonable for two reasons; first, that no question of health, morals, or municipal government is involved, and for that reason the subject-matter is not within the police power of the State; second, that other methods than cutting trees are in use for preventing or eradicating cedar rust.

(1) The State, in the exercise of its police power, is not restricted to matters of health, morals, and municipal government. Any property may be used so as to bring it within the operation of the police power. The rule is correctly stated as follows in 6 R. C. L. at p. 193: "All the property within the jurisdiction of a State, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal right of others to the use and benefit of their own property."

(2) The purpose of the plant act is to prevent and eradicate diseases which destroy plant life, and especially fruit-bearing plants.

The election as between remedies must necessarily be left to the board who investigate the matter along scientific lines and base the rules and regulations, more or less, on scientific knowledge. This court committed itself to the doctrine that the efficacy of the remedy was not a question for the courts in the interpretation of the cattle-tick eradication statutes. *Boyer* v. *State,* 141 Ark. 84.

No error appearing in the record, the judgment is affirmed.

CARROLL COUNTY *v.* REEVES CONSTRUCTION COMPANY.

Opinion delivered July 3, 1922.

1. BRIDGES—DEFECTIVE CONTRACT—CURATIVE STATUTE.—Failure of the commissioners of Carroll County to comply with statutory requirements in awarding contracts for materials and the construction of bridges was remedied by Acts 1921, No. 187, passed to cure irregularities, informalities and illegalities in the letting of such contracts.
2. STATUTES—PROOF OF PRIVATE ACTS.—Private acts are not required to be proved exclusively by the printed statute books; Crawford & Moses Dig., § 4115, providing that such books shall be evidence, but not making such method exclusive.
3. EVIDENCE—JUDICIAL NOTICE.—Acts 1921, No. 187, curing legal defects in the letting of certain contracts by county commissioners,

although a private act, need not be proved, as the courts take judicial notice of all statutes of the State.

4. BRIDGES—VALIDITY OF CONTRACT FOR BUILDING.—Under the constitutional requirement that contracts for building bridges shall be awarded to the lowest bidder, thereby implying competitive bidding after reasonable notice, contracts awarded separately for construction and for materials to the lowest bidder as to each after proper notice and based upon identical specifications were valid.

5. COUNTIES—VALIDITY OF WARRANTS.—As the quorum court, so-called, is not a court having judicial duties, but merely has the duties of levying taxes and making appropriations, its opening and adjourning orders are treated as those of the county court, and county warrants allowed while the quorum court was in session are not subject to the objection of invalidity because issued when the county court was not in session.

6. EVIDENCE—PAROL EVIDENCE OF SESSIONS OF COUNTY COURT.—Sessions of the county court may be proved by parol.

Appeal from Carroll Circuit Court, Eastern District; *W. A. Dickson,* Judge; affirmed.

Geo. J. Crump and *Chas. D. James,* for appellant.

The contracts were not let in conformity with sec. 16 art. 19 Const. or sec. 827 C. & M. Digest. The contracts let were not the same as were advertised for in the notices and bids requested. The contracts for labor and material were separate, and not in accordance with the advertisements, and created no liability on the part of the county. 54 Ark. 645; 11 Minn. 174.

The curative act relied on was a special act and not proven in the manner required by sec. 4115, C. & M. Digest.

The warrants are void and were properly canceled because ordered issued at a time when the county court was not in session. The orders opening and adjourning court on the day in question were orders referring to quorum court and not the county court. The order could not be made for the issuance of the warrants by the quorum court. The county court failed to convene on the day to which adjourned, and the term lapsed. See 138 Ark. 221 and 134 Ark. 447.

C. A. Fuller and *F. O. Butt,* for appellees; *J. V. Walker* and *W. N. Ivie,* of counsel.

There is no constitutional provision as to form of notice, and the only requirement is that the contract be let to the lowest bidder. This was done. Sec. 827, C. & M. Digest, was strictly complied with.

The fact that the court was in session could be established by parol evidence, in the absence of such showing by the court's own record. 68 Ark. 340; 138 Ark. 221. No judicial functions are conferred upon the quorum court, and the opening and closing orders as written up by the clerk, referring to that court, must be treated as referring to the county court.

Assuming an irregularity in the contract and the issuance of the warrants, the defect was cured by a special statute. This court will take judicial notice of such special statutes, without the necessity of proving them. 134 Ark. 121; 107 Ark. 292; 23 Ark. 387; 36 Ark. 196.

HUMPHREYS, J. This is an appeal from judgments rendered in the circuit court of Carroll County, Eastern District, in favor of each of the appellees against appellant, for claims severally filed against appellant by each, growing out of the construction of two bridges in said district. The nature of the claim of each is briefly set out in appellant's statement of the case as follows: "The Reeves Construction Company filed its claim against Carroll County in the county court of said county for the sum of $20,190.91, for the construction of two bridges in Carroll County, one over Long Creek and the other over Kings River. The court disallowed this claim.

"The Alexander Engineering Company filed its claim against Carroll County, in the county court of said county, for the sum of $862.60, for services as engineers in the estimates and construction of said bridges. The court disallowed this claim.

"The First National Bank of Eureka Springs, Arkansas, filed $8,000 in county warrants for cancellation and reissue, under an order calling in the outstanding

county warrants, for that purpose. The same being warrants issued for the steel used in the construction of the bridges above referred to. The county court refused to reissue said warrants, but canceled the same as illegal and issued without authority of law, on the ground that the county court was not in session at the time the order for their issue was made.

"The People's Bank of Berryville, Arkansas, filed $2,662.09 county warrants with the county court of Carroll County for classification and reissue under an order of the county court calling in the county warrants for that purpose; they were warrants that had been issued for steel used in the construction of the bridges above referred to. The county court canceled said warrants, but refused to re-issue them holding them to be illegal and void and not issued by order of the county court.

All of the cases were appealed to the circuit court, Eastern District of Carroll County, Arkansas, and by consent were all consolidated and tried before the court, sitting as a jury.

Appellant contends for a reversal of all the judgments upon the ground that the contracts for the materials and construction of the bridges were awarded contray to sec. 16, art. 19, Constitution of the State of Arkansas, 1874; and sec. 827, Crawford & Moses' Digest; and for a reversal of the judgments in favor of the two banks upon the additional ground that the county court was not in session at the time the warrants held by them were allowed. The section of the Constitution referred to requires that contracts for erecting or repairing bridges, or for materials therefor, be let to the lowest responsible bidder under regulations which may be provided by law. The section of the statute referred to provides for the character of notice and other regulations in letting contracts for building bridges in the county.

The validity of the contracts is first assailed because the commissioners did not fully comply with the stat-

utory requirements in awarding them. It is unnecessary to set out and discuss the alleged irregulatrities in letting the contracts, because, if any existed on account of a failure to comply with statutory regulations, they were validated by act 187 of the General Assembly of 1921, the passage of which was for the purpose of curing all irregularities, informalities, and illegalities that may have occurred in letting these particular contracts. Appellant contends, however, that the curative act is a private act and must have been proved in the manner required by sec. 411, Crawford & Moses' Digest. This is a method by which private acts may be proved, but the statutute does not make it the exclusive one. It is unnecessary to prove the statutes of the State. Courts take judicial notice of them. *Sloan* v. *Lawrence County,* 134 Ark. 121.

The validity of the contracts is next assailed because it is claimed they were not awarded to the lowest bidders. The constitutional requirement, that contracts for building bridges shall be awarded to the lowest bidder, necessarily implies competitive bidding, after reasonable notice. The three essential exactions of the Constitution in letting bridge contracts are, in the language of Mr. Justice HEMINGWAY, in the case of *Fones Hardware Co.* v. *Erb,* 57 Ark. 645: "An offering to the public, an opportunity for competition, and a basis for an exact comparison of bids." The facts in the instant case show a full compliance with the three vital principles thus enunciated. The public was given reasonable notice. There was competitive bidding upon identically the same plans and specifications, so there was an exact basis for the comparison of bids. The competitive bidders upon the whole work itemized their bids in such way that the cost of construction was separated from the cost of materials. The commissioners awarded the contract for construction to the lowest bidder on the work, and the contract for materials to the lowest bidder on materials. In this way the lowest bids possible were obtained, and the con-

tracts let to the lowest bidders upon the whole contract. The bidders acquiesced in, and the county profited by, the arrangement.

The validity of the warrants is assailed because allowed on a day, it is claimed, the county court was not in session. The warrants were allowed on November 6, 1920. The record reveals that on October 22, 1920, county court was in session and adjourned to October 27, 1920. The adjourning order was signed by Roy Thompson, judge; that on October 27, 1920, quorum court convened and adjourned to October 28, 1920; that on October 28, 1920, quorum court convened and adjourned; that, immediately thereafter, the orders allowing the warrants were made, other business attended to and the court adjourned to January 1, 1921; that the adjourning order was signed by Roy Thmopson, judge; that Roy Thompson was present and participating in the quorum court proceedings each day it was in session as evidenced by the opening and adjourning orders signed by him as judge. In addition to this, Roy Thompson, county judge, and J. E. Gregson, county clerk, testified that the county court was in session on the 27th and 28th days of October, 1920, and November 6, 1920, the latter day being the day on which the warrants were allowed. The quorum court is not a constitutional court. No judicial duties are conferred by the Constitution on the body of justices of the peace who sit with the county judge as a quorum court. The duties conferred are to levy the taxes and make appropriations, both of which are ministerial. Quorum court is, therefore, a misnomer. The opening and adjourning orders should therefore be treated as the opening and adjourning orders of the county court. Again, we think sessions of the county court may be shown by parol testimony. The evidence in the instant case sufficiently established that fact.

The several judgments are affirmed.

SATTERFIELD v. LOOPER.

Opinion delivered July 10, 1922.

1. COMPROMISE AND SETTLEMENT—SUFFICIENCY OF EVIDENCE.—In an action by a landlord to recover from the sublessee a portion of the rent owing from the original lessee for the land occupied by the sublessee, evidence *held* to sustain finding that the landlord accepted a portion of the crops grown on the premises in satisfaction of the sublessee's portion of the rent.
2. COMPROMISE AND SETTLEMENT—CONSIDERATION.—Delivery to the landlord by the sublessee of a portion of the crop grown on the land occupied by the sublessee was sufficient consideration for the landlord's agreement to accept the crops in full satisfaction of the rent due to him by the sublessee.
3. APPEAL AND ERROR—ASSIGNMENT OF ERROR—MOTION FOR NEW TRIAL.—A contention of error in giving an instruction does not require a reversal where the motion for new trial did not contain an assignment of error on that ground, although the instruction was objected to.

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

John M. Parker, for appellant.

McCULLOCH, C. J. Appellant owned a farm containing 154 acres of land in cultivation, and he rented it to one Haney for the year 1920, the rent to be payable in money at a certain price per acre. Haney sub-rented fifty-five acres of the land to appellee under a contract whereby appellee agreed to pay, as rent, certain shares of the corn and cotton. Haney failed to pay the rent to appellant, who instituted this action against appellee to recover the proportionate part of the rent due on the land sub-rented to appellee, according to the terms of the contract between appellant and Haney.

The defense made by appellee in the trial below was that, after the crop had become matured and a small portion of it gathered, appellant entered into a contract with him to accept all of the ungathered portion of the corn and cotton in satisfaction of appellee's liability for rent, and that pursuant to that agreement he delivered the ungathered crop to appellant. This issue was tried out be-

fore the jury upon conflicting testimony, and the jury returned a verdict in favor of appellee.

The court, in its charge to the jury, narrowed the issues down to the sole question concerning the alleged settlement between the parties by delivery of the ungathered portion of the crop.

It is contended, first, by appellant that there was no testimony to support the verdict on that issue, but we think there was testimony which was legally sufficient to support the verdict. It is true there are sharp conflicts in the testimony on this issue, but the verdict of the jury settled that conflict in favor of appellee's contention. Appellee testified positively that after a portion of the crop had been gathered he offered to turn over the balance of the crop—all the corn and cotton left in the field—to appellant in satisfaction of the rent, and that appellant accepted the proposition and agreed to have the crop gathered. His statement was that appellant first agreed to accept, as his rent, a share of the crop in accordance with appellee's contract with Haney, and that he (appellee) sold the crop to one George with the understanding that the latter was to comply with the agreement, but that about a week later George turned the crop back to him, and that he then turned it over to appellant, who agreed to accept it in satisfaction of the rent. Appellant denies this, but it was a question for the jury to determine. There was another witness who corroborated appellee by testifying that appellant tried to hire him to pick appellee's cotton.

It is next contended that there was no consideration for this agreement, and that, even if it was made, it did not operate as a satisfaction of appellant's claim for rent. This contention is not sound, for the reason that there was no contractual relation between appellant and appellee; appellee was merely liable for the rent by virtue of the statute, which provides that in case of subrenting of lands the occupant shall be responsible for the rent of such part of the lands as are cultivated or occupied

by him. Crawford & Moses' Digest, § 6982. Therefore the contract of settlement by delivery of the crop constituted a new undertaking on sufficient consideration for the settlement of the liability. The consideration was the delivery of the crops, and the evidence was sufficient to show that there was such a delivery.

Finally, it is contended that the court erred in giving an instruction on the subject of burden of proof, but the motion for a new trial does not contain an assignment of error on that ground. The instruction was objected to when given, but the exception was not preserved by proper assignment in the motion for a new trial.

Judgment affirmed.

McGehee v. Road Improvement District No. 2.

Opinion delivered July 10, 1922.

Highways—abandonment of plans—effect on pending appeal.—Where, under Road Laws 1919, No. 202, establishing a road improvement district, the county court approved the commissioners' plans over the protest of a property owner, who appealed, and subsequently those plans were abandoned, and new plans were filed and approved without objection, the property owner could not object to the new plans on his appeal.

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

Abner McGehee, for appellant.

Coleman, Robinson & House, for appellee.

McCulloch, C. J. Road Improvement District No. 2 of Desha County was created by act No. 202 of the General Assembly of 1919 for the purpose of improving certain roads in Desha County, the roads being designated numerically, and subdistricts, or sections, being created for the purpose of improving each of the roads. The commissioners filed plans with the county court for the improvements in accordance with the directions of the statute, and appellant, who is the owner of real property in the district, appeared before that court for

the purpose of protesting against the approval of the plans with respect to section No. 5. There was a hearing before the county court and the plans were approved, and appellant prosecuted an appeal to the circuit court.

The order of approval was entered by the county court on February 26, 1920, but the General Assembly, at the extraordinary session in February, 1920, enacted a special statute, which was approved February 20, 1920, amending the former statute with regard to section or subdistrict No. 5, and the order of the county court was not in conformity with the amendatory statute. While the matter was pending in the circuit court on the appeal of this appellant, the county court and the commissioners took cognizance of the change in the law, and the commissioners abandoned the former plans which had been approved by the county court and filed new plans in regard to the road in section 5. The county court approved these plans, and there was no appeal prosecuted from the order of approval. Thereafter, the circuit court heard the cause upon the appeal and decided that the plans then before that court had been abandoned, and for that reason the litigation inaugurated on appellant's protest was at an end.

The court was correct in this conclusion for the reason that the plans about which the controversy arose in the county court had been abandoned, and there was nothing to litigate concerning those plans. If appellant had any objection to the adoption of the new plans, his remedy was to appear in the county court and make his objection there. He seeks now to make objection to the approval of the new plans, but he cannot do so in this proceeding.

Affirmed.

HOEHLER v. W. B. WORTHEN CO.

Opinion delivered July 3, 1922.

HIGHWAYS—PRIORITY OF BONDS ISSUED IN INSTALLMENTS.—Though bonds issued under authority of a special statute creating a certain road improvement district (Acts 1909, p. 1151), were issued and sold in two successive allotments, all the bonds issued were within the authority conferred, and amounted to a single issue, and no priority was created in favor of the holders of the allotment just issued, and the funds in the hands of a receiver appointed on default in judgment under the statute should be distributed *pro rata* on all matured bonds.

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

Alfred H. Burr and *George H. Burr*, for appellants.

1. Special act 402 contemplates and authorizes but a single issue of bonds. The first bonds issued are valid and the second issue of bonds is invalid as against appellants, because unauthorized. This is the legislative intent as plainly appears upon the face of the act itself. See §§ 10, 12, 13, 15, 16, 18, 19, 21 of the act.

It cannot be doubted that the Legislature intended that the commissioners should borrow the entire amount of money required to construct the whole improvement in a single bond issue. This intention is made clearer by the provision in section 16, *supra,* that "all uncollected assessments are pledged for the repayment of such loan, and that negotiable bonds may be executed and issued therefor;" by the provision in section 18 that "for the payment of both principal and interest of the bonds to be issued under the provisions of this act, the *entire* revenues of the district arising from any and all sources, and *all* real estate subject to taxation in the district, *is by this act pledged,*" and by the provision in section 19 that "*all* bonds issued under this act shall be secured by a lien on all lands and real property in the district." The bonds issued on October 1, 1914, in compliance with all requirements of the act, became the first valid and subsisting obligations of the district, and a first lien on all

of its resources, not only because of the above pledges but also because the second bonds had not then been issued.

The fundamental rule in construing statutes is to ascertain and give effect to the legislative intent. 117 Ark. 606; 86 *Id.* 368, 385; 36 Cyc. 1106. Every part must be construed together. 102 Ark. 205; 11 *Id.* 44; 22 *Id.* 369. It must be considered as a whole. 115 Ark. 194; 116 Ark. 538. Each word and phrase should be given effect. 99 Ark. 149.

2. The construction contended for by appellee involves the act in contradictory and impossible provisions. Section 16 of the act pledges all uncollected assessments for the payment of the first bonds, and, likewise, section 18 pledges the entire revenues of the district and all real estate for the payment of the first bonds, and these pledges were fulfilled from October 1, 1914, to May 10, 1915. If *all* uncollected assessments and the entire revenues and all real estate in the district, in truth and in fact be pledged by this act to the payment of the second bonds, the original pledge for the payment of the first bonds is destroyed, leaves the first bonds unsecured and the second bonds with all the security.

Appellee's contention is also inequitable and unreasonable. The first bonds met the original requirements of the district. The money was advanced upon the solemn pledges both of the district and of the act itself that the loan was secured by first lien on all the resources of the district and had undisputed priority of payment, and that the district would not thereafter do or suffer any act to be done that would impair or defeat such securities or priority. To give subsequent bonds equal priority in securities absolutely pledged for the first bonds eight months before the later bonds were issued would work an inequitable loss and hardship upon the first bondholders. Even if the equities were equal, the maxim "*Qui prior est tempore potior est jure*" should prevail in appellant's favor. 89 Ark. 378; 22 *Id.* 369; 104 *Id.*

583; 91 *Id.* 5; 35 *Id.* 56, 61; 10 *Id.* 516, 524; 130 N. E. 827; 129 N. E. 500; 105 S. E. 7; 185 N. Y. S. 267; 229 N. Y. 277. The construction contended for by appellee would impair, divert and destroy vested rights of the appellants. 203 Ala. 401.

James B. McDonough, for appellee.

1. If it is the law that the second issue of bonds has a prior right, then the purchasers of the first issue bought with knowledge that the prior right existed, and the purchasers of the second bonds bought with the understanding that they had the superior right. The statute itself does not in words attempt to create any priority between the two issues. The district was authorized to issue bonds up to $31,000, and the second issue is not made inferior to the first in any way. We think, however, that the second issue is prior in equity and in law to the first issue. It is a lien (the assessment of benefits), fixed by law,—not a contract lien. In all liens such as taxes and assessments created by law, the later lien is superior. 182 Pac. 422; 191 Pac. 954; 20 Cyc. 1202; 175 S. W. 972; 120 Minn. 172.

2. If the foregoing contention is not correct, then we contend that there is no priority, as in the statute authorizing the issuing of the bonds there is no priority. The only limit fixed by the Legislature as to the amount of bonds to be issued was the 30 per cent. of the value of the property referred to in the act. There is, in reality, no "first" and "second" bonds in the sense employed by appellants. The purchaser of the bonds dated October 1, 1914, knew that bonds were authorized up to $31,000. All the provisions of the act, including sections 16, 18 and 19, pledged all the revenues for the issue of bonds dated May 1, 1915.

If appellants are right in saying that the concluding portion of section 19 with reference to default in payment and proceedings upon the appointment of a receiver is a mere distribution clause and does not establish any equality among the bonds, then the junior bonds must

be paid first, its past due interest and its past due bonds. If there is anything left after these bonds are paid, then the appellants' past due bond must be construed. If this is not the true construction of the act, then it means that all past due bonds must be paid *pro rata.* If the Legislature, knowing the rule as to priority between senior and junior bonds, had intended to apply a different rule, it would have expressed that intention in the act; hence it either intended that all past-due bonds should be paid *pro rata,* or that the rule of law on the subject as to priority of the junior bonds should be applied.

3. Upon the findings of the court in the motion and upon the presumptions arising on the record, appellee is entitled to a decree ordering its past-due bonds and coupons to be paid first.

Appellants introduced no testimony tending to show that they have any superior right or lien. The decree, therefore, against them on that point will be presumed to be correct. 141 Ark. 369; 146 *Id.* 232; 129 *Id.* 193; 139 *Id.* 408; 144 *Id.* 436.

4. This court has already upheld the validity of this statute. 112 Ark. 101. See also 92 Ark. 93; 102 *Id.* 553; 146 *Id.* 417.

N. F. Lamb and *Chas. D. Frierson,* representing certain drainage district bondholders, filed a brief as *amici curiae,* contending, in substance that priority in time gives priority in right among successive special assessment liens. 12 Wheat. 177; 6 L. ed. 592; 101 U. S. 837; 25 L. ed. 1081; 17 R. C. L., Liens, § 19, p. 610; 25 Cyc. 678; 2 Pom. Eq. Jur. 4th Ed. §§ 678-679. Counsel discuss the statutory provisions in chap. 109 C. & M. Digest, and cite further in support of the foregoing contention, 79 N. W. 77; 27 Pac. 52; 67 Pa. St. 345; 129 S. W. 1031; 83 So. 170; 2 Black 448; 67 U. S. 448; 17 L. ed. 327; 67 S. E. 294; 88 Pac. 722; 10 L. R. A. (N. S.) 110; 198 Fed. 557; 117 U. S. 657; 29 L. ed. 1026. Intention to establish priority of special assessments over other liens and of

special assessments as between successive issues thereof may be gathered from the whole act, even though not expressly declared. 25 R. C. L. 188-189. See notes to 30 L. R. A. (N. S.) 767; 35 L. R. A. 372; Ann. Cases 1913-C, p. 1210.

Cockrill & Armistead and *Charles Claflin Allen Jr.*, representing certain nonresident levee district bondholders, filed a brief as *amici curiae*.

Appellants' bonds contain a contractual pledge of a first lien, in apt and emphatic language, viz: "For the faithful performance of all covenants, recitals and stipulations herein contained, for the proper application of the proceeds of the tax assessment of benefits heretofore or hereafter levied, and for the faithful performance in due time and manner of every official act required and necessary for the prompt payment of the principal and interest of this bond as the same shall mature, the full faith, credit and resources of said road district are hereby irrevocably pledged." These bonds were then, necessarily, first mortgage bonds. The second bonds and pledge were executed seven months, and the pledge filed for record nearly three years, after the first, and recited the previous bond issue. Identical formal proceedings were had by the commissioners prior to the issuance both of the first and second bonds, authorizing the issuance of the bonds and pledge and levying an assessment of benefits, the only difference being a recital and recognition in the second proceedings, bonds and pledge of the first series of bonds. The recitals of the bonds make out a *prima facie* case of the truthfulness of the facts recited. 28 Cyc. 1627; 80 Ark. 462. The district thus issued a series of first bonds which became, by virtue of the act under which the district was formed, a first lien on the property and revenues of the district. This being true, no action of the district could subordinate the first lien of those bonds. 2 Black (U. S.) 448.

McCULLOCH, C. J. Road Improvement District No. 5 of Pulaski County was formed under a special statute

(Acts 1909, p. 1151) for the purpose of improving a certain road. The statute authorized a levy of special taxes on assessed benefits for the purpose of paying for the improvement, and also authorized the commissioners to "borrow money not exceeding the estimated cost of the work, at a rate of interest not exceeding ten per centum per annum," and to issue negotiable bonds for the discharge of liabilities created under the contract for constructing the improvement. The cost of the construction of the improvement and the creation of liabilities of the district therefor were limited by the statute to thirty per centum of the total assessed value of the real property in the district.

The statute contains the following provisions with reference to pledging the revenues of the district for the payment of the bonds:

"Section 18. That, for the payment of both principal and interest of the bonds to be issued under the provisions of this act, the entire revenues of the district, arising from any and all sources, and all real estate subject to taxation in the district is by this act pledged, and the board of directors are hereby required to set aside annually from the first revenues collected from any source whatever a sufficient amount to secure and pay the interest on said bonds, and said board shall also make due provisions for the payment of the principal thereof as the same shall become due.

"Section 19. All bonds issued under this act shall be secured by a lien on all lands and real property in the district, and the board of directors shall annually cause the assessment to be made and the tax levied and collected under the provisions of this act, so long as it may be necessary to pay any bonds issued or obligations contracted under its authority; and the making of said assessment or levy may be enforced by mandamus. If any bond or any interest coupon of any bond issued by said board is not paid within thirty days after its maturity, it shall be the duty of the chancery court of the proper

county, on the application of any holder of such bond or interest coupon so overdue, to appoint a receiver to collect the assessment aforesaid, and an assessor who shall make an assessment of said property; and the proceeds of such assessment and collection shall be applied, after the payment of the costs, first to the overdue interest, and then to the payment *pro rata* of all bonds issued by the said board which are then due and payable; and the said receiver may be directed by suit to foreclose the lien of said assessment on said property, and any suit so brought by the receiver shall be conducted in all matters as a suit by the directors, as hereinbefore provided, and with like effect, and the decrees and deeds therein shall have the same presumptions in their favor; provided, however, that when all such sums have been paid the receiver shall be discharged and the affairs of the district conducted by the board of directors as hereinbefore provided."

It is further provided in the statute that, on default in the payment of any matured bond or bonds, a receiver may be appointed for the purpose of collecting the assessments until a sufficient sum is realized to pay the matured bonds.

The assessed value of the property in the district is shown in the present litigation to be the sum of $104,985, therefore the statutory limit upon the amount of the bond issue restricts the issuance of bonds to the sum of $31,495.50. There was a total issue of bonds in the sum of $28,500, and upon default in the payment of some of the bonds and interest, a receiver was appointed, pursuant to the terms of the statute, and a fund was collected by him, and the distribution of that fund is the point at issue in the present litigation.

All of the bonds were issued and sold for the purpose of paying for the construction of the improvement, but all the bonds were not sold at the same time. Bonds aggregating the sum of $20,000 were issued and sold on October 1, 1914, and these bonds are owned by appellant;

the remainder of the bonds, aggregating $8,500, were issued and sold on May 1, 1915, and are owned by appellee. The respective holders of the bonds are each claiming priority, and the question involved in the case is whether or not the fund in the hands of the receiver is to be distributed *pro rata,* or whether either of the parties is entitled to priority.

The chancellor decreed that all of the accrued interest should first be paid in full, and that the remainder of the fund should then be distributed *pro rata* upon all of the matured bonds held by the parties.

It is not shown that the funds now in the hands of the receiver constitute the last collection that can be made of taxes, nor is it shown that taxes to be collected in the future will be insufficient to pay off the bonds in full. In other words, the controversy narrows down to the question of priority in the distribution of the particular funds now in the hands of the receiver.

It will also be noted that there was no excess of authority in the issuance of the bonds, for the total amount issued at both of the times mentioned was below the aggregate amount authorized by the statute.

It is contended by counsel for appellants that the case presents an instance of successive bond issues under a statute which provides that the revenue shall be pledged to the payment of the bonds, and that this necessarily creates priority in favor of the holders of the first of such successive issues of bonds. Counsel for appellees contends, on the other hand, that, if the court was not correct in the decision that there was no priority between the different bondholders, and, if there was any right of priority at all between them, the preference is in favor of the holders of the last issue of bonds.

We think that counsel on each side are mistaken in assuming that there were successive bond issues within the meaning of the statute. There was, in legal contemplation, only one issue of bonds, though the total amount issued was in two allotments, made at different times.

The statute provides that all bonds issued thereunder "shall be secured by a lien on all lands and real property in the district," and it makes no mention of any priority. The power to issue bonds is, however, limited to the sole purpose of raising money for constructing the improvement. It must be, and is, conceded that it is the statute itself which creates the lien upon the revenues of the district, and not the writings which evidence the obligations. The fact therefore that the bonds themselves contain a stipulation that the revenues of the district were pledged to the discharge of the obligation adds nothing to the rights of the parties, and, since the statute creates the lien, it can only be interpreted to mean that the lien is created, without priority, in favor of all the bonds issued for the purpose named. The fact that they were issued successively in point of time does not alter the relative rights of the bondholders, for each of the holders derives his right to a lien from the statute itself. The pledge of the revenues declared by the statute may be likened in some respects to a mortage executed to secure numerous debts maturing at different times, and this court has held that under such a security there is no priority between holders of the different debts on account of priority in point of time of the assignment to separate parties of the different obligations. *Penzel* v. *Brookmire*, 51 Ark. 105. In that case the debtor executed a series of notes and a mortgage to secure all of them, and the mortgagee transferred the notes to different parties, and a controversy arose as to the priority under the successive assignments. Judge BATTLE, in delivering the opinion of the court, called attention to conflict in the authorities, which he divided into three classes: one holding that the notes should be paid in the order of their assignment; another class holding that the notes should take precedence in the order of maturity, and the third class holding that the proceeds of the sale of the mortgaged property should be applied *pro rata* in part payment of the several notes, irrespective of dates of ma-

turity or assignment. The court approved the view taken by the class of authorities cited last, and in disposing of the question it was said:

"The comparison of a mortgage given to secure several notes to successive mortgages given to secure each of them does not support the doctrine it is made to prove. To make the case analogous, the mortgages to secure each note must bear the same date, and be executed, delivered and filed for record, and recorded, at the same time, and the property mortgaged must be the same. In the latter case the mortgages would be concurrent; neither one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be transferred to a third party, it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature. We do not think that either of the doctrines laid down by the two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage executed for the equal benefit of all. * * * * * There can be no priority of rights in favor of one against the others, as the mortgage is one."

The facts of that case are, of course, different from the facts in the present case, but the principle is the same, for we hold that the statute creates the lien, and only one lien, and that for the security of all the bonds issued under that particular authority—not part of them, but all of them. The decision is limited to the particular facts of this case, and reaches no further. We have no case of successive bond issues in the sense that bonds were issued at different times under different authority, nor have we a case of overlapping districts where there is a question of priority in assessment liens. We reiterate that in this case all of the bonds issued were within

the single authority conferred, and we hold that they are tantamount to a single issue, even though actually successive in point of time.

The question is one of first impression in this State. Indeed, it seems not to have been decided elsewhere, so far as we are able to discover. Counsel for the respective parties, as well as the other interested counsel who have filed briefs as *amici curiae,* have not brought to our attention a single case in point on the question involved in this particular controversy. The only case which might appear to be in point is *First National Bank* v. *Terry, Briggs & Co.,* 203 Ala. 401, and an analysis of the decision will show that it has very little bearing on the particular point involved in the present case. In that case there was a levy by the county of special taxes pursuant to authority of the Constitution to raise a fund annually to pay for the construction, by the county, of certain local improvements, and where there were several contracts let during the same year for different improvements it was decided that the contractors were entitled to priority in point of time for the payment of the amount due out of the funds levied for that purpose. It could only have been held, and was held, to be a case of successive contracts for payment out of the same fund, and of course, when the funds were insufficient, they necessarily must be applied on the first obligations contracted, pursuant to the Constitution and the statute. We have no such case here, for the bonds in the present case were all issued, not only under the same authority, but for the same purpose.

The other cases cited by counsel are not in point, for they all relate either to the question of priority of liens of the assessments of different taxing districts, as in the California, Missouri and Iowa cases cited; or to the question of priority where there has been creation of obligations in excess of the authority granted by law, as in the Federal cases cited; or to the question of priority

of special assessment liens over other securities, such as antecedent mortgages.

Our conclusion is therefore, after interpreting our statute to confer a single lien for the whole bond issue, there is no priority of the holders of bonds issued at different times, and that the chancellor was correct in his conclusion to that effect. Under this view of the statute, where there is authority for the issuance of bonds up to a certain amount for a given purpose, the purchasers of the bonds first delivered must take notice of the fact that there may be other bonds issued for the same purpose, standing upon an equality with those then issued; and subsequent purchasers of bonds must take notice that there may have been prior deliveries of bonds under the same authority.

The decree of the chancery court is therefore affirmed.

ARKANSAS SHORT LEAF LUMBER COMPANY *v.* WILKINSON.

Opinion delivered July 3, 1922.

1. MASTER AND SERVANT—ASSUMED RISK.—In an action for injuries to a ripsaw operator in a sawmill, sustained when a splinter struck him in the eye, in which there was evidence that the lumber fed into the ripsaw was supposed to be clear of knots and splinters, the questions of assumed risk and contributory negligence and of the master's negligence were for the jury.
2. DEPOSITIONS—REFUSAL TO QUASH.—Refusal to quash depositions on the ground that during the taking of the deposition and while counsel for defendant was cross-examining a witness for plaintiff, the notary permitted counsel for plaintiff to confer with the witness was not error.
3. TRIAL—IMPROPER ARGUMENT—INSTRUCTION.—In an action for injuries to a ripsaw operator, an instruction charging the jury not to consider "the argument of either counsel that is not borne out by the record, but you will consider the testimony as given you by the witnesses only, disregarding anything that is not in the record," *held* sufficient to remove any prejudice that might be produced by remarks of counsel in argument that rules of the American Hardwood Manufacturers' Association might show that it was the duty of the passer to inspect the lumber.

4. APPEAL AND ERROR—HARMLESS ERROR.—In an action for injuries to a ripsaw operator, the action of the court in permitting witnesses to testify that they belonged to the American Hardwood Association *held* not prejudicial.

5. DAMAGES—AMOUNT OF VERDICT.—A verdict for $5,750 given to plaintiff, who was 45 years old and was earning $3.75 per day with the prospect of increased wages at the time of the accident, for the loss of an eye, which reduced his earning capacity, and for injury to his health caused by the accident, *held* not excessive.

6. DAMAGES—PHYSICAL INJURY—ELEMENTS OF RECOVERY.—An employee who lost an eye as result of the employer's negligence could recover damages for physical suffering and inconvenience and for humiliation and mental anguish caused by disfigurement.

Appeal from Grant Circuit Court; *W. H. Evans,* Judge; affirmed.

Mike Danaher and *Palmer Danaher,* for appellant.

T. N. Nall and *Rowell & Alexander,* for appellee.

WOOD, J. The appellee was an employee of the appellant in the capacity of rip-sawyer. He was working at appellant's sawmill on the second floor. The lumber he sawed came from the first floor on moving endless chains, and when it reached the second floor a negro employee, called the passer, or puller, took the boards from the chains and placed them on the table beside the appellee, to be handled by the appellee and pushed by him through the rip-saw. The appellee was passing one of the boards through the rip-saw when a splinter flew out and struck him in the eye, severely injuring him. The appellee instituted this action for damages, alleging that it was the duty of the lumber passer to inspect the boards before placing them on the table for his use; that the passer negligently failed to discharge this duty, and on account of such negligence the injury occurred.

The appellant defended on the ground that the appellee assumed the risk and was guilty of contributory negligence. The appellee testified substantially as follows: He was feeding the ripsaw No. 3, cutting clear lumber free of knots and splinters. It was supposed to be the clearest and best lumber that comes through.

The lumber starts down stairs and comes up stairs on endless chains. The clearest lumber and the rough lumber together. The No. 1 ripsaw man upstairs takes the first rough lumber and it goes on to No. 2 ripsaw, and the passer takes the next—takes what he can use off. It was coming so fast he could not get all of it off, and some of the rough lumber came down the chain to No. 3. There was a man supposed to throw the lumber back to No. 1 and No. 2 ripsaws, if not good, and the best lumber was supposed to come to plaintiff's table free from knots and splinters. Before putting it on appellee's table the passer had the duty of inspecting the lumber and throwing back the rough lumber, and putting the best lumber on appellee's table in order to make a better class of lumber. Under the rush they had, appellee did not have time to make a better class of lumber and protect himself from splinters, and the foreman instructed him to run the lumber through the machine as fast as it would go—to butt the ends together and keep them going through with the ends together, and the passer would inspect it. Under the orders of the superintendent at that time in the rush it was not appellee's duty to insect the lumber for knots and splinters. The price of lumber was going down. The appellant had a rush order they wanted right away. The appellee stated: "If a piece of lumber got by inspectors No. 1 and 2, and came to inspector No. 3, it was his duty to pass it back to No. 1 and 2, and to place on plaintiff's table the lumber that was clear of knots and splinters. That lumber was put there for the purpose of making a better class of lumber, and under the rush, to protect plaintiff from knots and splinters." Again he says: "They (appellant) had speeded the saws up to where they would cut the lumber faster, and that was the reason Mr. Walker had given instructions to me to butt the ends of the lumber together, so as to keep the lumber in the machine, keep it going all the time. They speeded the saws up a

day or so before that. I think they were going around 2,600 revolutions. They speeded them up because they wanted more lumber cut, and more work out of the machine. A careful inspection would have detected that splinter in that board. I did not have time to inspect that board before I put it in the machine and keep the boards butted end to end, as I have been instructed to do. * * * If the inspector does his duty, there is no danger from knots and splinters. * * * * Under the superintendent's direction, appellee had nothing to do with the lumber at all except put it up against the saw. He did not have to look at it at all, and did not have time."

On cross-examination appellee stated, among other things: They were supposed to put into ripsaw No. 3 boards absolutely free from knots and splinters, and if that had been done his eye would not have been hurt. He knew the very best grade did not come to the flooring mill, but he knew the best grade of flooring was made out of a good grade of lumber, free from knots and splinters. The lumber that came through there generally was simply the best that came to the flooring mill. What went through there was supposed to be the best that they cut into oak flooring. If the best that comes to the flooring mill had some knots and splinters, they would be bound to be thrown out at times.

The testimony on behalf of the appellant was to the effect that the best grade of hardwood lumber is called "first and second", the next best "No. 1 common", the next "No. 2 common", and the next "No. 3 common." A board belonging in the "first and second" grade could have from one to five standard defects—that is, a board might have as much as a six-inch split and five knots not exceeding one and a quarter inches in diameter, or other defects. A standard defect, five of which are permissible even in a board of that best grade, is a knot one and a quarter inches in diame-

ter, or its equivalent in extent of damage. The testimony of the witnesses for the appellant was that the best grade of hardwood lumber was never sent into the flooring factory. The appellee himself testified in regard to this as follows: "I know the very best grade don't come to the flooring mill, but I also know that the best grade of flooring is made out of a good grade of lumber, free from knots and splinters." The appellee was asked this question: "Q. In other words, lumber is run through the flooring mill to take out the knots, and that is the reason it is cut into short lengths? A. Yes, sir; but there is different kinds of lumber that goes through these different machines. Only the very best of it was supposed to go through ripsaw No. 3."

1. This is the second appeal in this case. The case on first appeal is reported in 149 Ark. 270. The facts on the last trial were substantially the same as on the first trial, except the testimony of the appellee above set forth and the testimony of the witnesses for the appellant as to the kind of lumber that appellee was to put through the ripsaw.

The appellant contends that the above testimony shows that the appellee knew that nothing but boards having defects therein went into the flooring mill and into the machine that he was operating, and that therefore appellee knew of the danger to which he was necessarily exposed in passing the boards to the ripsaw having defects therein, and consequently assumed the risk of the injury which he received as one of the dangers incident to his employment. But it occurs to us, from the above testimony, that it was an issue of fact for the jury to determine whether or not the appellee assumed the risk.

2. On the first appeal the judgment was reversed because of errors in the instructions of the court. We find from an examination of the instructions given by the trial court at the last trial that the court eliminated the

errors pointed out in the former trial, and its instructions on the last trial were in conformity with the law as declared by the opinion of this court on the first appeal. In other words, the instructions of the trial court at the last trial on the issues of negligence, contributory negligence, and assumed risk are free from error. Under the evidence these were issues for the jury. We find no reversible error in the instructions on the measure of damages and in regard to comparative negligence.

3. Learned counsel for appellant complains that counsel for the appellee were permitted repeatedly to ask the appellee and other witnesses leading questions and to make a number of derogatory remarks as to the manner in which the defendant was conducting its case, and was permitted to examine appellee and other witnesses on re-direct examination as to matters fully covered in their direct examination.

Upon examination of the record we find that counsel for both appellee and appellant frequently asked questions that were leading in character and therefore improper, but we do not discover that the errors complained of in this respect were of such substantial character as to call for a reversal of the judgment.

4. Counsel for appellant contends that the court erred in not suppressing the deposition of one of the witnesses for the appellee because, during the taking of the deposition, while counsel for the appellant was endeavoring to cross-examine him, the notary before whom the deposition was being taken permitted counsel for appellee to confer with the witness. The court did not err in refusing to quash the deposition on this ground.

5. The appellant complains because the trial court permitted the appellee to ask certain witnesses whether they belonged to the American Hardwood Manufacturers' Association, and in permitting counsel for the appellee to say in his argument that the rules of such association might show that it was the duty of the passer to inspect the lumber. In response to appellant's objection to

these remarks and the testimony, the court instructed the jury that "they must not consider the argument of either counsel that is not borne out by the record, but you will consider the testimony as given you by the witnesses only, disregarding anything that is not in the record." Counsel for the appellee, in his argument before the jury, contended that the remarks to which the appellant objected were made in answer to something that had been said by counsel for the appellant. In the colloquy that took place between the counsel for the respective parties, during the alleged improper argument of appellee's counsel, and in response to the frequent objections made to such remarks, the court told the jury that they would not consider any remarks that were not borne out by the evidence in the record, and, after the argument was concluded, gave the instruction as above indicated. We are convinced that the instruction of the court to disregard all improper remarks of counsel that were not responsive to the evidence adduced was sufficient to remove any prejudice that the remarks might otherwise have produced in the minds of the jury. *Hall* v. *Jones,* 129 Ark. 18-25. There was no prejudicial error in permitting the witnesses to testify that they belonged to the American Hardwood Association.

6. Appellant contends that the verdict and judgment for $5,750 was excessive. It could serve no useful purpose to set out and discuss in detail the testimony bearing on this issue. Appellee, by reason of the injury, has lost the sight of his left eye. He was forty-five years of age, and at the time of his injury was earning $3.75 per day, with the prospect of an increase in wages. The loss of an eye has reduced his earning capacity, and his testimony shows that he suffered great physical pain from the time of his injury until his vision became entirely destroyed in that eye. Since that time he has not suffered so much, but does suffer at times. Before the injury his health was good, but it is not as good now as before. The loss of his eye has disfigured

him. Appellee stated that, aside from the physical suffering and inconvenience, he has been humiliated by this disfigurement to his person. The jury and the trial court had the opportunity to observe the extent of such disfigurement, and the jury had the right to take into consideration the mental anguish endured by the appellee on account of his injury. All of the above were proper elements to be considered by the jury in estimating the damages which had accrued to appellee because of the injury he had sustained. These were all taken into account and reduced to a present value in the aggregate sum of $5,750. It occurs to us that when this amount is paid to the appellee it will not afford him more than a reasonable pecuniary compensation for the injury he has sustained. The verdict and judgment are therefore not excessive.

Other errors are assigned, and we have considered them and find that they are not prejudicial to the rights of appellant and not of sufficient importance as a precedent to call for further comment. The record presents no reversible errors, and the judgment is therefore affirmed.

HONEA v. KING.

Opinion delivered July 3, 1922.

1. LIBEL AND SLANDER—CONSTRUCTION OF ARTICLE.—In ascertaining the meaning of written words to determine whether they are libelous, the entire article must be construed.
2. LIBEL AND SLANDER—CONSTRUCTION OF ARTICLE.—In ascertaining the meaning of written words to determine whether they are libelous, the words are to be taken in their plain and natural meaning.
3. LIBEL AND SLANDER—PUBLICATION NOT LIBELOUS.—An article signed by defendant stating that plaintiffs and defendant belonged to a partnership, that they had differences about the manner in which the business should be carried on and as to their rights under certain contracts, that defendant had not done well in investing in such business, that he received only a part of what his profits should have been, that plaintiffs had shown bad man-

agement in making and collecting debts of the firm, but not alleging or imputing dishonesty or misconduct to the plaintiffs, *held* not libelous *per se.*

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

STATEMENT OF FACTS.

B. F. Honea and A. L. Honea instituted this action against E. M. King to recover damages for an alleged libel publised in the McRae Progress, a newspaper of general circulation in White County, Ark.

The complaint alleges that the plaintiffs and the defendant were members of the same business partnership and that the publication in question grew out of their partnership transactions and impeached the business integrity of the plaintiffs.

The complaint sets out in full the alleged false publication and it is as follows:

As long as the Honea Mercantile Company has gone into print and thereby leading the readers of the paper to believe that E. M. King has not only spread a false report but has received from them a square deal, all that he was entitled to as per terms of company partnership, under which said firm was organized, and also the personal word of B. F. Honea, I desire to make a true statement of the whole matter. The terms of the guarantee at the time of organizing was that each stockholder should receive the amount of dividends earned according to money invested, and at any time any member should become objectionable to the firm that he would withdraw his capital and accept as payment what it has earned while being used, and at any time any member was not satisfied with the firm, that the firm was to return to him the amount put in, with all earnings while invested in business, and that is the way both Mr. Joe Rechtin and Mr. Jackson went out of the firm. Now, in addition to the terms of the partnership, Mr. B. F. Honea gave me his personal guarantee, his word, before I consented to become a partner, and numerous times after-

ward, that at any time I wanted my money he would see that I got it, with all the accumulated dividends from the time I became a member of the firm. Now, did he do so? Not on your life. But instead, after I had found that he had opened up a store in competition to the firm's business, taking over the entire feed business of the firm, also any other goods out of the grocer line that he wanted of the firm's store and was selling it and placing the proceeds to his private account in the bank, I went to him for him to make his word good. Did he do so? Not by any means, but said instead, 'No, I want to sell out, too.'

"Now the Honea Mercantile Company has jumped into print to make it appear that E. M. King has done well on his $3,000 investment, and that I should be entirely satisfied. They state very explicitly, which is correct, what I got out of the business, but failed to state that they had set aside the earnings on my stock, $926.50 up to the first of January, 1921, that I did not get. Neither did I get anything for the use of $4,926.50 from the first day of January, 1921, to June 10, 1921, and $3,926.50 until June 30, 1921, except my account as mentioned in their article which was $197.27. Now, about the 1st of February, 1920, I was informed that the business had earned a dividend of $4,000, and that my part was $1,471, but on account of sickness, before I could get my part, it had been put back into the business by B. F. Honea, manager, but the best I—(the rest of this sentence blotted out in paper, as shown by copy of paper attached to complaint).

"I was informed by Albert Honea that, after the $1,117.78 dividend had been declared to my part, there could not possibly be any more losses.

"Now, after deducting $662.28 account I had a ballance for the year 1920 of $455.54, making a total of my investment from September 6, 1919, to January 1, 1921, $2,588.78, what I received for this amount was $1,662.28, instead of $2,588.78. Now E. M. King would be perfectly satisfied with what he had gotten out of this business if

the people from whom has been exacted this amount of $926.50 had been reimbursed by the Honea Mercantile Company, together with what the money had earned from January 1, 1921, to June 30, 1921, had it or could get it, but as it is in the hands of Albert and B. F. Honea I am not especially pleased with the way it was obtained by them.

"On June 10th I called for my dividend, which was in their hands as herein described, and after some hesitation and excuses by Albert Honea on account of poor collections, etc., I was finally given a check for $1,000, with a promise of the other as soon as sufficient collections were made, and I inquired three or four times about the collections between the 10th and 13th of June, and very little or nothing had been done, when really and truly there had been, according to B. F. Honea's statement on June 30, $12,000 had been collected. Yet it was impossible to pay over to me $1,926.50, then past due, some of it for over a year. Now, I wish to state and am willing to make oath to same, that a day or two after I had given Albert Honea and Allie Harrison to understand I knew how the feed business had gone, B. F. Honea came to me and stated that Allie Harrison had told him what I said about the feed business, and told me positively that the feed business was just as it had always been; that he had borrowed $1,000 and that was about all the firm owed. This was about three or four days before I closed out to them, and I knew positively at the time that he had not only taken the feed business out of the firm, so far as I could be benefited by it, but had turned it over to Bob Bailey, with instructions to keep the proceeds separate from that of the other business, long before he bought out the feed store, and I knew then that he was not only selling feed, but any other articles he wanted out of the firm's store and having the proceeds placed to his private credit in the bank. What right had he to take any line of merchandise out of our business without the consent of all concerned, and start a compe-

titive business of his own to be fed from the company's store? He usurped the rights of all profits from the feed business, one of the best, if not the best, in the business.

"What was this done for? Can you, gentle reader, imagine? Why didn't his son, who was a partner and bookkeeper, as well as clerk, object? Certainly he knew what was going on, although when I ask him how the feed business was handled, he said he did not know, 'that when anything was charged he charged it'. That was all I could get out of him. Poor satisfaction for me, a partner.

"'B. F. Honea's Personal Word.

" 'B. F. Honea came to me some time in July or August, 1919, and stated to me that he wanted to put out J. T. Lyon, and that he did not have sufficient funds to do so and stock it up as it should be, stating that he wanted to do a general dry goods, grocer, and feed business, and that he was agent for the Cunningham Commission Company, for all points in White County, except Searcy, and got $7.50 per car on all feed sold in the county, except Searcy, and that he would put the feed business into the firm, which was done, and so remained until taken out as herein stated. I told Mr. Honea that I was no business man, but had explicit confidence in his honesty and qualifications, and would put in $3,000 by the time he needed it, but I assured him that he was the only merchant that I knew of that I would go into copartnership with, and that I depended wholly upon him to see that I got a square deal, and that confidence was not shaken until after he attempted to put off two land notes on me that represented $1,500, with only about $900 to secure their payment, for my 1919 and 1920 dividends amounting to $1,926.50.

" 'He gave me his word that he would see that I got back every dollar that I put in with all that it earned in dividends. Now what about this $926.50 that was set aside by the managers and these earnings on the capital

from January 1, 1912, to June 30, 1921, was it earned or taken from the patrons of this business? I did not get, they said it was mine.

" 'Their only excuses offered for the foregoing methods employed was bad accounts, reduction in prices, and poor collections.

" 'Remember, there can be no dividends declared as long as there are losses; also, from the best information obtainable, other merchants in McRae were very successful in making collections from their customers during the berry season.

" 'Also but little losses have occurred from reduction in prices since January 1, 1921. These excuses reflect heavily upon the customers of Honea Mercantile Company, if they are correct.

" 'I stated repreatedly to B. F. Honea that I was perfectly willing to stand any losses that might occur in my portion of the business.

" 'But Albert preferred to put me out, and sent Alley Harrison to make these wants known, but not until after I had began to dig around too close to the feed store proposition.

" 'I made them a proposition which I thought that any man who wanted to deal fairly would accept, but it was turned down. The $926.50 was not included, which Albert Honea had held up on the 10th on account of poor collections, as he stated, when there had been $12.00 collected. If B. F. Honea states the truth.

" 'Then B. F. Honea came to me and said that he had offered to take for his interest one thousand dollars, his living and the money he put in the business. That was enough to satisfy me, that if there was an offer made for my interest that what he had stated would be just what they proposed to allow me. I told Mr. Tucker and my son two days before their offer was made precisely what it proved to be.

" 'I knew every inch of the ground I stood on. I knew I had to lose the $936.50 dividends or run a great risk of losing the whole thing.

" 'I had been notified by B. F. Honea that on the first day of July the books would be closed and cash business would be done in the future.

" 'I knew what had been done with the feed business and what could be done with the cash business. I had no right to expect that the same methods would not be employed in both cases, so I sold to Albert Honea, at a loss, according to their own figures, of $926.50, and the earnings on my money as heretofore described.

" 'I recognize that this is a pointed statement, but I back every word I have written as true.

"E. M. KING."

The defendant filed a demurrer to the complaint, which was sustained by the court. The plaintiffs declined to plead further, and upon their complaint being dismissed, they have duly prosecuted an appeal to this court.

Gregory & Holtzendorff, for appellant.

The article published by appellee is libelous *per se.* 25 Cyc. 256, 262, 337, 341; American Annotated Cases 1913-B, p. 253; 20 A. & E. Am. Cases, p. 717; 95 Ark. 199.

Even though the article was not libelous *per se,* the complaint states a cause of action by alleging special damages, and a demurrer should not have been sustained.

Brundidge & Neelly, for appellee.

The article published by appellee was an endeavor to vindicate himself, and published in good faith for the purpose of repelling a charge, and was privileged. 17 R. C. L. 364; 72 Ark. 425; 18 A. & E. Enc. Law, 1033.

The only possible way for the article to be considered libelous would be by innuendo, and the complaint does not charge that. The words must be given their ordinary and natural meaning. 11 L. R. A. 668.

HART, J. (after stating the facts). Counsel for the plaintiffs rely upon the case of *Murray* v. *Galbraith,* reported in 86 Ark. 50, and in 95 Ark. 199.

We do not think that case applies. There the publication in express words charged the commissioners of an improvement district with an overcharge of $7,000 in the purchase of gravel, and stated that the improvement district was not the only paving district formed in Pine Bluff that was boodled.

In ascertaining the meaning of written words to determine whether or not they are libelous, the entire article must be construed. The general rule is also that the words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who read them. *Skaggs* v. *Johnson,* 105 Ark. 254. Hence it was necessary to set out the whole of the published article, although it is very long and is rambling in character.

By giving to the words used in the published article their most natural and obvious meaning and by giving to them that meaning which would most naturally be ascribed thereto by those who would read the articles, we do not think the publication is libelous *per se.* The natural and ordinary construction that would be placed upon the article would be that the plaintiffs and defendant had belonged to the same business firm and had had differences about the way the business should be carried on and as to their rights under certain contracts with each other. The article does not impute dishonesty to the plaintiffs nor does it accuse them of any misconduct in the business that would tend to impeach their integrity or veracity. The article sets forth somewhat in detail the differences between the plaintiffs and the defendant, and it is rather argumentative in character. The publication seems to have been an effort on the part of the defendant to state the various transactions had be-

tween himself and the plaintiffs and to show that he was right in the whole matter.

He does state specifically that he had not done well in investing in the business with the plaintiffs, but he does not accuse them of any actual dishonesty. He does state what his amount of the profits in the business should have been and that he was only paid a part of this amount. He states he was given a check for $1,000 with the promise to pay more as soon as sufficient collections could be made. He made several efforts to learn about the collections and they told him that they had been unable to collect the debts.

King also questioned the right of the plaintiffs to establish a feed business and take that line of business out of the partnership; but he does not accuse the plaintiffs of any actual fraud or dishonesty in that respect. It is true that the defendant, King, also stated in the article that the plaintiffs had attempted to put off land notes on him that represented $1,500 with only about $900 to secure their payment. He does not charge them, however, with fraud or dishonesty in this respect. The notes may have been good without any security at all.

The article does charge the plaintiffs with bad management, especially in the making and collecting of the debts of the concern; but there is no imputation of dishonesty or misconduct in the business charged against the plaintiffs. The publication cannot be construed to accuse the plaintiffs of doing anything in connection with the business that they did not have a legal right to do under the contract as construed by them. There are no facts alleged to connect the publication with any transaction by which the court could say that the publication is libelous *per se*.

We must therefore conclude that the complaint does not state a cause of action, and that the trial court committed no error in sustaining the demurrer to the complaint.

The judgment will therefore be affirmed.

CUMNOCK v. CITY OF LITTLE ROCK.

Opinion delivered July 3, 1922.

1. MUNICIPAL CORPORATIONS—POWERS.—Municipal corporations can exercise no powers except those conferred upon them by the statute by which they are constituted, or such as are necessary to the performance of their corporate powers and duties.
2. HOSPITAL—POWER OF CITY TO ERECT.—Under Crawford & Moses' Dig., § 7494, authorizing municipal corporations to make and publish such by-laws, not inconsistent with State laws, as seem necessary to preserve the health and improve the comfort of such corporations, and the inhabitants thereof, a city may by ordinance provide for the erection of a city hospital.

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

STATEMENT OF FACTS.

Frank Cumnock, a citizen and property owner in the city of Little Rock, Ark., brought this suit against the city of Little Rock and all the officers thereof, including the members of the city council, to restrain them from issuing any warrants or certificates of indebtedness or in any wise proceeding further with the erection of a city hospital.

The complaint alleges that the common council of the city of Little Rock passed an ordinance appropriating the sum of $200,000 for the purpose of completing the new city hospital, and that the mayor and other city officials are proceeding to let a contract for the completion of a new city hospital.

A general demurrer was filed to this complaint upon the ground that the city of Little Rock had the authority to construct a city hospital and to incur indebtedness therefor, and that on this account the complaint does state a cause of action.

The chancery court sustained the demurrer, and, the plaintiff having declined to plead further, his complaint was dismissed for want of equity.

The plaintiff has duly prosecuted an appeal to this court.

Rogers, Barber & Henry, for appellant.

A municipal corporation has no powers except those expressly conferred by the Legislature and those necessarily or fairly implied as incident to or essential for the attainment of the purposes expressly declared. 130 Ark. 337; C. & M. Digest, sec. 7494; 58 Ark. 270; 121 Ark. 606; 116 Ark. 125; 70 Ark. 4.

John F. Clifford, for appellees.

A city has those powers which, first, are granted in express words; second, those necessarily or fairly implied, and, third, those essential to the declared objects and purposes of the corporation. 58 Ark. 270.

It is not possible to argue that because the word hospital is not employed in some statute now in force, the power does not exist to build or maintain one. The course of legislation as appears in the statute books as well as the custom of this and other cities in the State since the Civil war, all lead to the conclusion that the city has the right to erect and maintain such institutions to care for the poor when ill, and to protect the other inhabitants against those who are diseased. C. & M. Digest, §§ 7458, 7490, 7744, 7752, 7593. See also 10 N. W. (Mich.) 133; 100 Ark. 587; 67 Ark. 530; McQuillin on Ordinances, par. 439; *Id.* par. 445; 70 Ark. 463.

HART, J. (after stating the facts). The sole issue raised by the appeal is whether or not the city of Little Rock has the power to build a city hospital.

In *Spaulding* v. *City of Lowell,* 23 Pick. (Mass.) 71, Chief Justice SHAW, speaking of municipal corporations, said: "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is fairly derived from the nature of corporations, and the mode in which they are organized, and in which their affairs must be conducted."

In *Ottawa* v. *Carey,* 108 U. S. 110, the Supreme Court of the United States, speaking through Chief Justice WAITE said: "Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. 1 Dill. on Mun. Corp., par. 89, 3rd Ed., and cases there cited. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect."

On the same point in Dillon on Municipal Corporations, 5th Ed. vol. 1, par. 237 (89), it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

The principle laid down above is one of universal application throughout the United States and has been recognized and applied by this court in several cases according to the particular facts of each case.

Sec. 7529 of Crawford & Moses' Digest contains a specific enumeration of powers granted by the Legislature to municipal corporations. It is conceded that there is no express power given by the statute to municipal corporations to construct and maintain city hospitals.

Sec. 7493 of Crawford & Moses' Digest provides that municipal corporations shall have the power to make and publish ordinances not inconsistent with the laws of the State for carrying into effect or discharging the powers or duties conferred by the provisions of the act.

Sec. 7494 of the Digest concludes as follows: "And they shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

This clause, or a similar one, is contained in the statutes of many of the States and is usually called the "general welfare clause." Reliance is placed upon this clause to sustain the decree of the chancery court.

Counsel for the plaintiff insist that this contention is against the authority of *Tuck* v. *Town of Waldron*, 31 Ark. 462, but we do not agree with them. In that case the ordinance prohibited the sale of ardent or vinous liquors in any quantities, and by any person without a corporate license. Under the section of the statute then in operation, corresponding to section 7529 of Crawford & Moses' Digest, municipal corporations were only authorized to license, regulate, tax, or suppress tippling houses. The court held that the particular enumeration of powers granted under the statute excluded the idea of greater powers of the same character which were granted under the "general welfare clause."

This is an application of the rule that where the statute specifically enumerates various powers which the common council may render effectual by means of ordinances, this enumeration is an implied exclusion of the right to act otherwise than as specifically directed. In other words, the statute having prescribed what powers the common council might exercise with regard to intoxicating liquors, additional powers could not be implied from the "general welfare clause."

If municipal councils could exercise no authority except with regard to the particular things enumerated in sec. 7529 of Crawford & Moses' Digest, it is manifest that no useful purpose could be served by enacting the general welfare clause. The purpose of the general welfare clause was to extend the powers of the city in addition to those specifically enumerated to other things which are necessary to accomplish the purposes of municipal government as explained above in the quotations from Dillon and the decisions of the Supreme Court of the United States and of the Supreme Court of Massachusetts.

As we have already said, the principles announced by those authorities have been expressly upheld and applied by this court according to the peculiar facts of each case.

In the *Town of Jacksonport* v. *Watson,* 33 Ark. 704, in the application of the principle, it was held that municipal corporations have no authority to expend the corporate funds in establishing and operating free ferries without the limits of the corporation, to promote trade, commerce, etc. No argument is necessary to show the correctness of this decision. The establishment of a free ferry was not necessary to accomplish any purpose of municipal government.

Again, in *Russell* v. *State,* 52 Ark. 541, it was held that a municipal council has no power to appropriate money to help erect a county courthouse. The reason is that a county courthouse is a building provided for the use of the county officers in discharging their duties and for keeping and preserving the public records of the county. Such a building is not devoted to any purpose of municipal government, and for that reason the city could not appropriate money to help erect it.

Again, in *Newport* v. *Railway Company,* 58 Ark. 270, it was held that an incorporated town has no power to contract for the construction of a levee, nor to bind itself to pay therefor. The building of a levee is not indispen-

sable to the purpose for which municipal corporations are organized in this State, and for that reason it would be necessary for an express grant of power to enable a municipal corporation to construct a levee for the purpose of protecting its inhabitants from high waters.

In *Torrent* v. *Common Council of Muskegon,* 47 Mich. 115, 41 Am. Repts. 715, it was held that, unless forbidden by its charter, a city may not be enjoined from erecting a suitable city hall. Judge CAMPBELL, who delivered the opinion of the court, said: "If cities were new inventions, it might with some plausibility be claimed that the terms of their charters, as expressed, must be the literal and precise limits of their powers. But cities and kindred municipalities are the oldest of all existing forms of government, and every city charter must be rationally construed as intended to create a corporation which shall resemble in its essential character the class into which it is introduced. There are many flourishing cities whose charters are very short and simple documents. Our verbose charters, except in the limitations they impose upon municipal action, are not as judiciously framed as they might be, and create mischief by their prolixity. But if we should assume that there is nothing left to implication, we should find the longest of them too imperfect to make city action possible."

"We have had occasion several times to refer to the historical character of municipal institutions, and to the duty of courts to read all laws and charters in that light."

In discussing the subject in *Clark* v. *Inhabitants of Brookfield,* 81 Mo. 503, 51 Am. Repts. 243, the Supreme Court of Missouri said: "From these, as well as other, provisions of the statutes it will be seen that a vast number of powers and duties are imposed upon the trustees. which contemplate the various officers and departments of administration and business, incident to a complete and efficient municipal organization, having charge of and

conducting its affairs for the benefit of the inhabitants. A building suitable for the accommodation of the town officers and records, and for the preservation of its necessary property, is a reasonable want, resulting from the fact of its corporate existence as a town. The right to erect such a structure is incidental to the powers expressly granted, or essential to carry out the objects of the corporation. *State* v. *Haynes,* 72 Mo. 377. Accommodations of some sort for the departments of the town government must, at all times, be possessed and maintained, as disclosed in the evidence of this case. The board must have lawful authority to erect suitable buildings for the conduct and transaction of its necessary affairs, on land which it is authorized to purchase and hold for the benefit of the town, otherwise it would be not only without the power to provide for its daily wants, but without the power incident to the proprietorship of realty, that is, of improving and devoting it to its own use and benefit. (Citing authorities)." To the same effect see *Eastman* v. *Meredith,* 36 N. H. 284, 72 Am. Dec. 302; *Bates* v. *Bassett,* 60 Vt. 530, 1 L. R. A. 166; *Wheelock* v. *City of Lowell,* 196 Mass. 220, 12 Ann. Cas. 1109 and note; 19 R. C. L. par. 85, p. 780 and note; and 26 L. R. A. (N. S.) 426, 427.

In *Spaulding* v. *Lowell,* 23 Pick. (Mass.) 71, and *Wartman* v. *Philadelphia,* 33 Pa. 202, it was held that cities and towns by virtue of their general powers have authority in their corporate capacity to build a market house and to appropriate money therefor.

Without approving these last-two decisions, it is undoubtedly true that a municipal corporation may erect a city or town hall and appropriate its money therefor under the general welfare clause of sec. 7494 of the Digest quoted above.

We are also of the opinion that the power to erect a city hospital is a necessary incident of municipal life. In a growing city, a city hospital may be necessary for the preservation of the public health and the care of sick

paupers. We can see no difference in principle between the right of a city to erect and maintain a hospital and to erect and use city halls, jails, and the like. Most cities of any considerable magnitude have city hospitals subject to the regulation of its own local authorities. It is true there is express statutory authority to erect them in many of the States, but we are also of the opinion that such authority is essential to carry out the object and purpose of organizing municipal corporations.

A municipality is a governmental agency, and in cities the erection of hospitals to preserve the public health and to care for indigent people within its borders is highly essential and may be absolutely necessary.

It results from the views we have expressed that the city had the power under the general welfare clause to erect a city hospital, and the decreee of the chancery court must therefore be affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY v. LEWIS.

Opinion delivered July 10, 1922.

1. PUBLIC SERVICE COMMISSIONS—REVIEW OF ORDERS.—Though the Railroad Commission is an administrative body, its actions in the regulation and control of public utilities are *quasi* judicial, and the circuit court on appeal acts judicially in the determination of the correctness of the orders made by the commission.
2. RAILROADS—DEPOT—RECONSTRUCTION.—Evidence heard by the Railroad Commission, on petition under Acts 1921, No. 124, for the construction of a new railway depot, *held* to establish that the plans for the reconstruction of the old depot submitted by the railway company were sufficient to provide adequate facilities, unless it was necessary to remove the depot to another location.
3. PUBLIC SERVICE COMMISSIONS—NECESSITY OF REMOVAL OF DEPOT.—Where the Railroad Commission rejected the railway company's plans for reconstruction of its depot, without determining whether the removal of the depot to another place was necessary, the court, on reversing the order of the circuit court affirming the order of the Commission because the plans for reconstruction were sufficient unless removal was necessary, will not determine the

question of removal, leaving that question to be determined in the first instance by the Railroad Commission.

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

W. T. Evans and *Warner, Hardin & Warner,* for appellant.

The Railroad Commission is a ministeral body. In order to sustain the order made, it must appear that the facilities offered by the company are inadequate and unreasonable. 85 Ark. 12; *Id.* 284; 170 U. S. 269; 200 U. S. 562. The Commission cannot act arbitrarily. Cases *supra.* The facilities proposed by the company are in every way adequate and reasonable, and far better than those in some cities of three times the population of Fayetteville.

The reasonableness of the order is a question for the court to determine. 206 U. S. 1.

The order of the Commission is repugnant to the Fourteenth Amendment to the Constitution of the United States, and to sec. 8, art. 2 of our Constitution.

J. V. Walker, for appellee.

The Commission had power to order the construction of a new building and to prescribe the kind and capacity thereof, and the material to be used in the construction. *St. L. S. W. Ry. Co.* v. *Stewart,* ms. op.

The findings of the Commission are supported by the evidence. A comparison of the earning by the company at Fayetteville with cities much larger emphasizes the reasonableness of the findings of the Commission. Judicial notice of the population of cities will be taken. 31 L. R. A. 726; 16 L. R. A. 836; 15 L. R. A. 561; 47 L. ed. 346.

McCULLOCH, C. J. This appeal involves a controversy which arose in a proceeding instituted against appellant before the Railroad Commission of Arkansas concerning the building of a new station at Fayetteville. Appellees, citizens of Fayetteville, filed a petition before the Railroad Commission asking that appellant be re-

quired to construct and maintain an adequate building as a depot and station house for passengers and freight. Appellant appeared and responded to the petition, proposing to remodel the building now in use as a station and to improve and enlarge the facilities in that respect.

Appellant furnished plans and specifications of the improvements to be made, which contemplated the use of the walls and foundation of the old building, so far as the same could be used, and extensive enlargements of the building. The estimated cost of the contemplated improvements was shown to be about $68,000.

The Commission, after hearing the evidence and viewing the premises, made an order rejecting the plans proposed for repairing and improving the present passenger station at Fayetteville, and directing that appellant "file with this Commission on or before the first day of January, 1922, plans for the erection of a new passenger station at Fayetteville, Arkansas, said station to be constructed of brick and the plans to provide for suitable and adequate waiting-rooms for white and colored passengers, with a modern heating plant, said station to be in keeping with the importance of the city of Fayetteville and the business transacted by the railroad company at said station."

The order of the Commission concluded with a recital that jurisdiction of the matter was retained by the Commission "for the purpose of making a final order, or orders, for the erection of said passenger station after the plans have been submitted and approved, and for such further orders as may appear just and necessary."

The company appealed from this order to the circuit court of Pulaski County, and the cause was there heard on the record made before the Commission, the trial resulting in a judgment of the circuit court affirming the order of the Commission.

These proceedings were instituted and prosecuted before the Commission pursuant to the statute (act No. 124, Acts of 1921) giving jurisdiction to the Railroad

Commission and providing for an appeal to the circuit court from the orders of the Commission, and also an appeal from the circuit court to this court.

The Railroad Commission is an administrative body, but its actions in the regulation and control of public utilities are *quasi*-judicial, and the circuit court on appeal acts judicially in the determination of the correctness of the orders made by the Commission. *St. L. S. W. Ry. Co.* v. *Stuart,* 150 Ark. 586.

There is no conflict in the statements of the witnesses in regard to the facts, though different deductions may be drawn from some features of the evidence.

Fayetteville is a city of about 5,500 inhabitants, and the State University is located in the western side of the city, the business part of the city being situated on the east side. Dickson Street, running east and west, is the one principally traveled between the University and the business district, and the railroad station is situated at the intersection of appellant's railroad tracks with this street, the station being on the east side of the tracks and on the north side of Dickson Street. There is a considerable residential section west of the railroad, and the travel along Dickson Street is heavy.

The undisputed testimony shows that there is considerable congestion in travel at the railroad crossing on account of the numerous tracks and frequent passage of trains—main line trains, and freight cars being switched.

There are six side-tracks crossing Dickson Street east of the station.

The present building is about forty years old, and is constructed of brick with stone foundation. It is thirty feet wide and one hundred seventy-two feet long, sixty-seven feet on the south end being devoted to passenger facilities, and the remainder to freight. There is a platform twenty feet wide on the west side of the station, running its full length, but a bay window extending out from the building narrows the space so that it is dif-

ficult for passengers to pass along there when trains are receiving or discharging passengers.

One of the side-tracks east of the station runs parallel with the building and cuts off the approach to the east side of the building. This situation is caused by the fact that the building is used for freight purposes, and it is necessary to have a track running close to the platform of the freight station to receive and unload freight.

Most of the testimony introduced by the petitioners was directed to the state of congestion on account of the numerous tracks and the amount of traffic along Dickson Street, and also the insufficient approaches to the station building and the insufficiency of the platform.

It is not contended, on behalf of appellant, that the present facilities are adequate or suitable to the necessities of the railroad traffic and business at the city of Fayetteville. The contention is that the plan of reconstructing and enlarging the old building, separating the freight station from the passenger station and changing the location of the tracks, will be amply sufficient to afford adequate and convenient facilities in keeping with the railroad business at that place, and that the construction of a new building is entirely unnecessary and will cost the company nearly double the amount of the cost of reconstructing the old building in accordance with the proposed plans.

It is shown that the ground owned and occupied by the railroad company at the station in Fayetteville fronts 250 feet on Dickson Street and runs north over 600 feet, narrowing down to a shorter distance about midway of the length of the lot.

The proposal of the company is to rebuild the passenger station, using the stone foundation and walls, with certain changes, converting the whole of the present station building into a passenger station, and remodel it from one end to the other. The plan contemplates the construction of a new freight house 140 feet long by 30 feet wide, north of the passenger station, with a plat-

form on the west side along the main track extending the full length of both buildings, which would give a platform about 600 feet long, parallel with the main track, which is to be removed westward five feet so as to give that much additional platform space. The bay window referred to is to be eliminated, and this will make a platform of unobstructed width of twenty-five feet between the walls of the building and the main track. The side-track running along the platform on the east side of the station is to be removed eastward from the passenger station so as to give space for a driveway of macadam sixty feet wide and two hundred feet in length, unobstructed by any of the side-tracks.

Specifications for the size and inside arrangements of the remodeled building are shown in detail, and it is not contended in any quarter that the capacity of the building is insufficient for the volume of railroad travel and business at that place.

The evidence shows beyond question that, unless the station is to be removed from the exact spot where the old building is located, the proposed plans for remodeling the old building and the construction of a new freight house are entirely adequate, and the construction of a new building at increased cost is unnecessary. In other words, our conclusion is, leaving out the question of removal of the station, that the order of the Railroad Commission is not supported by evidence. If the station is not to be removed from that spot, then the company should be permitted to carry out its proposed plans.

It will be noted from the language of the Commission's order that it did not pass on the question of removal, though most of the testimony introduced by the petitioners was, as before stated, directed to the question of inconvenience to travel along the street and to the station. The Commission, according to the language used in the order, merely decided that a new building must be constructed, and, as we understand, the question of location is to be hereafter decided. Now, this was

not the proper order to make, for, as we have already seen, there is no necessity for a new building unless there is to be a removal. Of course, if the removal of the station is ordered, then a new building is necessary, for the old one would be abandoned, but until the question of removal or non-removal is settled, the railroad company could not be bound by an order to construct a new building.

It would not be proper for us to decide, in the first instance, the question of the necessity for the removal, as the parties are entitled to have this question primarily passed on by the Commission. In speaking of the question of removal, it is not necessarily meant a removal to a distant location, but refers, as well, to the question of removal to another spot on the same property now occupied by the company for station purposes.

The present order is erroneous, but the matter is still before the Commission, and there may be a further hearing upon the original petition of the property owners and the plans proposed by appellant to determine the whole question whether or not there should be a removal from the spot on which the present building is located.

This inquiry will then draw into question the location as well as the building or remodeling of the station at Fayetteville, and the reversal of the judgment and quashing of the present order of the Railroad Commission will be without prejudice to a further hearing of the whole matter.

What we now hold is that, without a decision upon the question of removal, the order requiring the abandonment of the old building and the construction of an entirely new building is unnecessary, and that the proposed plans for remodeling and changing the old facilities are adequate unless a removal is necessary.

The judgment of the circuit court is therefore reversed and the cause remanded, with directions to quash the order of the Railroad Commission, without prejudice to further hearing before the Commission, upon all the

questions relating to improved station facilities at Fayetteville.

HUMPHREYS, J. (dissenting opinion). According to the plat filed in the case the depot is without ingress or egress on the west, north and east, the only entrance for passengers being from Dickson street on the south. This street runs east and west and the old depot is close to the street, so close, in fact, that all incoming and outgoing trains, in stopping at the depot, block the street. This street is the main thoroughfare, and when blocked causes much congestion and great inconvenience to the general public. The testimony reflects that those passing from the east to the University, and vice versa, are frequently delayed from five to fifteen minutes. The situation, as reflected by the testimony, may be more clearly described as saying that the depot is "bottled up." The testimony also reveals the great extent of the passenger traffic and the enormous income received by the company from it. This is due to the fact that trains from four directions center there. The income for a number of years far exceeded the income in larger cities. The testimony reflects that the congestion in and immediately around the depot causes great confusion and inconvenience. The repair of the old depot necessarily means the retention of the present site and the use of more space immediately around it for building purposes. It is true the proposed plan contemplates the removal of the west track a few feet to the west, and of the track east of the depot entirely, so as to give more platform space and a driveway on the east. The driveway, however, is to have no outlet to the north, so the changed situation will necessarily be the same, with only one street entrance. The depot, including the driveway and platforms, will be "bottled up." It is apparent, from the record made, that the congestion and dangers incident to the situation will not be relieved by the repair of the old depot in the manner suggested. The trend of the major part of the testimony was in this direction, so I

am convinced that the controlling issue in the case was, whether practical to repair the depot where it now sits. The order of the Commission was to build a new depot, necessarily determining, in the light of the testimony, that it should be located at a more convenient place on the lot owned by the company. It is quite apparent that the building could be constructed on the east side of the lot, which would give two street entrances; and far enough toward the north so that incoming and outgoing trains could stop without blocking Dickson Street. The physical facts are undisputed, and the testimony tending to show the congestion and inconvenience were fully developed. It is therefore unnecessary to remand the case for further evidence upon that issue. The additional testimony would necessarily be cumulative in nature. It seems to me that the record made fully sustains the order of the Commission. Mr. Justice WOOD desires to be noted as concurring in the views thus far expressed.

In addition to the views expressed, I am of the further opinion that the plans presented by the company for repairing the depot are not commensurate with the income from passenger traffic and the importance of the city shown by the testimony.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* BARNES.

Opinion delivered July 10, 1922.

1. INSURANCE—PROOF OF BY-LAWS OF FRATERNAL ASSOCIATION.—Under Crawford & Moses' Dig., § 6097, requiring fraternal benefit societies to file with the insurance department a certified copy of amendments of their by-laws, but making copies of the constitution and by-laws as amended when certified to by the secretary of the society *prima facie* evidence of the legal adoption, an amended by-law properly certified is admissible in evidence without proof that a copy thereof had been filed in the insurance department.
2. INSURANCE—FILING OF AMENDED BY-LAW.—Under Crawford & Moses' Dig., § 6097, requiring fraternal benefit societies to file copies of all amendments to their by-laws within 90 days after

their enactment, but not making such filing a prerequisite to the taking effect of the by-laws, the by-law is not prevented from taking effect until it is filed.

3. INSURANCE—MEMBER OF SOCIETY BOUND BY CONSTITUTION AND BY-LAWS.—Where the constitution and by-laws of a fraternal benefit society are made part of the contract by a statement in the application or policy, each member must take notice of the provisions of the constitution or by-laws, and is bound by an amended by-law, though he was not notified of its adoption.

4. INSURANCE—REINSTATEMENT—ACCEPTANCE OF DUES.—The requirement of the by-laws of a certificate of good health as a condition to reinstatement after forfeiture for nonpayment of dues is not waived merely by the acceptance of the dues and assessments by a local officer.

5. INSURANCE—REINSTATEMENT.—Proof that a fraternal benefit society had permitted the reinstatement of other members after forfeiture of their certificates for nonpayment of dues does not entitle a member to reinstatement without compliance with the by-laws, even if such proof established a general custom to that effect.

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

T. E. Helm, for appellant.

Each and every beneficiary certificate is issued upon the conditions stated in and subject to the constitution and laws then in force or thereafter enacted. 104 Ark. 538; 183 U. S. 308; 180 Pac. 2; 188 S. W. 941; 153 Wis. 223. The failure of William E. Barnes to comply with the requirements of reinstatement prevented a recovery. 133 Ark. 411; 136 Ark. 355; 85 S. R. 827; 180 Pac. 2; 144 Pac. 223; 125 N. W. 49; 170 S. W. 937; 172 S. W. 687. The court erred in refusing to sustain defendant's objections to the introduction of evidence as to reinstatement. 99 Ark. 547; 55 Ark. 567; 71 Ark. 197; 11 C. J. 176. The court erred in ruling that the testimony of John K. Barnes and Ned P. Atkins was competent. 104 Ark. 538; 133 Ark. 411. The court erred in holding that the change in the constitution was not binding upon the assured because the defendant had not complied with section 6097 of C. & M. Digest. See also secs. 6086, 6087 and 6090, C. & M. Digest; 104 Ark. 538; 133 Ark. 411; 151

N. W. 692; 87 Mo. 458. The certificate was not in effect and his beneficiary is not entitled to recover. 114 N. Y. S. 480; 89 Atl. 301; 63 So. 571; 80 So. 545; 47 Atl. 257; 188 Ill. App. 131; 32 Ind. App. 273; 69 N. E. 707.

G. P. George and *Compere & Compere,* for appellee.

The verdict of the jury was supported by the evidence. 233 S. W. 708. If the assured was not a member, and ceased to be such before January 3d, when the dues were sent in, then defendant has waived such defense by holding the dues. 233 S. W. 280. Such question was a question of fact for the jury to determine. 233 S. W. 280. No question was raised at the time he received the money as to the time it had been paid. 99 Ark. 204. It was a question for the jury to determine whether defendant had held it an unreasonable length of time before returning it. 233 S. W. 412. Any agreement, declaration or course of action on the part of the insurance company, which leads the insured to believe that by conforming thereto, a forfeiture of his policy will not be incurred, constitutes a waiver. 36 U. S. Law Ed. 496. The rules were not properly proved. 87 Ark. 115; C. & M. Dig., sec. 6087. The law does not favor forfeitures. 67 Ark. 506; 230 S. W. 576.

McCULLOCH, C. J. Appellant is a fraternal insurance society operating in Arkansas, and formerly had a subordinate branch, or camp, at Parkdale, in Ashley County. W. E. Barnes became a member of the camp at Parkdale in the year 1910, and kept up his membership by the payment of dues and assessments until September or October, 1920. His policy, or benefit certificate, in the sum of $2,000 was made payable to his wife, Maggie Barnes.

The camp at Parkdale was ordered disbanded for certain reasons, and the members who had preserved their membership were transferred to the camp at Omaha, Nebraska, and W. E. Barnes was one of the members so transferred. It is undisputed that he was suspended for nonpayment of assessments, either in September or Oc-

tober, 1920. There is a dispute in the testimony as to which of the assessments he failed to pay, whether his suspension occurred on account of the nonpayment of the assessment in September or in October. At any rate, it is undisputed that he was suspended not later than the first part of October, 1920, for nonpayment of assessments.

On January 3, 1921, a son of W. E. Barnes mailed to the clerk of the camp at Omaha, of which W. E. Barnes was a member, a postoffice money order for the sum of $16.20, which was the amount of three assessments, accompanied by a letter stating the fact that the money order was inclosed for the sum named, "covering three months' dues." The clerk made no reply to this communication until January 27, 1921, when he mailed the uncashed money order back to the address of Barnes, calling attention to the fact that another assessment was due before reinstatement could be effected, and that under the constitution and laws of the order a certificate of good health must be furnished.

Barnes died on January 19, 1921, and upon refusal of appellant to pay the amount of the benefits, this action was instituted to recover the sum named in the certificate. There was a verdict in favor of appellee, from which an appeal has been prosecuted.

The suspension of Barnes as a member of the fraternity being admitted, the only questions involved in the controversy are, whether or not he was duly reinstated, and whether the noncompliance with certain conditions of the by-laws with reference to the method of reinstatement were waived.

The application and policy state, in substance, that the by-laws of the order constitute part of the contract. The jury might have found from the conflicting testimony that at the time the remittance was made to the secretary of the camp at Omaha on January 3, 1921, the suspension for nonpayment of assessments had occurred within three months before that date, therefore the following by-law is the one which is applicable to the case:

"Sec. 66 (a) Should a suspended member pay all arrearages and dues to the clerk of his camp within ten days from the date of his suspension, and if in good health at the time and continue in good health for thirty days thereafter, and not addicted to the excessive use of intoxicants or narcotics, he shall be reinstated and his beneficiary certificate again become valid.

"(b) After the expiration of ten days, and within three months from date of suspension of a suspended member, to reinstate he must pay to the clerk of his camp all arrearages and dues and deliver to him a written statement and warranty, signed by himself and witnessed, that he is in good health at the time, and continue in good health for thirty days thereafter, and not addicted to the excessive use of intoxicants or narcotics, as a condition precedent to reinstatement, and waiving all rights hereto if such written statement and warranty be untrue.

"(c) Any attempted reinstatement shall not be effective for that purpose unless the member be in fact in good health at the time, and continue in good health for thirty days thereafter, and if any of the representations or statements made by said applicant are untrue. then said payments shall not cause his reinstatement nor operate as a waiver of the above conditions."

The by-laws put in evidence were properly certified by appellant's supreme secretary, and it is shown that the by-law as it now appears was adopted at a regular session of appellant in the year 1919, but the court refused to permit it to be introduced in evidence for the reason that it was not shown that it had been filed with the insurance department in accordance with the provisions of the following statute:

"Every society transacting business under this act shall file with the insurance department a duly certified copy of all amendments of or additions to its constitution and laws within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed or added to, certified by the secretary

or corresponding officer of the society, shall be *prima facie* evidence of the legal adoption thereof." Crawford & Moses' Digest, sec. 6097.

The record is silent on the subject whether or not the amendment to the by-laws had been filed with the insurance department, but the statute itself provides that the certificate of "the secretary or corresponding officer of the society shall be *prima facie* evidence of the legal adoption thereof," and under the statute this certificate is competent evidence of the adoption of an amendment, whether shown to have been filed with the insurance department or not. The Supreme Court of Mississippi announced this view in construing an identical statute of that State in the case of *Sovereign Camp W. O. W.* v. *Garner,* 125 Miss. 8, and our conclusion is that the Mississippi court was correct. In reaching that conclusion the court said:

"Section 22 of the act provides that printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be *prima facie* evidence of the legal adoption thereof. Under this provision the society may introduce such certified copy, and this shall be sufficient evidence of the legal adoption thereof, which, in the purview of this statute, includes filing, unless this *prima facie* evidence is rebutted. In the instant case the appellant introduced the evidence required under this section to show *prima facie* the legal adoption of the by-law, and the burden was thereby shifted to appellee to overcome this *prima facie* evidence, if, in fact, the by-law had not been filed and legally adopted in this State."

It will be observed that the statute we have quoted contains no condition or statement that the amendment shall not be in force until it is filed with the insurance department. It merely requires that this be done.

A society doing business here is amenable to the laws, and may be excluded from doing business here without complying with the laws, but this statute does not,

as long as the society is doing business here, require the filing of an amendment with the insurance department before it goes into effect. On the contrary, the statute expressly provides that the certificate, not of the insurance department, but of the secretary or corresponding officer of the society, shall be *prima facie* evidence of the legal adoption of the amendment.

It was contended by counsel for appellee in the trial below, and is so contended here, that the member was not bound by this by-law for the reason that he was not notified of its adoption. It has long been the rule adhered to in this court that the constitution and by-laws of a fraternal order constitute a part of the contract where it is so stated in the application or policy, and that each member must take notice of the provisions. The cases on this subject are collated in the recent case of *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132. This being true, the member was bound by the by-laws with reference to the method of securing reinstatement, and it is undisputed that this by-law was not complied with.

It is next contended that there was a waiver of the requirement concerning a certificate of good health by the retention, for a time, of the remittance and until after the death of the deceased. We decided this question against the contention of appellee in the case of *Woodmen of the World* v. *Jackson,* 80 Ark. 419. That was the point expressly raised and decided in the case, and we held that there was no waiver of the noncompliance with the provisions of the by-laws merely by the acceptance by a local officer of the dues or assessments. The question of waiver under the same circumstances arose in the case of *Sovereign Camp W. O. W.* v. *Anderson,* 133 Ark. 411. Following the Jackson case, *supra,* we held that there was no waiver under those circumstances.

Appellee was permitted, over the objection of appellant, to introduce proof to the effect that reinstatement of members in this and some other subordinate branches of the fraternity had been permitted without furnishing

health certificates. The proof was not sufficient to show a general custom of accepting reinstatements in disobedience of the express terms of the by-laws, but, even if sufficient for that purpose, it is not competent to show an abrogation of the by-laws by that method. The acceptance of reinstatement of other suspended members at different times did not entitle this member to reinstatement in the same manner in disregard of the express terms of the by-laws.

Each party in the trial below requested a peremptory instruction, and the court gave such an instruction in favor of the appellee.

The material facts are undisputed, and show that the deceased member, W. E. Barnes, was suspended from the fraternity and forfeited his benefit certificate, and that he was never properly reinstated, and was not a member at the time of his death.

The judgment against appellant was therefore erroneous upon the undisputed facts, and it is reversed and judgment will be entered here in favor of appellant.

STATE v. COX.

Opinion delivered July 3, 1922.

1. HIGHWAYS—TRANSFER OF WAR MATERIAL TO STATE.—Under Acts of Congress of Feb. 28, 1920, providing for distributing war material suitable for use in the improvement of highways, and act of Congress of March 15, 1920, fixing the amount to be paid therefor to the United States by the States and providing that the title thereto shall be vested in the State for use in improving highways, the State had title to such property so donated, provided the State under its statutes had the right to accept the donation.
2. HIGHWAYS—HIGHWAY COMMISSIONER AUTHORIZED TO RECEIVE DONATIONS.—Under Crawford & Moses' Dig., §§ 5165, 5168, creating the State Highway Department and the State Highway Commission, and §§ 5198-9, *Id.*, relative to the receipt of Federal aid, the State Highway Commissioner had power to apply for and receive, on behalf of the State, donations of war material from the United States.

3. HIGHWAYS—FUNDS DERIVED FROM SALE OF WAR MATERIAL.—Under Crawford & Moses' Dig., § 5199, funds derived from the sale or rental of property donated by the Federal Government for aid in road building is not payable into the State Treasury, but is to be kept by the Commissioner of Highways in a separate account.

4. HIGHWAYS—RIGHT TO DISPOSE OF WAR MATERIAL DONATED TO STATE. —The donation of war material by the United States, when accepted by the State through the Commissioner of Highways, constituted a present gift and vested the State with the absolute power of disposition, through its Highway Department.

5. HIGHWAYS—AUTHORITY OF STATE TO SELL UNSERVICEABLE WAR EQUIPMENT.—Under act Cong. March 15, 1920, § 5, providing that vehicles and equipment in serviceable condition donated to the States for road-making purposes shall not be sold to any individual, company or corporation, the State has authority to sell equipment which, though virtually new, is not serviceable for the building of highways in the State.

6. HIGHWAYS—AUTHORITY OF HIGHWAY COMMISSIONER.—The State is bound by the act of the Commissioner of State Highways in selling road-making equipment donated by the Federal Government under Acts of Cong. of Feb. 28, 1919, § 7, and of March 15, 1920, when not in a serviceable condition.

7. HIGHWAYS—AUTHORITY OF STATE AS TO DISPOSITION OF WAR MATERIAL.—While the title to machinery and equipment donated by the Federal Government under Acts of Cong. of Feb. 28, 1919, and March 15, 1920, is held absolutely by the State, and not in trust, and its power of disposition is unrestricted, it must see that the property so received is administered for road-building purposes, and may repudiate the acts of its highway officers as *ultra vires* and void if they fail to dispose of the property in accordance with the Acts of Congress.

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

J. S. Utley, Attorney General, *Elbert Godwin* and *Wm. T. Hammock,* Assistants; *George Vaughan,* special counsel.

1. Plaintiff is the owner, and entitled to the immediate possession of the property in controversy. Congress by express enactment (§ 7 of postoffice appropriation act of February 28, 1919) authorized the Secretary of War in his discretion to transfer to the Secretary of Agriculture "all available war material and supplies

* * * * *suitable for use in the improvement of highways* * * * * of the several States *to be used on roads constructed in whole or in part by Federal aid.*" 40 Stat. L. 1201.

The Wadsworth-Kahn act of Congress, approved March 15, 1920, expressly provided a restriction in keeping with the policy of the first act to the effect that "no more * * * * material, equipment and supplies * * * * shall be transferred * * * than said Department of Agriculture *shall certify can be efficiently used for such purposes* within a reasonable time after such transfer." Express authority was contained in section 2 for the transfer of certain specific units to which the item now in dispute belong. Section 4 provided for reimbursement of the War Department by the department to which the property is transferred, of freight charges and expense of loading, and further provided that "any State receiving any of said property *for use in the improvement of public highways*" shall pay 20 per cent. of its estimated value, against which the State may set off the freight charges paid by it on the shipment. Section 5 fixes the title of such allotment in the State, for use in the improvement of public highways, etc.

The record affirmatively shows a request for the items now in suit by the State Highway Commissioner to the bureau of public roads, war materials division, Department of Agriculture, and specific shipping instructions issued by the chief of the bureau of public roads covering these items.

There is therefore no question but that the disputed units of material and equipment became the lawful property of the State. It is not material in this inquiry whether the property was impressed with a trust, or whether the right of disposal was absolute or qualified. Special ownership is sufficient to support the action of replevin. C. & M. Digest, § 8640; 37 Ark. 64; 67 *Id.* 135; 53 S. W. 678; 34 Cyc. 1390; *Id.* 1468; 23 R. C. L. 864, § 14.

2. The attempted transfer by the highway commissioner was unauthorized and unlawful, and vested no title, either legal or equitable, in the defendants. By the limitations placed upon the *use* to which the materials should be put, and the *condition* under which it might be alienated, Congress may well be said to have created a trust estate in the beneficial allottees. 39 Cyc. 17; 12 N. Y. S. 815. The subject-matter of trusts is not limited to real property. 31 Ark. 119; 25 R. C. L. "States," 389, § 22; 1 Perry on Trusts, 6th Ed., § 67; 37 Cyc. 36; *Id.* 51; 26 R. C. L. 1171, § 6 ; Perry on Trusts, § 41.

Although there is no affirmative acceptance of a trust, yet acceptance may be implied. 3 Pomeroy, Equity, §§ 1007, 1060. The language of the Acts of Congress and that of the certificate of the Highway Commissioner that the property would be used for the purpose intended, together with the acceptance of the consignor and consignee, are sufficient to create a trust. 26 R. C. L. 1179-1180. That authority to enforce a Federal statute or a national policy, of the nature involved here, may be conferred upon State officers as such, and that such officers may execute the same unless prohibited by the Constitution or statutes of the State, is no longer open to question. 16 Pet. 539, 622; 10 L. Ed. 1060; 197 U. S. 169, 174; 25 S. C. 422; 49 L. Ed. 709.

Only the Legislature may authorize the sale or transfer of public property. 36 Cyc. 870; 25 R. C. L. "States", 392-3. §§ 25, 26.

The State Highway Department is not one operated for gain. It is a creature, and within the exclusive control, of the Legislature, charged with the performance of a definite assignment of the manifold functions of State government. In view of the Federal aid laws, this department operates as an indispensable cog in coordination with the National Government in promoting the cause of good roads. 151 Cal. 797; 91 Pac. 740; 154 Cal. 119; 97 Pac. 144, 148.

The State may hold title to property in two distinct capacities—one as proprietary, and the other in a sovereign or governmental role. 157 Pac. 1097-8.

Not only must express authority exist for disposing of public property, but statutory procedure must be strictly pursued. 24 Minn. 332; 76 Ark. 167, 88 S. W. 888.

The State is liable only to the extent of the powers actually given to its officers, and not to the extent of their apparent authority. All who deal with a public agent must at their peril inquire into his real power to bind his principal. 39 Ark. 508-3; 42 *Id.* 118; 66 *Id.* 48, 52; 51 S. W. 68; 70 Ark. 568, 578; 69 S. W. 559; Throop, Public Officers, p. 523 § 551; 44 Ark. 437; 47 *Id.* 205; 7 Wall. (U. S.) 666; 25 Ark. 261; *Id.* 273.

The language of section 5 of the Wadsworth-Kahn Act excludes the possibility of alienation except in two contingencies, viz: if unserviceable, *sale* may be made to any "individual, company or corporation"; otherwise by *rental* to a "State agency or municipal corporation" at not less than the cost of upkeep, but this use must be "for the purpose of consructing or maintaining public highways." If the language of the Acts of Congress, which are the source of the State's title, are to be strictly construed, then due import must be given to the word "serviceable" therein employed. Georgia courts have construed the term. 25 S. E. 428; 132 Ga. 445, 64 S. E. 475; 91 S. E. 771.

3. The defendants are not entitled to any relief on their cross-complaint, as against the State. Const. art. 5, § 20; C. & M. Dig., § 9294; *Id.* § 9303; 19 Ark. 559, 562.

Defendants' pleadings nowhere ask relief against the State. A suit to compel the State to perform its contract cannot be maintained. 108 Ark. 60, 67; 156 S. W. 839 45 L. R. A. (N. S.) 731; note 68 Am. St. Rep. 753; 6 Pomeroy, Eq. Jur. § 759. See also 106 Ark. 174; 121 *Id.* 489. Our statute expressly forbids the allowance of any debt or claim by way of set-off in a suit on behalf of the State. C. & M. Dig., § 9303. It has been held that

no principle of direct set-off or recoupment will authorize the allowance of a claim of a defendant for damages, liquidated or unliquidated, against a claim of the State. 18 Md. 193; 59 Hun. 299; 12 N. Y. S. 936; 128 N. Y. 640, 29 N. E. 147; 51 N. Y. S. 747; 156 N. Y. 693; 51 N. E. 1093; 56 Cal. 401; 65 N. C. 406; 14 S. C. 135; 16 S. C. 533; 87 Tenn. 725; 11 S. W. 935; 10 Am. St. Rep. 712; 2 Tex. 616; 31 Md. 344; 46 La. Ann. 431; 15 So. 174. See also 33 L. R. A. (N. S.) 378; 91 Ark. 527; 98 *Id.* 525; 35 *Id.* 565; 161 U. S. 10; 40 L. Ed. 599; 202 U. S. 473; 50 L. ed. 1113; 123 U. S. 443; 31 L. ed. 216; 263 Fed. 410; 117 U. S. 52; 140 U. S. 1; 172 U. S. 516; 105 Fed. 459; 107 U. S. 711; 33 L. R. A. (N. S.) 376, Note; *Id.* p. 379, note.

Equity follows the law in matters of set-off. 34 Cyc. 635. Defendant cannot avail himself of a set-off, because the demand is uncertain in its nature, and it is no justification of a tortious act that the plaintiff is indebted to the defendant. Waterman on Set-Off, Recoupments and Counterclaim, 2nd Ed. 169, § 42; Cobbey on Replevin, 2nd ed., §§ 791, 792; Shinn on Replevin, § 589; Morris on Replevin, 165; Wells on Replevin, § 630.

Mehaffy, Donham & Mehaffy, for appellees.

1. The State is not the owner of the property and not entitled to possession. Appellees are not bound by the provisions of the Wadsworth-Kahn act, since this property may be some of the equipment acquired under the postoffice appropriation act of February 28, 1919. If it was so acquired, it was an absolute gift on the same basis as money given to the State under the Federal aid road act of July 11, 1916, and Commissioner of State Lands, Highways, etc., was the proper person to receive and dispose of the same and apply the funds obtained to work of his department in road building.

If the property came to the State under the act of February 28, 1919, plaintiff is not entitled to relief under the provisions of the Wadsworth-Kahn act, and the

burden is on the State to show that the property came to it under the later act.

The term "serviceable condition" in section 5 of the Wadsworth-Kahn act must be given its ordinary and commonly accepted meaning. Under no rule of construction could it be made to mean "new" or "unused." The three Georgia cases cited by appellant sustain appellee's contention on this point.

If it be true that the property came to the State under the later act which provided that no equipment in serviceable condition could be sold, then the donation of this equipment was a grant *in praesenti,* and when it came into possession of the State it became a gift absolute. 31 Ark. 119; *Id.* 833; 54 *Id.* 251; 24 *Id.* 431.

The State, through its Legislature, had designated the Commissioner of State Lands, Highways and Improvements as the proper person to receive payments from the United States Government. C. & M. Digest, § 5199. There is no question but that he had full authority under the above section to receive this property, sell the same, and apply the proceeds to the building of highways. And it is clear that there is no necessity for money so derived to go into the State Treasury.

Since, by virtue of the foregoing legislative enactment, the commissioner was the proper person to receive and dispose of the property, his acts were the acts of the State, and the latter cannot question them. The Federal Government alone could complain if the money was not spent, or the property not handled, in accordance with its regulations. In the absence of a showing of fraud, the commissioner's action in disposing of the property is presumed to have been legal and proper. He is presumed to have performed his duty. 22 R. C. L., §§ 143, 145, 146, pp. 472-4; 38 Pa. Sup. Ct. 437; 74 Atl. 392; 123 Pac. 8; 88 Ark. 37; 4 *Id.* 251; 96 *Id.* 424.

2. If the State is the owner and entitled to possession, it cannot obtain the relief sought without reimbursing the defendants. She comes into court divested of

her sovereignty, and is bound by the same equitable rules that govern a private suitor. 45 Ark. 88; 57 Ark. 480; 98 *Id.* 125; 52 *Id.* 157; 1 Pomeroy, Eq. Jur. 4th ed., § 385; *Id.* 388. See also 114 Ark. 289.

J. H. Carmichael and *Rowell & Alexander* filed separate briefs as *amici curiae.*

WOOD, J. This is an action of replevin begun in the Pulaski Circuit Court, Second Division, and afterwards, by consent of parties, transferred to the Pulaski Chancery Court. The action is to recover the possession of certain articles of industrial machinery and supplies therefor. The description and value thereof are set forth in the complaint. The facts, so far as it is necessary to set them out, are substantially as follows:

The property in controversy had been transferred by the War Department to the Federal Department of Agriculture, under the authority of section 7 of the Postoffice appropriation act of Congress, approved February 28, 1919. Upon the requisition of William B. Owen, the then Commissioner of Highways in Arkansas, the Secretary of Agriculture forwarded the property to the Highway Department of the State of Arkansas. In his requisition the Commissioner of Highways certified that the property would be used in the improvement of the public highways in this State, in accordance with the provisions of § 5 of the act of Congress, March 15, 1920, known as the Wadsworth-Kahn act. Acting under the authority of a resolution of the State Highway Commission, passed January 31, 1920, Commissioner Owen on October 15, 1920, executed to Hot Spring County, Arkansas, what is designated as a "lease" whereby the Commissioner leased to Hot Spring County the property in controversy for the period of twenty years, the consideration named being the rental price of $9,250 cash. On the 18th of November, 1920, C. F. Berry, county judge of Hot Spring County, under a written instrument undertook to "transfer and donate" to the defendants, residents of Malvern, Hot Spring County,

Arkansas, all of the right, title and interest to Hot Spring County to the property in controversy. No consideration was named for this transfer, but it was in proof that the real consideration were certain checks of the defendants, aggregating the sum of $9,250, payable to W. B. Owen, Commissioner of Highways, which were deposited and passed to his credit in a special account or "war equipment fund" controlled and maintained by him with the People's Savings Bank of Little Rock, Arkansas. These funds never reached the State Treasury.

In 1921 the Federal Government demanded an accounting of the State of Arkansas of the war surplus equipment allotted to it. Growing out of the investigation by the agents of the Federal Government, in collaboration with the Highway Department and the office of Attorney General, incident thereto, the present action was instituted by the State through her Attorney General to recover possession of the property.

The defendants, in their answer, set up that they were in lawful possession of the property as *bona fide* purchasers at a valid sale thereof made by the Commissioner of Highways. By way of cross-complaint they set up that they were innocent purchasers, and that the present Highway Commission, composed of the Commissioner and his two associates, were necessary parties to the action; that in order to protect the defendant, if it were decided that they were not innocent purchasers and not entitled to the possession of the property, the Highway Department should in equity be required to return the money paid to it by the defendants for the property.

At the hearing the court found that the disposal of the property by the State Highway Commission was unauthorized, contrary to law, and that therefore no title passed to the defendants; that the plaintiff was entitled to the possession of the property upon the payment to the defendants of the sum of $9,250, which they had paid to the Highway Department for the proper-

ty. The court entered a decree according to its finding, and directed that the State of Arkansas have until April 1, 1923, to arrange for the payment of the sum of money decreed to reimburse the defendants, and that upon the payment of such sum by the plaintiff to the defendants the possession of the property should be delivered to the plaintiff. From that decree the plaintiff prosecutes this appeal, and the defendants have prayed here and been granted a cross-appeal.

1. The first question to be determined under the issues and facts presented by this record is whether or not the State is entitled to the possession of the property in controversy. A proper solution of the question involves a construction of the acts of Congress under which the Highway Department of the State of Arkansas received the property in controversy, and the statute of the State governing the disposition of such property by such department. It is conceded that the United States Government is the source of title to the property in controversy. Sec. 7 of the act of Congress of February 28, 1919, entitled "An act making appropriation for the services of postoffice," etc, 40 Statute Laws, p. 1201, authorized the Secretary of War, in his discretion, to transfer to the Secretary of Agriculture "all available war material * * * suitable for use in the improvement of highways, * * * * the same to be distributed among the highway departments of the several States to be used on roads constructed in whole or in part by Federal aid."

An act of Congress approved March 15, 1920, entitled "An act to authorize the Secretary of War to transfer certain surplus motor-propelled vehicles and * * * road-making material to various services in departments of the Government and for the use of the States", 41 Public Laws, p. 530, authorizes the transfer of the property of the kind here in controversy from the War Department to the Department of Agriculture. That act contains a provision that "any State receiving

any of said property for use in the improvement of public highways shall, as to the property it receives, pay to the Department of Agriculture the amount of 20 per centum of the estimated value of said property, * * * * against which sum the said State may set-off all freight charges paid by it on the shipment of said property, not to exceed, however, said twenty per centum." And the further provision: "Sec. 5. That the title to said vehicles and equipment shall be and remain vested in the State for use in the improvement of the public highways, and no such vehicles and equipment *in serviceable condition* shall be sold or the title to the same transferred to any individual, company, or corporation: Provided, that any State Highway Department to which is assigned motor-propelled vehicles and other equipment and supplies, transferred herein to the Department of Agriculture, may, in its discretion, arrange for the use of such vehicles and equipment, for the purpose of constructing or maintaining public highways, with any State agency or municipal corporation, at a fair rental, which shall not be less than the cost of maintenance and repair of said vehicles and equipment."

It is in proof that the Highway Commissioner of Arkansas obtained the property in controversy according to the methods prescribed by the Federal Department of Agriculture. Therefore, unquestionably, under the above acts of Congress the State had title to the property at the time it was disposed of by the Commissioner of Highways of the State, provided the State under our statute had the right to accept the donation.

2. Did the State Highway Commissioner have authority to dispose of the property in the manner adopted by the State Highway Commission and pursued by him as above set forth? The State Highway Department and the State Highway Commission were created by the act of March 31, 1913, secs. 5165 and 5166, C. & M. Digest. Act 105, entitled "An act to provide that the State of Arkansas shall accept aid from the Federal

Government for the construction of rural post roads * * * * and for other purposes," approved February 20, 1919, provides, among other things, a method of procedure for the State to pursue in procuring Federal aid for constructing or improving State roads. See secs. 5198 and 5199, C. & M. Digest. The latter section reads as follows:

"The Commissioner of State Lands, Highways and Improvements is hereby designated as the proper officer to receive payments as they shall be made by the Secretary of the Treasury of the United States; said Commissioner shall keep a separate set of books showing all such payments made by the United States and the road or the road improvement district to which it is to be applied, showing all disbursements of money so received from the United States Government. The moneys shall be paid out of this fund received from the United States in accordance with the regulations prescribed by the proper authorities of the United States Government. And provided, further, the State Highway Commission is authorized, for and on behalf of the county judge, to enter into all necessary agreements with the Department of Agriculture of the United States, for carrying out the rules and regulations of the Secretary of Agriculture in granting aid to any county or road improvement district for the building of rural post roads."

It will be observed that the Commissioner of State Highways is designated by the above statute to receive payments and make disbursements of moneys received from the United States under the Federal aid road law of July 11, 1916, according to the regulations prescribed by the proper authorities of the United States, and that the said highway commission is authorized to enter into all necessary agreements with the department of Agriculture of the United States for carrying out the rules and regulations of the Secretary of Agriculture in granting aid for the building of rural post roads. The State Highway Department must disburse all moneys

received from the United States government in accordance with the regulations prescribed by the proper authorities of the Federal Government.

Under the broad powers conferred upon the Commissioner of State Highways and upon the State Highway Commission it was unnecessary for the Legislature to pass a special act authorizing the acceptance by the State of the donation by the Federal Government of its surplus war material and supplies suitable for use in the improvement of highways and to be used on roads constructed in whole or in part by Federal aid. The Federal aid road act of July 11, 1916, expressly provides that "the Secretary of Agriculture is authorized to cooperate with the States, through their respective State Highway Departments, in the construction of rural post roads." Under the authority of the above laws, State and Federal, already existing, it was within the power of the Commissioner of Highways acting for the State Highway Department, to apply for and receive the donation of the property in controversy, to be used on roads that were being constructed in whole or in part by Federal aid. Under the State and Federal statutes the Commissioner of State Highways had the authority to receive the property in behalf of the State and to use the same or the proceeds thereof for the purpose of constructing and maintaining public roads as contemplated by the acts of Congress and the State statute above mentioned. It is clear that the funds derived from the sale or rental of property received by the State through the munificence of the Federal government for aid in road-building is not to be paid into the State treasury, but a separate account thereof is to be kept by the Commissioner of State Highways, showing the amount received and the amounts disbursed of the funds received direct, or the proceeds of property donated under the Federal aid laws for the construction of public highways. If the State Highway Department, under the existing statute, *supra,* did not have authority to dispose of the

property after the same had come into its possession, then she had no authority under that act to accept the property in the first instance, and consequently had no title, either general or special, thereto, and hence could not maintain this action.

But we are convinced that, under a proper construction of the State statute and the Federal aid laws, the donation of the property in controversy and its acceptance thereof by the Commissioner of State Highways in compliance with the provisions of the Federal statutes, constitutes a donation or gift *in praesenti* to the State and vested the absolute title in the State, with the unlimited right of disposition through its Highway Department and the Commissioner thereof, when duly authorized so to do by the State Highway Commission. The donation of money or property under these Federal aid road building statutes is analogous to the grants of land by the United States Government to the State for school and other purposes. See *Myers* v. *Burns,* 19 Ark. 308; *Branch* v. *Mitchell,* 24 Ark. 331; *Ringo* v. *Rhoton,* 29 Ark. 56; *L. R. & F. S. Ry. Co.* v. *Howell,* 31 Ark. 119; *Hendry* v. *Willis,* 33 Ark. 833; *Chisholm* v. *Price,* 54 Ark. 251; *Hibben* v. *Malone,* 85 Ark. 584.

It does not follow, however, that, because the State had the absolute title and the unlimited right to dispose of the property that the act of her Commissioner in disposing of the property was binding upon the State unless he was authorized by law to make a lease or sale thereof in the manner indicated. As we have seen, the Commissioner of Highways, under the law, was the proper person to receive for the State the road aid funds donated to it by the Federal Government and to dispose of the same, and, as we have said, the power conferred upon him by this statute is ample to authorize him also to receive the donation of war materials such as the property in controversy, for use in the improvement of highways being constructed in whole or in part under the Federal aid laws. The uncontroverted testimony shows that the

State Highway Commission authorized the Commissioner to operate and handle the property in controversy. The testimony of the Commissioner and other witnesses as to the method of procedure and the facts relating thereto by which appellant obtained possession of the property, and showing the various steps taken by the Commissioner in disposing of the same to the appellees, is too voluminous to set forth and discuss in detail. It shows that, acting under authority of a resolution of the Highway Commission authorizing him so to do, the Commissioner leased the property in controversy to Hot Spring County, Arkansas, for a period of twenty years for the consideration of $9,250, and the county judge of Hot Spring County in turn, without any additional consideration, transferred and donated the property contained in the lease to the appellees. The appellees, in fact, paid the consideration mentioned, which was received by the Commissioner and the property delivered to the appellees. The uncontroverted testimony shows that the transaction was nothing more nor less than a sale of the property in controversy by the Commissioner to the appellees, and that the funds paid by them and received by him for the sale of the property went into the funds maintained by the Highway Department for the benefit of the highways. The law as to the receiving and disbursement of the funds was fully complied with. The Commissioner had a survey made of the property, and a preponderance of the evidence shows that the property in controversy at the time of its sale to the appellees was *unserviceable* and not suitable for general road building purposes in this State. The equipment was entirely too heavy, not of standard gauge, and was impractical to be used in building highways in the State of Arkansas. While the proof shows that the equipment was virtually new, nevertheless it was not serviceable for the building of highways in this State.

It will be observed that sec. 5 of act No. 159, approved March 15, 1920 (Wadsworth-Kahn act, *supra*)

provides that "no such vehicle and equipment in serviceable condition shall be sold or the title to the same transferred to any individual, company, or corporation." The language quoted necessarily implies that the State shall have authority to sell the property if it is in an *unserviceable* condition. From the proof in this record the Highway Commissioner was justified, as we have seen, in concluding that the property in controversy at the time of the sale thereof to the appellee was not in a serviceable condition. In coming to such conclusion he acted for and on behalf of the State, and the State is bound by his act. There is no proof of any fraudulent conduct by the Commissioner in the sale of the property.

Now, while the State does not hold the title in trust and while the *jus disponendi* is unrestricted, nevertheless the State cannot do wrong. Therefore she will see, and has the right to see, that her Highway Department through its State Highway Commission and its Commissioner duly constituted and authorized to receive and disburse the Federal aid to the building of highways, shall so administer the fund derived from the Federal Government as to carry out the intention of Congress in making the donation. The State therefore must see that the property received for road building purposes in this State is duly administered for such purposes. If therefore the officers of the State charged with the administration of such aid failed to dispose of the property received from the Federal Government in accordance with the acts of Congress making the donation to the State, their acts will be *ultra vires* and void, and the State may repudiate the same. But, as we have already shown, the acts of the officers of the Highway Department, its Commission and the Commissioner, were strictly in accord with the regulations of the Federal Government in the disposition of such property. Our conclusion, therefore, is that the learned chancellor erred in holding that the sale of the property by the State Highway Commission was unauthorized and contrary

to law and that no title passed to the appellees by virtue of such unauthorized act.

Having reached this conclusion, the other question passes out, and we do not decide whether, if the sale were void, the State would have to return to the appellees the consideration paid by them as a condition precedent to the recovery of the possession of the property. The decree is therefore reversed, and the complaint is dismissed for want of equity.

Mr. Justice HUMPHREYS not participating.

SLEDGE-NORFLEET COMPANY v. MATKINS.

Opinion delivered July 3, 1922.

1. EXECUTION—WRONGFUL JUDGMENT—REMEDY AT LAW.—Where appellant took default judgment against appellee on an account on immature service, which was set aside on appellant's motion under agreement that appellee execute and deliver his note secured by mortgage, which was done, and at a succeeding term of court appellant, without further service, took a second default judgment on the same account, in violation of the above agreement, appellee, suing to enjoin the levy of an execution on the latter judgment, had an adequate remedy at law under Crawford & Moses' Digest §§ 4291, 5788, 6290, by procedure to have the judgment set aside.
2. EXECUTION—COMPLAINT ALLEGING PAYMENT.—In a suit to restrain a sheriff from levying an execution, based on a judgment upon an account, a complaint alleging payment of the account by executing a note and mortgage *held* not demurrable.
3. TRIAL—WRONG FORUM—REMEDY.—Under Crawford & Moses' Dig., § 1041, bringing a suit in equity, when the remedy at law was adequate, is not ground for dismissal of the suit, the remedy being a motion to transfer to the law court.
4. TRIAL—WRONG FORUM.—Under Crawford & Moses' Dig., § 1041, where a motion is properly made to transfer a suit in equity to the law court, it is reversible error to proceed with the case in equity.
5. TRIAL—WRONG FORUM.—Where, in a suit brought in equity which should have been brought at law, defendant elected to stand upon a demurrer, and made no motion to transfer the cause, it was not error to proceed in equity; the relief sought being within that court's jurisdiction.

6. EQUITY—RELIEF AGAINST JUDGMENT AT LAW.—While equity will not order a new trial in a case tried at law, it may decree that unless the opposite party submits to a new trial, his judgment at law will be enjoined.

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

Roy D. Campbell, for appellant.

The chancery court was without jurisdiction. C. & M. Dig., sec. 5788; 55 Ark. 454; 133 Ark. 256; 79 Ark. 289.

The appellee had a complete remedy at law and should have proceeded in the law court. C. & M. Dig., sec. 6285 and sec. 6290; 33 Ark. 454; 97 Ark. 314; 138 Ark. 408.

The complaint of appellee did not state facts sufficient to constitute a cause of action. Sec. 6293, C. & M. Digest.

R. M. Hutchins, for appellee.

The complaint stated a cause of action. In assuming jurisdiction the equity court did not undertake to exercise supervisory or appellate jurisdiction over the circuit court. 61 Ark. 348.

In a proper case a court of equity may make a decree that unless the judgment holder should submit to a new trial, his judgment at law would be enjoined. 73 Ark. 566; 61 Ark. 348; 51 Ark. 343; 35 Ark. 123; 61 Ark. 348; 120 Ark. 156.

The complaint stated a cause of action and was not demurrable. 61 Ark. 341; 48 Ark. 510; 93 Ark. 266; 75 Ark. 507; 74 Ark. 297; 50 Ark. 458; 52 Ark. 80; 48 Ark. 331; 94 Ark. 111.

The judgment was taken by fraud and was properly set aside. 23 Cyc. pp. 1024, 1028, 1037, also pp. 1000 to 1005. Injunctive relief was properly granted on the following grounds: Payment, 15 R. C. L. p. 759; fraud, *Id.* p. 760; violation of agreement, *Id.* 765; misrepresentation, *Id.* 764; showing of meritorious defense, *Id.* p. 735.

SMITH, J. Appellee Matkins, plaintiff below, brought this suit in equity, and for his cause of action alleged that

a default judgment upon an open account was taken against him on immature service, and thereafter this judgment was set aside on motion of the plaintiffs in that case. That action was taken pursuant to an agreement between the parties whereby it was agreed that the cause of action upon which the judgment had been obtained would be disposed of in the following manner: Matkins was to execute and deliver to his creditor "a certain mortgage and note, said note being due November 15, 1921, which would liquidate the cause of action set forth in the above mentioned lawsuit upon which default judgment was had," and the note and mortgage were executed and delivered pursuant to said agreement. That at the following term of court defendants here (plaintiffs there), without further service took a default judgment upon the account, which had been paid by the execution of the note and mortgage, and that this was done in violation of the agreement pursuant to which the note and mortgage had been executed. Plaintiff here made no defense to that suit, as he had discharged the demand sued on, and his first knowledge that said judgment had been rendered came when the sheriff advised him that he had an execution issued thereon for service. There was an allegation that plaintiff was without adequate remedy at law and a prayer that the sheriff be restrained from levying the execution, and that on final hearing the injunction be made perpetual.

A demurrer to this complaint was filed upon the grounds, (1) that the chancery court had no jurisdiction; (2) that plaintiff had a complete remedy at law; and (3) that plaintiff's complaint did not state a cause of action.

The decree recites that the demurrer was overruled, and that the defendants "desire and elect to stand upon their demurrer," and it was by the court ordered that "the defendants be restrained and enjoined from proceeding under the judgment further until said defendants shall consent to a new trial of the cause of action

they may have against the plaintiff herein, at which the parties hereto shall be afforded an opportunity to be heard and present any and all defenses and equity to which they may be entitled; and, in the event that said defendants shall refuse to submit to a new trial of the said action, then this injunction shall be made perpetual." This appeal is from that decree.

The plaintiff was mistaken in his allegation that he had no remedy at law. He had a full, complete and adequate remedy at law. Sections 4291, 5788, 6290, C. & M. Digest; *Wood* v. *Stewart,* 81 Ark. 51; *Shaul* v. *Duprey,* 48 Ark. 331; *Gorman* v. *Bonner,* 80 Ark. 339; *Dale* v. *Bland,* 93 Ark. 266; *Knight* v. *Creswell,* 82 Ark. 330; *Wingfield* v. *McLure,* 48 Ark. 510; *Arkadelphia Lbr. Co.* v. *Asman,* 79 Ark. 284; *Hunton* v. *Euper,* 63 Ark. 323; *Driggs' Bank* v. *Norwood,* 49 Ark. 136; *Walker* v. *Files,* 94 Ark. 457; *Chambliss* v. *Reppy,* 54 Ark. 539.

The defendants insist that the complaint was demurrable because it alleged no defense to the cause of action sued on. But such is not the case. A valid defense, that of payment, is alleged. The allegation of the complaint is that the demand sued on was liquidated by the execution of a note and mortgage. If this is true, some innocent holder of the note might demand payment thereof, even if the judgment were satisfied by a levy and sale under the execution which issued upon the judgment.

As has been said, plaintiff had a complete and adequate remedy at law, and should have proceeded there. But the failure to do so was not ground for dismissing his complaint as prayed in the demurrer. Section 1041, C. & M. Digest. Had it been asked that the cause be transferred to law, it would have been error calling for the reversal of the judgment to have proceeded with the case in equity. *Cole v. Burnett,* 119 Ark. 386; *Farmer* v. *Towers,* 106 Ark. 123; *Cribbs* v. *Walker,* 74 Ark. 104; *Goodrum* v. *M. & P. Bank,* 102 Ark. 326; *Kampman* v. *Kampman,* 98 Ark. 328; *Gerstle* v. *Vandergriff,* 72 Ark.

261; *Burke* v. *St. L. I. M. & S. R. Co.,* 72 Ark. 256; *Organ* v. *Memphis & L. R. R. Co.,* 51 Ark. 235; *Harris* v. *Townsend,* 52 Ark. 411; *Love* v. *Bryson,* 57 Ark. 589; *Smith* v. *Pinnell,* 107 Ark. 185; *Horsley* v. *Hilburn,* 44 Ark. 458; *Gaither* v. *Gage,* 82 Ark. 51; *Brown* v. *Norvell,* 74 Ark. 484; *Weaver* v. *Ark. Nat. Bank,* 73 Ark. 462; *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208; *Rowe* v. *Allison,* 87 Ark. 206; *L. R. & F. S. Ry. Co.* v. *Perry,* 37 Ark. 164; *Berry* v. *Hardin,* 28 Ark. 458; *Grooms* v. *Bartlett,* 123 Ark. 255.

In the case of *Organ* v. *Memphis & L. R. R. R. Co.,* 51 Ark. 235, Mr. Justice BATTLE, for the court, said: "In *Talbot* v. *Wilkins,* 31 Ark. 411; *Moss* v. *Adams,* 32 Ark. 562; *Hammond* v. *Harper,* 39 Ark. 248; *Dorsey County* v. *Whitehead,* 47 Ark. 208, and *Catchings* v. *Harcrow,* 49 Ark. 20, it was held that an error as to the kind of proceedings adopted is not a good cause for dismissal, but only for a transfer of the cause to the proper docket; and that where no motion is made to correct the error, the court may either transfer on its own motion, or may proceed to a trial upon its merits.

"The latter rule is more in harmony with the spirit and letter of the Code of Practice in Civil Cases. The code abolished all form of actions, and provides that there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action; and that the proceedings in a civil action may be of two kinds; first, at law, and second, in equity; that the plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of the code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive; and that in all other cases the plaintiff must prosecute his action by proceedings at law. It further provides: 'An error of the plaintiff as to the kind of proceedings adopted *shall not cause the abatement or dismissal of the action,* but merely a change in

the proper proceedings by an amendment in the pleadings and a transfer of the action to the proper docket.' Such error may be corrected at the instance of either party, but is waived by a failure to move for its correction. Mansfield's Digest, secs. 4914-4928. In this case the action was dismissed, because, in the opinion of the court, the remedy of the plaintiffs was at law. If legal and equitable remedies were required to be administered in separate forms of action, this ruling would be correct. But under the code there is but one form of action for all kinds of civil remedies. All that the plaintiff is required to do in the statement of his cause of action is to state in his complaint facts to show that he is entitled to the relief demanded; and it is the duty of the court to treat his complaint as valid without stopping to speculate upon the name to be given to his action. If he states facts which entitle him to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If an error in the kind of proceedings adopted be committed, it should not be dismissed on that account, but the issue in the action should be tried according to the principles involved, and the relief he is entitled to should be granted without regard to such error. *Trulock* v. *Taylor,* 26 Ark. 54."

The complaint in this cause recited facts entitling plaintiff to the relief of having the default judgment set aside, and, while he should have proceeded as provided by the statute, this is not a case of which equity, under no circumstances, could have assumed jurisdiction. There are circumstances under which equity will relieve against judgments at law. *Kansas & A. V. R. Co.* v. *Fitzhugh,* 61 Ark. 341; *Valentine* v. *Holland,* 40 Ark. 338; *Harkey* v. *Tillman,* 40 Ark. 551; *Johnson* v. *Branch,* 48 Ark. 535; *State* v. *Hill,* 50 Ark. 458; *Whitehill* v. *Butler,* 51 Ark. 341; *Jackson* v. *Woodruff,* 57 Ark. 599; *L. R. & H. S. Ry. Co.* v. *Newman,* 73 Ark. 555; *McLaughlin* v. *State,* 120 Ark. 156; *Wingfield* v. *McLure,*

48 Ark. 510; *Dale* v. *Bland,* 93 Ark. 266; *Knight* v. *Creswell,* 82 Ark. 330; *Fuller* v. *Townsley-Myrick D. G. Co.,* 58 Ark. 314.

As was said in the case of *Cribbs* v. *Walker, supra,* this "is not a case where there is such a lack of jurisdiction of either the parties or subject-matter as the parties cannot waive. Where a suit is improperly brought in equity, it should not, on that account, be dismissed, but should be transferred to the law court; and if no motion is made to transfer the cause, the objection is waived." (Citing cases).

By electing to stand upon the demurrer, defendants took the position that a case was not made entitling plaintiff to relief; but, as we have said, they were wrong in this assumption. Under the allegation of the complaint the demand sued on had been discharged, and it was therefore improper to have rendered judgment upon it. Had plaintiff proceeded at law, he would have been entitled, under the allegations of his complaint, to have had the judgment set aside; and while equity will not order a new trial granted in a case tried at law (and has not done so here), yet in a proper case a court of equity might make a decree that unless the opposite party would submit to a new trial, his judgment at law will be enjoined, and this is the relief granted here. *L. R. & H. S. Ry. Co.* v. *Newman, supra; Kansas & A. V. R. R. Co.* v. *Fitzhugh, supra.*

By the operation of the decree upon the parties to the judgment at law, the defendant in that suit (the plaintiff in this) has been given, in effect, the relief which he would have obtained had he proceeded at law, and as, under the pleadings, that decree was a proper one, it is affirmed.

MILTON v. JEFFERS.

Opinion delivered July 10, 1922.

1. WILLS— CAPACITY OF TESTATOR—EVIDENCE.—Evidence *held* to sustain a finding that a will was the act of one mentally incapable of making it.
2. WILLS—UNDUE INFLUENCE—QUESTION FOR JURY.—Evidence *held* not to warrant submission to the jury of the question of undue influence in procuring the execution of a will.
3. WILLS—UNDUE INFLUENCE DEFINED.—Fraud or undue influence which will avoid a will is not the legitimate influence which springs from natural affection, but the malign influence which results fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property; and this influence must be specially directed toward the object of procuring a will in favor of particular parties.
4. TRIAL—INSTRUCTION INVADING JURY'S PROVINCE.—In a proceeding to probate a will, an instruction that "mental powers decline with advancing years" invaded the jury's province.
5. WILLS—STATEMENT OF TESTATOR'S WIFE HELD INADMISSIBLE.—In a proceeding to probate a will where the issue of undue influence was raised, evidence that testator's wife advised him to make his will and that his sons, the proponents, knew best, was inadmissible; there being no evidence of a joint undertaking between proponents and testator's wife to induce the making of a will.
6. WILLS—STATEMENTS OF TESTATOR.—In a will contest the statements of the testator are competent only to show his mental status, but not to show an independent fact, such as undue influence or fraud.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran*, Judge; reversed.

Hill & Fitzhugh, for appellants.

The court erred in not directing a verdict for appellant and in failing to set aside the verdict of the jury as being against the weight of the evidence. 126 Ark. 427. The evidence does not sustain the contention of mental incapacity when measured by the rule laid down in 49 Ark. 367 and repeated in 114 Ark. 69. Old age and physical infirmities alone are not sufficient to establish a "partial eclipse of the mind." The circumstances de-

tailed in 66 Ark. 623 made a stronger case of mental incapacity than the present one, yet the will there was not set aside.

There was no testimony whatever of undue influence on the part of appellants over their father, and it was error to submit that issue to the jury. 122 Ark. 407. The undue influence which is required to avoid a will must be directly connected with its execution. There was none shown. 49 Ark. 367; 87 Ark. 148; 94 Ark. 176. Neither courts nor juries can arbitrarily disregard undisputed, unimpeached, disinterested witnesses, but when done it is the duty of this court to set aside the verdict. 101 Ark. 532; 53 Ark. 96; 67 Ark. 511; 80 Ark. 396.

Willard Pendergrass, June P. Clayton and *Evans & Evans,* for appellees.

Instruction No. 9 given by the court correctly defined senile dementia according to the text-books and cases. Gardner on Wills, sec. 43, p. 125; 2 Clevenger's Med. Juris. of Insanity 910. *Beaver* v. *Sprangler,* 93 Iowa 576; 61 N. W. 1072; *Davis* v. *Denny,* 94 Md. 390; 50 Atl. 1037. See also 145 Ark. 247.

The declarations of the father, both before, at the time of the execution of the will and after, were admissible for the purpose of enabling the jury to pass upon his mental capacity and his susceptibility to undue influence. 122 Ark. 407; 115 Tenn. 73; 5 A. & E. Ann. Cas. 601, 3. L. 8 A. (N. S.) 749 and note, citing a number of cases.

The court did not err in submitting to the jury the question of undue influence. Gardner on Wills, sec. 63, p. 192; 13 S. W. 1098.

Hill & Fitzhugh, for appellant in reply.

Instruction No. 9 was clearly erroneous in that it was an expression of an opinion by the court on the weight of the evidence. The instruction is practically a copy of a statement in Gardner on Wills, sec. 43, p. 125, but the statement is not sustained by either of the court

decisions cited by him. There is no presumption against a will because made by a person of advanced age, and incapacity cannot be inferred merely from an enfeebled condition of mind and body. 3. Witthaus & Becker on Med. Juris, p. 406 and cases cited. 1 Wharton & Stille's Med. Jur. sec. 975.

McCULLOCH, C. J. Appellants were the proponents of the last will and testament of W. C. Milton, and they have prosecuted an appeal from the judgment of the circuit court of Franklin County sustaining a contest of the will by appellees.

The instrument in controversy was executed by W. C. Milton on January 26, 1918, and he died on June 11, 1920. Appellants are the three sons of the testator, and appellees are his two daughters.

By the terms of the will, the testator gave the whole of his estate to his wife Eliza, and gave the remainder of his real estate at the wife's death to his three sons to the exclusion of the daughters, and gave to all of the children an equal part of the remainder of the personal property after the death of testator's wife.

The testator was the owner, at the time of his death, of a farm, on which he resided, of the value of about $12,000, and he left personal property of the aggregate value of about $1,200.

The testator's wife died after the execution of the will, and prior to the death of the testator.

Appellees allege that at the time of the date of the will the testator was not of sufficient mental capacity to make a will, by reason of the fact that his mind, on account of age, had been reduced to a state of senile dementia, and also allege that the execution of the will by the testator was induced by coercion and undue influence of the three sons, who were the chief beneficiaries under the will. The issues were joined upon these two allegations, and, as before stated, the verdict and judgment resulted in favor of the contestants.

It is undisputed that the testator was a farmer and was about ninety-two years old at the time of the execu-

tion of the will. He had been a strong man, both physically and mentally, all of his life, and it is conceded that much of his physical and mental vigor were preserved up to the time of his death. But the contention of appellees was, at the trial below, that on account of old age his mental vigor had been reduced to the extent that he was incapable of disposing of his property. There was much testimony introduced by appellants to the contrary, tending to show that the testator remained in full and complete possession of his mental faculties up to the time of his death, and that he was capable of executing the testament. The court submitted both of the issues to the jury as to his mental capacity and undue influence. Appellants requested the court to give a peremptory instruction, contending that the evidence was insufficient to submit either of the issues, and they also contend, especially in regard to the issue of undue influence, that there was no evidence to sustain the finding and that the court should not have submitted that issue to the jury. Objections were made to the instruction submitting the issue of undue influence.

Several witnesses introduced by appellees testified that the testator was weak-minded and childish on account of his advanced age, and they gave instances of forgetfulness on his part and of childish acts and conduct. Witnesses also testified to conversations with the testator about the time of the execution of the will, in which he stated that he wanted his children to share equally in his estate. Many witnesses were introduced by appellants, nearly all of them being men of prominence in the community, who had been acquainted with the testator a great many years, and they all testified that he was a man of strong mentality and positive convictions, not easily led away—in other words, that up to the time of his death he was a quiet, determined man with strong convictions, and in complete possession of his mental faculties. We cannot say, however, that there is an entire absence of testimony of a substantial nature tending

to show that at the time of the execution of the will the testator did not have sufficient mental capacity to execute the will. Considering his extreme old age and his physical condition, as described by some of the witnesses, together with his forgetfulness in regard to ordinary transactions, and the opinions of those witnesses, given in connection with these circumstances, we think there is enough to warrant the inference that the testament was not the act of one mentally capable of making it.

Our conclusion is, however, that there is absolutely no testimony in the record justifying the submission of undue influence on the part of appellants in procuring the execution of the will. The circumstances concerning the execution of the will are undisputed, and are detailed by L. R. A. Wallace, then a practicing lawyer at Ozark, the county seat of the county wherein the testator resided. Judge Wallace testified that he had been acquainted with the testator for many years, though he had had few business transactions or conversations with him. He testified that in January, 1918, the testator came to his office in Ozark and requested him to prepare his will, and gave him the data from which the will was to be framed. Witness stated that he made memoranda of the statements of the testator, and informed him that he would prepare the will and send it to him by mail. He stated that he prepared the will, in accordance with the directions of the testator, and sent it out by mail, and that a short time thereafter—not more than two weeks, and perhaps only a few days—the testator came back to the office with the will and expressed himself as being satisfied with it, and that they went to a business house in Ozark and requested two business men there to witness the will. The witnesses were both men who had known the testator for a great many years, and both of them, as well as Judge Wallace, testified that the testator was, to all appearances, in his usual mental state and fully capable of understanding the will and executing it.

There is no testimony at all tending to show that either of the appellants had requested the testator to make the will in their favor or that they resorted to any kind of influence or device to induce the execution of the will. The evidence shows that appellants, the three sons of the testator, were men in middle life and were engaged in different kinds of business, and at times some of them looked after their father's business, particularly the youngest son, Walker. The evidence also shows that the relation between the testator and all of his children were most cordial. We are therefore unable to find any testimony at all tending in the slightest degree to show that the execution of the will was induced by improper influence. The law on this subject, so far as necessary to invoke it in the present controversy, is very well settled by decisions of this court. The rule on that subject, as announced by this court in *McCulloch* v. *Campbell,* 49 Ark. 367, and approved in later cases, is as follows:

"The fraud or undue influence which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which springs from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution."

In the case of *Miller* v. *Carr,* 94 Ark. 176, Judge BATTLE, delivering the opinion of the court and applying the rule announced in *McCulloch* v. *Campbell, supra,* said: "It was necessary for them (contestants) to show that the will was procured by undue influence, that is to say, the undue influence that will avoid a will must be di-

rectly connected with its execution, must be the procuring cause."

The error of the court in submitting this issue to the jury necessarily calls for a reversal of the judgment, for we have no means of determining upon what issue the verdict of the jury was based.

It is also insisted that the court erred in giving, at the request of the contestants, instruction No. 9, which reads, in part, as follows: "Senile dementia is a form of insanity peculiar to aged people, marked by a decay of the mental faculties, and in consequence of which testamentary capacity may disappear. Old age is not inconsistent with testamentary capacity. But, as a general thing, the mental powers decline with advancing years, and when the insanity characteristic of and peculiar to old age appears—and this is what is meant by senile dementia—testamentary capacity cannot longer exist."

This instruction stated to the jury as a fact that "mental powers decline with advancing years," and this was tantamount to an instruction on the weight of the evidence. It is a matter of common knowledge that generally, or, at least, frequently, mental powers decline in a more or less degree with advancing age, but it is not always true, and it is a question of fact in a given case for the determination of the trial jury. A trial court in this State, which is prohibited from instructing on the weight of the evidence, should not tell the jury that, as a matter of fact, "mental powers decline with advancing years," for this could only be interpreted by the jury as a statement of a fact by the court, and that their only province was to determine the extent to which the testator's mental powers had declined. The jury should have been left free, without intimation from the court, to decide whether or not, notwithstanding the testator's advanced age, there had been any substantial decline in his mental faculties.

Learned counsel for appellees rely upon statements of eminent text-writers and of judges in delivering opin-

ions as to the theory advanced by the court in this instruction. Such discussions and statements are appropriate in opinions of courts and in text-books, which are discussions of facts in determining the weight of evidence, but where it is the exclusive province of the jury to determine the weight of the evidence, the court has no right to undertake to state the facts, or the weight of the evidence, to the jury.

There is another assignment of error, which will be mentioned in view of the fact that the case will be reversed for a new trial. Appellees introduced as a witness J. R. McGee, who testified, over the objection of appellants, concerning a conversation between the testator and his wife, about the time of the execution of the will. He testified that he was living at the house of the testator, and that he noticed the envelope in which the will was received by mail by the testator, and that the testator read the instrument to him. He testified to the following conversation between the testator and his wife:

"Mrs. Milton asked, 'Are you going to town today?' She said, 'You had better go while I am well and fix up those papers. Wallace and Eddie (referring to the two sons, W. G. Milton and E. B. Milton) know best.' He looked out and said: 'How can I go? Yonder goes the buggy.' "

The objections of appellants were to the statements of Mrs. Milton to her husband, and we are of the opinion that those statements were incompetent. They had no bearing upon the mental capacity or incapacity of the testator, and they had no tendency to establish undue influence on the part of appellants to induce the execution of the will. If there had been any testimony at all tending to show undue influence by appellants, or a joint undertaking between Mrs. Milton and appellants to induce the testator to make the will, then the statements of Mrs. Milton to the testator might have been competent as tending to show an exertion of influence in connection with her three sons, but, as before stated, there is no

evidence tending to show any influence by the sons, and these statements of the mother were without effect in that direction. The statements of the testator himself were only competent to show his mental status, and not for the purpose of establishing an independent fact such as undue influence or fraud. *Mason* v. *Bowen,* 122 Ark. 407.

For the errors indicated, the judgment will be reversed and the cause remanded for a new trial.

TRUEMPER v. THANE LUMBER COMPANY.

Opinion delivered July 10, 1922.

1. CONTRACTS—WAIVER OF BREACH.—Where a party to a contract, with knowledge of a breach by the other party, accepts money in performance of the contract, he will be held to have waived such breach.
2. SALES—SUFFICIENCY OF EVIDENCE AS TO DAMAGES.—In an action for breach of a contract to deliver logs, evidence as to the amount of damages *held* to support the verdict.
3. SALES—INSTRUCTION AS TO MEASURE OF DAMAGES—GENERAL OBJECTIONS.—In an action for breach of a contract to sell logs, court's instruction that the measure of damages was the difference between the market value of the timber at the time and the contract price, without stating that the market value at the place of delivery was to be considered, was not open to a general objection.

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

STATEMENT OF FACTS.

The Thane Lumber Company brought this suit against Joseph Truemper to recover damages for an alleged breach of contract in failing to deliver to it 200,000 feet of cottonwood logs and also for certain amounts advanced by the plaintiff to the defendant under said contract.

The defendant Truemper denied the allegations of the complaint, and by way of counterclaim sought to re-

cover damages against the plaintiff for an alleged breach of the contract on its part.

On the 15th day of May, 1917, Joseph Truemper entered into a written contract with the Thane Lumber Company to sell it 200,000 feet of cottonwood logs to be cut, hauled and rafted in the Mississippi River along the banks of the Montezuma Towhead in Phillips County, Ark. The price was $12.50 per thousand feet for the logs when placed in the raft.

Evidence was introduced by the plaintiff tending to show a breach of the contract on the part of the defendant and also to show the amounts advanced by the plaintiff to the defendant under the contract.

Evidence was adduced by the defendant tending to establish a breach of the contract on the part of the plaintiff.

The jury returned a verdict in favor of the plaintiff in the sum of $1,162.50 for money advanced by the plaintiff to the defendant under the contract, and for $400 damages.

The defendant has appealed.

John I. Moore, Sr., J. G. Burke and *John I. Moore, Jr.*, for appellant.

The letter was admissible, and the trial court committed reversible error by refusing to permit same to be introduced. 127 Ark. 385.

The testimony of Geo. W. Reese was not sufficient to sustain the finding of the jury as to the value of the logs in controversy. 1 Wigmore on Evidence, sec. 718, p. 815; 62 Ark. 1.

The court erred in its instruction as to the measure of damages. It should have instructed the jury that the measure of damages would be the difference between the market value at the time of the breach at the place of delivery and the contract price. 134 Ark. 300; 57 Ark 257.

E. E. Hopson, for appellee.

HART, J., (after stating the facts). The first assignment of error urged by the defendant for a reversal of the judgment is that the court erred in refusing to admit the carbon copy of a letter written by the defendant to the plaintiff. The letter is dated October 29, 1917, at Helena, Ark., and is addressed to the Thane Lumber Company at Arkansas City, Ark. The letter notified the plaintiff that the defendant had commenced rafting the logs and expected the plaintiff to take them up not later than the 2nd day of November. The letter tended to corroborate the defendant's claim that the plaintiff had committed a breach of the contract on its part by not sending for the logs after being notified to do so.

The undisputed evidence shows that the plaintiff advanced to the defendant, under the contract, the sum of $600 on the 23rd day of November, 1917, and that the defendant accepted that sum of money under the contract. This was subsequent to the alleged breach of contract by the plaintiff, and amounted to a waiver of it. The money was accepted with full knowledge of all the facts, and this calls for an application of the well-known rule that where a party to a contract, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach. *Alf Bennett Lumber Company* v. *Walnut Lake Cypress Co.,* 105 Ark. 421; *Friar* v. *Baldridge,* 91 Ark. 133, and *Tidwell* v. *Southern Engine & Boiler Works,* 87 Ark. 52.

The next assignment of error is that the evidence is not sufficient to support the verdict. It is contended that the evidence of the amount of damages suffered by the plaintiff is not sufficiently definite to support the verdict.

The witness for the plaintiff on this point was George W. Reece, its secretary. He stated that he was familiar with the market price of cottonwood logs during the months of November and December, 1917, and knew

the general price that prevailed along the Mississippi River near Montezuma Towhead. He stated that most of his buying was up and down White River in and around Rosedale and in that vicinity. He also stated that his operations hardly ever extended up to Montezuma. Hence it is contended that his testimony does not warrant the verdict.

The witness stated further, however, the following: "Q. Would you say you are familiar with the prices in the vicinity of Montezuma Towhead in the months of November and December, cottonwood logs—? A. Yes sir, I think I am familiar with it. Q. And you would say that was a fair market price at that time? Yes sir. Q. What was? $17 to $18—depending on the logs."

The contract price of the logs was $12.50 per thousand feet, and the amount of damages found by the jury was $400. We think the evidence is sufficiently definite to warrant the finding made by the jury on this point.

The next assignment of error is that the court erred in instructing the jury that, in the event of a recovery by the plaintiff, the measure of damages would be the difference between the market value of the timber at the time and the contract price.

It is contended that the court should have told the jury that the measure of damages was the difference between the market value of the timber at the place of delivery at the time the contract was broken and the contract price.

The jury must be credited with common sense, and, when this is done, we do not think that any prejudice resulted to the defendant. As we have already seen, in discussing the preceding assignment of error, the secretary of the plaintiff finally stated that he was familiar with the price of cottonwood logs in the vicinity of Montezuma Towhead in November and December 1917, and stated what the price was. The jury could not have misunderstood the testimony on this point. It is true the witness said that his company had bought most of its

logs about this time at a point lower down on the river, but he fixes the price of cottonwood logs not upon what he paid for logs lower down the river, but on what he considered they were worth in the vicinity of Montezuma Towhead. The jury based its finding on his testimony, and could not have been misled by the instruction given.

Counsel for the defendant excepted to the instruction, but not on the ground now urged. If counsel deemed the instruction faulty, the defect should have been pointed out at the time by a specific objection, and doubtless the court would have amended the instruction to conform thereto.

We find no prejudicial error in the record, and the judgment will therefore be affirmed.

VAUGHAN v. HILL.

Opinion delivered July 10, 1922.

1. APPEAL AND ERROR—ORDER TRANSFERRING CAUSE.—An order transferring a cause from the chancery to the circuit court is not final or appealable.
2. ATTORNEY AND CLIENT—LIEN ON JUDGMENT RECOVERED.—An attorney has a statutory lien on his client's cause of action for the percentage of the amount recovered which his contract with his client entitles him to receive.
3. ATTORNEY AND CLIENT—LIEN ON RECOVERY.—Parties are entitled to make a settlement, but must consider the fact that the attorney has a statutory lien on the cause of action.
4. ATTORNEY AND CLIENT—LIEN—JURISDICTION.—The lien in favor of an attorney on a judgment recovered by him in the circuit court may be enforced in that court, under the statute; but the remedy given by statute is cumulative to his rights to enforce his lien in equity.
5. EQUITY—JURISDICTION.—Where a case within the jurisdiction of equity is brought within that court, the control of that court over the case continues until the matter is disposed of in the appellate court.
6. APPEAL AND ERROR—TRIAL OF CHANCERY CAUSES.—Appeals from chancery courts are tried *de novo*, and the appellate court will

reverse a decree therefrom where the findings of fact are against the clear preponderance of the evidence.

Appeal from Prairie Circuit Court, Northern District; *George W. Clark,* Judge; reversed.

STATEMENT OF FACTS.

Emmet Vaughan brought this suit in equity against Lillie Mae Webber and the Farmers & Merchants' Bank at Des Arc to foreclose an attorney's lien.

It appears from the record that the Modern Woodmen of America issued a beneficiary certificate on the life of George Webber in the sum of $2,000 in which Mark Webber, his father, was named as the beneficiary. Subsequently George Webber married and undertook to transfer the policy to his wife. George Webber died, and the insurance association paid the amount of the policy to Mark Webber. Lillie Mae Webber employed Emmet Vaughan to bring suit against Mark Webber for $2,000, the amount of the policy.

The case was tried in the circuit court and Vaughan secured a verdict for $2,000 in favor of the widow. Subsequently Mark Webber satisfied the judgment against him in the favor of the widow by the payment thereof. The payment was made by a check which was deposited in the Farmers & Merchants' Bank at Des Arc, Ark.

Vaughan brought this suit in equity against Lillie Mae Webber to recover his fee and to have the same declared a lien upon the fund recovered. An equitable garnishment was issued and served upon the Farmers & Merchants' Bank at Des Arc, Ark.

Upon motion of Lillie Mae Webber the case was transferred to the circuit court. Vaughan objected to the transfer of the case, and duly saved his exceptions to the ruling of the chancery court in transferring it to the circuit court.

The case was tried before a jury in the circuit court and a verdict was returned in favor of Vaughan for $200. Lillie Mae Webber died about a week before the trial, and

the case was revived in the name of Robert Hill as special administrator of her estate.

According to the testimony of the plaintiff Vaughan, he made a contract on a contingent basis with Lillie Mae Webber to sue Mark Webber for the $2,000 received by him on the benefit certificate on the life of George Webber. Vaughan was to pay all the expenses of the litigation and was to receive one-half of the amount recovered as his attorney's fee. He spent between $100 and $150 in preparing the case for trial. He did a good deal of work in preparing the case for trial and in trying it. He recovered the full amount sued for, and one-half of that amount was a reasonable contingent fee.

Two other attorneys testified that such a fee was a reasonable one.

According to the evidence adduced in favor of the defendant, Vaughan was only to receive 10% of the amount recovered, which was $200.

As we have already stated, the jury returned a verdict in favor of Vaughan for this amount, and he has duly prosecuted an appeal to this court from the judgment rendered.

Gregory & Holtzendorff, for appellant.

The court erred in transferring the cause to the circuit court. The chancery court has jurisdiction to enforce a lien in favor of an attorney upon land of his client recovered by him. 85 Ark. 101; 28 Ark. 385; 37 Ark. 86; 33 Ark. 233. The court lost jurisdiction of the cause upon lapse of the term. 92 Ark. 388. The question of jurisdiction of the chancery court to enforce a statutory lien of an attorney for his fees was upheld by this court. 133 Ark. 430; 85 Ark. 101.

F. E. Brown, for appellee.

The chancellor did not err in transferring the cause to the circuit court. 44 Ark. 478. The appellant had no interest in the judgment, had only a lien upon it, and Lillie Mae Webber had a right to collect the judgment and satisfy the record. 120 Ark. 389; 117 Ark. 504.

The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount involved; but a jury trial may be waived by the parties in the manner prescribed by law. Constitution, art. 2, § 7.

HART, J. (after stating the facts.) It is first earnestly insisted by counsel for the plaintiff that the court erred in transferring the case from the chancery court to the circuit court, and in this contention we think counsel are correct. At the outset it may be stated that the plaintiff duly saved his exceptions to the action of the chancery court in transferring the case to the circuit court. An order transferring a cause from a chancery to a circuit court is not a judgment from which an appeal may be taken. Therefore Vaughan had to wait until final judgment was rendered in the circuit court before he could appeal to this court. *Womack* v. *Connor,* 74 Ark. 352.

Under our statute an attorney has a lien upon his client's cause of action for the percentage of the amount recovered which his contract with his client entitles him to receive, and a statutory liability is thereby created.

The parties to the suit had a right to make a settlement, but the act requires that they shall take into consideration the fact that the attorney has a lien upon the cause of action. The lien created in favor of the attorney is a specific lien on the subject-matter of the controversy, and under the statute it may be enforced in the same court in which the judgment is recovered. *St. L. I. M. & S. R. Co.* v. *Hays & Ward,* 128 Ark. 471.

Although the plaintiff might have enforced his lien by an application to the circuit court in the case in which it arose, this did not exclude the jurisdiction of equity to afford relief. *Gist* v. *Hanly,* 33 Ark. 233, and *Lane* v. *Hallum,* 38 Ark. 385. In the latter case, the court said that the right of the attorneys to resort to a court of equity to enforce their lien was unquestionable.

Hence it will be seen that these remedies are cumulative, and the remedy given by statute in no wise prevents

the attorney from seeking his remedy in a court of equity, which, on account of its more enlarged remedial powers, may be the more appropriate tribunal. This is an application of the well-settled doctrine in this State that, where courts of equity have jurisdiction, they do not lose it by jurisdiction being given by statute to the courts of law. In such cases courts of equity and courts of law exercise concurrent jurisdiction in the premises. For instance: our statute provides for a mechanic's lien and its enforcement in the circuit court. This court has held that chancery courts have concurrent jurisdiction with circuit courts in the enforcement of our mechanic's lien law which is created by statute. *Carr* v. *Hahn & Carter,* 126 Ark. 609.

In the present case the plaintiff elected to bring his suit in equity, as he had a right to do. When a case is brought in a court of competent jurisdiction, the authority and control of that court over the case continues until the matter is disposed of in the appellate court. The principle is essential to the proper and orderly administration of the law. *Dunbar* v. *Bourland,* 88 Ark. 153.

It cannot be said that in any event the chancellor should have found the facts in favor of the defendant, and that therefore no prejudice resulted to the plaintiff from the transfer of the case to the circuit court. Appeals from chancery courts are tried *de novo* in this court, and it is our duty to reverse the decrees of chancery courts where the findings of fact made by a chancellor are against the clear preponderance of the evidence.

On the other hand, this court reviews a judgment from the circuit court for error only, and the finding of fact made by the circuit court is in the nature of a special verdict and must be upheld on appeal if there is any evidence of a substantial character to support such finding.

Therefore the plaintiff, having elected to bring his suit in the chancery court, had a right to have it tried in that court and to be tried *de novo* in this court.

It follows that the chancery court erred in transferring the case to the circuit court, and the judgment will be reversed and the cause remanded, with directions to the circuit court to transfer the case to the chancery court for further proceedings in accordance with principles of equity and not inconsistent with this opinion.

CARPENTER *v.* STATE BANK OF SILOAM SPRINGS.

Opinion delivered July 10, 1922.

1. PARTNERSHIP—COMPLAINT HELD TO ALLEGE A PARTNERSHIP.—A complaint by a bank against the payee of a check and another alleging that defendants were engaged in raising, buying and marketing cattle and other live stock, that the payee, acting on behalf of himself and the other defendant, sold cattle belonging to the latter and received a check which was cashed by plaintiff bank and was subsequently dishonored, was sufficient to allege a partnership between defendants in raising cattle.
2. PARTNERSHIP—EVIDENCE.—A finding that a partnership in the cattle business existed between two defendants is sustained by proof that one of the defendants furnished the cattle and money to run the business, that the other defendant was to run the business, and that the increase of the cattle was to be divided between the two.
3. TRIAL—INSTRUCTION.—In an action against an indorser of a check and a codefendant, an instruction as to liability on the theory of partnership *held* not misleading and prejudicial, in view of other instructions given.

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

STATEMENT OF FACTS.

The State Bank of Siloam Springs sued Robert H. Els and F. H. Carpenter to recover $788.24 alleged to be the amount of a check alleged to be due plaintiff by defendants for a check cashed by the plaintiff, together with protest fees and the accrued interest. The defendant Carpenter denied liability.

According to the testimony of W. L. Lineback, he was the cashier of the plaintiff bank, and in March, 1919,

Robert H. Els came into the bank and presented a check to be cashed, signed by C. H. Harris, drawn on the McIlroy Banking Company of Fayetteville, Arkansas, and payable to R. H. Els. The check came back in seven or eight days protested for nonpayment, and the protest fees amounted to $3.85.

According to the testimony of Robert H. Els, he cashed the check in question at the bank of the plaintiff and got $20 in money and a cashier's check for the balance, $680. With the balance he paid a bill of the defendant, F. H. Carpenter, for $200, and deposited the balance in a bank to the credit of Carpenter. At the time the plaintiff cashed the check he told the cashier that the check was for cattle which had been sold to Harris, the drawer of the check. The witness had known F. H. Carpenter for about twenty years and had lived with him in Texas. When the witness' wife died, Carpenter sent him up to his farm in Benton County, Ark., to run it, and sent about ten head of cattle to the farm at the same time. It was the understanding that Els should have one-half of the increase of the cattle. Carpenter furnished the money with which to run the place. Els had been on the place about ten years when the transaction in question occurred. Els was accustomed to drawing checks on Carpenter when he needed money with which to run the place. They usually divided the cattle when they sold them. On the occasion in question Els took twenty-one head of the cattle and sold them as his own. He considered them as his part of the cattle and the purchase money as belonging to himself. Els said nothing to Carpenter about taking out any of the cattle and selling them as his own. Carpenter knew nothing about the transaction until it was over. Els left a like number of cattle on the place as Carpenter's share. Els sold the cattle to Harris as his own, and the plaintiff bank cashed the check given by Harris for the purchase price. Els paid a debt of Carpenter's for $200 with part of the proceeds and deposited the balance in a bank in Carpenter's name

because he owed Carpenter that amount of money. Carpenter did not have any interest in the proceeds of the cattle.

Carpenter was a witness for himself, and testified that he had no interest whatever in the cattle sold to Harris or in the proceeds thereof.

The jury returned a verdict in favor of the plaintiff against both the defendants. The defendant, Carpenter, alone has prosecuted an appeal to this court from the judgment rendered.

Rice, Rice & Elrod, for appellant.

Instruction No. 1 given on the court's own motion was erroneous, as it refers to the cattle as partnership cattle. There were no pleadings or proof as to the partnership. A share-cropper is never a partner. 39 Ark. 280; 44 Ark. 427. The instruction also refers to Els being the agent of appellant. The proof was to the contrary. The instruction was further erroneous because it told the jury that if appellant had received an interest in the proceeds of the check by reason of having a beneficial interest in the cattle, they should find against him.

A. L. Smith, for appellee.

Appellant's objection as to the pleadings on the question of partnership should have been made by motion to make more definite. Pleadings will be treated as amended to conform to the proof. 98 Ark. 529; 91 Ark. 292; 98 Ark. 312; 97 Ark. 576, and other cases cited in brief. His specific objections to instruction No. 1 were not made at the proper time. The motion for new trial cannot serve this purpose. 104 Ark. 409; 84 Ark. 81; 103 Ark. 391; 126 Ark. 567; 128 Ark. 559.

Participation in profits of an enterprise is conclusive of a partnership, where the rights of third parties are involved, unless there are some circumstances altering the nature of the contract. 63 Ark. 518, and cases cited; 145 U. S. 611.

There was sufficient testimony to establish agency on the part of Els. 227 S. W. (Ark.) 753; 169 S. W. 967; 65

Ark. 385. One who deals with an agent for an undisclosed principal may treat the after-disclosed principal as the person with whom he contracted. 44 Ark. 367; 50 Ark. 433; 87 Ark. 374.

HART, J., (after stating the facts). It is first contended by counsel for the defendant that the judgment should be reversed because the complaint does not allege or attempt to allege any partnership relation in the cattle between Els and Carpenter. We cannot agree with counsel in this conclusion. The complaint alleges that said defendants are engaged in raising, buying, and marketing cattle and other live stock; that Els, acting for and on behalf of the defendant Carpenter and himself, sold to C. H. Harris cattle belonging to the defendant Carpenter and received from him a check for $700, which was cashed by the plaintiff bank. This allegation is sufficient to allege a partnership between Els and Carpenter in raising the cattle. According to the testimony of Els, the original stock of cattle amounting to ten head belonged to Carpenter, and Els was to have one-half of the increase. His testimony is in accord with the allegation of the complaint, and the complaint in effect alleges a partnership between Els and Carpenter in the increase of the cattle of the original herd. Hence it cannot be said that the case was submitted upon proof at variance with the allegations of the complaint.

It is next insisted that the verdict is not supported by the evidence. This is a very close question, but we are of the opinion that the evidence, together with all legal inferences that might be drawn from it, warranted the jury in returning a verdict for the plaintiff.

It is true that, according to the testimony of Carpenter himself and that of Els, the jury might have returned a verdict for Carpenter. It is fairly inferable from the evidence that the cattle sold to Harris were partnership cattle. The bare statement of Carpenter and that of Els to the effect that such was not the case does not overcome the inference deducible from the attending circumstances,

Els and Carpenter were to share equally in the increase of the cattle. They usually divided the cattle when they sold them. The cattle in question had not been set apart to Els by any agreement with Carpenter at the time he sold them. Els took the proceeds and paid a debt of Carpenter with $200 of the amount and deposited the balance to the credit of Carpenter. These circumstances speak for themselves and tend to show that the cattle sold were partnership cattle, and it cannot be said that the undisputed evidence showed that they belonged to Els.

Again, it is insisted that the court erred in giving instruction No. 1, which is as follows:

"If you find from a preponderance of the evidence that the check given by C. H. Harris to R. H. Els on the McIlroy Banking Company was not paid by McIlroy Banking Company or by any one for it, and you further find that the check was given for cattle belonging to R. H. Els and defendant Carpenter as partners, or for cattle belonging to F. H. Carpenter, and Els was the agent of Carpenter in making the sale, or that Carpenter had and received an interest in the proceeds of said check by reason of having a beneficial interest in the cattle, you should find for the plaintiff as against Carpenter, and in determining these issues you will take into consideration all of the facts and circumstances in evidence."

There was only a general objection made to this instruction at the time it was given. When considered in connection with the other instructions given by the court, we do not think it was misleading and prejudicial to the rights of the defendant Carpenter. In other instructions the jury was expressly told that if the cattle belonged solely to Els, and that Carpenter had no interest in them and did not receive any part of the proceeds of the check, the jury should return a verdict for Carpenter.

The court also told the jury that the mere fact that a part of the proceeds of the check was paid to Carpenter was not sufficient in itself to make Carpenter liable.

On the other hand, the jury was told that it must appear that some part of the check was paid to him by reason of his having an interest in the cattle sold before it could find for the plaintiff. The jury was also expressly told that the declaration of Els to the cashier of the bank in the absence of Carpenter could not be considered for the purpose of establishing a partnership between Els and Carpenter.

The sole issue to be determined by the jury was whether or not Els and Carpenter were interested in the cattle at the time Els sold them and cashed the check for their purchase price at the plaintiff bank.

We think that the question was fairly submitted to the jury, and that the evidence warranted the verdict in favor of the plaintiff.

The judgment will therefore be affirmed.

DENTON v. YOUNG.

Opinion delivered July 10, 1922.

1. FORCIBLE ENTRY AND DETAINER—RIGHT OF DEFENDANT TO RECOVER DAMAGES.—Under the statutes, defendant in an action for unlawful detainer, where his occupancy is without right, cannot recover damages from the owner; it is only where he disputes the plaintiff's right of possession that he can introduce evidence showing he was damaged by being dispossessed.
2. JUDGMENT—SUFFICIENCY OF PLEA OF RES JUDICATA.—A motion to dismiss a cross-complaint which set forth that the issues raised by the cross-complaint had been determined by the judgment in an action of ejectment between the same parties, though informal, was sufficient as a plea of *res judicata*.
3. JUDGMENT—CONCLUSIVENESS WHEN RENDERED AFTER COMMENCEMENT OF OTHER SUIT.—Judgment, in an action of ejectment, is conclusive in an action of forcible entry and detainer, though it was rendered after the latter action was commenced.

Appeal from Fulton Circuit Court; *Archie F. House*, judge on exchange; affirmed.

C. E. Elmore and *Oscar E. Ellis,* for appellants.

The judgment in the ejectment suit which was pleaded as a bar by appellee in his motion to dismiss the cross-complaint herein, and which was held by the court to constitute a bar, could not be a defense to the cross-complaint. 33 Ark. 801; 2 Ark. 578; 7 Ark. 502.

The former ruling of this court (145 Ark. 147), reversing the case with directions to reinstate the answer and cross-complaint, is the law of this case. Appellee should have pleaded the judgment in the ejectment suit as a defense to the cross-complaint on the former trial, and not having done so, he is estopped. 122 Ark. 491.

J. M. Burrow and *John H. Caldwell,* for appellees.

The judgment in the ejectment suit, from which appellants took no appeal, is a bar to the present suit, since the same issues were therein adjudicated. 65 Ark. 469; 57 Ark. 500; 55 Ark. 292; 66 Ark. 336. Since appellants cannot dispute appellees' right of possession under this judgment, they cannot maintain the present suit under sec. 4854, C. & M. Digest; 128 Ark. 277. Although the judgment in the ejectment suit was rendered after appellants filed their cross-complaint in the present action, still this does not prevent its being a bar. 76 Ark. 423; 55 Ark. 633. The judgment in the ejectment suit settled the issues in this.

WOOD, J. This is the second appeal in this case. See *Denton* v. *Young,* 145 Ark. 147. We refer to that opinion for a statement of the issues set forth in the pleadings. Concluding the opinion in that case, we said: "Appellees' action was for forcible entry and unlawful detainer of the property in controversy. Appellants, in their answer, dispute appellees' right of possession to said property, and in their cross-complaint allege that they were in the possession, and entitled to the possession thereof, as purchasers at a tax sale for delinquent taxes for the year 1918; that, although appellees had no right to the possession of said lands, they wrongfully dispossessed them through proceedings for forcible entry and unlawful de-

tainer, and, in doing so, damaged their household effects. One wrongfully and unlawfully ousted from the possession of real estate is entitled to have any damages sustained by him assessed by the jury trying the main issue and to a judgment for the amount so assessed. Sec. 3646, Kirby's Digest. Appellees contend, however, that this statutory right in favor of appellant was swept away by their confession in the judgment rendered in the ejectment suit between the same parties. The judgment relied upon in support of this contention was not introduced in evidence in the instant case and was not, and could not have been, brought into this record by bill of exceptions. It was improperly brought into this transcript by writ of certiorari. Appellants' motion to strike it from the files is sustained. For the error in sustaining the demurrer to the answer and crossbill of appellants to appellees' last amended complaint, the judgment is reversed and the cause remanded, with directions to reinstate the answer and cross-complaint and for further proceedings not inconsistent with this opinion."

Upon remand of the cause the appellee, Jas. R. Young, filed a motion to dismiss the cross-complaint, in which he set up that Ross Denton and Mrs. Ross Denton, the cross-complainants, obtained permission of Jas. R. Young, as administrator of the Harrison estate, to enter upon and take possession of the premises described in their cross-complaint, and thereby became tenants at will of the said Young, but later refused to surrender and vacate the premises when Young demanded them to do so, and wrongfully and unlawfully held the same against said Young, who, as such administrator, on July 17, 1919, instituted a suit in ejectment against these cross-plaintiffs. They attached to their motion a copy of the complaint in ejectment and the answer and cross-complaint of the Dentons thereto, in which they set up that they had the lawful right and legal possession of the premises. The motion then alleged that Young and Niles filed a supplementary or amended complaint, asking for a writ of

possession, which writ was issued and executed on the 29th of September, 1919. The motion then alleged that the question of whether Mr. and Mrs. Denton were rightfully or wrongfully in possession of the premises, together with other questions, were raised in that suit, and that, upon a final hearing of the same, the circuit court, at its February term, 1920, adjudged that the Dentons were in unlawful possession of the property and rendered against them a judgment of ouster. The motion then, by way of explanation, recites the history of the litigation in the present action of unlawful detainer as is set forth in the statement of facts in our first opinion. (See *Denton* v. *Young, supra*). The motion concluded by pleading that the judgment in the ejectment suit was *res judicata* of the rights of the Dentons in the present suit, and asked that their cross-action be dismissed.

The appellants filed a demurrer to this motion, which was overruled. The appellants then filed an answer in which they denied the allegations of the motion and set up that, while the suit in ejectment instituted by Young and Niles against the Dentons on July 17, 1919, was still pending, the present action for unlawful detainer was instituted and the judgment in the ejectment suit was not rendered until the 24th of February, 1920; that in the meantime the proceedings and judgment in the circuit court in the present action of unlawful detainer and the judgment of this court reversing the judgment of the circuit court operate as a bar to appellees' motion to dismiss the appellants' cross-complaint.

The issues presented by the motion and the answer thereto were heard on the records showing the orders made in the respective actions of ejectment and unlawful detainer. The trial court sustained the appellee's motion to dismiss the cross-complaint in the present action, and entered a judgment dismissing such cross-complaint, from which is this appeal.

The judgment of the trial court is correct. In *White River Land & Timber Co.* v. *Hawkins,* 128 Ark. 277, we

held (quoting syllabus): "Under the statutes, defendant, in an action for unlawful detainer, where his occupancy is without right, cannot recover damages from the true owner. It is only where defendant disputes the right of possession that he can introduce before the jury evidence showing that he has sustained damages by being dispossessed." It will be observed that this court, on the former appeal, held that the answer and cross-complaint of the Dentons in the present action of unlawful detainer stated a cause of action against the appellees. On the former appeal the judgment in ejectment was not brought into this record. On remand of the cause for further proceedings the appellees moved to dismiss the cross-complaint of the appellants in this action. The motion to dismiss set up the judgment in the ejectment suit between these same parties, and, although inartistically drawn, was in legal effect tantamount to a plea of *res judicata*. On the issues raised by this motion and the answer thereto, the judgment in the ejectment suit was introduced in evidence and is properly brought into the record before us.

The appellants contend that this judgment in ejectment is not a bar to the maintenance by them of the cause of action set up in their answer and cross-complaint, because the judgment in the ejectment suit was rendered after their cross-complaint in the present action of unlawful detainer was filed. But in *Church* v. *Gallic*, 76 Ark. 423, we held: "The fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defense, without regard to the order of time in which the suits were commenced. * * * * All of the rights and matters asserted in this suit by appellant could have been adjudicated in the ejectment suit, or she could have pleaded the pendency of this suit in bar of appellee's right to maintain that suit. Having failed to do either, she is barred by the final judgment in that case from seeking

further to adjudicate the question in this case." The doctrine here announced precludes the appellants from maintaining the action set up in their answer and cross-complaint in this action of unlawful detainer. In this action of unlawful detainer the appellants did not plead the pendency of the suit in ejectment as a bar to this action. The judgment in the ejectment suit settled the issue that the appellants were in possession of the land without right. Hence it now appears that, since this judgment was brought into the record, the appellants had no cause of action against the appellees, because appellants were not in lawful possession of the property and were not unlawfully ousted therefrom. See *White River Land & Timber Co.* v. *Hawkins, supra.*

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

HOLCOMB *v.* BOWE.

Opinion delivered July 10, 1922.

1. EQUITY—MORTGAGES—FORECLOSURE OF DEED ABSOLUTE INTENDED AS MORTGAGE.—Where a deed absolute in form is held to be a mortgage, at suit of the grantor, in foreclosure, the court applying the equitable rule that he who asks equity must do equity, will charge the grantor with the grantee's expenditures, including water bills, insurance and taxes paid, and will credit the grantor with the rental value of the land during the grantee's possession.
2. CANCELLATION OF INSTRUMENTS—DURESS—SUBROGATION.—Where plaintiff seeks to have a deed given to defendant set aside entirely upon the ground of duress, he cannot complain because the court treated the deed as a mortgage and charged plaintiff with a previous mortgage indebtedness on the land which defendant had paid, as, had the deed been set aside, the court would have given similar relief by way of subrogation.

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

STATEMENT OF FACTS.

Mary Holcomb, by her next friend, Jennie Gyce, brought this suit in equity against Justus Bowe to set

aside a deed on the ground of the mental incompetency of the grantor.

It appears from the record that Mary Holcomb owned certain real estate in the city of Hot Springs, Ark., which she had mortgaged to M. H. Pemberton for $1,000, and upon which there was a balance due of principal and interest of $1,150. Mary Holcomb executed a deed to said property to Justus Bowe, and the consideration recited in the deed was $1,150.

Evidence was introduced on the part of the plaintiff tending to show that Mary Holcomb was not mentally competent to transact business in general at the time the deed in question was executed, and that the execution of a deed absolute in form was procured by the undue influence of Justus Bowe over her.

It was further shown that Bowe had promised to pay off a mortgage which Pemberton held on the property, and that it was the intention of the parties that the deed from Mary Holcomb to Bowe should be a mortgage.

On the other hand, there was evidence in behalf of Bowe tending to show that the transaction was a conditional sale and not a mortgage. Inasmuch as the court found the facts on this branch of the case in favor of the plaintiff, and no appeal has been taken by the defendant, it is not necessary to set out the testimony in detail.

The chancellor found that the transaction was a mortgage, and a decree of foreclosure was entered of record.

The plaintiff has duly prosecuted an appeal to this court.

R. G. Davies, for appellant.

To invalidate a deed on the ground of insanity, the insanity must show inability to exercise reasonable judgment in regard to the matter involved. 115 Ark. 436. Where the consideration of a deed is the undertaking by the grantee to support the grantor, and he fails to comply with such undertaking, the grantor's remedy is either to sue at law for the amount of the consideration, or else

treat the contract as void and sue in equity to cancel the deed. 103 Ark. 464.

C. T. Cotham and *Frauenthal & Johnson,* for appellee.

HART, J., (after stating the facts). The court found that, although the deed was absolute in form, it was intended as a mortgage. The deed was treated by the court as a mortgage, and a foreclosure thereof was granted for the balance due.

The undisputed evidence shows that Mary Holcomb owed M. H. Pemberton $1,150, the balance due on a mortgage which she had executed to him on the property. The mortgage indebtedness bore interest at the rate of ten per cent. per annum.

In the present case, judgment was rendered in favor of Bowe against Mary Holcomb for the balance due on the mortgage indebtedness. The defendant was allowed credit in certain amounts for water bills, insurance, and taxes which he had paid on the property and the further sum of $60 which he had furnished Mary Holcomb for her support. He was charged with the rental value of the property while he had it in his possession, and judgment was rendered in his favor against the plaintiff for the balance of the mortgage indebtedness.

There was no error in the action of the court in this respect. The court followed the rule that he who asks equity must do equity, and properly decreed that relief against the deed should be granted the plaintiff on condition that she pay off the mortgage indebtedness against the property. This was treating the transaction between the plaintiff and the defendant as a mortgage, and was strictly in accordance with the prayer of the complaint.

The action of the court was in accord with the rule laid down in *Bryan* v. *Hobbs,* 72 Ark. 635. In that case it was held that where a mortgagee by duress compels the mortgagor to execute an absolute deed to his wife in satisfaction of the mortgage debt and a further indebted-

ness which the mortgagor was willing to secure, equity will treat the instrument as a security merely, and grant relief on condition that the mortgagor pay the debt he intended to secure.

Here it is claimed that the deed was procured by the undue influence of the defendant, and the plaintiff was granted the same relief as was granted in the above case where the deed was procured by duress.

Again, if the contention of counsel for the plaintiff to the effect that the transaction should be set aside entirely be sustained, the relief granted would be the same. It was proper for the chancery court, under the doctrine of subrogation, after setting the deed aside, to charge Mary Holcomb with the money advanced in paying off the mortgage on the land to Pemberton and to subrogate the defendant to Pemberton's rights in the premises.

In *Hudson* v. *Union & Mercantile Trust Co.,* 148 Ark. 249, it was held that, under the doctrine of subrogation, one lending money to an insane woman to buy land may have a lien thereon for the amount of such purchase money. One who pays a debt at the instance of the debtor is not a volunteer; and if at the time of payment he manifests an intention to keep the lien alive for his protection, he will in equity be subrogated to the rights and remedies of the creditor. *Rodman* v. *Sanders,* 44 Ark. 504.

The undisputed evidence shows that Bowe paid off the mortgage indebtedness of Mary Holcomb, and it is manifest that he at least intended to keep the lien alive by taking a deed to the property absolute in form, although the instrument should in equity be treated as a mortgage, and although Mary Holcomb should be considered insane at the time of its execution.

The chancellor only allowed the defendant interest at the same rate the mortgage indebtedness bore. He also allowed him credit for insurance, taxes, and water bills paid by him, and properly charged him with the

rental value of the premises after the execution of the deed to him by Mary Holcomb.

Bowe had charge of the property for about two years, and the chancellor found that its rental value was $24 per month. After deducting the expenses above mentioned, the chancellor applied the rents on the mortgage indebtedness and rendered judgment in favor of the defendant against the plaintiff for the balance due.

It would serve no useful purpose to discuss these specific findings of the chancellor in detail. It is sufficient to say that the chancellor's finding of facts is supported by the evidence, and the decree must be affirmed.

WEBB v. WATERS.

Opinion delivered July 10, 1922.

1. DEATH—WRONGFUL KILLING—RIGHT TO RECOVER FOR DECEDENT'S SUFFERING.—The widow and children of one wrongfully killed are not entitled to recover for his pain and suffering, in the absence of allegations bringing the case within Crawford & Moses' Dig., § 1.
2. APPEAL AND ERROR—PREJUDICIAL ERROR.—In an action for wrongful killing where the jury were erroneously instructed to consider decedent's pain and suffering in fixing damages, and there was nothing to show what amount, if any, was allowed for pain and suffering, a new trial will be granted, as the presumption is the jury were influenced by the erroneous instruction.

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

James B. Gray, and *Trimble & Trimble,* for appellants.

A continuance should have been granted on account of the sickness of Dudley Webb, which prevented him from being present at the trial. 195 S. W. 682; 99 Ark. 394.

Instruction No. 1 was erroneous in that it allowed damages to the widow and children for conscious pain and suffering of the deceased. Recovery for this ele-

ment of damage can only be had in the name of an administrator for the benefit of the estate. Sec. 1070, C. & M. Dig.; 146 Ark. 562, S. W. 165.

Oscar H. Winn, Oscar E. Williams and *Guy E. Williams,* for appellees.

The so-called instruction No. 1 given on the court's own motion could hardly be called an instruction. It was merely a preliminary statement. None of the instructions asked for by plaintiffs contained any mention of the element of damage for conscious pain and suffering, and this feature was not relied on. The verdict was based on deceased's contributions to his family for his life expectancy, or nearly so.

WOOD, J. This is an action by Mrs. Julia Waters, widow of King Waters, for herself and minor children against the appellants to recover judgment for damages for the alleged assassination of King Waters, late husband of Julia Waters and father of the minor children. It is alleged in the complaint that the appellants did assassinate King Waters on the 11th day of June, 1920, by wrongfully and unlawfully shooting him with a shotgun loaded with gunpowder and buckshot. It was alleged that during the time that Waters lived after he was shot he suffered excruciating physical pain and mental anguish. Mrs. Waters asked judgment for herself in the sum of $50,000 and for her children in the sum of $60,000 and for the benefit of the estate in the sum of $10,000, making the aggregate sum of $120,000, for which she prayed.

The appellants, in their answer, denied all the material allegations of the complaint, and set up that, on the 11th day of June, 1920, they were attacked by King Waters while they were in the field looking at their crops; that King Waters fired upon them with a 44-calibre pistol; that the attack was without any provocation whatever, and that they returned the fire in self-defense and without any fault or carelessness on their part; and they alleged that, if King Waters died from wounds received

in the combat, his death was by reason of his own fault. There was testimony to sustain the allegations of the complaint that King Waters was assassinated by the appellants, and also testimony to sustain the allegations of the answer to the effect that King Waters was the aggressor, and that the appellants shot him in self-defense.

It was purely a question of fact under the evidence as to whether the appellants unlawfully killed King Waters. There was testimony to sustain the verdict that King Waters was unlawfully killed.

In one of its instructions, the court told the jury that they (the plaintiffs) "are entitled to recover such a sum as would reasonably, fairly and justly compensate for any physical pain and mental anguish suffered by the deceased, if any, between the receiving of these wounds and his death, or to the period of time where he lost consciousness, or was no longer capable of feeling any physical pain or mental anguish as the result of these wounds." The record shows the following: "The defendants * * * especially except to instruction No. 1, given by the court on its own motion, because no letters of administration have been taken out in this suit, and the suit was not brought by an administrator, and the elements of the damages for the benefit of the estate are improper in said suit."

The plaintiff and one of the children testified, without objection on the part of the appellants, substantially as follows: That from the time Waters was shot until he died "he was suffering and complained of hurting in his chest and legs—asked for a pillow under his legs, and that his shoes be pulled off because his feet were hurting him so bad; that he was conscious up to the time of his death."

There was a verdict in favor of the plaintiff in the sum of $15,000. One of the grounds of defendants' motion for a new trial is that the court erred in giving instruction No. 1 on its motion. The motion for new trial

was overruled, judgment was entered in favor of the plaintiff in the sum of $15,000, from which judgment is this appeal.

In *Hines* v. *Betts,* 146 Ark. 555-563, the court, in one of its instructions, "permits the jury to find for plaintiff for conscious pain and suffering, if any, suffered by the decedent by reason of the injury." In commenting upon this instruction we said: "It clearly authorized the jury to allow the widow and children damages for the conscious pain and suffering of Andy Betts. This was wrong. The widow and minor children were only entitled to sue for damages which they sustained by reason of the death of the husband and father, and this was the financial loss to them of his comfort and support. They could not sue for damages for the conscious pain and suffering of decedent. Such suits must be brought, under our statute, by the personal representative of such deceased person." See secs. 1070, 1074, 1075, C. & M. Digest. The Legislature, by act of March 31, 1893, p. 229, sec. 1, C. & M. Digest, passed an act providing that "when all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and collect all demands and property left by the intestate, and to manage, control and dispose of such estate without any administration being had thereon in all cases where the creditors of such estate consent or agree for them to do so, or where they have paid or satisfied all valid debts and demands against such intestate," etc.

Neither the allegations of the complaint nor the proof brings the appellees' cause of action within this section. The burden was upon the appellees to do this before they could maintain this action for damages for the benefit of the estate. Therefore the case of *Hines* v. *Betts, supra,* is controlling here.

While there were other separate and correct instructions on the measure of damages, yet it is impossible for us to say that the jury were not governed by the

above erroneous instruction in fixing the measure of damages. The presumption, in the absence of an affirmative showing to the contrary, is that the jury were influenced by such instruction. The record discloses no facts which would justify us in eliminating the error by reducing the verdict. There is nothing to show to what extent the erroneous instruction influenced the jury; that is, what amount, if any, they allowed on account of the conscious pain and suffering of Waters. For the error indicated, the judgment is reversed and the cause remanded for a new trial.

ROAD IMPROVEMENT DISTRICT NO. 16 *v.* SALE.

Opinion delivered July 10, 1922.

1. STATUTES—PRESUMPTION OF REGULARITY.—That one page of an enrolled bill for an act was in different typewriting and on a different kind of paper from that of the other pages of the bill does not overcome the presumption of the regularity of its introduction and passage.
2. STATUTES—PRESUMPTION OF REGULARITY.—An enrolled statute, signed by the Governor and deposited with the Secretary of State, raises the presumption that every requirement was complied with, and this presumption is conclusive unless the records of which the courts can take judicial knowledge show to the contrary.
2. EVIDENCE—JUDICIAL NOTICE.—The courts take judicial notice of the records of the General Assembly.
3. STATUTES—IMMATERIAL ALTERATION OF BILL.—The substitution of the word "embrace" for "abolish," in an act entitled "An act to embrace Road Improvement District No. 2 of the Northern District of Woodruff County in, and to create, Road Improvement District No. 16 of Woodruff County," after the bill was passed by the Senate and before it was passed by the House, did not affect its validity, since the real object of the act was to abolish District No. 2 and embrace it in District No. 16.
4. STATUTES—SPECIAL SESSION OF LEGISLATURE—SCOPE OF PROCLAMATION.—The act of Special Session of 1920 entitled "An act to embrace Road Improvement District No. 2 of the Northern District of Woodruff County in and to create Road Improvement District

No. 16 of Woodruff County, and for other purposes," was within the terms of the Governor's proclamation calling the session "for the purpose of enacting laws establishing special or local road improvement districts.

5. EVIDENCE—PAROL EVIDENCE AS TO NOTICE OF SPECIAL BILLS.—Extrinsic evidence outside of the legislative records is inadmissible to show that the notice of the introduction of a special bill had not been published for the requisite length of time.

Appeal from Woodruff Chancery Court, Northern District; *J. E. Martineau,* Chancellor; reversed.

H. M. Woods, Roy D. Campbell and *Coleman, Robinson & House,* for appellants.

The finding by the court that the title to the act had been changed by substituting the word "embrace" for the word "abolish," and was a material variation in the bill, was not justified by the record. 44 Ark. 549; 110 Ark. 273; 34 Ark. 283; 40 Ark. 200.

In concurring in amendments, the Constitution does not require that it shall be done by yea and nay vote, and that the same shall be entered upon the journal. 61 Ark. 226.

Before a bill, which has been duly enrolled, shall be declared invalid, the record must show conclusively that the constitutional requirements have not been met. 43 W. V. 523; 64 Am. St. Rep. 878; 26 Kan. 723; 139 Ark. 598.

In determining whether an act has been properly passed, the court will not look beyond the records of the General Assembly. 72 Ark. 565; 40 Ark. 200; 131 Ark. 291; 139 Ark. 227.

While the title of an act may be looked to to ascertain its meaning, it is no part of the act and is not controlling in its construction. 124 Ark. 476; 130 Ark. 505.

While the journals furnish evidence of legislative proceedings so far as they go, yet courts are not bound by what appears therein. 40 Ark. 215.

It is not necessary that the vote on amendments be recorded. Const. 1874; 61 Ark. 230; 130 Ark. 276; 61 Ark. 227; 110 Ark. 269; 4 Neb. 503; 11 Ind. 424.

R. M. Hutchins and *Mehaffy, Donham & Mehaffy,* for appellees.

The constitutional provision limiting the scope of legislation at special sessions is mandatory, and any law enacted not embraced within the Executive's call is void. *Jones* v. *State,* 25 R. C. L. 806; Lewis, Sutherland, Statutory Construction, 2nd ed. sec. 65, p. 11.

The Legislature cannot indirectly do that which it is prohibited from doing directly. 5 Ark. 412.

The act does not fall within the range of the subjects submitted by the Governor in his proclamation. 19 S. W. 530. The approval of the act by the Governor could not make it valid. 110 Mo. 286; 58 Tex. Cr. R. 209.

The duty having been placed on the Governor to specifically name the legislation in which the General Assembly was engaged when called together in special session, that duty can alone be dischaged by him. 107 S. E. 765; 25 R. C. L. sec. 56; 110 Mo. 286; 19 S. W. 530; 15 L. R. A. 847; 40 L. R. A. (N. S.) 28; 28 Okla. 94; 113 Pac. 921; 58 Tex. Cr. R. 209; 127 S. W. 208; 130 Cal. 82; 128 Tenn. 456.

Duly enrolled acts, properly authenticated, approved by the Governor and deposited with the Secretary of State as existing laws, are presumed to have been enacted in accordance with constitutional requirements. 3 Nev. 233; 34 S. W. 769; 174 S. W. 1108; 161 S. W. 1006; 187 Fed. 393.

If a statute is divisible, and is partly unconstitutional, that part may be rejected and the balance upheld; but if it is not divisible, and any part is unconstitutional, the entire statute falls. 25 Ark. 236; 34 Ark. 224; 49 Ark. 110.

Any material change in either house renders it null and void. 72 Ark. 565; 41 Ark. 471; 90 Ark. 174; 103 Ark. 109; 132 Ark. 240.

The courts will take judicial knowledge of enrolled bills as found in the office of the Secretary of State. 72 Ark. 563; 132 Ark. 240; 90 Ark. 174; 103 Ark. 109; 130 Ark. 503.

The act was passed in violation of sec. 26, art. 5 of the Const. 141 Ark. 140; 48 Ark. 82; 8 Cyc. 762; 93 Ark. 339; 156 Pa. 1121.

McCULLOCH, C. J. Road Improvement District No. 2 of Woodruff County was formed by order of the county court of that county, pursuant to the general statute authorizing the formation of road improvement districts (Crawford & Moses' Digest, sec. 5399 *et seq.*), and progress seems to have been made in preparing for the construction of the improvement, though it is not shown in the pleadings or proof in the present case to what extent the proceedings progressed.

The General Assembly, at the extraordinary session convened in January, 1920, pursuant to the proclamation of the Chief Executive, enacted a special statute bearing the title as follows: "An act to embrace Road Improvement District No. 2 of the Northern District of Woodruff County in, and to create Road Improvement District Number 16 of, Woodruff County, and for other purposes." The first section of that statute reads as follows: "That all assessments now levied on lands in Improvement District Number 2 of the Northern District of Woodruff County are hereby set aside and revoked, and that the territory of Road Improvement District Number 2 be and is hereby embraced in and made a part of the hereinafter created Road Improvement District Number 16 of the Northern District of Woodruff County; and that said District Number 16, hereinafter created, is benefited by the preliminary work, estimates and surveys made on account of District Number 2, and that District Number 16 shall assume the burden of payment of all preliminary expenses in the matter of formation, surveys, estimates, fees, etc., of District Number 2, and assessments are hereby authorized to cover the payment of said benefits

by said hereinafter created District Number 16; and the commissioners hereinafter appointed shall have control, as provided by law, over all the road improvements and territory herein embraced in Road Improvement District Number 16."

The subsequent sections designated the boundaries of the district, specified the road or roads to be improved, named the commissioners, and contain other provisions with reference to assessing benefits, levying taxes, borrowing money and constructing the improvement.

Appellees are residents and owners of real property within the boundaries of the old district as well as the new district created by the special statute above referred to, and they instituted this action in the chancery court of Woodruff County to restrain the commissioners of Road Improvement District No. 16 from proceeding under the statute. The validity of the special statute creating Road Improvement District No. 16 is assailed on the grounds that it was not legally enacted, in that the bill was changed without authority during its progress through the House of Representatives; that it was not embraced within the Governor's proclamation for the extraordinary session, and that notice of the introduction of the bill was not given for the length of time required by the Constitution. The points of attack upon the validity of the statute will be discussed in the order in which they are made.

The charge that the bill was changed without authority during its passage through the House is sought to be established from inspection of the original bill, with indorsements thereon, as it now appears on file in the office of the Secretary of State. It is shown by the inspection that the first page, which is typewritten, is in different type from that of the other pages of the bill and on different kind of paper. The bill cannot be stricken down on this ground, for the fact that one of the pages appears in different typewriting and on a different kind

of paper does not overcome the presumption of the regularity of its introduction and passage through the two Houses of the General Assembly. The rule is firmly established in this State that an enrolled statute "signed by the Governor and deposited with the Secretary of State raises the presumption that every requirement was complied with, unless the contrary affirmatively appears from the records of the General Assembly," etc., and that this presumption is conclusive "unless the records of which the courts can take judicial knowledge show to the contrary." *State* v. *Crowe,* 130 Ark 272; *Harrington* v. *White,* 131 Ark. 291; *Perry* v. *State,* 139 Ark. 227; *Booe* v. *Sims,* 139 Ark. 595; *Booe* v. *Road Imp. Dist.* 141 Ark. 140.

The further inquiry then presents itself whether there is anything appearing upon the preserved records of the General Assembly which overcomes the presumption arising from the enrolled statute in the office of the Secretary of State. We take notice of these records (*Butler* v. *Kavanaugh,* 103 Ark. 109; *Mechanics' Bldg. & Loan Assn.* v. *Coffman,* 110 Ark. 269), but, in addition to that, counsel have brought into the record certified copies of all the journal entries and a copy of the original bill with all of its indorsements.

The contention of appellees is that the title of the bill as introduced and passed in the Senate contained the word "abolish," instead of the word "embrace" as now appears in the original bill and in the enrolled statute, and that this change was made without proper amendment after the bill had been read the first and second times in the House. Counsel rely upon the journal entries of the two Houses to establish this charge.

The Senate Journal recites that Senate Bill No. 4, by Senator Roddy, "An Act to abolish Road Improvement District No. 2 of the northern district of Woodruff County in, and to create Road Improvement District Number 16 of, Woodruff County, and for other purposes", was read the first time on January 26, 1920, the

rules suspended and read the second time, and made a special order for January 27. The entry on the Senate Journal on January 27, 1920, recites the title of the bill in the same language as in the entry on the previous date. It states that the bill was read the third time and placed on final passage and passed, the aye and nay vote being set forth on the record, showing the affirmative vote of a majority. The entry on the House Journal on January 27, recites that "Senate Bill No. 4, being a 'bill to abolish Road Improvement District No. 2 of the northern district of Woodruff County, and to create Road Improvement District No. 16, and for other purposes,' was read the first and second time and placed on the calendar." The entry in the House Journal on January 30, showing the final passage of the bill, recites that "Senate Bill No. 4, by Senator Roddy, the same being a bill for 'an act to embrace Road Improvement District No. 2 of the northern district of Woodruff County in, and to create Road Improvement District No. 16 of, Woodruff County, and for other purposes,' was read the third time and placed on final passage." The entry further recites the aye and nay vote in detail, showing the affirmative vote of a majority of the House. The last entry in the two Houses is on the Senate Journal on February 2, 1920, reciting that "Senate Bill No. 4, by Senator Roddy, the same being a bill for an act to be entitled, 'An act to embrace Road Improvement District No. 2 of the northern district of Woodruff County in, and to create Road Improvement District No. 16 of, Woodruff County, and for other purposes,' was received by the Senate from the House." The bill was then enrolled and approved by the Governor on February 18, 1920, and the title of the act as enrolled corresponds with the language of the original bill as it now appears.

If the alleged change in the original bill, by substituting the word "embrace" for the word "abolish" should be held to be material so as to defeat the validity of the bill, the recitals of the journal are not sufficient to overcome the presumption of the regularity of the enactment.

At most, there is only silence of the record with respect to the substitution of the word, and the presumption must be indulged that the change was regular and was authorized. *Mechanics' Bldg. & Loan Assn.* v. *Coffman, supra; State* v. *Crowe, supra.* But the change, if made irregularly, was not material and did not affect the validity of the bill. The title of a bill has no controlling force (*Special School Dist. No. 33* v. *Howard,* 124 Ark. 475), and the substitution of the word "embrace" for the word "abolish" did not, if made, change the bill from its original purpose as introduced. When the two words are considered in the light of the body of the statute, the use of either one would be appropriate, for the statute itself, in fact, abolished Road District No. 2 and embraced it in the new district. In other words, under the statute the old district was swallowed up in the new district, and, speaking even in the strictest sense, it not only embraced the old district, but abolished it. Moreover, the use of the words, when we consider the immateriality of the change, must be construed to be merely a clerical misprision, for the difference in the journal entries in this instance is not sufficient to overcome the presumption arising from the enrolled statute approved by the Governor, especially since its language is in exact conformity with the original bill now on file in the office of the Secretary of State. *Desha-Drew Road Dist.* v. *Taylor,* 130 Ark. 503.

Our conclusion therefore is that this attack upon the validity of the statute is not supported by the record and is unfounded.

That part of the Governor's proclamation which specifies the legislation to be undertaken at the extraordinary session reads as follows:

"For the purpose of enacting laws establishing special or local road, bridge, drainage and levee improvement districts, and school districts, and conferring special powers thereon, and amending and curing defects in existing special or local laws for the same, and ratifying,

confirming and validating special or local improvement districts organized under general laws or special or local laws and enlarging the powers thereof, and to enact such laws as will permit the completion, reconstruction or extension of waterworks systems and other improvement districts in cities or towns."

The records of the General Assembly do not show that the extraordinary session was extended for the purpose of considering general legislation, and it therefore follows that, unless the bill for the statute now under consideration fell within the terms of the Governor's proclamation, the enactment was unauthorized and invalid. *Jones* v. *State, ante* p. 288. The contention is that the statute, in fact, abolished a road improvement district, that a bill for such a purpose was not embraced within the proclamation of the Governor, and that the whole statute being inseparable, was invalid, and that the effect of the statute is to abolish the old district. But it will be observed that no express words of negation are used in the proclamation, there being only an affirmative expression describing the subject-matter of legislation to be considered.

The Constitution (sec. 19, art. VI) in providing that "no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session," etc., contains no restriction upon the power of the lawmakers except to confine themselves to the legislation specified in the proclamation until that business is finished. The power of the lawmakers with regard to legislation at the extraordinary session is therefore full and complete so far as it relates to the subjects specified in the proclamation. The language of the proclamation confines the legislation to "laws establishing special or local road, bridge, drainage and levee improvement districts, and school districts," and the power to carry out such enactments is complete. The fact that the statute incidentally amends, or even

abolishes, another local district does not hamper the power of the Legislature in creating a new district which brings about that result.

Having clearly the power, under the Constitution and the proclamation of the Governor, to pass special laws establishing local districts, the power to pass such legislation to abolish or embrace other districts is a necessary incident to the exercise of the power conferred. If it be conceded that the enactment of a statute abolishing a road district and doing nothing more would not be within the Governor's proclamation, the present instance is not one of that kind, for the provisions of the bill with respect to the old district constituted, as before stated, the exercise of incidental powers in enacting legislation that falls expressly within the language of the proclamation.

Learned counsel for appellees rely upon the recent case of *Jones* v. *State, supra,* but we do not think the decision has any bearing on the question now before us. The statute considered in that case was held to be a general statute affecting all improvement districts, and that it was not within the subjects specified in the proclamation of the Governor.

The last contention in support of the chancellor's decree declaring the act unconstitutional is that notice of the introduction of the bill was not published for the length of time required by the Constitution. In support of this contention appellees introduced extrinsic evidence outside the legislative record showing that notice was not properly published for the requisite length of time. There is a conclusive presumption in favor of the legislative determination that notice of the introduction of a special bill had been properly published for the requisite length of time. That was the rule established by this court in *Chicot County* v. *Davies,* 40 Ark. 200, and has been adhered to down to the present date. We overruled a certain portion of that decision, not material to the present controversy, in the case of *Booe* v. *Road Imp. Dist., supra,* but the doctrine in *Chicot County* v. *Davies, supra,* was

reaffirmed in that case so far as it related to the conclusiveness of the legislative determination in regard to notice, except in the case of an extraordinary session, where the proclamation of the Governor was not made a sufficient length of time before the convening and adjournment of the session to give time for publishing the notice. We are asked to overrule the former cases on this subject, but the court declines to do that.

It follows that all of the attacks on the validity of the statute are unfounded, and that the decree in declaring the statute invalid was erroneous. The decree is therefore reversed and the cause remanded, with directions to dismiss the complaint for want of equity.

HART, J., dissents.

BELDING v. WHITTINGTON.

Opinion delivered July 10, 1922.

1. VENDOR AND PURCHASER—ELECTION OF REMEDIES.—Where a vendor fails to comply with his contract to execute a deed, the vendee may sue him for damages for his failure to comply therewith; but when he elects to do so, he necessarily abandons his right to require the vendor to perform the contract specifically by executing the deed.
2. ELECTION OF REMEDIES—IRREVOCABILITY—An election between remedies, in the absence of a mistake as to material facts, is irrevocable.
3. APPEAL AND ERROR—DECREE CORRECT THOUGH BASED ON ERRONEOUS REASON.—Where, in answer to a plea in abatement setting up a prior action for damages for breach of contract to convey land as a bar to a suit for specific performance of such contract, plaintiffs did not ask for a transfer to the law court in the event of an adverse decision on the plea, a decree dismissing the complaint, though assigning an erroneous reason, is correct, and will be affirmed.

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

A. B. Belding and *C. T. Cotham,* for appellants.

Plaintiffs were entitled to specific performance of their contract. 36 Cyc. 761 and cases cited in notes; 81 S. W. 419; 33 Ark. 550; 25 R. C. L. 327, and cases cited.

L. E. Sawyer, and *Martin, Wootton & Martin,* for appellees.

1. Appellants are precluded from recovering in this action because they elected to treat the contract as breached and sought remedy at law for damages, inconsistent with the equitable relief prayed for in this action. They are bound by their election. 83 Ark. 304; Elliott on Contracts, vol. 3, § 2097.

2. The limitation in the power of attorney from Whittington and wife to Dr. Wootton, which expressly denied the right of the latter to sell real estate in Garland County belonging to the former, was known to the appellants, and makes inapplicable the principle of law that an agent, in the conduct of business for a principal, binds the principal as to all acts within the apparent scope of his authority. Moreover, in specific performance cases, an agent is held to strict compliance with his authority, or the principal must have subsequently ratified his contract. 104 Ark. 464.

Courts will not decree specific performance where it is impossible. The title to the land, at the filing of this suit, was, and is, in an innocent purchaser.

A. B. Belding and *C. T. Cotham,* in reply.

The mere bringing of a suit for damages, which is not prosecuted to a final decision but dismissed, does not amount to an election of remedy that will bar a subsequent action for specific performance of the contract. 111 Mass. 270; 227 Mo. 193; 21 R. I. 223; 72 N. J. Eq. 780; 141 Ia. 225; 144 *Id.* 187; 36 L. R. A. 195; 40 Minn. 424-8; 87 Fed. 390.

The mere fact that a party mistakes his remedy and pursued the wrong one at first may not prevent him from afterwards pursuing another remedy. This is the

concluding statement of section 2097 of 3 Elliott on Contracts, relied on by appellants, and is our case exactly.

WOOD, J. This action was instituted by the appellants against the appellees in the Garland County Chancery Court. The appellants in their complaint set out the following contract: "Received of A. B. Belding and A. C. Jennings the sum of $200 (two hundred dollars) as a part of the agreed purchase price of the Plateau Hotel property in the city of Hot Springs, being approximately 42x90 feet, the agreed purchase price being $24,500 (twenty-four thousand five hundred) nineteen thousand five hundred in cash, balance at rate of six per cent. per annum. I hereby agree to have same released from deed of trust now held by Southern Trust Co., of Little Rock, if possible. Deferred payments of five thousand to be carried by me for one year. As part payment I agree to accept Liberty bonds as part cash. (Signed)

"W. T. WOOTTON, Attorney in fact.

"H. A. WHITTINGTON,

"E. W. WOOTON."

The appellants, among other things, alleged the execution of the contract, and that the appellants had always been ready and willing to comply with all terms of the contract on their part; that the appellees, H. A. Whittington and the Woottons, had refused to perform the contract on their part, but on the contrary, in violation of the terms of the contract, had sold the land described in the contract to one Peter Gartenberg for the consideration of $24,500, and had executed to him a warranty deed for the property; that Gartenberg purchased the property with full knowledge of the rights of the appellants under their contract as above set forth. They further alleged that Mrs. Carolyn W. Whittington, the wife of H. A. Whittington, who had a dower interest in the property, had ratified the sale to the appellants; that she also joined in the warranty deed, conveying her rights of dower and homestead to Gartenberg. The appellants alleged that

Gartenberg and his wife on the 8th of May, 1919, executed a deed of trust to C. E. Marsh, as trustee, to secure the payment of certain promissory notes to H. & G. Strauss in the sum of $14,000; that at the time of the execution of this deed of trust Marsh, the trustee, and H. & G. Strauss had knowledge of the sale of the property to the appellants and of their rights therein; that Gartenberg, by reason of the above conveyance to him, was constituted a constructive trustee for the appellants; that the conveyance to H. & G. Strauss constituted a cloud on the title of appellants.

All of the above parties named were made defendants in the action, and the prayer of the complaint was that, upon the payment of the balance of the purchase money, the appellants be declared owners of the land, and that title thereto be divested out of the appellees and vested in them; that the appellees be directed to have proper conveyances executed to vest the fee title in the appellants. There was also a prayer for rents and profits, and an alternative prayer that, if specific performance were impossible, the appellants have judgment for their damages in addition to the rents and profits in the sum of $1,700, and for all other and general relief.

There was a general demurrer to the complaint, which was overruled. A "plea in abatement" was filed in which it was alleged that on the 3d day of May, 1919, appellants filed a complaint in the Garland Circuit Court against the Woottons and H. A. Whittington, alleging that the latter had breached their contract for the sale of the property to the appellants whereby they had damaged appellants in the sum of $1,320, for which they prayed judgment, and also for a return of the $200 purchase money paid by the appellants. It was set up in the "plea in abatement" that, by reason of such action in the Garland Circuit Court, the appellants had waived any and all rights they had to the specific performance of the contract and for damages growing out of failure to specifically perform same.

The appellants replied to the "plea in abatement" and admitted that they filed a complaint in the Garland Circuit Court as alleged in the plea, but they averred that on the 13th day of September, 1919, the action for damages in the Garland Circuit Court was dismissed without prejudice, and they attached to their reply a duly certified copy of the order dismissing the action without prejudice. They therefore alleged that they had not waived, and were not barred of, their rights to prosecute the present action. The court overruled the "plea in abatement," and the appellees filed separate answers, especially reserving therein their rights as set up in the "plea in abatement." The execution of the contract set out above was admitted, and it was also admitted that the property was sold, as alleged, to Peter Gartenberg. All other material allegations of the complaint were specifically denied, and it was denied that the appellants were entitled to a specific performance of the contract.

The cause was heard upon the pleadings and the depositions of the witnesses. The court rendered a decree in favor of appellants against H. A. Whittington and the Woottons in the sum of $200 with interest from the 10th of April, 1919, and dismissed their complaint in all other respects for want of equity. From that decree is this appeal.

The first question for our consideration is whether or not the appellants are barred from maintaining the present action for specific performance because they had instituted an action in the circuit court of Garland County for damages for an alleged breach of the contract on the part of H. A. Whittington and the Woottons in failing to execute and deliver to the appellants a warranty deed to the land in controversy. An action at law for damages growing out of an alleged breach of contract for failure to execute a deed is inconsistent with an action in equity seeking to have the contract specifically performed by having the deed executed. One cannot maintain an action at law for damages growing out

of an alleged breach of contract in failing to execute a deed and at the same time maintain an independent action in equity to require the same party to perform the contract by executing the deed. Where a vendor fails to comply with his contract to execute a deed, unquestionably the vendee may stand on the contract and sue the vendor for damages for his failure to comply therewith, but when the vendee elects to do this he necessarily abandons his right to require the vendor to specifically perform the contract by executing the deed.

In *Bush* v. *Barksdale,* 122 Ark. 262-265, we said: "The principle that an election of remedies is irrevocable seems too plain for argument to the contrary, and its application to the proceeding now under discussion is obviously proper." In 20 Corpus Juris, at page 38, the authors make this statement: "An election, once made between coexisting remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent, even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar." Among numerous authorities cited to support the text is the case of *Bush* v. *Barksdale, supra.*

Elliott, in his work on Contracts, vol. 3. sec. 2097, says: "It is the doctrine of election of remedies that one having the choice of two or more inconsistent remedies for his relief is bound by his selection of the remedy he will pursue, and he cannot thereafter avail himself of the other remedies * * *. So, where the party brings an action at law for damages for the breach, he cannot thereafter maintain a suit in equity to enforce specific performance. * * *. It should be observed, however, that the mere fact that a party mistakes his remedy and pursues the wrong one at first may not prevent him from afterwards pursuing another remedy."

In 9 R. C. L. p. 960, sec. 7, is the following statement: "An election of a remedy which has the effect of an estoppel *in pais* or an estoppel by record, in that class

of cases in which the remedies are really inconsistent, is generally considered made when an action has been commenced on one of such remedies. Some courts go so far as to say that in such cases the choice of a remedy once made cannot be withdrawn or reconsidered, though no advantage has been gained nor injury done by the choice, and no injury would be done by setting the choice aside. But the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel *in pais* has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election."

In *Craig* v. *Meriwether,* 84 Ark. 298, 306, we quoted from *Spread* v. *Morgan,* 11 H. L. Cases, 588, as follows: "In order that a person who is put to his election should be concluded by it, two things are necessary: First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them. Second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence." In the same case we held that one is "not bound by any election made in ignorance of material facts." Citing *White* v. *Beal & Fletcher Gro. Co.,* 65 Ark. 278; *Dudley E. Jones Co.* v. *Daniel,* 67 Ark. 206.

Now, it cannot be said that the appellants, in electing to sue at law for damages for an alleged breach of contract on the part of the Woottons and H. A. Whittington in failing or refusing to make the deed, were pursuing this course on account of a material mistake of facts or ignorance of facts. At least they do not set up any such mistake. Their only contention is that they were not bound by such election of remedies because their suit at law was afterwards voluntarily dismissed by them without prejudice. Appellants will not be heard to say that they did not have knowledge of the nature of their remedies and of the necessity for an election between them, for these are matters of law, and ignorance of the law will not excuse them. Therefore, in the absence of

any facts showing that their election to institute an action at law for damages was based upon a misconception or mistake of facts, they are bound by such election to pursue that course. Their intention to elect this remedy is manifested in the highest manner by the record showing that they had instituted their action for damages.

We are aware that many very able courts hold that the mere bringing of an action which has been dismissed before judgment, and where no advantage has been gained by the party bringing the same, or no deteriment has been occasioned to the party against whom the same is brought, is no election. See cases cited in *Connihan* v. *Thompson,* 111 Mass. 370; *Otto* v. *Young,* 227 Mo. 193. and other cases cited in brief of learned counsel for appellant. But there is also excellent authority to the contrary. See cases cited in 9 R. C. L. 260, notes 1 and 5.

The doctrine of our own court is in accord with the view that where there has once been an election between alternative and inconsistent remedies not occasioned by a mistake or ignorance of material facts, but as the result of a deliberate choice of election between the two, the party making such choice cannot afterwards recant, dismiss his pending action and invoke another remedy in the same or a different forum, even though no positive disadvantage or injury has resulted to the other party. We believe the better reason is to hold one to a deliberate choice once made between inconsistent remedies, where that choice involves nothing more than the determination by the party as to which of two remedies will best subserve his purpose. Certainly this doctrine has the merit of preventing one who is about to hale another into court from making a capricious choice between inconsistent remedies which he may pursue. Because he knows that whatever course he elects to pursue he will not thereafter be allowed to shift his ground, unless he can show that his election was based upon a mistake of material facts. No such showing is presented by the facts of this record.

We conclude therefore that the appellants are barred from maintaining this action for specific performance of the contract because they first elected to prosecute an action for damages for a breach thereof.

In their answer to the plea in abatement the appellants did not ask the trial court, in the event of an adverse decision to them on the plea, to transfer the cause to the law court, and they have not asked this court to direct a transfer of the cause. The decree of the court dismissing the appellants' complaint for want of equity, although for a different reason, is therefore correct, and it is affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* WATTERS.

Opinion delivered July 3, 1922.

1. INSURANCE—PRESUMPTION AGAINST SUICIDE.—In an action on a life insurance policy in which suicide was an excepted risk, self-inflicted death is presumed to have been accidental until the contrary is made to appear.
2. INSURANCE—EVIDENCE OF SUICIDE.—In an action on life insurance policies in which suicide was an excepted risk, evidence *held* to establish a case of suicide.

Appeal from Pulaski Circuit Court, Second Division; *Archie F. House,* Judge; reversed.

Rose, Hemingway, Cantrell & Loughborough, for appellants.

A verdict should have been directed in appellants' favor, as the undisputed physical facts and circumstances eliminated every other reasonable theory than that the wound was intentionally self-inflicted. 95 Ark. 456; 182 N. W. 808; 146 S. W. 461 (Mo.); 117 S. W. 788 (Tex.).

Coleman, Robinson & House and *Hendricks & Snodgress,* for appellee.

When appellants complain of the refusal of the court to direct a verdict in their favor, they seem to overlook the following cases, in which there was a stronger pre-

sumption of suicide than in the present one, wherein the court refused to disturb a verdict returned by the jury. *Guardian Life Ins. Co.* v. *Dixon,* 152 Ark. 597; 80 Ark. 190; 113 Ark. 504; 221 S. W. 858.

HUMPHREYS, J. Separate suits were instituted by appellee against appellants in the Pulaski Circuit Court upon life insurance policies issued by each to her husband, in which she was named as the beneficiary. The defense interposed to each suit was that the insured committed suicide, which was an excepted risk. The causes were consolidated by agreement and submitted to a jury upon the pleadings, evidence, and instructions, which resulted in a verdict and separate judgments against each appellant in favor of appellee, from which is this appeal.

At the conclusion of the testimony appellants requested the court to instruct a verdict for them, which was refused, over their objection and exception.

Appellant's main contention for reversal is that the undisputed evidence clearly established that the insured committed suicide, and overcame the presumption of an accidental killing. The law applicable in this class of cases, gleaned from an array of authority, was very plainly and tersely enunciated in the case of *Grand Lodge of A. O. U. W.* v. *Bannister,* 80 Ark. 190, in the following language: "In the first place, there is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted; it is presumed to have been accidental until the contrary is made to appear. This rule is founded upon the natural human instinct or inclination of self-preservation, which renders self-destruction an improbability with a rational being." In quoting and applying this rule to the facts in the case of *Industrial Mutual Indemnity Co.* v. *Watt,* 95 Ark. 456, this court said: "Hence we see that if reasonable men, viewing the facts, which are undisputed, might come to different conclusions as to whether the deceased commit-

ted suicide, then the facts, although undisputed, were properly submitted to the jury." With the rule itself in mind, and the rule last quoted as a guide for the application thereof, after a careful consideration of the facts and circumstances in the instant case, we are unable to account for the death of the insured upon any other reasonable hypothesis than suicide. The record reveals that the insured was the head of a family consisting of his wife and two children. The family were devoted to each other and lived together happily. Until the latter part of September, 1920, he had been superintendent of the bauxite mining operations in Pulaski County of the Republic Mining & Manufacturing Company, at a good salary. He was succeeded by John T. Fuller, but was continued in the employ of the company during October, after which he was promised a vacation for two months on full salary, so that he might have an opportunity to seek other employment. He had been in the employ of the company since 1907, and had purchased a home in Little Rock. He was an old friend of the president of the company, who proffered assistance in getting him another position, and who agreed to pay the expenses of the move should he sell his home in Little Rock and return to Georgia, from whence he came. According to the preponderance of the testimony, he was not despondent over the loss of his position. Naturally he was of a happy disposition. Nothing in his conversation or conduct in the past indicated that he contemplated suicide. He slept well the night before his death, and left home for the mines in his usual good humor, after joking and playing with the children. Being pay-day at the mines, he carried his pistol, according to custom. Such acquaintances as he met observed nothing unnatural about him. In the suburbs of the city he stopped at a negro garage to have his car repaired. He was in his usual happy frame of mind. He went behind the garage, remained there for a short time, returned and asked if his car was ready, complained of his stomach, and step-

ped behind the garage again. Almost immediately thereafter, while standing, seemingly in a leaning position against the house, his pistol fired. William Oliver, who was passing the garage just before the pistol fired, observed that the insured, who was standing in the rear of the garage, had on a gray cap. Just as the pistol fired he looked and observed the man still standing up and saw the cap shake just as one would see a shadow. When those near hurriedly reached the place of the tragedy the insured was lying on the ground and his pistol, a Savage automatic .32, was by his side. The ball had entered the right temple back of and about one-half inch above the right eyebrow, passed through his head almost on a level, and came out of the left temple at a point slightly higher than the point of entry. The powder-burn covered a space of about four inches, indicating, according to the expert evidence, that the point of the pistol was from nine to sixteen inches from the head of the deceased when it fired. Gus Leimer testified that such a pistol might be accidentally discharged.

Reasoning upon the undisputed physical facts in the case, we are unable to evolve any reasonable theory by which the insured could have been accidentally shot. He was standing when the pistol fired. The course of the ball was approximately straight through the head from temple to temple. Had the pistol accidentally dropped and fired either before or after it hit the ground, and if the ball had taken an upward course, it could not have passed on a level through a standing man's head and have left powder-burns on the place of entry. Had the insured been examining or handling the pistol for ordinary purposes, and same had accidentally discharged, the ball would have necessarily entered the body from the front. The physical facts are not consistent with any reasonable theory of an accidental killing of which we can conceive. We are unable to reconcile them with any manner of killing except suicide. Learned counsel for appellee content themselves with relying on the pre-

sumption of accidental death, and do not suggest the particular manner in which it might have occurred. The entry and exit of the bullet, the powder-burn, and the standing position of the man, unerringly indicate that at the time the pistol fired it was in the hand of the insured and pointed directly at his right temple. This being the case, the purpose must have been suicidal. There is no suggestion in the record of any fact from which a reasonable inference might be drawn that the insured met his death through foul play. The case seems to have been fully developed, and, as the presumption of an accidental killing was overcome by the undisputed facts and circumstances, the court should have instructed a verdict for appellants.

The judgments are reversed and the cases dismissed.

DOYLE-KIDD DRY GOODS COMPANY v. A. W. KENNEDY & COMPANY.

Opinion delivered July 10, 1922.

1. CORPORATIONS—DE FACTO CORPORATION DEFINED.—To constitute a corporation *de facto*, there need not be a strict or substantial compliance with the statutes, but there must be a colorable compliance therewith, that is, a color of a legal organization under the statutes and user of the proposed corporate franchise in good faith.
2. PARTNERSHIP—LIABILITY OF MEMBERS OF JOINT STOCK COMPANY.—Persons who associated themselves in business for the purpose of organizing a corporation, and who participated in the management of the business through a board of directors, but who failed in any way to comply with the statutory requirements as to formation of corporations or to limit their liability as partners, as provided by ch. 137 of Crawford & Moses' Dig., are liable as partners for the debts contracted by such managers; the organization being a common-law joint-stock company.

Appeal from Howard Circuit Court; *Percy Steel*, special judge; reversed.

Graves & McFaddin, for appellant.

A joint stock company was created by the articles of agreement entered into by the parties. 125 Ark. 146; 63 Ark. 518; 37 Ark. 308; 138 Ark. 281; 137 Ark. 80; 63 Ark. 581.

Where the language of a contract, when considered as a whole, creates the partnership relation, then it should be so construed, even though the parties expressly provide that such was not their intention. 141 Ill. 124; 30 Am. Dec. 596; 30 N. E. 442; 20 Ore. 132; 11 L. R. A. 149; 30 Cyc. 360. The rule is that members of a voluntary association of individuals or an unincorporated company are to be considered as partners in their relation to third persons, and it is immaterial that the proportions in the ownership of the associates in the common property are represented by certificates having a similarity to shares of stock in a corporation, or that the members call themselves stockholders and believe they incur no liability for losses beyond the actual amount paid for the shares. 89 N. E. 434; 133 A. S. R. 296; 12 Am. Dec. 495; 28 Am. Dec. 650; 49 Am. Rep. 313; 115 A. S. R. 407; 91 N. E. 439; 98 Tenn. 109; 60 A. S. A. 842; 36 L. R. A. 282; 303 Mass. 311; 89 N. E. 434; 133 A. S. R. 296; 128 Mass. 445; 124 N. E. 32; 23 Cyc. 474. Stockholders who take no active part in the business of a pretended corporation, which is acting without any charter or filed articles, and who supposed the corporation had been duly organized, are exempt from individual liability for debts incurred. 55 Hun 579; 57 N. Y. 23. Defendants are liable for the acts of Kennedy on the principle of agency, as distinct from, and in addition to, the matter of partnership liablity. 111 Ark. 236; 117 Ark. 176.

W. P. Feazel, for appellees.

The partnership relation is always created by agreement between the parties and never by operation of law. 54 Ark. 384; 70 Miss. 193; 66 N. Y. 424; 116 U. S. 461; 118 U. S. 211. In determining whether or not the rela-

tion of partnership was created between the parties, their intention must control. 137 Ark. 8; 44 Ark. 423; 63 Ark. 518; 77 Ark. 390; 74 Ark. 437; 87 Ark. 412; 138 Ark. 281; 91 Ark. 206; Story on Partnership, § 49. The mere fact that persons associate themselves together to promote or organize a corporation does not make such person partners for the reason there is no agreement or intention to enter into such relation. 8 Col. App. 110; 96 Ill. App. 200; 9 Mass. 900; 135 Mass. 140; 34 Minn. 355; 62 Minn. 332; 60 Ohio St. 288; 123 Pa. 259; 158 Pa. 197; 121 Ark. 545.

WOOD, J. The Doyle-Kidd Dry Goods Company is a domestic corporation, and will be hereafter referred to as the appellant. The appellant instituted this action against A. W. Kennedy, W. G. Gardner, H. B. Gardner, Jesse Johns, H. T. Smith, J. S. Harrison and R. B. Harrison, as copartners trading under the firm name of A. W. Kennedy & Company. The parties named above, except Kennedy, will hereafter be referred to as the appellees. A. W. Kennedy & Company will be hereafter referred to as the company. The appellant alleged in its complaint that it was engaged in the wholesale dry goods business in the city of Little Rock, Pulaski County, Arkansas, and that the appellees were partners trading under the firm name of the company; that the appellees were indebted to the appellant in the sum of $1,272.18 for merchandise purchased by them. Appellant alleged that the merchandise was purchased on the 12th of March, ——, and at various other times, as shown in an itemized account, which is made an exhibit to its complaint. Kennedy did not answer the complaint, and judgment by default was rendered against him. He has not appealed, and thus passes out of the case. The appellees, in their answer, denied that they were indebted to the appellant in any sum whatever. They set up that some time in the month of November, 1919, A. W. Kennedy proposed to form a joint stock company for the purpose of conducting a mercantile business in their community in Howard County,

the stock in the company to be sold at $100 per share, and that the appellees purchased stock in the company as represented by the respective number of shares taken by each of the appellees, which they specified, amounting in the aggregate to the sum of $6,000. The appellees alleged that it was understood between them and Kennedy at the time they purchased the shares that the business would be incorporated, and that Kennedy should have the exclusive management and operation of the business, subject to the advice of the board of directors; that the appellees took no part toward the organization of the corporation or the management and direction of the business after it was put in operation. They alleged that they did not intend to form a partnership and did not hold themselves out as partners, and did not sign any articles of association, incorporation, or partnership. They alleged that the business was not incorporated, and that, while they knew that the business was in operation, they supposed it had been incorporated by Kennedy, and did not know that Kennedy was attempting to run the business as a partnership, and did not know that it had not been incorporated until immediately prior to the institution of this action. They therefore denied liability.

The cause was, by consent, tried by the court sitting as a jury. The facts developed at the hearing were substantially as follows: A. W. Kennedy, who had been running a small business in the rural community where the appellees resided, agreed with the appellees, who were farmers, that they would establish a new business. Kennedy prepared a document called "articles of agreement" which specified that the stockholders agreed to form a joint stock company for the purpose of conducting a general mercantile business to be styled A. W. Kennedy & Company, stock in the company to be sold at $100 per share. Kennedy was to be the president and general manager. The stockholders were to elect three directors, who were to advise with the manager in the conduct of the business. The manager was to do all the buying and sell-

ing and keep an accurate account of sales and expenditures, and furnish the directors a report of the business at any time desired. Kennedy was to receive as compensation for his services one-half of the profits of the business after all expenses were paid. The articles further provided that dividends should be declared the first of January, 1921, and that no stockholder should withdraw his stock except the first of each year, without the consent of the majority of the stockholders. The manager was to give a receipt showing that the entire assets of the corporation should stand as security to each stockholder for the amount of his investment, and the manager was to make bond to cover the full amount of the stock. These articles of agreement were circulated among the people, and the appellees and others paid in cash varying sums amounting in the aggregate to $6,000. The several amounts were paid by the appellees and others to Kennedy, who issued to them a receipt for so many shares in the company at the rate of $100 per share, according to the amounts severally paid. After the above sum had been paid in, Kennedy called a meeting of those who had subscribed and paid the fund and they elected the three directors, as provided in the articles of agreement, and these directors signed the articles of agreement. The other stockholders who had paid did not sign, it being understood that the signatures of the three directors were sufficient. The directors met from time to time in an advisory capacity to Kennedy, who was the manager and had sole control of the business. When the appellant was approached by Kennedy to purchase merchandise, it inquired of him what kind of a company he had, and he told the appellant that it was a joint stock company with a paid-up capital of $6,000, and he named the appellees as stockholders in the company. In March, 1920, after the company had been formed and had been operated for some time under the above management, there was a meeting of the directors and some of the stockholders. The directors met from time to time, and some of the

stockholders met with them at these meetings. No minutes were kept. At one of the meetings one of the original directors resigned, and W. G. Gardner, one of the appellees, was elected in his place. At the meeting in March, 1920, it was discovered that Kennedy had not incorporated, and it was again decided that the business should be incorporated. The undisputed testimony shows that it was the purpose of the appellees to have the business incorporated in order that they might be severally protected from any liability in excess of the amounts that they had subscribed and paid for shares of stock in the proposed corporation.

In January, 1921, the stockholders had a meeting at which all of the appellees were present except Smith. At that meeting Kennedy submitted a statement of the business of the company. Upon ascertaining that Kennedy was unable to pay any dividends, and that he had not had the business incorporated as he had promised, the appellees sold their interest in the business to him. He paid some of them a small amount in cash and executed his notes for the balance, which notes the appellees still have. Kennedy continued the business in the name of the company until the summer of 1921, when his business failed. The appellant sent a note to Smith, one of the appellees, for the amount of its debt, with a request that Smith and the other appellees sign the same. When this note was presented, the appellees ascertained that Kennedy had not incorporated, and that the business was a failure. They refused to sign the note.

Upon substantially the above facts the court found the facts and the law in favor of the appellees and entered a judgment in their favor against the appellant, dismissing its action, and for costs, from which judgment is this appeal.

The trial court, in one of its declarations of law, announced that "A. W. Kennedy & Company was in no sense at any time a corporation either *de facto* or *de jure.*" In this declaration the trial court was correct.

Because, as is said in *Rainwater* v. *Childress,* 121 Ark. 541, at page 547: "To constitute a corporation *de facto,* there need not be a strict or substantial compliance with the statute, but there must be a colorable compliance with the statute—that is to say, there must be color of a legal organization under the statutes and user of the supposed corporate franchise in good faith. Courts differ among themselves as to how much must be done in order to constitute a corporation *de facto.* But all of the courts agree that some of the statutory steps must be taken in an honest attempt to comply with the requirements of the law and exercised by the associates of the corporate powers."

The undisputed testimony shows that there was no attempt upon the part of any of the appellees individually, or Kennedy acting for them, to comply with any of the requirements of the law as to the formation of corporations prescribed in chapter 38, C. & M. Digest, secs. 1700-01-11. The appellees therefore cannot be held liable as partners on the ground that they had associated themselves together for the purpose of transacting a general mercantile business as a corporation, and had taken some steps in compliance with the statute looking to the formation of the corporation, and that they had done business in the corporate name but without perfecting the corporate organization.

In *Garnett* v. *Richardson,* 34 Ark. 144, and *Morse* v. *Burkhart Mfg. Co., ante* p. 362, we held that those who associated themselves together for the purpose of organizing a corporation and who have taken some of the statutory steps looking to that end, and who have transacted business and incurred liabilities in the corporate name, but without finally completing the corporate entity, are responsible as partners for the debts incurred by the *de facto* corporation. The liability of the appellees as partners cannot be predicated upon the doctrine of these cases because, as we have seen, the uncontroverted facts show that they had made no effort whatever to comply

with the requirements of the law. They had not taken any of the steps prescribed by the statute for the organization of a business corporation.

It does not follow, however, that, because they were not liable as partners under the doctrine of the cases last above cited, they are not liable as partners at all. Under our law, when three or more persons shall associate themselves together for the purpose of carrying on a business in which they are to share in the profits and losses, they can only transact such business as a corporation or as a partnership. If they desire to conduct a business as a partnership and to limit their liability, they may do so under the provisions of chapter 137, C. & M. Digest; or, if they prefer to conduct the business as a corporation and to have their respective liabilities limited in proportion to the capital invested in the joint enterprise, then they may organize and do business as a corporation under the provisions of chapter 38 of C. & M. Digest, *supra.* But there is no middle ground between these two where persons may associate to carry on a business and not be liable for the debts incurred by that business, either as partners, or as stockholders in a corporation. As we have shown, the appellees are not liable as stockholders in a corporation, either *de facto* or *de jure.* There is no pretense that they formed a limited partnership under the statute, and therefore, if liable at all, and they are, their liability is governed by the general law pertaining to partnerships. While our statute makes no provision for the existence of joint stock companies *eo nomine,* they are not prohibited, and a mercantile business may be conducted in that form as a partnership.

We are convinced that the facts of this record show conclusively that the company in which the appellees were stockholders was a typical common-law joint stock company, according to the definition of that term as given by standard text-writers and by courts in various adjudications. "A joint stock company is an association of individuals for purposes of profit, possessing a common

capital contributed by the members composing it, such capital being divided into shares of which each member possesses one or more, and which are transferable by the owner, the business of the association being under the control of certain selected individuals called directors." 20 R. C. L. p. 321; 23 Cyc. 467, and cases cited in notes; see also Wrightington, Unincorporated Associations, secs. 10, 12, 14, 15; 2 Lindley on Partnership, ch. 5, p. 1532, and notes; Cook on Corporations, chap. 1, sec. 1, p. 3, note; ch. 29, sec. 504, p. 1465, and notes. Lindley says: "Unincorporated joint stock companies, as they exist in the United States, are, with the exception perhaps of those organized under the statutes of New York, merely copartnerships; and, as a general thing, subject to all the rules governing that branch of the law. The shareholders are therefore each personally liable for all the debts of the company, no matter what the private arrangements among themselves may be; and this notwithstanding they attempt to arrogate to themselves the attributes of copartners by doing business under a corporate name and appointing certain of their members to act as directors." Ch. 5, p. 1532, sec. 1.

In 20 R. C. L. at page 808, the authors make the following statement: "Nevertheless at common law voluntary associations were regarded as partnerships in the transaction of business. And the rule generally recognized today is that the members of the voluntary association of individuals or of an unincorporated company are to be considered as partners in their relations to third persons, and it is immaterial that the proportions of ownership of the associates in the common property are represented by certificates having a similarity to shares of stock in a corporation, or that the members call themselves stockholders and believe that they incur no liability for losses beyond the amount paid for the shares." To support the text the authors cite the following cases: *Ashley* v. *Downing* (Mass.) 89 N. E. 434, 133 A. S. R. 296; *Lynch* v. *Postlethwaite* (La.), 12 Am. Dec. 495, and

cases cited in note; *Babb* v. *Reed* (Pa.), 28 Am. Dec. 650; *Farnum* v. *Patch* (N. H.), 49 Am. Rep., 313.

In *Ashley* v. *Downing, supra,* (203 Mass. 311), it is said: "A voluntary unincorporated association of individuals for the purpose of conducting a business whose proportions of ownership in the assets are represented by certificates having similarity to shares of stock in a corporation has repeatedly and uniformly been held to be a partnership." The facts of that case are very similar to the case in hand and cannot be distinquished in principle. See also *Brotherton* v. *Gilchrist,* 144 Mich. 274, 115 A. S. R. 397, and exhaustive case notes at p. 407; *Hossack* v. *Ottawa Devel. Co.* (Ill.) 91 N. E. 439; *Carter* v. *McClure,* 98 Tenn. 109, 60 A. S. R. 842, 36 L. R. A. 282.

The appellees rely upon the case of *Rainwater* v. *Childress, supra,* to support their contention that the appellees are not liable as partners. In that case, as in this, there was no attempt whatever to comply with the statutes relating to the formation of corporations. Some of the defendants subscribed for stock in a corporation, but took no further part looking toward the organization of the corporation or the management of the canning factory after it was put in operation. Other defendants did not intend to subscribe for stock in a corporation, but only intended to donate the amount subscribed by them to have a canning factory established at Morrilton. We held that such defendants are not liable as partners because "they took no part in the business transacted by the canning factory, either as principals, partners, agents, directors, or otherwise." But three other parties, Childress, Rainwater, and Simpson, were held "liable as partners, because they were actively engaged in establishing the canning factory, and in operating it after it was established, and with the knowledge that no attempt had been made to incorporate it."

Now, it cannot be said that the appellees in the present case intended to donate any funds to the company; nor can it be said that they paid their respective

sums to Kennedy, but took no further part in the formation of the company and the management of the business, either as "principals, partners, agents, directors or otherwise." On the contrary, the facts set out above show that all of the appellees not only paid in their money but they took further interest in the establishment of the business and in the conduct thereof. They selected directors; they all knew of the articles of agreement and knew that they were signed by the three directors for the appellees. They attended various meetings, and they ascertained that the business had not been incorporated as they contemplated. They consulted with Kennedy and advised with him as to the buying out of another firm (Bedwell & Hughes) at Center Point, Arkansas. They, through their directors, advised with Kennedy as to the employment of a certain clerk in the store, and finally, after they ascertained that the business was not prosperous, they sold their interest to Kennedy. An analysis and comparison of the facts of this record with the facts in *Rainwater* v. *Childress, supra,* will discover that, while the appellees were not as active in the establishment and conduct of the business in this case as were Rainwater, Childress and Simpson in that case, nevertheless the difference is only in degree and not in principle. The relation of the appellees to the company in the present case, in principle, was like that of Rainwater, Childress and Simpson to the canning factory in that case. That case is certainly authority for the doctrine that where parties associate, intending to form a corporation, and join hands and capital in the conduct of the business under a name assumed by them, but without attempting to incorporate, they are liable as partners to third parties for the debts incurred. We conclude, therefore, that the case of *Rainwater* v. *Childress, supra,* is authority for holding the appellees liable in the present case. Learned counsel for the appellees quote and rely upon the doctrine announced by Judge STORY in sec. 49 of his work on Partnership, as follows: "In short, the true rule, *ex aequo et bono,* would seem to

be, that the intention and agreement of the parties themselves should govern in all cases. If they intend to form a partnership in the capital stock, or in the profits, or in both, then that same rule should apply in favor of third persons, even if the agreement was unknown to them, and, on the other hand, if no such partnership was intended between the parties, then there should be none as to third parties, unless the parties held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

We recognize that the above is the rule in many jurisdictions. See cases cited in appellees' brief. But our court has taken a definite stand contrary to the above doctrine as to the stockholders in a *de facto* corporation and holds that such stockholders are liable as partners. *Morse* v. *Burkhart Mfg. Co.,* and cases there cited. If stockholders in a *de facto* corporation are liable as partners, then it occurs to us, *a fortiori,* that the stockholders in a joint stock company also would be liable as partners to third parties for the debts incurred by such company. Such unquestionably is the effect of our own decisions. *Rainwater* v. *Childress, supra;* see also, *Pierce* v. *Scott,* 37 Ark. 308. These are supported by able adjudications of other jurisdictions as shown by the cases already cited.

One of the most illuminating of these cases is that of *Carter* v. *McClure, supra.* It is unnecessary to pursue the subject further or to discuss the rulings of the trial court upon the several declarations of law. These rulings were not in harmony with the law as above announced. The judgment is therefore reversed. The amount of appellant's account is not challenged, and, inasmuch as the cause seems to have been fully developed on the facts, judgment will be entered here in favor of the appellant against the appellees for the amount claimed.

HART, J., dissenting.

FARR v. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

Opinion delivered July 10, 1922.

1. RAILROADS—PROCESS NOT CHANGED BY FEDERAL CONTROL.—The Director General of Railroads, upon being served with process as agent in control of a connecting carrier doing business in Arkansas, is not in court as representative of the delivering carrier, a Texas corporation bearing the same name; the provisions of general orders Nos. 18, 18a, and 50, issued under the Federal Control Act (U. S. Comp. Stat. Supp. §§ 3115¾-3115¾p) indicating that process must be served upon the Director General in the same way that service had been made against the corporation which he represents.
2. CARRIERS—TIME TO SUE—LIMITATION IN BILL OF LADING.—In an action by a shipper against a connecting carrier for damages from delay and neglect as to a shipment for which the shipper received from the initial carrier a bill of lading providing that, "except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness, or negligence, as condition precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after reasonable time for delivery has elapsed, and suit for loss, damage or delay shall be instituted within two years and a day after a reasonable time for delivery has elapsed, *held* that suit must be brought within two years and a day, as the exception relates only to the written notice of the claim.

Appeal from Columbia Circuit Court; *C. W. Smith*, Judge; affirmed.

Joe Joiner, for appellant.

1. Plaintiff's right to sue in the county of his residence was never challenged by any special plea. Instruction No. 3, therefore, to the effect that if the damage occurred either on the line of the St. Louis Southwestern Railway Company or the St. Louis Southwestern Railway Company of Texas, plaintiff would be entitled to judgment against the Federal agent, was clearly within the provisions of general order No. 18, and should have been given. *Alabama & V. Ry. Co.* v. *Journey*, 42 Sup. Ct. Reporter, p. 6.

2. The limitation in the bill of lading issued by defendant Louisiana & Northwestern Railroad, to the ef-

fect that in certain cases suit must be brought within two years and one day after the loss or damage, does not apply. This provision, having been written by the defendant, will be construed most strongly against it. The provision does not stipulate that suit must be brought for loss, damage or delay within two years and one day against each carrier or any one carrier of the shipment, such as the initial carrier. When suit was brought on November 4, 1919, and service was had on the Director General on December 11, 1919, a suit was instituted for the damage within the meaning of the bill of lading. The regular three year statute applies to the others. The statute will not run while a suit is pending against any one of the defendants to a common cause of action. 67 Ark. 340; 85 *Id.* 144; 49 *Id.* 248; 223 S. W. (Tex.) 340; *Id.* 192; 218 S. W. (Tex.) 5.

If there was loss or damage in this case, it was in transit. Therefore it falls within the exception in the bill of lading. At any rate, it was a jury question, and the court erred in taking it from the jury by its instruction. 53 Ark. 381.

3. The plaintiff should have had judgment against the receiver. He did not answer, did not plead the limitation in the bill of lading. The receiving carrier is liable for loss or damages to goods or property when caused by negligence anywhere in transit. C. & M. Digest, § 924; 188 S. W. 1177.

Daniel Upthegrove, J. R. Turney and *Gaughan & Sifford,* for the Director General.

Appellant has confused the issue, which is, in fact, not a question of venue, but a question of jurisdiction. Under the Federal Control Act, and general order No. 50, in order to secure service of process on the Director General operating the St. Louis Southewestern Railroad of Texas, it would be necessary to serve such process as would have been good service on the Texas company under existing laws. Sec. 10 of Federal Control Act. Service in this case on the agent of the St. Louis

Southwestern Railway, at Waldo, in Columbia County, an agent in no way connected with the St. Louis Southwestern Railway Company of Texas, was not valid service on the Texas Company nor on the Director General operating the same. The trial court was therefore right in restricting plaintiff's right of recovery to damages arising between McNeil and Texarkana on the line of the St. Louis Southwestern Railway Company.

Henry Stevens, for appellees, La. & N. W. R. R. and the receiver.

1. Under the pleadings and the evidence, if plaintiff relied on the contract shown in the bill of lading for the prompt delivery of the car of potatoes to Dallas, it would devolve on him to show the failure of delivery by the Louisiana & Northwestern Railroad Company and the damages sustained by such failure. 44 Ark. 439; 52 *Id.* 246; 74 *Id.* 606; Encyc. Ev. pp. 6, 7. He would have to show also that the failure of delivery and the damage complained of was not the result of any interference on his own part. 80 Ark. 288; 6 Cyc. 379, 468.

2. The limitation in the bill of lading as to time of bringing suits is valid. 83 Ark. 502; 120 *Id.* 43.

A suit is begun when complaint is filed and summons issued thereon. C. & M. Dig., § 1049; 138 Ark. 10. Summons was issued and served on the Louisiana & Northwest Railroad Company on August 2, 1921. The damage complained of is alleged to have occurred in November, 1918.

There is nothing in the action against this defendant which is common to the other defendants. 6 Cyc. 487. The amendment filed in August, 1921, making the Louisiana & Northwest Railroad Company, and issuing summons thereon, fixes the date when suit was begun against it. 17 Ark. 608.

There is no merit in the contention that judgment should have been rendered against the receiver. A judgment against a receiver cannot be effectual unless it is also against the party for whom he was receiver. 17 Encyc. Pl. & Pr. 80; 27 S. W. 109.

HUMPHREYS, J. Appellant instituted suit against the St. Louis Southwestern Railway Company, and Walker D. Hines, Director General, in the Columbia Circuit Court, to recover damages in the sum of $698.50 to a car of sweet potatoes, shipped by him from Magnolia, Arkansas, to Dallas, Texas, alleged to have been occasioned through the delay and neglect of the defendants. It was alleged in the complaint that appellant delivered to the Louisiana & Northwestern Ry. Co. at Magnolia, Ark., for shipment to Dallas, Texas, by way of defendant's line of railroad and that of the St. Louis Southwestern Ry. Co. of Texas, 450 bushels of potatoes in baskets, with the right of stop-over at Nevada, Texas, receiving therefor from the initial carrier a bill of lading or shipment contract which contained the following clause: "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, as condition precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property, or, in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed; and suit for loss, damage or delay shall be instituted within two years and one day after delivery of the property, or, in case of a failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." Summons was issued on November 4, 1919, and served December 11, 1919, on the agent of the Director General at Waldo, Arkansas, and issued and served on the St. Louis Southwestern Ry. Co. on August 2, 1921, by delivering a copy to its agent at Waldo, Arkansas. Answers were filed by both defendants denying the material allegations of the complaint. At the time of the shipment the initial carrier, which was not under government control, was in the hands of E. R. Bernstein as receiver. The initial carrier and its receiver were made parties to the suit, and both filed a motion to make the complaint more speci-

fic, and said carrier a separate answer, denying the material allegations of the complaint, on February 25, 1921. It seems that later, on August 2, 1921, a summons was issued and served upon them by delivering a copy thereof to their agent at Magnolia, Arkansas. The receiver filed no answer. The cause was submitted upon the pleadings and testimony introduced by the respective parties, and the instructions of the court, which resulted in a verdict and judgment in favor of all the appellees, from which is this appeal.

The facts material to a determination of the issues involved in this appeal, as reflected by the record, are as follows: The initial carrier was never under the supervision of the Director General of Railroads. The connecting carrier was a Missouri corporation, doing business in Arkansas, and the delivering carrier a Texas corporation, doing business in that State, being separate and distinct corporations, but both, at the time, being controlled and operated by the Director General of Railroads.

The shipment of potatoes was delivered to the initial carrier, in good condition, on November 1, 1918, at Magnolia, Arkansas, and left there at 7 p. m. The car was received by the St. Louis & Southwestern Railroad Company, the connecting carrier, at McNeil, Ark., at 9:30 p. m. on the same date. The connecting carrier delivered the car to the St. Louis & Southwestern Rd. Co. at Texarkana, and it arrived at Nevada, Texas, its stopover place, on the 3rd or 4th of November, 1918. Appellant examined the car there, and after considerable effort, sold 20 bushels of potatoes, but was unable to sell more on account of the per cent. of rotten ones. The car did not reach Dallas, its destination, until November 11th, at which time the potatoes had greatly deteriorated. The evidence tended to show an unreasonable delay in delivery; that on this account the potatoes were damaged, and that the damage occurred in transit. There is no proof that the potatoes were damaged while in the

possession of the initial or connecting carrier. The first deterioration in them was discovered when the car was opened at Nevada, Texas. They were then in possession of the delivering carrier.

Proceeding upon the theory that the Director General of Railroads was in court, under the summons issued and served upon his agent at Waldo, Arkansas, only as the representative of the St. Louis Southwestern Railroad Company, and not the representative, by virtue of the service upon him, of the St. Louis Southwestern Railroad Company of Texas, the trial court instructed the jury that, before they could find against the Director General they must find that the damage occurred between McNeil and Texarkana, on the line of the St. Louis Southwestern Rd. Co. We think the interpretation placed upon the Federal Control Act by the trial court, as reflected by the instruction, is correct. While under the act, general orders Nos. 18 and 18a were made directing all suits against the Director General to be brought in the county or district where the plaintiff resides, or county or district where the cause of action arose, such orders were not intended to change the manner or mode for the service of process in the several States. We think the provision relating to service of process under general order No. 50, dated October 28, 1918, indicates very clearly that the service of process in actions, suits, and proceedings against the Director General of Railroads shall be made in the same way as formerly made against the transportation entity he represents. In other words, to bring the Director General of a particular transportation corporation into court in this State, the same process must be resorted to necessary to bring the corporation itself into court. Under the process in the instant case the Director General of Railroads is in court only in his capacity as representative of the St. Louis Southwestern Railroad Company and not as the representative of the Texas corporation bearing the same name.

Proceeding on the theory that the bill of lading, made the basis of the suit, exempted the initial carrier and its receiver from liability unless suit was brought within two years and a day, the court instructed the jury to that effect. Appellant contends that on account of this instruction the judgment should be reversed. The correctness of this instruction must depend on the proper interpretation of the provision in the bill of lading heretofore set out. After a careful reading and consideration of the clause, we have concluded that the exceptions as to damage to property in transit applies only to the notice in writing of the claim required to be given to the originating or delivering carrier, and does not relate to the time in which suit must be commenced. The language, as well as the punctuation, indicates this. The exception is directly connected with the notice but is separated from the time in which to bring suit by a semicolon. Again, there is much reason in making an exception where only a short time is given to the injured party to notify the carrier, but no good reason why an exception should be made where ample time is given to commence a suit. The undisputed proof shows that suit was not commenced against the initial carrier and its receiver for more than two years and a day after delivery was made. The construction placed upon the clause in the bill of lading was correct. There was no joint liability between the initial and connecting carrier, so the pendency of the suit against the Director General and the connecting carrier does not prevent the application of the limitation in the bill of lading.

No error appearing, the judgment is affirmed.

CLARK v. STATE.

Opinion delivered September 25, 1922.

1. CRIMINAL LAW—SEPARATION OF JURORS—NEW TRIAL.—Where jurors violate the court's order that they be kept together during the progress of the trial, and separate and expose themselves to improper influences, a new trial should be granted.
2. JURY—MEMBERSHIP IN ORGANIZATION.—A showing that a juror was a member of the Ku Klux Klan which was opposed by the Miners' Union, to which defendant belonged, would not disqualify such juror, unless it was shown that the particular juror had actual bias or was directly connected with the matter under investigation in a way from which bias or prejudice would be implied.
3. JURY—EXAMINATION FOR PURPOSE OF PEREMPTORY CHALLENGE.—For the purpose of determining whether to exercise peremptory challenge, a party is entitled to the same latitude in examining a juror as when seeking information relative to challenge for cause; but such examination must be conducted in good faith and subject to the discretion of the court.
4. JURY—EXAMINATION—ABUSE OF DISCRETION.—Where defendant's counsel informed the court that the Miners' Union, to which defendant belonged, had by resolution condemned the Ku Klux Klan, it was an abuse of discretion to refuse to permit him to ask a juror whether he belonged to the latter society, for the purpose of determining whether he would exercise the right of peremptory challenge; the inquiry appearing to be made in good faith.

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

Webb Covington, for appellant.

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

McCULLOCH, C. J. This is an appeal from a conviction of the statutory crime of nightriding. Crawford & Moses' Digest, sec. 2795.

Appellant was jointly indicted with certain other persons upon the charge that he and the other persons named confederated and banded themselves together for the unlawful purpose of damaging and destroying the mining property of the Werner-Dunlap Coal Company. There was a severance, and on the trial of appellant there was, as before stated, a judgment of conviction, from which an appeal has been prosecuted.

At the first adjournment of the court after the commencement of the trial there was an order entered directing that the jury be kept together in charge of proper officers, and among other grounds assigned in appellant's motion for a new trial there are several allegations in regard to the separation of the jury, in violation of the court's order. Numerous affidavits were filed in support of the motion, showing that several of the jurors, during the recess of the court, separated themselves from their fellow jurors, and mingled with bystanders and had an opportunity for exposure to improper influences.

The State made no effort to meet this issue. The Attorney General frankly concedes that in this state of the record a reversal of the judgment must necessarily follow. In other words, there is a confession of error on this ground, and under the settled rules announced by this court the confession is well founded.

Where the court orders the jurors kept together during the progress of the trial, and a showing is made in the motion for a new trial, supported by affidavits, that this order was violated and that the jurors separated themselves and exposed themselves to improper influences, the only way to correct the error is to grant a new trial. *Maclin* v. *State*, 44 Ark. 115; *Reeves* v. *State*, 84 Ark. 569; *Ferguson* v. *State*, 95 Ark. 428.

There are numerous other grounds for reversal urged by counsel for appellant, among others that the court erred in refusing to permit the counsel to interrogate jurors as to certain matters alleged to affect their qualifications as jurors, and it is insisted that we should pass upon these assignments in view of the fact that the same questions are likely to arise in the next trial of the case. Counsel have satisfied us that these questions will probably arise, and for that reason we deem it not improper to pass upon them now.

It is shown that appellant was a coal miner by occupation, and that during the examination of one of the jurors it was brought to the attention of the court by

statement of appellant's counsel that appellant was a member of the miners' union, a national association of coal miners. The juror was asked by appellant's counsel whether or not he was a member of any organization or association that was interested in the prosecution of appellant, and the juror replied that he did not belong to any organization in which "this matter had been discussed at all." The juror was then asked if he was a member of an organization known as the Ku Klux Klan, and over the objection of the State's counsel the court refused to permit this question to be propounded. Counsel for appellant then stated to the court, as his reason for eliciting information from the juror as to membership in said organization, that the miners' union had passed a resolution condemning the organization known as the Ku Klux Klan, and that he wished to test out the qualifications of proposed jurors by ascertaining whether or not they were members of the klan and had any bias or prejudice against the members of the miners' union.

The court overruled the contention of appellant's counsel and refused to permit the question to be answered, on the ground that the inquiry was of too personal a nature and had a tendency merely to probe into the private affairs of the proposed juror. In other words, it was held that the question was impertinent. An exception was duly saved to the ruling of the court, and the same thing happened with reference to the examination of numerous other jurors.

It is argued, in the first place, that the showing that there was antagonism between the miners' union and the Ku Klux Klan, by reason of the adoption of resolutions by the former condemning the latter, constituted bias upon the part of members of the organization which rendered them disqualified as jurors in a trial in which members of the other organization were interested.

We are of the opinion that there were not sufficient circumstances shown to render the jurors disqualified by reason of personal bias. There was nothing to show that the particular jurors were under the influence of actual

bias. It was merely sought to show that they were members of the organization known as the Ku Klux Klan.

The rule seems to be settled that mere membership in committees, or in societies, or other organizations for the suppression of crime, or the achievement of any other particular purposes, does not operate as a disqualification of a juror unless it is shown that the particular individual has actual bias or is directly connected with the matter under investigation in a way from which bias or prejudice will be implied. 16 R. C. L. p. 277; 17 Standard Ency. of Proc., p. 298; *Conners* v. *United States,* 158 U. S. 408; *Dodd* v. *State* (Tex. Crim.) 82 S. W. 510; *Boyle* v. *The People,* 4 Col. 176; *Vanskike* v. *Potter,* 53 Neb. 28.

It does not follow, however, from the fact that the information to be elicited might not constitute disqualifying bias that appellant was not entitled to propound the inquiry. On the contrary, we think that he was entitled to make the inquiry for the purpose of determining in what he should exercise a peremptory challenge allowed by the statute. *Lavin* v. *People,* 69 Ill. 303; *Watson* v. *Whitney,* 23 Cal. 375; *State* v. *Mann,* 83 Mo. 589; 17 Standard Ency. of Proc. p. 300.

The right of peremptory challenge is just as important and valuable to an accused person as the right to challenge for cause, and he is entitled to the same latitude in the examination of a proposed juror for either purpose. This examination must, however, be conducted in good faith, and is subject to the discretion of the trial judge. *Williams* v. *Cantwell,* 114 Ark. 542; *Cooper* v. *Kelly,* 131 Ark. 6.

This court will not reverse a judgment on account of the ruling of the court in the exercise of discretion unless abuse of such discretion is shown. If there were merely involved an inquiry by the accused as to membership in a particular organization, this alone would not show that the inquiry was material or that prejudice resulted, but in the present case appellant's counsel informed the court of the fact that there were certain

possible antagonisms between the membership of the organization to which appellant belonged and the one to which the proposed jurors belonged, and he was entitled to ascertain the fact whether or not the jurors were members of the other organization, so that he could determine in what instances he would exercise his right of peremptory challenge. The question was not, under those circumstances, impertinent, and it was not a useless probe into the personal affairs of the jurors. It brings no reproach upon a juror to inquire concerning membership in any organization, and where it is shown that there are reasons why membership in an organization might influence the parties to the litigation in the exercise of peremptory challenges, the court ought to permit the inquiry to be made if it appears to be made in good faith.

These observations concerning the law on this subject and the proper practice to be followed by the trial courts are, as before stated, made in view of the next trial and for the guidance of the court if the same questions again arise.

The confession of error of the Attorney General is sustained, the judgment is reversed, and the cause remanded for a new trial.

CLENDENNING v. STATE.

Opinion delivered September 25, 1922.

1. CRIMINAL LAW—FAILURE OF RECORD TO SHOW THAT JURY WAS SWORN.—Where the record in a felony case fails to show that the jury was sworn as required by statute, a conviction will be reversed.
2. CRIMINAL LAW—FAILURE TO PROVE VENUE.—Where there was no evidence tending to show where the alleged offense was committed, a conviction will be set aside.
3. CRIMINAL LAW—FAILURE TO PROVE WHEN OFFENSE WAS COMMITTED.—Where the State failed to prove that the defendant made mash and possessed an unregistered still subsequent to the enactment of Acts 1921, p. 372, convictions for such offenses will be reversed.

4. CRIMINAL LAW—JUDICIAL NOTICE.—The courts will not take judicial notice of the location of property owned by a private corporation.

Appeal from Mississippi Circuit Court, Osceola District; *R. E. L. Johnson,* Judge; reversed.

D. F. Taylor and *Prewitt Semmes,* for appellant.

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

McCULLOCH, C. J. Two separate indictments against appellant were returned by the grand jury for the Osceola District of Mississippi County, one charging the crime of making mash, and the other the crime of keeping an unregistered still. The two cases were consolidated by consent and tried together, and the result was appellant's conviction under both charges.

The Attorney General confesses error on three grounds; first, that the record fails to show that the trial jury was sworn as required by statute; second, that there was no proof tending to establish the venue; and third, that there was no proof tending to show the commission of either of the offenses after the enactment of the statute creating the offenses, which was approved March 23, 1921, Acts 1921, p. 373.

We are of the opinion that the confession of error is well founded and that the judgment must be reversed on each of the grounds stated above. A careful search of the record discloses nothing which shows that the trial jury was sworn, nor is there any evidence tending to show where the alleged offenses were committed. Witnesses testified that they found the mash and still at the home of appellant, on the property of the Three States Lumber Company, but the record does not show whether that property was in Mississippi County, or elsewhere. The trial court could not take judicial knowledge of the location of individual property, or property owned by a private corporation.

The State also failed to prove the dates of the alleged offenses, and failed to prove that the time appel-

lant made the mash and had the still in his possession was subsequent to the date of the enactment of the statute creating those offenses.

It is unnecessary to discuss other assignments of error, for upon the grounds stated above the judgment will be reversed and the cause remanded for a new trial.

OUTLER v. STATE.

Opinion delivered September 25, 1922.

1. CRIMINAL LAW—APPEALS IN CAPITAL CASES.—Crawford & Moses' Dig., § 3404, requiring appeals to be allowed by a judge of the Supreme Court in convictions in capital cases, applies only where accused is sentenced to be electrocuted, and in other cases an appeal may be granted by the trial court under Crawford & Moses' Dig., § 3396.
2. HOMICIDE—EVIDENCE AS TO CAUSE OF DEATH.— In the absence of other cause of death, which occurred a few hours after defendant struck deceased a violent blow across the head with a gun, knocking him down, the jury were warranted in making the inference, without direct proof on the subject, that death resulted from the blow.
3. HOMICIDE—EVIDENCE OF MALICE AND DELIBERATION.—Evidence of malice and deliberation *held* sufficient for conviction of murder in the first degree.
4. CRIMINAL LAW—IMPROPER EVIDENCE—EFFECT OF WITHDRAWAL.—The prejudicial effect of admitting statements by defendant's brother, made in defendant's absence, was cured by the court's subsequent withdrawal thereof from the jury.
5. CRIMINAL LAW—CONDUCT OF DEFENDANT AND BROTHER.—Joint conduct of defendant and his brother immediately after the fatal blow was admissible as part of *res gestae*.
6. HOMICIDE—HARMLESS ERROR.—Any error in refusing an instruction on manslaughter was harmless where the jury, on correct instructions as to the degrees of murder, found defendant guilty of murder in the first degree.
7. CRIMINAL LAW—COERCING JURY.—No improper argument or pressure was brought to bear on the jury to induce a verdict where, after they had returned and announced their inability to agree, the court merely declared that it would hold them together as long

as there was any possibility of a verdict, and that it was their duty, without yielding any positive conviction, to exert every reasonable effort to reach a verdict.

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

C. H. Herndon and *Earl Witt,* for appellant.

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

McCULLOCH, C. J. Appellant, Buck Outler, was convicted of the crime of murder in the first degree, alleged to have been committed on December 24, 1921, in Montgomery County, by striking with a gun and killing Will Blackburn. The jury fixed appellant's punishment at imprisonment in the penitentiary for life, and, upon the overruling of appellant's motion for a new trial, the court granted an appeal to this court.

It is first contended by the Attorney General that the case is not properly here for review because the appeal was granted by the trial court and not by this court or by one of the judges of this court. The Attorney General relies upon the statute (Crawford & Moses' Digest, § 3404) which provides that "in cases of conviction of a capital offense" an appeal must be allowed by a judge of the Supreme Court. We are of the opinion that the words "capital offense" refers to the degree of offense named in the judgment of conviction, and not to the original charge in the indictment. The point is, we think, ruled by the decision of this court in *Walker* v. *State,* 137 Ark. 402, where we held that, upon conviction of murder in the first degree, with the punishment fixed at life imprisonment, the accused was entitled to bail on appeal. It follows that, since the statute does not require the appeal to be granted by this court or one of the judges, the method of appeal falls within another statute, which authorizes the trial court to grant an appeal in a felony case. Crawford & Moses' Digest, sec. 3396.

The killing occurred, according to the evidence, on the night of December 24, 1921, at a certain schoolhouse

in Montgomery County, where a Christmas tree celebration was being held by the people of the neighborhood. Appellant and his brother Leroy were present, and were intoxicated. Their father, Joe Outler, was also present and was acting as a special deputy sheriff for the purpose of preserving order on the occasion, and he deputized deceased, Blackburn, to assist in preserving order.

Jim Taylor and Edgar Taylor, two young men of the neighborhood, were also present, and an altercation arose between appellant and Jim Taylor. They came to blows, but were separated by the elder Outler, who placed his son, appellant, in charge of Blackburn. After holding appellant in custody for a short time outside of the building, Blackburn decided to release appellant, and did so, telling him to go back in the house and behave himself. Appellant went home at once and armed himself with a shotgun and returned to the schoolhouse, where the celebration was still in progress. He met Edgar Taylor at the door, and after a word or two passed between them—not of an unfriendly nature—appellant struck Taylor with the gun, which was accidentally discharged.

Blackburn was standing on the inside of the door when the shot was fired, and he picked up a lantern from a shelf and started out of the door. As he reached the bottom of the steps he spoke to appellant, who was in the act of striking Edgar Taylor, saying, "Don't do that," whereupon appellant turned and advanced upon Blackburn several steps, and raising himself up, as witnesses say, upon his toes, struck Blackburn a violent blow across the head with the gun. He knocked Blackburn down, and some of the witnesses say he struck him the second time.

About that time appellant and his brother Leroy rushed into the room and into the presence of the excited crowd, cursing and commanding the people to stand back, and, among other things, they said, referring to deceased, "He come out there and drawed a damn little short gun on me like this." They also spoke of Blackburn having been deputized, exclaiming, "If any damn son of a bitch

wants to be deputized, come on." These profane and vulgar expressions were made by Leroy, however, and repeated by appellant.

Blackburn walked into the room with blood streaming down from his head and face, and was engaged in wiping his face with a cloth. The testimony tends to show that it was not thought, either by Blackburn himself or those present, that Blackburn was seriously hurt, at least there is no testimony directly on this subject, some of the witnesses merely stating that Blackburn was wiping blood from his face and seemed to be conscious. None of the witnesses detailed the circumstances under which Blackburn left the house, or what occurred after that time, but it was proved that Blackburn went home and died early the next morning.

It is earnestly contended that the evidence is insufficient to warrant the conviction, for the reason that it was not proved that death resulted from the blow delivered by appellant. There is nothing, however, in the record to show that there was any other cause for the death which resulted so soon after the infliction of the blow, and the jury were authorized, we think, in drawing the inference, even in the absence of direct proof on the subject, that death resulted from the blow.

Again, it is insisted that the evidence is insufficient to justify conviction of the highest degree of homicide for the reason that the proof shows that deceased and appellant were on friendly terms up to the time the blow was struck, and that there was no proof to show either malice or deliberation. The evidence shows clearly, however, that appellant assaulted Blackburn without any provocation whatever, and that the assault was of such a violent nature that the jury were warranted in the conclusion that it was made with the intent to take the life of deceased, and that it was done after such deliberation as constituted murder in the first degree.

Appellant testified that Edgar Taylor was the aggressor in the difficulty in which he was engaged at the

time Blackburn came out of the door, and that he thought Blackburn was one of the Taylor boys coming out to join in the assault. But other witnesses testified that Blackburn came out with a lantern in his hand, and that he called out to appellant "not to do that," meaning not to strike Taylor again. These circumstances warranted the conclusion by the jury that appellant knew it was Blackburn, and that he deliberately turned on him with a murderous intent.

The court permitted the State not only to prove the conduct of appellant and his brother Leroy immediately after the blow was delivered as those parties returned into the schoolhouse, but also to prove statements made by Leroy in the absence of appellant. The court subsequently withdrew from the jury the statements made by Leroy in the absence of appellant, and this, we think, cured any prejudicial effect that might have resulted from the original ruling of the court in allowing the testimony to be heard by the jury. It was competent for the State to show the joint conduct and declarations of appellant and his brother immediately after the blow was struck. The evidence showed that the men walked into the room immediately after the blow was struck, and that they were cursing and declaring that deceased had drawn a gun. These declarations were competent as a necessary part of the transaction under investigation. *Childs* v. *State,* 98 Ark. 430.

The court refused to grant appellant's request for an instruction on manslaughter, and this ruling is assigned as error. Conceding that there was evidence warranting the submission of the issue as to that degree of homicide, we are of the opinion that there was no prejudice in the ruling of the court, for the reason that the jury, upon instructions correctly submitting the degrees of murder, found appellant guilty of murder in the first degree, which implies a finding that the killing was done with malice and after deliberation. *Jones* v. *State,* 102 Ark. 195.

The court gave correct instructions defining the difference between the two degrees of murder and stating the elements of those two crimes. Among other instructions, the court gave the following:

"You will first determine whether or not the evidence proves that the defendant is guilty of murder in the first degree. If, after fully and fairly considering all the evidence in the case, you are convinced that the defendant killed Will Blackburn with malice aforethought and after premeditation and deliberation, it would be your duty to find him guilty of murder in the first degree. But if, after such consideration of the evidence, you entertain a reasonable doubt as to whether deliberation and premeditation have been proved, you should not find him guilty of murder in the first degree, but you should then consider whether or not he is guilty of murder in the second degree. If, after fully and fairly considering the evidence, you are convinced that the defendant killed the deceased without considerable provocation, or on account of a desire to harm him or do him evil, or to avenge some real or fancied injury, then you should find the defendant guilty of murder in the second degree; but if you have a reasonable doubt as to whether or not the defendant killed the deceased with malice aforethought, express or implied, you should find him not guilty."

It will be observed that the court told the jury in this instruction that if they entertained a reasonable doubt "as to whether deliberation and premeditation have been proven, you should not find him guilty of murder in the first degree," and the jury returned a verdict of murder in the first degree, which showed that they found beyond a reasonable doubt that the killing was done with deliberation and premeditation.

Again, the instruction told the jury that if they had any doubt as to whether or not appellant killed the deceased with malice aforethought they should find him not guilty. This was more favorable than appellant was entitled to, for, even though it was found that the killing

was done without malice, it would have constituted manslaughter, unless the killing was justifiable as an act of self-defense. At any rate, the verdict of the jury under this instruction necessarily implied a finding that the killing was not done under circumstances which would reduce the degree of the offense to manslaughter, and no prejudice resulted from the failure of the court to instruct on the subject of manslaughter.

Finally, it is contended that the court erred in its final charge to the jury after the jury had returned to the courtroom and announced the inability of the jurors to agree upon a verdict. When the whole statement of the trial judge is considered together, it is clear that no improper argument or pressure was brought to bear upon the jury to induce a verdict. The court declared, in substance, that it would hold the jury together as long as there was any possibility of a verdict, and that it was the duty of the jurors, without yielding any positive convictions, to exert every reasonable effort to reach a verdict.

We are of the opinion that there was no prejudicial error in the record, and that the evidence is sufficient to support the verdict.

The judgment is therefore affirmed.

BROWN v. STATE.

Opinion delivered September 25, 1922.

1. INDICTMENT AND INFORMATION—STATUTORY OFFENSE.—An indictment for a statutory offense, framed in the language of the statute, is ordinarily sufficient, unless other words are necessary to put the accused on notice of the charge involved.
2. INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to warrant a conviction under Acts 1921, No. 324, declaring it a crime to make mash for use in the distillation of spirits or for the manufacture of beer or wine.
3. INTOXICATING LIQUORS—EVIDENCE.—In a prosecution for the illegal manufacture of mash for the making of intoxicating liquors, testimony of a search of defendant's home, made three months

after finding of mash in a nearby shanty, *held* admissible over the objection that the search was too remote in point of time from the finding of the mash.

4. CRIMINAL LAW—EFFECT OF ALLOWANCE OF APPEAL.—The allowance of an appeal in a criminal case suspends the judgment, and the incarceration of the defendant in the State Penitentiary during the pendency of the appeal is improper.

Appeal from Greene Circuit Court; *R. E. L. Johnson,* Judge; affirmed.

Jeff Bratton, for appellant.

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

McCULLOCH, C. J. This is an appeal from the conviction of appellant of the statutory crime of making mash for distillation of spirits or for the manufacture of beer or wine. Acts 1921, p. 324.

There was a demurrer to the indictment on the ground that it failed to state a public offense, in that it was not alleged that the mash was made for use in the distillation of spirits or the manufacture of wine or beer. The charge was framed in the precise language of the statute itself, which is ordinarily sufficient unless other words are necessary to put the accused on notice of the charge involved in the indictment.

It is also contended, as grounds for reversal, that the evidence is not sufficient to support the judgment of conviction, but we are of the opinion that the evidence is abundant. Appellant resided in Greene County, and a certain quantity of mash fit for use in the distillation of spirits was found in a small shanty, or house, about two hundred yards distant from appellant's home. The shanty was near a levee and adjoined appellant's land, but, as a matter of fact, was on land said to be owned by the government, the markers indicating the line of the government's land being near the shanty itself. There was found in this shanty six barrels of mash in process of fermentation, and it was still warm from the process when appellant and two other persons were seen to come

from the shanty, and the officers went in and examined it. They also found meal and sugar in large quantities.

Certain officers of the county received information that appellant was making mash for manufacturing intoxicating liquors, and they went to his place for the purpose of ascertaining the truth of the charge, and making arrests, if necessary. This was about the middle of September, 1921, and when they got to a place near appellant's home, having passed it in an effort to secrete themselves from view, they heard a sound emanating from appellant's kitchen like the blowing of a horn, or shell. They were secreted in the bushes at that time, and they saw appellant and a boy and a man come out of the shanty door and come along the path toward appellant's house. A few minutes later a woman living with appellant came from his home and walked on down the path, meeting them. The officers accosted the party, and subsequently examined the shanty and found, as before stated, the mash and other articles to be used in its preparation.

When appellant and his companions were seen emerging from the door of the shanty they trotted along the path at a rapid gait, and when they reached the officers appellant seemed to be hot and covered with perspiration, and had meal on his shoes and clothing. There was a plain path running from the shanty to appellant's house, and there was no other path leading from the shanty.

About three months later appellant's house was searched and bottles were found that smelled of whiskey, and also a stillworm was found.

There were other suspicious circumstances in connection with appellant and his conduct about this time, and we are of the opinion that the evidence warranted the finding that appellant had made the mash and was keeping it in possession for the purpose of distilling spirituous liquor.

It is also contended that the court erred in admitting testimony of the search of appellant's house three months after the finding of the mash. The search was made under a warrant, but the ground of the objection is that it was too remote in point of time from the finding of the mash.

We think that the finding of the apparatus for the distillation of spirits was competent evidence, and was of high probative force as tending to show that appellant was engaged in the unlawful manufacture and distillation of spirituous liquors, and tended to show that the mash found in the shanty near his home was kept by him for such purpose. There was no error, therefore, in permitting the State to introduce this testimony.

We think there was no error in any of the rulings of the court, and that the evidence was sufficient to support the verdict. It follows that the judgment is correct and must be affirmed, and it is so ordered.

At the time of the submission of this cause appellant presented to the court a petition for a writ of *habeas corpus* for the purpose of challenging the legality of appellant's incarceration in the State Penitentiary. The petition was based upon the theory that the allowance of an appeal to this court suspended the judgment, and that, even though appellant did not give an appeal bond, the appeal itself operated as a suspension of the judgment during the pendency of the appeal to this court.

We think that appellant is correct in the contention, and that while the appeal is pending here we have jurisdiction over the person of appellant for the purpose of releasing him from improper incarceration in the penitentiary. This is not the exercise of original jurisdiction, but is incident to the exercise of appellate jurisdiction.

It is true, as contended by counsel for appellant, that the appeal suspends the judgment, and as appellant was unable to give bond, he should remain in the custody of the jailer of Greene County until the case is determined here on appeal.

The affirmance of the judgment is now entered, but it will not become final, under the statute, for fifteen days, and during that time appellant has the right to insist that he be remanded to the custody of the jailer of Greene County, to remain there until the judgment of this court becomes final. An order will be entered here to that effect, and the keepers of the penitentiary will be directed to return appellant to the custody of the jailer of Greene County.

MILLINER v. STATE.

Opinion delivered September 25, 1922.

INTOXICATING LIQUORS—MAKING MASH FOR FEEDING CATTLE.—Where, under indictment for manufacturing alcoholic and intoxicating liquors, it was admitted that defendant had in his possession mash which contained alcohol but which he testified was intended only for feeding his stock, it was error to instruct the jury that if defendant made a liquor containing alcohol he would be guilty, as the defendant would not be guilty if the mash was intended solely for the purpose of feeding his stock.

Appeal from Sebastian Circuit court, Fort Smith District; *John Brizzolara,* Judge; reversed.

I. S. Simmons, for appellant.

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

WOOD, J. This is an appeal from a judgment of conviction upon an indictment which in good form charges that the appellant "unlawfully and feloniously did manufacture and unlawfully and feloniously was interested in the manufacture of ardent, vinous, malt, spirituous, fermented, alcoholic and intoxicating liquor."

The testimony for the State tended to prove that on or about the 15th day of January, 1922, officers searched the residence of the appellant in Sebastian County, Arkansas, Fort Smith District, under the authority of a search warrant. They found in his house forty or fifty gallons of mash, took a sample therefrom, which was

analyzed by the State chemist and found to contain 6.63 per cent. of alcohol by volume. One of the officers making the search testified that the appellant showed the witness the barrel containing the mash, and stated that he had made the chock to sell, but had sold none. He decided it was wrong to sell it and refused to sell any. Appellant raked off the top of the liquor with a cup and took a drink and asked the officers to sample it. The mash was well fermented and was ready for use. The officers had information that there was a still at the house of appellant, and they were looking for it. The liquor found was chock beer. Witness looked for something stronger than chock, but found nothing.

The appellant testified that he had a six months' old colt that would not eat dry food. He fed the stuff found in his house to the stock—fixed up this mash for a sick colt and other young stock and fed it to them once or twice a week—did not know it was wrong until the officers came with a search warrant to search for chock beer. He showed it to the officers. The preparation contained corn chops, sugar and water. Witness had on hand from war sugar some brown sugar which was not fit for use. It had worms in it. He put it in the mixture to make sweet mash for the colts. He had fed it to them many times before. Witness did not drink any of it and did not tell the officers that he had done so.

This testimony was corroborated by other witnesses. One of these witnesses testified "that that stuff smelled like corn bread with water over it"; that it was too thick to drink—had to dip it with a cup and it looked more like hominy. After the appellant was arrested the stuff was picked up and fed to the stock.

The court instructed the jury in part as follows:

"1. (a) If you find from the evidence beyond a reasonable doubt that the defendant, J. H. Milliner, in the Fort Smith District of Sebastian County, Arkansas, within three years next before finding of the indictment in this case, unlawfully and feloniously did

manufacture or unlawfully and feloniously was interested in the manufacture of ardent, vinous, malt, spirituous, fermented, alcoholic or intoxicating liquor, it is your duty to find the defendant guilty." And further,

"4. (a) If you find from the evidence beyond a reasonable doubt that the defendant made a liquor from chops, sugar and water, which contained alcohol, you will find the defendant guilty."

The appellant asked the court to instruct the jury as follows:

"1. You are instructed that if you find from the evidence in this case that the mash which the officers testified about in this case was made by defendant and was being used by him to feed his sick colt and was not being made and used by him as a beverage, then your verdict should be for the defendant."

The appellant was indicted and convicted of the crime of manufacturing alcoholic liquors contrary to the provisions of sections 6160 of Crawford & Moses' Digest. There was testimony on behalf of the State sufficient to sustain the verdict, and the court correctly declared the law applicable to the evidence adduced by the State in the above instruction "1 (a)." But the testimony adduced on behalf of the appellant tended to prove that the preparation or concoction which he manufactured was a mash, and although containing alcohol, was not manufactured by him to be used as a beverage, but only for the purpose of feeding his stock, and that same had not been sold by him, nor had he used same, or intended to use same as a beverage; but, on the contrary, that the preparation was manufactured and was being used by him solely for the purpose of feeding his stock. Therefore, the court erred in giving to the jury instruction 4-A. Such instruction, under the testimony, was calculated to confuse and mislead the jury.

Section 1 of act No. 324 of the Acts of 1921 (General Acts of 1921, p. 372) reads as follows: "Sec. 1.

No mash, wort or wash fit for distillation or for the manufacture of beer, wine, distilled spirits or other alcoholic liquor shall be made or fermented by any person other than a person duly authorized under the laws of the United States to manufacture sweet cider, vinegar, non-alcoholic beverages, or spirits for other than beverage purposes.''

Construing the above section, in *Logan* v. *State,* 150 Ark. 486-490, we said: ''But the words, 'fit for', must, of course be interpreted and defined as meaning 'intended for' the uses there prohibited, and not as meaning merely adapted to or capable of being used for such purposes.'' And further (p. 491): ''* * * * * the conclusion is reached that the legislative inhibition is against the making of a mash, wort or wash intended as preliminary processes in making distilled, alcoholic and fermented beverages. To give the statute the broad interpretation which would convert into a felony the making of a mash, wort or wash out of which a distilled, alcoholic or fermented liquor might be made, although such was not the purpose for which it had been made, would make the constitutionality of the act very doubtful.'' See also *Burns* v. *State, ante* p. 215; *Neal* v. *State, ante* p. 324.

If the appellant, as the evidence introduced in his behalf tended to prove, manufactured a mash intended solely for the purpose of feeding his stock and not to be used in making ''distilled, alcoholic and fermented beverages,'' then appellant would not be guilty of the crime charged agaist him in the indictment, and therefore, the instruction No. 4-A of the court, under the authority of *Logan* v. *State, supra,* was erroneous and prejudicial.

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

MARTIN v. ALLEN.

Opinion delivered July 10, 1922.

1. LANDLORD AND TENANT—CONTRACT CONSTRUED—LIEN.—Where a purchaser took possession of land under a verbal contract made in December, 1919, and afterward contracted in writing on June 22, 1920, (embodying the terms of the oral contract) that a failure to pay any installment of the purchase price should avoid the contract of sale and cause the relation of landlord and tenant should arise and relate back to January 1st of the year in which such default occurred, and a default occurred in 1920, the relation of landlord and tenant arose and related back to January 1st, and gave the landlord a lien on the tenant's crop raised on the premises superior to a mortgage on the crop executed by one to whom the tenant rented the premises.
2. APPEAL AND ERROR—RECORD SHOULD SHOW EXCLUDED TESTIMONY.—A cause will not be reversed for error in sustaining objection to a question addressed to a witness where appellant does not show in the record what the excluded testimony would have been.

Appeal from Columbia Circuit Court; *C. W. Smith,* Judge; affirmed.

P. C. Crumpler, John E. Harris and *Joe Joiner,* for appellants.

The relation of vendor and vendee and of landlord and tenant cannot exist at the same time. 92 Ark. 326. There was nothing to put the appellant on inquiry as to any relationship of landlord and tenant between Allen and Martin. Allen's contract, by which the relation of landlord and tenant was created on October 1, 1920, to date back to January 1st, was probably good as between the parties to the contract, but it did not affect the rights of Crumpler & Bustion, who had acted in good faith, and whose lien attached on February 13th, while Allen was holding Martin out to the world as his vendee. 60 Ark. 360; 31 *Id.* 131.

There was an actual delivery of part of the cotton in suit to Crumpler & Bustion, to be applied on account, before they knew of appellee's claim. 83 Ark. 118; 103 Ark. 95; 9 A. L. R. 326 and authorities cited; 71 Fla. 536;

150 Ky. 508, 150 S. W. 651; 66 Iowa 731, 24 N. W. 530; 81 Tex. 17; 16 S. W. 555.

Wade Kitchens, for appellee.

The agreement to sell was upon the express condition of payment of the purchase money at the time stated in the contract. Upon failure to perform that condition, the relation of landlord and tenant existed between the parties, which related back to the time of execution of the contract. 95 Ark. 34, 37; 48 Ark. 415.

Crumpler & Bustion took the mortgage without investigation as to who owned the land. It was their duty, at their own peril, to know who was the owner and the landlord. The landlord's lien is superior to that of a mortgage. 37 Ark. 403; 31 Ark. 557. They are chargeable with constructive notice of the tenancy. However they had actual notice. 69 Ark. 306. Appellee is entitled to recover his rent in accordance with the contract with Martin, without regard to any contract between the latter and the subtenant for rent. 103 Ark. 94.

Appellants did not buy the cotton from the subtenant. They did not claim, either in their answer or in their testimony, to be innocent purchasers. The fact is they were holding same for the subtenant for the purpose of selling later and applying the proceeds to the payment of the mortgage debt. The landlord's lien became a charge upon the crop raised on the land as soon as it came into existence. 95 Ark. 37; 25 *Id.* 417; 27 *Id.* 1.

SMITH, J. Appellee brought suit in a justice of the peace court to recover the value of 3,000 pounds of seed cotton as rent, and caused two bales of cotton to be attached in the hands of Bustion & Crumpler.

The testimony shows that in December, 1919, or January, 1920, appellee contracted to sell one Jim Martin a forty-acre tract of land. Martin was put in possession under this contract, and built a house and made other improvements. On June 22, 1920, appellee and Martin entered into a written contract concerning the sale of the

land, which was signed by both parties. This contract contained the following provisions, among others:

"But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and at the times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, time being of the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all rights and interests hereby created, or then existing, in favor of the said second party, his heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in the said first party, his successors or assigns (without any declaration of forfeiture or act of reentry, or without any other act of said first party to be performed, and without any right in the said second party of reclamation or compensation for moneys paid or improvements made), as absolutely, fully and perfectly as if this contract had never been made.

"And it is hereby further covenanted and agreed by and between the parties hereto, that, immediately upon the failure to pay any of the notes described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord and tenant shall arise between the parties hereto, for one year from January 1st immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of 3,000 pounds of seed cotton for occupying the premises from said January 1st to the time of default, such rent to be due and collectable immediately upon such default."

The language quoted appears to be substantially identical with that construed in the case of *Murphy* v. *Myar,* 95 Ark. 32, where this court held that, upon default being made in the payment of the consideration contracted for, the vendee became the tenant of the vendor and the tenancy related back to the date of the contract.

Default was made by Martin in the 1920 payment called for by his contract, whereupon the vendor, as landlord, sued for the rent there agreed upon and attached two bales of cotton grown upon the land that year.

It is insisted that the doctrine of the case of *Murphy* v. *Myar, supra,* does not apply here for the reason that the written contract from which we have quoted was dated June 22, 1920, whereas prior to that time Martin had entered upon the land, and had rented it to Alice Wilburn for one-third of the cotton and one-fourth of the corn to be grown thereon, and thereafter, to-wit: on February 3, 1920, Alice Wilburn executed a mortgage to Bustion & Crumpler on the crop to be grown by her in the year 1920 on said land, to secure the advances necessary to make said crop, pursuant to which contract advances were made by the mortgagees in the sum of $278.

Martin was called as a witness for himself and his codefendants, and testified that he bought the land in January and entered into possession under an oral agreement of purchase. He was asked: "Were the details of this contract contained in this agreement?" An objection to that question was sustained. The witness then testified that the contract was signed later, and that he was present when Alice Wilburn executed the mortgage on the crop, and he stated to the mortgagees at the time that he was to claim as rent only one-third of the corn and one-fourth of the cotton. The mortgagees tendered the value of one-third of the corn and one-fourth of the cotton; but the tender was refused. They testified that they had no knowledge of the terms of the contract between Martin and appellee, and supposed Martin was in possession of the land as owner.

For the reversal of the judgment it is insisted that the relationship of landlord and tenant did not exist between appellee and Martin at the time the mortgage was executed, and that if that relationship existed it was created by the written contract of June 22, 1920, and the relationship of landlord and tenant related back only to

that date, and that prior thereto the mortgage was given and recorded and the mortgage lien therefore became the superior lien.

This argument fails, however, to take account of the fact that June 22, 1920, is not the date of the contract under which Martin entered upon the land. The contract was not reduced to writing until that time, but it was made in January and before Martin entered upon the land. There is no showing that the written contract did not embody the terms of the oral agreement. Such testimony as there is on the subject is to the effect that the written contract embodied the terms of the oral agreement.

It would, of course, have been competent to have shown that the provisions set out above were not a part of the original contract, if such was the case; and, had that proof been made, the lien of the mortgage would have been superior to that of appellee as landlord, because it would first have been created. But, as has been said, there was no offer to make this showing. We do not know what Martin would have testified. This court does not reverse where an objection is sustained to a question unless it is shown what the answer of the witness would have been. Martin might have testified that the oral agreement did not contain the stipulation set out above, converting the contract into a lease upon failure to pay the purchase money; but we cannot assume that he would have done so in the absence of an offer to show what his testimony would have been had he been permitted to testify. *Battle* v. *Guttrey,* 137 Ark. 228.

The decision of the question stated is conclusive of the other questions raised on the appeal, and, as no error appears, the judgment is affirmed.

OASTLER v. PARKS.

Opinion delivered July 10, 1922.

1. HUSBAND AND WIFE—MORTGAGE—INDEBTEDNESS SECURED.—Where the undisputed evidence showed that certain notes of mortgagor's husband represented the indebtedness intended to be secured by her trust deed, although such notes did not correspond in date with the notes described in such deed, the contention that the indebtedness was not sufficiently identified because appellant did not execute her individual notes to cover same will not be sustained.
2. DEEDS—DELIVERY.—Where a wife signed and executed a trust deed to be delivered to grantee to secure him for paying her husband's indebtedness, and it was delivered to grantee by her husband, she is estopped to deny delivery.
3. MORTGAGES—CONSIDERATION.—Where a grantee, in consideration of the execution and delivery to him of a trust deed, paid a $750 debt owed by grantor's husband, there was a sufficient consideration for the execution of the deed.

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

Callaway & Callaway, for appellant.

The notes intended to be secured by the deed of trust were not the notes of B. R. Oastler. To entitle a party to reform a written instrument upon the ground of mistake it is essential that the mistake be mutual and common to both parties. 102 Ark. 334; 89 Ark. 309; 71 Ark. 614. There was no delivery of the deed; it cannot take effect without delivery. 77 Ark. 89; 113 Ark. 289. There was no consideration for the deed of trust. 34 Ark. 1; 35 Ark. 480; 45 Ark. 117; 70 Ark. 516; 107 Ark. 10. A mortgage (of the wife's property) given for a preexisting debt of the husband without a new consideration is unenforceable. 21 Cyc. 1486. A promise to perform an existing contract with a third person or the performance of it, does not constitute a valuable consideration. 13 C. J. 356. Where the consideration named in a deed is not the true consideration, and was inserted through fraud or mistake, such fact may be shown to defeat the conveyance. 125 Ark. 441. The

deed of trust was void for uncertainty. 30 Ark. 657; 35 Ark. 470; 30 Ark. 640. This being a voluntary conveyance the plaintiff had no right to have it reformed; a court of equity will not reform a voluntary conveyance. 80 Ark. 548; 15 Ark. 519; *Howard* v. *Howard,* 152 Ark. 387.

HUMPHREYS, J. Appellee instituted suit against appellant in the Clark County Chancery Court to foreclose a deed of trust against the south half of the southwest quarter of section 1, township 7 south, range 18 west, in said county, given to secure two notes in the sum of $370 each, bearing interest at the rate of 8% per annum from date until paid, the first note due January 1, 1918, and the second January 1, 1919. The notes and deed of trust were made exhibits to the bill. The notes were described in the deed of trust as of even date with it. The notes were dated on June 9, 1917, and signed by B. R. Oastler, the husband of appellant. The deed of trust was executed by appellee on the 17th day of July, 1917, and described the 80-acre tract of land as the south half of the southwest quarter, section 1, township 7, range 18. It was alleged in the bill that the notes signed by B. R. Oastler in the sum of $270 each, due respectively on January 1, 1918, and January 1, 1919, were the notes intended to be secured by said deed of trust; and that the land intended to be mortgaged was the south half of the southwest quarter of section 1, township 7 south, range 18 west, in Clark County, Arkansas.

Appellant filed a separate answer admitting the execution of the deed of trust but denying its validity on the alleged grounds that it was not delivered; that the land was insufficiently described; that the notes alleged to have been secured represented the antecedent debt of her husband; that neither she nor her husband received any present consideration for the deed of trust, in the nature of money or extension of time for the payment of her husband's debt, or in any other way. It was also denied

in the answer that the alleged notes were intended to be secured by the deed of trust.

The cause was submitted to the court upon the pleadings and testimony adduced by the respective parties, which resulted in a reformation of the deed of trust to conform to the allegations of the bill and a foreclosure of the lien upon the land to pay the notes executed by appellant's husband on June 9, 1917.

From that decree an appeal has been duly prosecuted to this court.

The record reflects that appellee and B. R. Oastler, appellant's husband, were partners, and while conducting the partnership business became indebted to the Elk Horn Bank & Trust Co. in the sum of $1,480; that Oastler could not pay his part of the debt and agreed to execute his notes for one-half the amount to appellee and secure same by a deed of trust on said 80 acres of land if appellee would pay his portion of the indebtedness to the bank; that, pursuant to the agreement, B. R. Oastler executed two notes to him on June 9, 1917, in the sum of $370 each, bearing interest at the rate of 8% per annum from date until paid, due respectively on January 1, 1918, and January 1, 1919; that on the 7th of July, 1917, he delivered the deed of trust executed by appellant to him to secure said notes; that upon the delivery of the trust deed to appellee he paid the partnership debt to the bank; that the two notes represented the only debt B. R. Oastler owed appellee; that the only piece of land owned by appellant at the time she executed the deed of trust was the south half of the southwest quarter of section 1, township 7 south, range 18 west; and that appellant knew of the partnership indebtedness, and that appellee was willing to pay the same and give her husband time to pay his part thereof, if he was given a deed of trust on the land in question, to secure him. Appellant testified that her purpose and intent was to execute her individual notes to cover the indebtedness and secure them by the deed of trust, but that after she executed the deed

of trust, she changed her mind and did not execute the notes, or deliver the deed of trust to appellee.

Appellant's first contention for reversal is, that the notes intended to be secured by the deed of trust were not the notes of B. R. Oastler. It is true the B. R. Oastler notes do not correspond in date with the notes described in the deed of trust, but the undisputed evidence shows they represent the indebtedness intended to be secured. They were given in evidence of a payment to be made by appellee to said bank, which appellant's husband owed it, when the deed of trust should be delivered to him. To hold that the indebtedness was not sufficiently identified because appellant did not execute her individual notes to cover same would be giving more regard to form than substance.

Appellant's next contention for reversal is that there was no delivery of the deed of trust. The trust deed was signed and acknowledged by appellant for the purpose of delivering it to appellee to secure him for paying her husband's indebtedness to the bank. It was delivered to appellee by her husband, and recorded. Appellee accepted the security, and in good faith paid the indebtedness to the bank. She put it in the power of her husband to deliver the deed, as her agent, and cannot be heard to say that he delivered it without authority. She contents herself with swearing that she did not deliver the deed to appellee. She does not volunteer an explanation as to how it got into the possession of her husband. The only reasonable inference is that she gave it to him to use for the purposes for which it was executed. She is clearly estopped to deny the delivery thereof.

Appellant's last contention for reversal is that there was no consideration for the deed of trust. It is argued that, if given as a security, it was given to secure an antecedent debt of her husband, and was therefore without a present consideration, and void. This contention is not supported by the fact. The undisputed fact is that,

upon the delivery of the deed of trust, and, in reliance thereon, appellee parted with $740 in cash in order that appellant's husband might liquidate his indebtedness to the bank. This was a present consideration. The consideration being sufficient, it was proper to reform the instrument to conform to the intent of the grantor and decree a foreclosure upon it as reformed.

The decree is therefore affirmed.

HUGHES v. STATE.

Opinion delivered July 10, 1922.

1. INDICTMENT AND INFORMATION—FAILURE TO LAY VENUE.—An indictment, containing no statement of the venue except by a reference to the county and State in the caption, will be considered, under Crawford & Moses' Dig. § 3020, as charging that the offense was committed in the local limits of the court in which the grand jury was impaneled.
2. INDICTMENT AND INFORMATION—NEGATIVING PRESENCE OF ACCESSORY.—It is not necessary to the validity of an indictment against an accessory before the fact to a crime to negative the presence of such accessory at the perpetration of the crime.
3. HOMICIDE—CORROBORATION OF ACCOMPLICE.—Evidence of principal convicted of murder in the first degree *held* sufficiently corroborated to sustain conviction of accused as accessory before the fact.
4. CRIMINAL LAW—CONFESSION—INSTRUCTION.—Where a confession was admitted in evidence against accused, and there was a conflict as to whether it was voluntarily made, its admission was proper in connection with the court's charge to consider whether defendant was subjected to undue influence or coercion, etc.
5. CRIMINAL LAW—IMPROPER ARGUMENT.—It was the duty of the court in its sound discretion to challenge improper remarks with such comment as the exigencies of the occasion demand.
6. CRIMINAL LAW—IMPROPER ARGUMENT OF PROSECUTING ATTORNEY.—In a prosecution for murder, it was prejudicial error for the prosecuting attorney to state to the jury: "I know he is guilty. * * *. I have examined the testimony and know so much about it, I know things that never get to anybody else."

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

Witt & Witt, Richard M. Ryan and *J. Wythe Walker,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted in the Montgomery County Circuit Court for the crime of being an accessory before the fact to murder in the first degree, and punished by imprisonment in the State Penitentiary for his natural life. From the judgment of conviction an appeal has been duly prosecuted to this court.

Appellant contends that no crime was charged in the indictment because it does not allege that Anna McKennon was murdered in the State of Arkansas and the county of Montgomery; and because it does not negative the presence of appellant at the time and place of the killing. Omitting the signature of the prosecuting attorney, and the indorsements, the indictment is as follows:

"Montgomery Circuit Court, State of Arkansas against H. M. Hughes. The grand jury of Montgomery County, in the name and by the authority of the State of Arkansas, accuse H. M. Hughes of the crime of accessory before the fact to murder in the first degree, committed as follows, to-wit: The said H. M. Hughes in the county and State aforesaid, on the ..... day of May, A. D. 1921, that one Raymond Cole unlawfully wilfully, feloniously, with malice aforethought, deliberation and premeditation, did kill and murder one Anna McKennon by then and there shooting her with a gun and then and there loaded with gunpowder and bullets, then and there had and held in the hands of him the said Raymond Cole; and that said H. M. Hughes on the ..... day of May A. D. 1921, before the said murder was committed as aforesaid, unlawfully, wilfully, and feloniously, with malice aforethought, premeditation and deliberation, did advise and encourage, aid, abet and assist the said Raymond Cole to do and com-

mit the murder in the manner and form aforesaid, against the peace and dignity of the State of Arkansas."

(1) In the body of the indictment reference is made to the county and State aforesaid, meaning Montgomery County and the State of Arkansas mentioned in the caption as well as the first part of the indictment. The last part of the indictment also charges that the offense was committed against the peace and dignity of the State of Arkansas. Reading the whole indictment together it is perhaps sufficient, though inaptly worded, to lay the venue in Montgomery County, Arkansas. We, however, uphold the indictment on the more substantial ground that its imperfections in this respect are cured by section 3020 of Crawford & Moses' Digest, which is as follows:

"If the indictment contains no statement of the place in which the offense was committed, it shall be considered as charged therein that it was commited in the local limits of the jurisdiction of the court in which the grand jury was impaneled."

(2) It is not necessary to the validity of an indictment against an accessory before the fact to a crime to negative the presence of the accused at the perpetration of the crime. This court said in the case of *Larimore* v. *State*, 84 Ark. 606: "Where the accused is indicted as accessory before the fact, it is unnecessary for the indictment to negative his presence at the perpetration of the crime. Presence at the perpetration of the crime marks the distinction, under our law, between principals and accessories before the fact, and it is sufficient in an indictment against an accessory to allege that he advised and encouraged the perpetration of the crime, without specifically alleging that he was not present."

Appellant next contends that the evidence is insufficient to support the verdict and judgment. The record reflects that Raymond Cole, charged as principal in the crime, was convicted of murder in the first degree. He testified that appellant induced him to kill Mrs. Anna McKennon, at a time when he was intoxicated, by prom-

ising to pay him $850 as soon as he accomplished the act and returned to the home of Mrs. Noland, where appellant resided; that appellant furnished him a 44 Winchester, already loaded, with which to commit the deed; that he went to the home of the old lady, who resided alone, and, while she was standing in the front door, fired upon and killed her; that he took her pony which was hitched near the house and returned to the Noland home to leave the gun and get his money; that he set the gun on the back porch, but, being unable to find appellant, left for his mother's home, and a short time thereafter left the community. This witness was an accomplice, and under the rule, in order to convict appellant, it was necessary that the testimony of the accomplice be corroborated. The record reveals a number of facts and circumstances tending to corroborate the testimony of this witness.

After a very careful reading and analysis of the evidence, we think it sufficient to sustain the judgment and verdict.

Appellant next contends that the court committed reversible error in admitting a statement or confession made by him while under arrest in Garland County. After appellant's arrest by Montgomery County officers he made his escape and was captured by Garland County officers. While incarcerated in jail there, he was urged by the officers to make a confession, and there is some evidence tending to show that undue pressure was used in an attempt to elicit information concerning the murder. He refused, however, to yield and make any statement at the time. Later he made a statement in the chambers of the circuit judge, in the presence of the judge, prosecuting attorney, sheriff, and perhaps others. This statement was in conflict, in part, with appellant's testimony on the trial. The witnesses present, except appellant, when the statement was made, testified that it was voluntarily made and that no undue influence was used to elicit it. Appellant testified that he made the statement under duress. There being a conflict in the

evidence as to whether the statement was voluntarily made, the trial court admitted it, over the objection and exception of appellant, under the following injunction, which was the court's 7th instruction:

"If the defendant or any of the witnesses have at other times made statements which contradict or do not agree with the testimony given in this trial, you should, in weighing and considering the effect of such contradictory statements on the testimony in this case, carefully consider all of the circumstances under which such contradictory statements were made and whether or not such witnesses were subjected to any undue influence, coercion or intimidation, or were laboring under the influence of dread or fear, and also the physical and mental condition of the witnesses at the time such contradictory statements were made, if such statements were made." We think, under the principle announced in the case of *Henry* v. *State,* 151 Ark. 620, it was proper to admit the statement, with the restrictions contained in the court's 7th instruction. In the case referred to the court said: "The testimony was sufficient to justify the court in submitting it to the jury, but appellant, as before stated, had a right to have the jury consider the question whether or not it was a confession voluntarily made."

Lastly, appellant contends that his rights were prejudiced by the following statements of the prosecuting attorney made in closing the argument, to-wit: "I know he is guilty, I am willing to meet my God in the next hour knowing that Hughes is guilty, because I am thoroughly convinced. I have examined the testimony and know so much about it, and know things that never get to anybody else." When this statement was made, the counsel for appellant objected, and the court stated that the argument of the prosecuting attorney was improper and the jury should not consider it. The statement was an attempt on the part of the prosecuting attorney to testify. He, in effect, said that he was in possession of facts which could not be revealed to the jury, but which riveted con-

viction upon appellant. Coming from a sworn official, the remark was calculated to make a deep impression upon the minds of the jurymen. It cannot, perhaps, be classed with remarks the effect of which cannot be removed even by a solemn admonition of the court, but it was certainly a flagrant violation of the right of appellant to a fair and impartial trial vouchsafed to him by the Constitution and laws of the State of Arkansas. Considering the highly prejudicial character of the remark, its effect could not be removed by a mild admonition of the court. We think the trial court, in the exercise of a sound discretion, should have challenged the statement, with such comment as the exigencies of the occasion demanded. He might have said that it was the sworn duty of the prosecuting attorney to reveal all the facts within his knowledge, and his failure to do so would have been proof conclusive that he had no such information; or he could have stopped the trial and required the attorney to establish the facts in his possession by competent testimony. Either course would have erased the ill effects of the remark from the minds of the jury, but, in the opinion of the majority, the mild admonition of the court, as indicated by the language used, did not meet the exigencies of the particular situation.

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

McCULLOCH, C. J., dissents.

WOOD, HART, and SMITH, JJ., concur.

Mr. Justice WOOD holds that the remarks of the prosecuting attorney were so flagrant that their prejudicial effect could not be removed at all, and that the only way to cure the error was to grant a new trial.

CONCURRING OPINION.

HART, J. It is conceded by the Attorney General that the result of the questioning of the defendant by the deputy prosecuting attorney and the sheriff in the chambers and in the presence of the circuit judge elicited

testimony which was damaging to the defendant and contrary to some of the testimony given by him at the trial.

Judge SMITH and myself think the admissibility of the confession in evidence was, under the circumstances, necessarily prejudicial to the rights of the defendant. Although we have found no case precisely in point, we believe that the court should not have admitted the confession in evidence at the trial.

W. R. Downing, the sheriff of Garland County, testified that he had an interview with the defendant, Hughes, in the chambers of the circuit judge in the Garland County courthouse on Sunday morning after the arrest of the defendant; that Judge Wood was present and the defendant, Hughes, made certain statements regarding the case and made them of his own volition.

On cross examination the sheriff stated that this was on Sunday morning after the Saturday night before when they had the defendant in the sheriff's office and questioned him there. Downing further stated that when he first arrested the defendant the latter stated that he did not have anything to say; but could wait until he saw his attorney before making any statement.

On the Sunday morning in question, Bumpass, the deputy prosecuting attorney, had the defendant brought up to the judge's chambers in the courthouse so that he could talk to him. The defendant at the time was a prisoner in jail.

According to the testimony of Downing he had previously told the defendant that if he was not guilty he ought to tell them what he knew about it, and that if he was guilty, not to say anything.

According to the testimony of the defendant, he refused to make a statement when first arrested and carried to the jail, saying that he wished to see Mr. Walker of Fayetteville, whom he had sent for to be his attorney. The sheriff called him a damned old crook, a murderer, and a liar. He also threatened to turn him

over to a mob in Montgomery County. The prosecuting attorney questioned the defendant in an inquisitorial manner and at times would curse and abuse him.

Burt Hall, who was present at the time Hughes declined to make a statement, said that Hughes said that he preferred to talk to his attorney first, and testified that the sheriff did not call Hughes a damned old liar and a crook. The sheriff did tell Hughes, however, that if he was not guilty himself he knew who was guilty and asked him why he did not tell it.

A little later the sheriff said that if the old man was not going to tell the story, he might just as well call up the Montgomery County men and let them come and get him. Sometime later the old man commenced to talk to them about the case. The sheriff said to him: "If you are a minister and a Christian and you are not guilty, you ought to tell us something about as who is the guilty party." The question of a mob was discussed in the presence of the defendant, but the witness said that he didn't recollect that the sheriff or any body else threatened the defendant with a mob. It was also shown that the defendant was very nervous and excited and was weak, tired and hungry at the time he was questioned on Saturday night.

The defendant was a witness for himself at the trial. According to his testimony given at that time, the prosecuting attorney abused him very much, and when they took him out of jail he appealed to a man named Floyd not to let them take him to be questioned. Floyd answered him that the prosecuting attorney had a right to take him to the courthouse to question him.

We think the evidence of the sheriff and of Hall shows that the alleged confession of the defendant was secured by the indirect threats of those having authority over the defendant when he was arrested. The evidence for the State shows that the defendant was sixty-four years old and was tired, hungry and weak when arrested. When they questioned him on Saturday night

he was nervous and excited. Something was said about a mob in Montgomery County. The sheriff told him that it was his duty to speak.

The sheriff threatened to send the defendant back to Montgomery County if he did not speak. He said that if he did not have anything to do with the killing it was his duty to speak, but that if he was guilty he need not speak. This did not amount to a warning. On the other hand it was perhaps the most effective way the sheriff could have adopted to obtain a statement from the defendant.

It is true that we have held that a statement obtained by questioning the defendant and the fact that he was not cautioned that the statement might be used against him does not render it inadmissible. But it must also be remembered that in this connection we have said that it is always better for the officer to give such warning in order to avoid suspicion of improper inducement. *Greenwood* v. *State,* 107 Ark. 568, and *Dewein* v. *State,* 114 Ark. 472.

It must be borne in mind that the questioning of the defendant was not for the purpose of satisfying the officers whether the accused was guilty or not; but he was subjected to the ordeal with the deliberate purpose of securing a statement to be used as evidence against him in the trial. It was doubtless done in good faith, but under the circumstances it was a case where their zeal clearly outran their duty.

It does not appear from the record that the circuit judge took any part in questioning the defendant in his office or that he knew of the inquisition by the prosecuting attorney the night before. This does not make any difference, however. Under the circumstances the prisoner should have been warned that he need not speak.

In *Blalock* v. *State,* 31 So. (Miss.) 105, Judge Whitfield said, that the scale of courage varies from Murat to Aguecheek and that a reasonable apprehension of fear is one that a man of average courage would entertain.

Viewed from the standpoint of the defendant, even under the testimony for the State, it is evident that he was overawed by the officers and that the powers of his mind were overcome by their persistent questioning of him and their unconcealed belief in his guilt.

His attorney was several hundred miles away and yet they persistently urged him to speak, although he protested that he first wanted to talk with his attorney. No person can be compelled to testify against himself in a criminal case, and a proper appreciation of the rights of the accused forbids the methods resorted to in this case to obtain testimony which was intended to be used against him at his trial. It was obtained by intimidation within the meaning of the law and could not be used against the defendant.

McCULLOCH, C. J., (dissenting). The remark of the prosecuting attorney was undoubtedly improper, but I am unwilling to declare that the trial judge failed to adequately withdraw the remark from consideration by the jury so as to remove its prejudicial effect. The court, on objection being made by appellant's counsel, stated that the remark was improper and that the jury should not consider it. The inference from the objectionable remark was that there was other testimony which, if disclosed, would be damaging to appellant, but I cannot see any sound reason why the effect of such remark should be deemed so damaging and ineradicable that the admonition of the trial court was ineffectual to remove it from the consideration of the jury. It seems to me, on the contrary, that the intimation of the attorney that he was in possession of other undisclosed facts was so unreasonable that men of ordinary intelligence would not accept it as true. Such men on the jury must have treated it as a mere exaggeration on the part of the attorney, born of his overzealousness, and the statement was calculated, I think, to weaken the State's case in the minds of such men. Be that as it may, however, the court admonished the jury not to consider the

statement. Why wasn't that sufficient? The majority say that the court should have been more emphatic in the admonition—should have stopped the trial and required the prosecuting attorney to prove what he had stated, or should have told the jury that the prosecuting attorney did not have any further proof.

The record does not, of course, reflect the court's manner or tone of voice, but we should assume that they were in keeping with the importance of the incident, and that the court, in the exercise of discretion, did all that was deemed necessary to remove the prejudicial effect of the improper remark. Counsel for appellant did not ask for any further action by the court, and, so far as the record discloses, were satisfied with what the court did. *St. L. I. M. & S. R. Co.* v. *Drumright,* 112 Ark. 452. We should, at least, respect the trial court's exercise of discretion in this regard, unless there has been a clear abuse of that discretion, and I fail to discover any abuse in this instance.

The following language of this court, used under similar circumstances, is appropriate: "The court might have been a little more emphatic in instructing the jury on the subject, but we do not think we can safely circumscribe trial judges to such minuteness of expression as asked in this controversy. They are present conducting the trial, and it is only in case of manifest abuse of discretion that they should be interfered with. The same may be said, but with still more emphasis, as to the court's refusal to reprimand the prosecuting attorney. The persistency in disobedience of the rules of the court, and contumaciousness in unbecoming conduct generally, which alone would call forth a reprimand of a public officer representing the State, are matters to be dealt with cautiously, for fear that the remedy may prove worse than the disease. Each judge ought to and does have a sound discretion when and where to employ this method of discretion, and this discretion ought not to be controlled by appellate courts except in extreme cases and where the control is clearly right and

proper." In *K. C. S. R. Co.* v. *Murphy,* 74 Ark. 256, we said: "As a general rule an objection by the opposing counsel, promptly interposed, followed by a rebuke from the bench and an admonition from the presiding judge to disregard prejudicial statements, is sufficient to cure the prejudice."

In *Browning* v. *State,* 84 Ark. 131, where the attorney for the State in a criminal prosecution had, in his argument to the jury, made a highly improper statement, Judge BATTLE, after referring to the rule laid down in the Murphy case, *supra,* said: "The appellant promptly interposed an objection to the remark of counsel, and the court directed the jury to disregard it, and *thereby* rebuked the counsel for making the same."

So in the present case the admonition of the court in sustaining the objection made by appellant's counsel was a rebuke to the State's attorney as well as a direction to the jury not to consider the remark.

It seems to me, with all respect for the opinion of my brethren, that it would have been a novel proceeding—one certainly not in keeping with the dignity of the occasion—for the trial court to tell the jury that the prosecuting attorney had no additional testimony tending to establish appellant's guilt, or to stop the trial and demand of the attorney proof of his statements. The opinion in this case is not, I think, in line with recent decisions of this court on the subject under discussion. *Fox* v. *State,* 102 Ark. 393; *Harris* v. *State,* 140 Ark. 13; *Sims* v. *State,* 131 Ark. 185; *Williamson* v. *State,* 131 Ark. 264; *Seaton* v. *State,* 151 Ark. 240.

We said in the cases above cited that we would assume that the jury heeded the admonition of the court and did not consider the improper remarks of the prosecuting attorney. A similar presumption should be indulged in the present case. The evidence is sufficient, we all agree, to sustain the verdict, and the judgment should not, in my opinion, be disturbed on account of the improper remarks of the attorney, which the court directed the jury not to consider.

DAVIE *v.* DAVIE.

Opinion delivered March 5, 1892.

1. HUSBAND AND WIFE—MARRIED WOMAN'S POWER OF ATTORNEY.—A conveyance by a married woman, by an attorney in fact, of all her interest as heir in a certain estate, consisting of real and personal property, cannot be avoided as to the personalty on the ground that, as a married woman, she is not authorized to convey by attorney.
2. GUARDIAN AND WARD—UNLAWFUL SALE OF WARD'S LAND—LACHES—Where a guardian sells the land of an infant ward without authority, and the money is applied to the ward's use, the fact that the ward does nothing to disaffirm the sale for nearly seven years after she became of age must be deemed a ratification of the sale.
3. WILLS—SUFFICIENCY OF PROBATE—Where a will is admitted to probate by the clerk of the court in vacation, and the court subsequently causes an order to be entered, reciting that the will has been fully proved before the clerk, and that the same is approved by the court, this is, in effect, an order of probate, and not merely an order approving the action of the clerk.
4. VENDOR AND PURCHASER—EFFECT OF EXECUTING BOND FOR TITLE.—Where an owner of land gives a bond for a deed on the payment of the purchase-money notes, and places the purchaser in possession, he holds the legal title only as security, and on his death the land does not decend to his heirs.

Cross-appeals from White Chancery Court; *David W. Carroll,* Chancellor; reversed.

This was an action of ejectment brought by E. N. Davie and others against J. M. Davie. From a judgment for plaintiffs, both parties appeal.

The other facts fully appear in the following statement by HEMINGWAY, J.:

The plaintiffs sued to recover undivided interests in land, which they claimed to have acquired as the heirs of J. C. Davie. The defendant resisted the recovery on the ground that J. C. Davie did not die seized of the land, but had sold it in his lifetime to persons from whom the defendant acquired title. He alleged that J. C. Davie had executed bonds conditioned to convey title upon payment of the purchase money, and placed the purchaser in possession, and that thereafter, in

March, 1870, the said J. C. Davie having died, his widow bought the lands from the obligees in the bonds, and took assignments of said bonds. He further alleged that the said J. C. died the owner of the notes given for the purchase of the land, and that said notes came into the hands of the administrator of said J. C., and were duly listed as a part of his estate in the inventory filed by the administrator; that the distributees of the estate, including the plaintiffs, sold to the widow all their interest in said estate, including the notes, and that said widow thereby, and by virtue of her right to dower, became entitled to the notes; that the administrator, believing her to have the sole right to said notes, surrendered them to her before she purchased the land from the obligees in the bonds of her husband; and that in said purchase she surrendered the notes to said obligees, and by assignment of said bonds acquired the equitable title to the lands, free from the lien of the notes. He further alleged that the widow died testate in 1881, and by her will devised the lands to him. He made his answer a crossbill, and prayed that the plaintiffs be required to convey to him the legal title to the land, or, in case that be denied, that they be required to refund the several sums paid to them by the widow for their respective interests in the land. The cause was transferred to the equity docket, and progressed to a determination upon the pleadings and proof. It was adjudged by the decree that the plaintiffs recover interests in the land in the proportion to which they were entitled as heirs of J. C. Davie. Certain conditions were imposed upon the recovery, which we deem it unnecessary to state. Each party appealed.

The pleadings contain a mass of matter not set out, but we have found certain issues that are controlling, and have set out in substance the allegations pertinent to them, omitting such matter as might confuse, and could not elucidate their determination. There is no practical disagreement as to the material facts. They are as follows: J. C. Davie owned the land in

controversy, and in November, 1869, sold it—a part to one person, and the remainder to others. He executed two bonds conditioned to convey title when the agreed price should be paid, let the purchasers into possession, and took notes for the purchase money, aggregating $10,000. On the 13th day of January, 1870, he died intestate and without issue, but leaving a widow. His heirs were a sister, Mrs. Finch, a brother, O. N. Davie, and the children of two brothers, George and Ashborn, who had previously died. The plaintiffs are the children of Mrs. Finch, who subsequently died intestate, and two of three children of the brother Ashborn Davie. On his deathbed, J. C. Davie attempted to devise his entire estate to his wife, but the attempt failed by reason of a failure to execute his will in proper form. On the 10th of February, 1870, the surviving brother, the nephew solely interested by right of one of the deceased brothers, and one of three children interested by right of the other deceased brother, conveyed their several interests in the estate to the widow, the consideration being the accomplishment of the expressed desire of the intestate. The widow thus acquired two whole shares and a third of one of the other two. In February, 1871, she visited Tennessee, where those owning the shares not acquired resided, for the purpose of acquiring them. She solicited their interests as a gift, but subsequently agreed upon a purchase at the rate of $1,000 per whole share. Mrs. Finch thereupon executed to J. D. Garrison a power of attorney, which was intended to authorize him to transfer all her interest in the estate, and collect and receipt for the $1,000. He received that sum and paid it to her, and on the 7th of July, 1871, executed a deed to the widow, conveying all the interests of Mrs. Finch in certain described lands, and also in all the property described in the inventory of the administrator. The plaintiffs' witnesses prove that Mrs. Finch actually sold all her interest in the estate. E. N. Davie, being one of the three claiming by right of Ashborn Davie, agreed with the

widow for a sale of his interest at $385, and on the 4th of December, 1871, executed a power of attorney which authorized B. F. Elder to execute proper conveyances to land, in pursuance of which Elder, on the 10th of January, 1872, executed a deed for the sum thus agreed upon, conveying to the widow all the right, title, and interest of said E. N. in the estate of the said J. C., including all personal property. Mrs. M. E. Clements was then a minor, and the sale of her interest was made by her guardian, who gave bond to the widow, conditioned that the minor on coming of age would make a transfer of all her interest in the estate. The guardian, who was her mother, collected the price agreed upon, and applied it to her use—a part of it after she was married. She knew of it, certainly, as early as 1880, and it is fairly inferable that she knew it much earlier. In 1877 she came of full age. In the fall of 1870 the defendant administered on the estate, received the notes given for the land, and included them in the inventory made and filed by him as administrator. He turned the notes over to the widow to enable her to make the trade with the holders of the title-bonds; believing, as he testified, that she was entitled to a part of them as dower, and had acquired the other interests by the transfers from the distributees. On the 4th of March, 1871, after the widow had returned from Tennessee, where she agreed upon the purchase of the interests now claimed by the plaintiffs, she bought from the vendees of her husband their interest in the land created by the title-bonds, and took assignments thereof, paying to the purchasers just what they had paid, and surrendering their notes. Upon receiving an assignment of the bonds the widow went into possession, and she and those claiming under her have held possession continuously since, and have made lasting and valuable improvements, estimated as worth $15,000. The administrator filed accounts current in 1877 and 1879, and in 1881 made his final settlement. He charged himself with the notes, and took credit for them as having

been turned over to the widow. No act was done by any of the parties to disaffirm the transfers made by them to the widow until this suit was brought, in May, 1884, an interval of 13 years after the sales, and of nearly 7 years after Mrs. Clements came of age. The defendant married the widow in 1874, and she died in 1881. Subsequently a writing was admitted to probate by the probate court of White County, whereby she devised to the defendant the lands in controversy. The validity of the will is denied by the plaintiffs.

S. L. Cockroft, for appellant.

J. M. Battle, J. E. Gatewood, and *J. N. Cypert,* for appellee.

HEMINGWAY, J., (after stating the facts). The sale in 1869 divested J. C. Davie of all beneficial title to the land. He held the legal title as a security for the purchase money, but his property was in the notes, not in the land. As the land had passed from him, and he was not the owner, it could not descend upon his death to his heirs. The plaintiffs could therefore recover no share in it by reason merely of his death and their heirship. But it is said that the notes given for the purchase money belonged to the estate of which plaintiffs were distributees; that said notes were without authority delivered by the administrator to the widow, and constituted almost the entire consideration for the assignment of the title-bonds to her; and that by reason thereof she held the estate created by the bonds for the benefit of those interested in the notes. The administrator was not authorized to purchase the land for the benefit of the estate, or to acquire title for the heirs by surrender of the notes. If he diverted assets of the estate by an unlawful delivery to the widow, it may be that those interested in the estate could have demanded that she restore them, or that they could have followed the proceeds into other property, in case the notes had been converted; but, if such right would have arisen upon the condition indicated, it would not have vested any title to the land, but conferred only an equity to charge

the land with the payment of the notes. Whether the plaintiffs could assert that right in this proceeding after the administrator had fairly settled the estate, and accounted, though improperly, for the notes, is a question not presented; for the record shows that the plaintiffs have parted with whatever rights they had in the notes, and are in no position to question the conduct of the administrator. The plaintiff E. N. Davie, by his deed of the 10th of January, 1872, conveyed and sold to the widow all his interest in the estate, and this conveyance was but the consummation of a sale actually made about a year before. How he can find any pretext to claim an interest in the notes we cannot conceive.

Mrs. Finch, the mother of the plaintiffs Garrison, Halloman, McCutchen, and Finch, early in 1871 sold to the widow all her interest in the estate for $1,000, which was paid to her; and, by her attorney in fact, she executed a conveyance for the purpose of consummating the sale on the 7th day of July, 1871. The description in the conveyance is about as obscure as one could be, but its meaning can be ascertained, and it appears that the property conveyed was that set out in the inventory of the administrator. But it is said that a married woman cannot convey property by attorney. The reply is that she can dispose at least of her personalty, as a *feme sole*. Much of the business of the country is conducted by married women, and the result of the argument would be to invalidate all sales made for them by clerks or other agents—a position without support. But, independent of the deed, a parol sale was made months before, and the agreed price paid. The notes were delivered to the widow as entitled to all the estate, and the administration subsequently settled. For more than 13 years after the sale, no effort was made to disaffirm it, and no reason shown to excuse the delay. If there ever was any ground for Mrs. Finch or those claiming under her to avoid the sale, the unexplained lapse of time bars it. The same may be said as to the rights of E. N. Davie.

The claim of Mrs. Clement presents more color of merit; for she was a minor when the sales were made to the widow, and her interest is claimed only by virtue of the attempted sale of her guardian. There is no proof that the guardian was authorized to make the sale, and we infer from the circumstances that she was not. But the widow paid for her interest, the money went to her use, and, as the evidence discloses, she knew the facts. She came of full age in August, 1877, before the administration of the estate was settled. For nearly seven years she did nothing to disaffirm the sale. Acquiescence for that time must be held an implied ratification of the guardian's sale of her interest.

The widow, therefore, acquired the interest of all the heirs in the notes, and, having acquired the land subject only to the lien of the notes, her title became perfect; and the plaintiffs are entitled to no relief as against those to whom her rights have passed.

It was suggested in the argument that some of the plaintiffs were entitled to recover as heirs of the widow, in case she was found to have owned the land. No such claim was asserted in the pleadings, or appears to be sustained by the proof. The mother of two of the plaintiffs is an heir of the widow; but, as she is living, they cannot have a recovery upon her heirship. Besides, it appears that the widow made a will, which was admitted to probate by the probate court of White County; and whether it was properly admitted is a question that cannot be reviewed in this collateral proceedings, nor at the suit of persons not interested in it. But it is contended that the will was not in fact admitted to probate by the probate court, but by the clerk of the court in vacation, and that the court subsequently only caused an order to be entered, reciting that the will had been fully proved before the clerk, and that the same was approved by the court, and directing that the will be recorded as such. This, it is contended, was not an order admitting the will to probate, but simply approving the clerk's action. The argument

has no regard for the effect of the order, but rests alone upon its form. It is too technical for our approval. *Petty* v. *Ducker,* 51 Ark. 281, 11 S. W. Rep. 2. It is admitted that by the will the defendant was to have the lands, and so long as the judgment of a court of competent jurisdiction, admitting it to probate, is unreversed, its terms must control the course of the land. *Dowell* v. *Tucker,* 46 Ark. 438.

From the views expressed, it follows that the plaintiffs were entitled to no relief, and that the defendant was entitled to have the legal title to the land vested in him. The judgment granting the relief to the former and denying it to the latter was therefore erroneous in each respect. Reversed and remanded, with directions to enter judgment in accordance with this opinion.

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