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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

DAVENPORT *v.* GRAY.

Opinion delivered January 29, 1923.

1. APPEAL AND ERROR—APPEAL FROM DIRECTED VERDICT.—On appeal from a judgment on a directed verdict, the court must give the testimony its strongest probative force in appellant's favor.
2. ACCORD AND SATISFACTION—JURY QUESTION.—Whether the amount of a physician's claim for professional services was disputed and whether there had been an accord and satisfaction in settlement thereof, *held* for the jury.
3. ACCORD AND SATISFACTION—WHAT CLAIMS MAY BE SETTLED.—All disputed claims, irrespective of their subject-matter, may be settled by a contract of accord and satisfaction, provided such contract is not tainted with fraud or illegality.

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

G. A. Hillhouse, for appellant.

It is sufficient to support a settlement of this kind to show an actual controversy between the parties involving a question of doubt on both sides, and that at the time of the agreed settlement there was a compromise fairly and deliberately made. 12 C. J. 334. The evidence raised a disputed question of fact here which ought to have been submitted to the jury. 103 Ark. 61; 107 Ark. 487.

Fred M. Pickens, for appellee.

The court properly directed the verdict. The claim was undisputed. An accord and satisfaction of an undisputed claim must be supported by a new or additional consideration. 1 R. C. L. 179, 183; 75 Ark. 354; 88 Ark. 476; 2 Ark. 45; 70 Ark. 220. Part payment is no con-

sideration for the release of a debt already due. 54 Ark. 185; 55 Ark. 369. See also 40 Ark. 180; 44 Ark. 349.

WOOD, J. This is an action by the appellee against the appellant to recover on an account for professional services alleged to have been rendered by the appellee to the appellant, for which the appellee asked judgment. The appellee testified that the appellant was indebted to him in the sum of $216. He exhibited an account which was taken from his books. He stated that the sum of $24 had been paid on the account. The appellee stated that he never made any agreement with the appellant to reduce the account to the sum of $24, and denied that he ever made a statement to the appellant or to any one else that he agreed to reduce the account to $24. He mailed the appellant a statement of the account showing the number of visits charged for, amounting in the aggregate to $240, which was credited by check for $24, leaving a balance due of $216. The account was exhibited to the jury. The appellee stated that the account was correct, and was past due and unpaid. On cross-examination the appellee identified a statement which had been rendered to the appellant by the appellee. which statement is as follows:

"Statement.

"Dr. C. R. Gray.

"Newport, Arkansas, Sept. 28, 1921.

"Professional Services Rendered to.....$24.00
Amount paid

Balance $24.00

"To Will Davenport

"Newport No. 1"

Appellee also identified a similar statement dated October 12th.

Appellee also exhibited a check which had been given to him by the appellant for the sum of $24, which check and statement were introduced in evidence. Appellee testified that the statements showing the account as $24

were due to an error made by the girl who worked in his office and who mailed out the statements for him. The statements should have been for $240 instead of $24. The correct amount of $240 is shown by his books. Appellee did not supervise the sending out of the statements, but told the young lady working in his office to send them out.

Miss Blanche Heebes testified that she was working in the appellee's office in September and October, and that she mailed out the statements of the accounts which had been exhibited and introduced in evidence. The appellee never instructed her to mail a statement to the appellant for the sum of $24. Appellee was sick from the 29th of September until some time in December. The statements sent out by her showing the amount of appellant's account to be $24 was a mistake made by witness. The amount of the account, as shown by appellee's ledger, was $240, and the ledger showed a credit of $24. The appellee was permitted to exhibit the ledger to the jury.

The appellant testified that the appellee had visited appellant's wife during her illness, and that appellant discharged him from the case. Afterwards the appellant met the appellee on the road and asked the appellee what kind of a bill he had against the appellant. The appellant told appellee that he had called him to wait on his wife, and with proper attention she would not have had the long spell of sickness. Appellee at that time told the appellant to send appellee $24 in settlement of the account, $20 being for the initial treatment of appellant's wife and $4 for a previous trip. Appellant told appellee to send him a statement. Appellant received a statement on September 28th for $24, and subsequently received two more statements showing a similar amount to be due. When he received the statement on October 12th he mailed appellee a check for $24. Appellant never received a statement showing $240 to be due. Appellee came to appellant's house and had a conversation in regard to the matter shortly before suit was filed, which

was after appellant had sent the appellee his check for the amount of the account rendered.

On cross-examination, appellant testified that before his wife got sick he owed the appellee $4. Appellant discharged the appellee on the 4th of February. Appellee came to visit appellant's wife about the 29th of December and visited her twice a day until appellant stopped it. Appellant had told appellee the reasons he objected to paying more than $24, and appellee agreed to accept $24 in settlement of his bill. Appellant had told appellee that he had not treated appellant's wife properly, and that appellee's conduct was ridiculous. The appellee said that he had not done anything wrong. Appellant told him some of the things that he had done wrong, and thereupon appellee stated that he didn't know that appellant was dissatisfied, and asked appellant to send him $24 and let it go. Appellant then told appellee that he didn't pay his bills until he got a statement, and asked appellee to send him a statement of the account agreed upon. Appellant got a statement, and mailed a check to appellee after the last statement was received.

Two witnesses testified to the effect that they had seen the appellant and appellee engaged in conversation about the time and place mentioned by the appellant as the time and place the conversation took place between him and the appellee concerning the agreement for settlement of the account.

Appellee testified that his visits for which he charged the appellant were when he was sent for by the appellant, or in response to a call over the telephone.

The court gave the jury the following instruction: "The plaintiff in this suit seeks to recover from the defendant upon an account which has been verified by the evidence in this case, and the amount of it undisputed, the correctness of the account undisputed. Under the law in this case, it becomes my duty to instruct you to return a verdict for the plaintiff for the amount of the account, $216 with interest." The appellant duly objected and ex-

cepted to the ruling of the court. The jury returned a verdict, as directed, for the sum of $216. Judgment was entered for that sum with interest, from which is this appeal.

The court erred in instructing the jury to return a verdict in favor of the appellee. We must give the testimony its strongest probative force in favor of the appellant. When this is done, it occurs to us that, under the testimony, it was an issue of fact for the jury to determine as to whether or not the claim of the appellee against the appellant was disputed. If the jury found that the claim was disputed, it was also an issue for the jury as to whether or not there had been an accord and satisfaction. "All disputed claims, irrespective of their subject-matter, may be settled by a contract of accord and satisfaction, provided such contract is not tainted with fraud or illegality." 1 R. C. L. p. 179, sec. 4; 12 C. J. 334, sec. 24, and cases there cited in note 4; see especially *Harris* v. *Henderson,* 100 A. S. R. p. 386, note at p. 409 *et seq.* These issues should have been submitted to the jury under instructions applicable thereto. The court therefore erred in telling the jury, as a matter of law, that the amount of the appellee's account against the appellant was undisputed.

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

WEIDEMEYER v. LITTLE ROCK.

Opinion delivered January 29, 1923.

EMINENT DOMAIN—CONDEMNATION FOR STREET—BENEFITS EXCEEDING DAMAGES.—Where, after taking a strip of defendant's lands for a proposed street, the remaining portion would be more valuable in city lots than it would bring on the market if sold in its present condition, and the benefit accruing to the remaining portion exceeded the value of the strip taken, compensation is properly denied.

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

Isgrig & Dillon, for appellant.

There being a material conflict in the testimony, it was error to direct a verdict. 62 Ark. 94; 77 Ark. 556; 120 Ark. 446; 174 S. W. 225; 37 Ark. 164; 37 Ark. 580; 36 Ark. 451. The mere fact that there was a preponderance of evidence in favor of appellee did not justify a directed verdict; the matter was a question for the jury. 39 Ark. 413; 117 S. W. 563; 39 Ark. 491; 131 Ark. 411; 136 Ark. 84.

John F. Clifford, for appellee.

Where, by the taking of private property for public use, the part remaining to the owner is so increased in value as to be worth more than the whole tract in its original condition, the owner has received just compensation in benefits. 64 Ark. 556; 114 Ark. 334.

The measure of the owner's compensation is the market value at the time of the taking, for all purposes comprehending its availability for any use to which it is plainly adapted, as well as the most valuable for which it can be used and will bring the most in the market. 103 Ark. 412.

WOOD, J. This action was instituted by the appellee against C. E. Ferguson, H. A. Bowman and appellant, Weidemeyer, to condemn for street purposes a strip of land. The city engineer testified that the street which the appellee was seeking to open on the land of appellant and others was sixty feet wide and 330 long. The land of appellant taken by it would be a little over .45 of an acre, not quite a half acre. On the west side of the street there would be .2272 of an acre, or thirty feet by three hundred thirty feet, a little under a quarter of an acre. On the west side of the street the entire tract of appellant contained 2½ acres and on the east side a little over half an acre. The acreage taken out of both tracts, measured in lots of the usual dimension of 50 x 140, would be one and two-thirds lots. When this acreage is

taken out, appellant would have a trifle over 2¾ acres left. After the proposed land is taken out for street purposes, it will leave appellant close to eight lots. It will leave him six lots on the west side, and on the east side a fraction over one lot. The opening up of the street would take one and two-thirds lots and leave appellant seven and a fifth lots on Broadway Street. The land taken would cut off the back end of appellant's home site to an amount equal of one and two-third lots. This witness exhibited and introduced a plat showing the location of the street as it affected appellant's land.

Witnesses who were familiar with the property, and who were engaged in the real estate business and had knowledge of property values in the vicinity, testified. One of them stated that "after the street or extension of the street is made the value of the land caused by the proposed improvement would be about $1,500 per lot. * * * The lots would be worth $1,500 when the street was open, and would sell at $2,500 if the street was fixed up." In witness' judgment the benefit derived from the extension is nearly one hundred per cent. of its present value. What he has left would be worth twice as much as it is now. Another testified that "the value of the lots on the east side as they stand today would be worth from twelve to fifteen hundred dollars per lot. Those on the other side from eighteen hundred to two thousand. * * * After the street was opened up the value of the land would be about $500 a lot more."

The appellant testified that he owned a block of ground on which was his home. It was a piece of ground more than 330 feet square. His home fronts on Arch Street. The proposed street will take off of his property a piece of ground 30 x 330 feet and also a piece 30 x 60 feet, approximately one and two-thirds lots. Appellant has about twelve lots in the tract. Appellant had owned it all of his life practically, it being given him by his father. Appellant had been living there for forty years, and had ample opportunities to notice land values out

there. Appellant was asked the following question: "I will ask if running this street through and taking off of this part of your property will increase the value of what you have left?" Appellant answered, "Not a cent."

On cross-examination appellant was asked this question: "What is that worth at the present time in acreage?" Appellant answered, "It has no value. I haven't it on the market. I have had an opportunity to sell it if I wanted to. The Jews wanted to make a New Jerusalem out there, and I wouldn't let them have it. That is my home site, and it is going down to posterity and to my children as long as I can hold it. Some of you gentlemen didn't think I can hold it, but I think I can." In response to a question as to whether appellant thought he was competent to place a value on it after it was platted and turned into lots, the appellant answered, "I haven't gone into it. There is no use of asking a question if the street is there and if I want to plat it. It is worth more, but I haven't got it there for that purpose. I don't want to, but nobody can keep me from doing it if I wanted to do it." He further testified that the figures of the city engineer were about correct. The land as acreage has no value because it is not on the market. It is worth more if it be platted, but appellant did not have it there for that purpose, because it was his home and he wanted to keep it as such, and it was not going to increase it in dollars and cents by having a strip taken off of it.

Another witness, Davis, who was in the horseshoeing business, and who had never been in the real estate business, but whose wife owned a piece of property out there, testified that he knew the value of the land in that community, and if the proposed street would open up Broadway Street to the railroad, the value would be very handsome, but they are not opening it up to the railroad. It goes to the south line of Ferguson's property, giving no outlet to town, and does not increase the value of the property to Mr. Weidemeyer.

The court instructed the jury to return the following verdict: "We, the jury, find that the benefit to be derived by the improvement to be made by each of the defendants exceeds the value of the property taken for such improvement." The court rendered a judgment which, in substance, recites that by reason of the fact that the benefits accruing to the remainder of the tracts of said defendants were in excess of the value of the tracts so taken, the appellant should recover nothing from the appellee. From that judgment is this appeal.

The question for decision on this record is whether or not the court erred in directing the verdict and entering a judgment in favor of the appellee. In *Cribbs* v. *Benedict,* 64 Ark. 556-559, we said: "The view which seems to us to accord with reason, and which is supported by high authority, is that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits. And the benefits which will be thus considered must be those which are local, peculiar and special to the owner's land, who has been required to yield a portion *pro bono publico.*" This doctrine has since been steadily adhered to, and was reannounced in the comparatively recent case of *Paragould* v. *Milner,* 114 Ark. 334-337. The undisputed testimony shows that the condemnation of appellant's land as a street for city purposes would make the remaining property of appellant more valuable than it was before the taking. The case on the facts is thus brought directly within the doctrine of the above cases.

While the appellant, at one place in his testimony, says that "the taking will not increase the value of this property one cent," and again that "it is not going to increase it in dollars and cents by having the strip taken off," yet, when his whole testimony is considered together, it is manifest, and must be conceded as uncon-

troverted, that the opinion of the appellant thus expressed was grounded entirely upon the fact that the appellant was holding and using the property as his home, and did not intend to use it in any other way, and therefore he didn't consider that it had any market value. He concedes that if the street is opened up and a market value placed upon the property afterwards, it would be worth more than in its present condition, for he says, "There is no use asking a question if the street is there and I wanted to plat it. It is worth more, but I haven't got it there for that purpose. I don't want to, but nobody can keep me from doing it if I wanted to." Likewise the testimony of the witness Davis, considered as a whole, shows that if the property were his and a street were opened through it, he wouldn't know what value to put upon the lots. It occurs to us that a close analysis of the testimony of the appellant and Davis shows that the opening of the street would in fact render the remaining property more valuable if the same were platted and valued as city lots, than the whole property is worth in its present condition. The testimony of Davis, on cross-examination, shows that in his opinion the property in that neighborhood was worth three or four thousand dollars per acre without any street or road touching it, but if a street were opened up it would be worth three to four thousand dollars a lot, provided the street went on to the railroad. Davis did not know and did not testify as to the value of appellant's land if it were platted and sold in lots after the proposed condemnation.

In *Fort Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405-412, we said: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes comprehending its availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring the most in the market." No issue is raised here as to the right of the appellee to condemn the property for street purposes. Such right being conceded by the appellant, we find that

there is really no conflict in the evidence that the land, after the taking of the strip proposed, would be more valuable in city lots, for which it would be plainly adapted, than it would be on the market if sold in its present condition and to be used in its entirety perpetually as a home, and for no other purpose.

The court did not err in directing the verdict of the jury. The judgment is correct, and it is therefore affirmed.

DOUGLAS v. LAMB.

Opinion delivered January 29, 1923.

1. LANDLORD AND TENANT—SHARE-CROPPER.—One who cultivates land for a specified portion of the crop, the landlord furnishing the land, teams and tools, is not a tenant but a laborer.
2. FORCIBLE ENTRY AND DETAINER—POSSESSION OF PLAINTIFFS.—Evidence tending to establish that plaintiffs were in possession of land through a share-cropper *held* sufficient to sustain a finding that plaintiffs were in possession of the land when the share-cropper was dispossessed by defendant.
3. FORCIBLE ENTRY AND DETAINER—EVIDENCE OF POSSESSION BY FORCE.—In an action to recover possession of land upon the ground that defendant had turned out plaintiff's share-cropper "by force, fighting, by threats and other circumstances," evidence that defendant, a white woman, came to the house on the land occupied by such share-cropper, who was a negro, and told him to get his things out of the house, that she was going to take possession, and did not want him to give her any trouble, and proceeded to put his household goods out of the house, and he moved away because he was afraid to stay there, *held* to sustain an action of forcible entry and detainer.

Appeal from Mississippi Circuit Court, Osceola District; *W. W. Bandy,* Judge; affirmed.

T. E. Allyn, for appellant.

Plaintiffs had no right to maintain the suit. Where a tenant is unlawfully evicted by a third party, the tenant and not the landlord can maintain the action of forcible entry and detainer. R. C. L., p. 1148; 42 Wash. 560;

62 Ark. 588; 25 W. Va. 404. The evidence does not support a finding that there was any force used or any evidence of a threat. 13 Ark. 488; 41 Ark. 535; 38 Ark. 257; 4 Ark. 147; 105 Ark. 630. A verdict cannot be based on surmise or conjecture. 114 Ark. 112. Under the evidence the relation of landlord and tenant was created, and instruction No. 1 was therefore incorrect. 70 Ark. 79; 54 Ark. 346; 34 Am. Dec. 388; 37 Am. Dec. 309; 46 Ark. 254; 108 Ark. 36. The relation of landlord and tenant exists where one agrees to furnish another with a house, land, tools, and to accept one-half the crop in payment. 76 Miss. 487. One having title and right may get possession peaceably and defend by force, if necessary, and will not be guilty of forcible entry and detainer. 69 Ark. 34; 105 Ark. 630.

Davis, Costen & Harrison, for appellee.

George Smith was a laborer under the following decisions. 39 Ark. 280; 48 Ark. 264; 130 Ark. 431. At the time this action was brought plaintiffs had exclusive possession of the property. 11 R. C. L. 1146, § 12. No greater force to obtain possession from Smith was necessary than is shown under the circumstances here. 11 R. C. L. 1160, § 33.

WOOD, J. This is an action by the appellees against the appellant to recover possession of a certain tract of land in Mississippi County. The appellees, among other things, alleged in their complaint that they were the owners and entitled to the possession of the lands, and that the lands were in possession of a negro tenant, and that appellant "turned said tenant out by force, fighting, by threats and other circumstances;" that she thus obtained possession and holds the same, without right or claim of title to the lands. They alleged and prayed for damages in the sum of $1,000 and for rents in the sum of $2,000.

The appellant answered denying all material allegations of the complaint, and alleged that she was in lawful possession of the property, and had made valuable

improvements on the same, and claimed she was the owner thereof. After the conclusion of the testimony the court instructed the jury, and there was a verdict in favor of the appellee for possession of the lands, but without damages. The court rendered a judgment, based on the verdict, in favor of the appellees against the appellant for possession of the lands and for their costs, from which is this appeal.

1. The appellant contends, first, that the appellees are not the real parties in interest and therefore cannot maintain this action. Under this head the appellant contends that there was no testimony tending to prove that the appellees, at the time the appellant took possession of the property, were in possession thereof; that the undisputed testimony proved that the party through which appellees claimed to have possession was their tenant, and that such tenant alone, and not the landlord, can maintain the action. Citing *King* v. *Duncan,* 62 Ark. 588, and other cases.

There was testimony on behalf of the appellees tending to prove that at the time the appellant took possession of the land in controversy the same was occupied by one George Smith, a negro. While one of the witnesses for the appellee states that the plaintiffs were in possession through their tenant, the witness further testified as to the nature of the contract with Smith as follows: "He had a contract with plaintiffs to farm practically all of the land in 1920." This witness further testified: "The plaintiffs had charge of the possession of the property—had it in charge the year before—and the only trade that was made was made with George Smith." The testimony tended to prove that the arrangement made by appellees through their agent with George Smith was that the latter should cultivate the land as a share-cropper. Smith himself testified that he had possession of the land that year, and was making a share-crop. Another witness stated that the lands were rented partly to Goforth and partly to George

Smith, a share-cropper. One of the witnesses, explaining the contract which he made on behalf of the appellees, stated, "I was to furnish the mules, team, seed, mule feed and provisions, and he was to get one-half of the crop, and I was to get one-half." At the time appellant entered into possession of the land in controversy he (Smith) was the only man on the place.

The above testimony was at least sufficient to justify the court in submitting to the jury the issue as to whether George Smith held the land as a tenant, or a mere laborer, or share-cropper. The testimony was sufficient to justify the court in refusing appellant's prayer for instruction No. 8 for a directed verdict in her favor, and to warrant the court in giving appellees' prayer for instruction No. 1 as follows: "One who cultivates lands under a contract by which the landlord furnishes land, teams and tools to make crop, and he works the land, and makes the crop for a specified portion thereof, is not a tenant, but a laborer." See *Gardenhire* v. *Smith,* 39 Ark. 280; *Hammond* v. *Creekmore,* 48 Ark. 264; *Rand* v. *Walton,* 130 Ark. 431; 11 R. C. L. 1146, sec. 12. The testimony was sufficient to warrant a finding that the appellees were in possession of the land in controversy through George Smith; that Smith was not technically a tenant of the appellees, but only a share-cropper, or laborer.

2. Appellant next contends that there was no testimony tending to prove that the appellant took possession of the land in controversy by force. The appellees brought this action under § 4837 of Crawford & Moses' Digest, and under that section force is the gist of the action. *Miller* v. *Plumber,* 105 Ark. 630, and cases there cited. Actual physical violence upon the person in possession by the one who takes possession is not a prerequisite to the maintenance of the action, but "if the demonstration of force is such as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace, it is sufficient. It is not necessary that the party be actually put in fear.

There need only be such a number of persons or show of force as is calculated to deter the person in possession from undertaking to send them away or to retain his possession." 11 R. C. L., § 23, pp. 1160-1161. To determine whether or not force was used, the personnel and situation of the parties and the circumstances surrounding them at the time must all be taken into consideration. The testimony showed that George Smith, the share-cropper or laborer, was a negro. The appellant was a white woman. She loaded her household goods in a wagon, and, in company with a white man, drove over to the house occupied by Smith. She told Smith to get his things out of the house; that she was going to take possession of the place. Smith went up to the store on the place to consult with "Mr. Bob" about it. He didn't see Mr. Bob, but asked Mr. Mike about it, who told him to go back down there until Mr. Bob came. When Smith went back, he found that the appellant had moved in, and she told Smith that she didn't want him to give her any trouble. Smith moved away because he was afraid to stay there. His household goods had been moved out in the back yard, and the appellant's goods were in the house when he got back from the store.

This testimony was sufficient to warrant the court in submitting the issue to the jury as to whether or not appellant used force necessary to sustain the action under § 4837, C. & M. Digest, *supra.* The court submitted the issue to the jury under proper instructions.

3. Appellant next contends that the court erred in refusing to grant certain of its prayers for instructions which we deem it unnecessary to set forth and discuss in detail. Such of these prayers as were correct were fully covered by instructions which the court gave. We have examined them and find no error in any of the court's rulings.

The judgment is in all things correct, and it is therefore affirmed.

Missouri Pacific Railroad Company v. Tompkins.

Opinion delivered January 29, 1923.

1. Removal of causes—jurisdiction after petition for removal.—Where a cause is removable to the Federal court, a State court is without jurisdiction to proceed with the trial after a petition for removal is filed.
2. Courts—conclusiveness of federal courts' decision.—As the right to remove causes to the Federal court is derived from the law of the United States, the State courts are bound by the decisions of the United States Supreme Court on the question whether a case is made for removal of a cause from a State to a Federal court.
3. Removal of causes—nonresident defendant.—Under Jud. Code U. S. § 28, as interpreted by the Supreme Court of the United States, a suit in a State court against a nonresident defendant by a resident of the State but not of the Federal district in which such State court is situated may be removed to the Federal court, over plaintiff's objections, if the other conditions of removability are complied with.

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

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

Appellant having in apt time filed a sufficient petition and bond for removal of the cause to the United States District Court, it should have been removed to that court. The fact that neither the plaintiff nor the defendant resided in the judicial district where the action was brought does not affect the removability of the cause. *Ex parte Wisner*, 203 U. S. 449, on which this court has based its decisions contrary to the above contention, has been modified and partially overruled. 219 U. S. 363, 55 L. ed. 252; 209 U. S. 490, 52 L. ed. 904; 210 U. S. 368, 52 L. ed. 1 And many of the Federal courts hold it is no longer an authority, and that these cases are removable. 218 Fed. 91; 224, 566; 251 Fed. 337; 222 Fed. 579; 244 U. S. 41; 205 Fed. 821; 211 Fed. 343. But the Supreme Court of the United States has recently settled this question favorably to appellant's contention. See *General Investment Co.* v. *Lake Shore & Michigan R. Co.*, 43 Sup. Ct. Rep. 106.

R. P. Hamby, and *Tompkins, McRae & Tompkins,* for appellee.

The cause was not removable. The suit was brought outside of the Federal district in which the plaintiff resided. The defendant is a foreign corporation. 203 U. S. 449; 98 Ark. 507; 107 Ark. 512; 129 Ark. 550. The language of the Judicial Code, § 51, admits of no uncertainty on this point.

HART, J. W. V. Tompkins, administrator of the estate of J. U. Brown, deceased, brought this suit against the Missouri Pacific Railroad Company to recover damages in the sum of $30,000 on account of his intestate being negligently killed by one of the defendant's trains.

On December 3, 1920, J. U. Brown, while driving his automobile across a public railroad crossing over the defendant's railroad in the city of Prescott, Ark., was struck by one of the defendant's passenger trains, with the result that the automobile was demolished and Brown was instantly killed. Brown left a widow and two minor children dependent upon him.

The case was tried before a jury in the Clark Circuit Court, and there was a verdict and judgment for the plaintiff in the sum of $7,500.

The Missouri Pacific Railroad Company duly filed its petition for removal of the action to the District Court of the United States, and as grounds therefor alleged that it was a corporation organized under the laws of the State of Missouri, with its general officers and principal place of business in the city of St. Louis, in said State.

The petition further alleged that the plaintiff is a citizen and resident of the State of Arkansas, and that the amount in controversy in this action exceeds $3,000, exclusive of interest and costs.

The petition further alleges that J. U. Brown was killed by one of the defendant's passenger trains while attempting to drive an automobile across a public street crossing in the city of Prescott, Ark., and that said acci-

dent happened without fault or carelessness on the part of the defendant.

The petitioner also filed its bond for the removal of the action, as required by law.

The Clark Circuit Court denied the petition of the defendant for the removal of the cause, and proceeded with its trial, with the result above stated.

The case is here on appeal.

If the cause was removable, the circuit court was without jurisdiction to proceed with the trial, and its judgment must be reversed for this reason, whether it might otherwise be sustained or not.

The ground of removal was the diverse citizenship of the parties. The petition for removal alleged that the plaintiff was a citizen of the State of Arkansas and the defendant was a corporation organized under the laws of the State of Missouri, and a citizen of that State within the meaning of the Federal statute providing for the removal of causes on account of diverse citizenship.

The right to remove is derived from the laws of the United States, and whether a case is made for removal is a Federal question. Hence we are bound by the decisions of the United States Supreme Court on the question. *K. C. S. Ry. Co.* v. *Wade,* 132 Ark. 551, and *Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207.

Sec. 28 of the Judicial Code enacted by the Congress of the United States provides:

"Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

According to the interpretation placed upon this section by the Supreme Court of the United States, in *General Investment Company* v. *Lake Shore & Michigan Southern Railway Company,* 43 S. C. Rep. 106, and *Lee* v.

Chesapeake & Ohio Railway Company, 43 S. C. Rep. 230, if the plaintiff brings suit in a State court not in his district, the defendant, being a nonresident of such State, can remove such suit to the Federal court, whether the plaintiff objects or does not object, if the other conditions of removability are complied with.

Following these decisions, we hold that the case was removable to the Federal court, and, for the error in refusing to transfer it to the proper Federal court, the judgment of the Clark Circuit Court must be reversed, and the cause will be remanded for further proceedings according to law.

PRATT v. STATE.

Opinion delivered January 29, 1923.

1. INTOXICATING LIQUORS—MANUFACTURE—EVIDENCE.—In a prosecution charging defendant with being interested in the manufacture of alcoholic, fermented and intoxicating liquors, evidence *held* sufficient to connect defendant with the manufacture of such liquors.
2. CRIMINAL LAW—INSTRUCTION—ARGUMENTATIVENESS.—In a prosecution for manufacturing intoxicating liquors, where defendant claimed that the mash which he had was being prepared for hog feed, a requested instruction that, to convict defendant, you must find that he manufactured some of the liquors prohibited by law or was interested in the manufacture, "and it is not sufficient that he was interested in the mash only as hog feed," was argumentative, and carried a suggestion that the mash in question was prepared for hog feed.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman,* Judge; affirmed.

Smith & Gibson, for appellant.

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

HART, J. W. E. Pratt prosecutes this appeal to reverse a judgment of conviction against him upon an indictment charging him with being interested in the man-

ufacture of alcoholic, fermented, and intoxicating liquors, contrary to the statute.

On the part of the State it was shown that the sheriff of Lawrence County procured a search warrant to search the house of Lute Smith, situated in the Eastern District of Lawrence County, Ark., for a still. When the officers reached Smith's home, he was absent, but they found his wife and daughter and the defendant Pratt in the house. Upon searching the house they found four fifty-gallon barrels of mash which had begun to ferment, and was intoxicating. The mash was made of chops, sugar and water, and tasted like it had just begun to sour and "work up good." They also found a number of fruit jars containing about one-half a teacup each of moonshine whiskey. When the officers entered the house, Mrs. Smith made a motion towards her daughter, and the daughter left the house with a half-gallon fruit jar full of whiskey. The officers attempted to seize her, and after a struggle with the mother, who went to the assistance of her daughter, they took the whiskey away from the daughter. During this time the defendant ran away from the house and hid in a treetop, where he was captured by one of the officers. He admitted to the officers that he was interested in the mash, and said that it had been prepared for hog feed.

Mrs. Smith stated to the officers, in the presence of the defendant, that her husband and the defendant had made the mash while she was away from home. The officers found where there had been a furnace prepared in the smokehouse and a pipe was in a ditch leading off from it, indicating that whiskey had been manufactured there. They found no worm, but there were several containers in the smokehouse which smelled of whiskey.

The defendant was a witness for himself, and denied having anything whatever to do with manufacturing whiskey at Smith's house, and stated that he just happened to be there on the day in question.

The evidence for the State clearly shows that the mash was suitable for making intoxicating liquors, and had been used and was being used for that purpose. This is shown not only by the fact that the mash was in a state of fermentation and was intoxicating, but other intoxicating liquors were found on the premises.

According to the testimony of the officers, the defendant admitted that he was interested in making the mash, but stated that it was being prepared for hog feed. The fact that sugar was used in its preparation negatived the idea that it was being prepared to feed hogs. The fact that it was in a high state of fermentation and that there were four fifty-gallon barrels of it, also tended to show that the mash was being used to make moonshine whiskey. The evidence for the State was sufficient to connect the defendant with the manufacture of intoxicating liquors and to support the judgment of conviction.

The court specifically told the jury that it must find beyond a reasonable doubt, from the evidence in the case, that the liquor found in the barrels was alcoholic or intoxicating liquor, and that the defendant was interested in making it, before it would be authorized to convict him. This was a clear presentation of the theory of the State. But it is contended by counsel for the defendant that he was entitled to have his theory of the case submitted to the jury in an appropriate instruction. His claim was that the mash was being prepared for hog feed, and that he had a right to have this theory of the case submitted to the jury, in compliance with the rule announced by this court in *Milliner* v. *State,* 154 Ark. 608. This is true if the defendant had asked a correct instruction on this point. The instruction asked by the defendant is as follows:

"You are instructed that, before you would be authorized to convict the defendant under this indictment, you must find that he manufactured some of the liquors prohibited by law, and named in the charge, or was interested directly or indirectly in the manufacture of the

same. And it is not sufficient that he was interested in the mash in proof only as hog feed."

The concluding part of the instruction is what the defendant claims presented his theory of the case. It will be noted that this part of the instruction is argumentative in form, and for that reason the court was not required to give it. The instruction carried with it a suggestion by the court that the mash in question was prepared for hog feed, when all that the defendant was entitled to was to have this question submitted to the jury. In other words, it was a question for the jury to say, under all the facts and circumstances in evidence, whether or not the mash in question was being prepared for hog feed. The court could not indicate to the jury that this was the use to be made of it.

We find no reversible error in the record, and the judgment must therefore be affirmed.

WILSON v. PANNELL.

Opinion delivered January 29, 1923.

1. JUDGMENT—RES JUDICATA.—A decree dismissing a complaint to quiet title on the ground that the equitable title was in defendant, which dismissal was affirmed on appeal, was *res judicata* in an action of ejectment by plaintiff against defendant to recover the same property under essentially the same state of facts, though a decree quieting title in defendant in the former suit was reversed because her husband was not made a party.
2. EJECTMENT—EQUITABLE TITLE.—An equitable title sufficient to prevent the holder of the legal title from maintaining a suit in equity to quiet title is sufficient to prevent him from maintaining an action of ejectment under substantially the same facts.

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

STATEMENT OF FACTS.

This is an action of ejectment brought in the Clark Circuit Court by Thos. N. Wilson against Mrs. S. A. Pan-

nell to recover a certain lot in the city of Arkadelphia, Ark.

Mrs. Pannell filed an answer in which she claimed the equitable title to the lot, and also interposed a plea of *res judicata.*

Thos. N. Wilson was a witness for himself. According to his testimony, he had lived in Arkadelphia and practiced law there for the past thirty years. The lot in controversy is on one of the principal streets of the town, and has been vacant for the past ten or fifteen years. W. G. Pannell formerly owned the lot and had a blacksmith's shop on it. He left Arkadelphia about thirty years ago, but has made a good many visits back there, and always claimed the lot in controversy. A son of W. G. Pannell operated the blacksmith shop for a number of years after his father left Arkadelphia. In September, 1920, Wilson obtained a quitclaim deed from W. G. Pannell to the lot and paid him $500 for it. Wilson considered this a fair value for the lot. He knew that the defendant had not been divorced from her husband and had not relinquished her dower in the lot at the time he purchased it. Wilson did not know, however, that Mrs. Pannell claimed title to the lot at the time he purchased it. Pannell told Wilson that his wife would not join him in the deed.

Mrs. S. A. Pannell was a witness for herself. According to her testimony, W. G. Pannell is her husband, and deserted her and their three minor children in 1897. Since that time he has not contributed anything to the support of herself and their children. When her husband left, she took possession of the blacksmith shop on the lot in controversy, and two of her children worked in the shop. At the time her husband left, her children were respectively 19, 17, and 12 years of age. Mrs. Pannell also kept boarders and paid the debts of her husband, amounting to between $800 and $1,000. She paid these debts to keep her husband's creditors from attaching the lot in controversy. After doing so, she had the

lot assessed in her own name and paid the taxes on it for twenty-four years. She has claimed to own the lot since her husband left her. Her testimony is corroborated by that of her eldest son.

According to his testimony, the lot was worth at least $2,500 when Wilson purchased it. Wilson had approached him several times, as agent for his mother, to purchase the lot. The witness told Wilson that the lot belonged to his mother, and that she did not wish to sell it. Wilson knew that his father and mother had been separated for twenty-three years, and that his mother claimed the property.

The proceedings in a chancery case between these same parties were introduced in evidence on the plea of *res judicata.* In that case Wilson brought a suit in equity against Mrs. Pannell to quiet his title to the lot, and Mrs. Pannell filed an answer and cross-complaint in which she claimed the equitable title to the lot, and also sought to quiet her title to it.

The chancery court dismissed the complaint of Wilson for want of equity, and there was a decree in favor of Mrs. Pannell quieting and confirming the title to the lot in her.

Upon appeal to this court the decree of the chancery court dismissing the complaint of Wilson for want of equity was affirmed, but the decree quieting and confirming the title in Mrs. Pannell was reversed because her husband had not been made a party to the suit. See *Wilson* v. *Pannell,* 149 Ark. 81.

The case was tried before the circuit court, which sustained Mrs. Pannell's plea of *res judicata,* and from the judgment rendered in her favor Wilson has duly prosecuted an appeal to this court.

J. H. Crawford, D. H. Crawford and *T. D. Crawford,* for appellant.

1. The statute of limitation did not run in favor of Mrs. Pannell against her husband. 86 Ark. 488. Even

if it could have run in such a case, there is no proof of adverse holding.

2. Treating appellee's plea of estoppel, there being no allegation nor proof on which to base a finding of estoppel *in pais*. Laches is a defense available only in equity, and has no application in ejectment. 88 Ark. 478; 100 Ark. 399.

3. The title to the property was not adjudicated in the former suit. 149 Ark. 81. That decision held that the legal title was in W. G. Pannell, p. 85, *Id.* And that title passed to appellant. Appellant is not barred by the adjudication in that case. 55 Ark. 286; 9 R. C. L. 209, § 30; 49 Am. St. Rep. 833, note.

The holding on former appeal that appellee was not entitled to relief for want of a necessary party, her husband, was in effect a dismissal of her action for want of a necessary party, and was not *res judicata* as to the subject of the controversy. 127 U. S. 619; 108 S. W. 118; 123 Wis. 510. See also 66 Ark. 336; 121 Ark. 594; 136 Ark. 115; 96 Ark. 87; 128 Ark. 492; 36 O. St. 347; 147 Ark. 236; 11 Ark. 411.

Callaway & Callaway, for appellee.

1. Appellant is not an innocent purchaser, as was adjudicated on the former appeal. 149 Ark. 81. He could acquire no greater rights by purchase than his grantor had. Moreover, a purchaser taking by quitclaim deed with knowledge of another's equities is not an innocent purchaser. 137 Ark. 170; 68 Ark. 157; 50 Ark. 322; 23 Ark. 270.

2. Appellee is not concluded by 86 Ark. 448, relied on by appellant, and it has no application here since Pannell abandoned all marital relations with appellee in 1897. Appellant is barred by the statute. 29 Pac. 1117; 158 Cal. 149; 110 Pac. 313; 132 Pac. 291.

3. Pannell was estopped by his conduct from disturbing appellee's possession, and appellant, being a purchaser with full notice, and without a good and sufficient consideration, is also estopped. 21 C. J. 1152.

HART, J. (after stating the facts). The judgment of the circuit court sustaining Mrs. Pannell's plea of *res judicata* was correct. A comparison of the statement of facts made by the court in the suit brought in equity by Wilson against Mrs. Pannell to quiet his title to the lot with the statement of facts in the present case will show that they are in all essential respects the same.

In the equity case Mrs. Pannell defended on the ground that she had the equitable title to the lot in controversy, and for that reason Wilson could not prevail in his suit to quiet title. The court dismissed the complaint on the ground that the equitable title to the lot was in Mrs. Pannell. This is clearly shown by a quotation from the opinion in the equity case as follows:

"Appellant insists that the court erred in dismissing his bill for want of equity. This must depend upon whether his grantor, W. G. Pannell, was in position to assert his legal title as against the equitable rights of Mrs. S. A. Pannell in a court of equity, for appellant cannot be regarded as an innocent purchaser, as the record reflects that he had a personal acquaintance with his grantor, W. G. Pannell, and the appellee, Mrs. S. A. Pannell, and understood that they had lived apart for twenty-three years; that said appellee had been in the actual possession of the lot during that period, paying taxes thereon and claiming ownership thereto." *Wilson* v. *Pannell,* 149 Ark. 81.

It is true that the court denied the right of Mrs. Pannell to have her equitable title in the lot quieted. This was not done, however, because the court was of the opinion that the equitable title was not in her, but relief was denied her on the specific ground that her husband had not been made a party to the suit, and that therefore it was a technical error for the court below to quiet the title in her.

As above stated, however, the court held in the equity case that Mrs. Pannell had the equitable title to

the lot, and for that reason denied the prayer of Wilson to have his title quieted, holding that he was not an innocent purchaser and had no greater right in the lot than his grantor, the husband of Mrs. Pannell.

Therefore in a suit between the same parties for the same property, under a state of facts essentially the same, the court having held that the equitable title was in Mrs. Pannell, her plea of *res judicata* is fully established. Under our Civil Code a defendant may set forth in his answer as many grounds of defense, whether legal or equitable, as he shall have. Crawford & Moses' Digest, § 1194, 4th subdivision. Under this provision of the Code it is well settled that the defendant in an action at law must interpose all defenses, legal and equitable. *Daniel* v. *Garner,* 71 Ark. 484, and *Wales-Riggs Plantations* v. *Banks,* 101 Ark. 461.

Therefore it necessarily follows that if the equitable title of Mrs. Pannell was sufficient to prevent Wilson from maintaining a suit to quiet title in the lot, it would also be sufficient, in a suit between the same parties, under substantially the same facts, to prevent him from maintaining an action of ejectment whereby he would recover possession of the lot and thus defeat the equitable title of Mrs. Pannell. In short, it would do no good to hold that the equitable title to the lot was in Mrs. Pannell, if she could not interpose it to a legal as well as equitable suit for the property against one who had purchased the lot from her husband with full knowledge of her rights.

It follows that the judgment must be affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* DAVIS.

Opinion delivered January 29, 1923.

ACTIONS—SPLITTING CAUSE OF ACTION.—Where a train running 40 miles an hour struck and killed or crippled 7 head of cattle belonging to plaintiff in a distance of 225 feet, there was a single act of negligence and one cause of action, and where a judgment

in the first of seven separate causes of action was paid by the defendant, the causes of action in the other six cases should have been abated.

Appeal from Crawford Circuit Court; *James Cochran;* Judge; reversed.

W. F. Evans, Warner, Hardin & Warner, for appellant.

A single cause of action cannot be split in order that separate suits may be brought for the various parts of what really constitutes but one demand, whether *ex contract* or *ex delicto.* 24 Ark. 177; 63 Ark. 259; 118 Ark. 402; 1 C. J. sec. 276, p. 1106, note 48; 1 Suth. on Damages (3d ed.) sec. 106; 18 Pac. 502; 127 S. W. 472; 50 L. R. A. 161; 38 Mo. Ap. 511; 24 Okla. 96; 18 Pac. 636; 120 Ky. 686; 115 Tenn. 172.

A single tort can be the basis of but one action. 1 Suth. on Dam., sec. 110, p. 315; L. R. A. 1917-C, 543; L. R. A. 1916-E, 974; 50 L. R. A. 828; *Id.* 161; 3 L. R. A. (N. S.) 225; 1 Freeman on Judgments, sec. 241; 23 Cyc. p. 1178; 25 Mo. Ap. 650; 1 C. J., sec. 301, p. 1118.

Where an attempt is made to split the cause of action and bring successive suits for parts, a recovery in the first suit, though for less than the whole demand, will be a bar to the second action. 118 Ark. 402; 60 Ark. 146; 95 Ark. 47; 119 Ark. 263.

For other authorities holding that there was but one cause of action see 1 R. C. L. 326, p. 346; 120 A. S. R. 379; 83 Mo. 660; 13 Ind. 103.

George Stockard, for appellee.

Where several judgments are rendered upon the same cause of action, a satisfaction of one of them will operate to discharge the others, provided the costs of all the suits be paid, also the interest on the judgment which is urged as a bar. 16 Stand. Proc., p. 593. The killing of each animal was a separate offense, although occasioned by the same agency. A case illustrative of our contention, where separate suits were brought under similar facts, see 41 Kan. 521.

SMITH, J. On September 15, 1921, appellees filed seven separate suits before a justice of the peace against the appellant railroad company to recover damages for seven head of cattle which they alleged were killed and crippled by one of defendant's trains on the 6th day of August, 1921. A summons was issued in each case, and on September 29, 1921, a separate judgment was rendered in each case for the amount sued for. The judgment in the first case was for $60 for one heifer; that in the second case was for $60 for another heifer, and the judgments in the four other cases were for different amounts aggregating $180.

On October 7, 1921, the railroad company paid and satisfied the judgment in the first case filed, and on October 12, 1921, appealed the remaining six cases to the circuit court.

There is some controversy about the conversation which occurred between the attorney for appellee and the attorney for appellant at the time the first judgment was satisfied, as to the purpose in satisfying it and in not satisfying the other judgments; but we regard this conflict as unimportant, for the reason that the railroad company had the right to satisfy the judgment if it saw proper to do so.

Upon the appeal the cases were consolidated and tried together, after the railroad company had filed an answer setting up the facts stated above, and pleading the satisfaction of the first judgment in abatement of the other suits.

There was testimony from which the jury might have found that the railroad company had not overcome the statutory presumption of negligence arising from the killing of the animals by a moving train. The animals were struck about 9:50 p. m. by a night passenger train, during a drenching rain, and the engineer and fireman testified that the cattle were bunched together and were lying near the point of a curve, and were not seen by them in time to have avoided striking them, be-

cause of the curve. The testimony on the part of appellees was to the effect that the animals were found lying along the track, and one witness stated that the last animal killed was lying 225 feet from the first animal killed. The other animals were lying between. Other witnesses for appellees placed the animals nearer together than we have stated, but none of them place the entire distance at more than 225 feet, and we state the testimony most favorably to appellees. One of the animals struck by the train was not killed, but was injured, and strayed away from the railroad, and was not found for several days.

The jury found for appellees, and the court rendered judgment in their favor for the value of the stock as found by the jury, but assessed the costs against appellees, and the railroad has appealed.

We think the plea in abatement should have been sustained, as appellees had but one cause of action, and had no right to split this cause of action into parts.

In Sutherland on Damages, page 381, (4th ed.) it is said: "The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim arising either upon a contract or from a wrong cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits of either will be available as a bar in the others."

This statement of the law accords with our own cases on the subject. *Reynolds* v. *Jones,* 63 Ark. 259; *Hemingway* v. *Grayling Lumber Co.,* 125 Ark. 400. Numerous cases are cited in the brief of counsel for appellant which support the text we have quoted.

Counsel for appellee cite the case of *Mo. Pac. Ry. Co.* v. *Scammon,* 41 Kan. 521, in which the owner of a mare was permitted to sue for and recover its value after having sued for and recovered the value of a colt which had been killed by the same train which had killed the mare. The facts recited in the opinion of the court were that the colt was first struck and killed, and then the mare was struck and injured at a point thirty rods from where the colt was struck. The court said there was a difference of time and locality, and that this difference made and constituted separate and distinct causes of action. The court stated the fact that the killing of the colt might have been prevented by the exercise of ordinary care, while the injury of the mare must have been the result of gross negligence. The court, however, recognized and stated the principle which controls here, for it was there said: "When two horses are killed by the cars of a railroad company at the same time, or when different chattels are taken by one trespass, or converted by one person at the same time, but one recovery can be had. This rule applies in all such cases where the tort, trespass, or conversion consists of one entire and undivided act."

We think the jury was warranted in finding that the injury to the stock could have been averted had the proper precautions been taken, notwithstanding the character and the location of the curve at the point where the animals were struck; but we think there was but a single act of negligence, and that there was no intervening time during which anything could have been done, or was omitted, which constituted an additional act of negligence. A train moving at the rate of 40 to 45 miles per hour would travel the distance of 225 feet in such a short space of time that nothing could have been done, after striking the first animal, to prevent striking the others, even though we assume that the animals were not thrown or carried any part of that dis-

tance by the train but were in fact that far apart when the first one was struck.

The first suit is a bar to the others, and the judgment must therefore be reversed and the cause dismissed.

MISSOURI PACIFIC RAILROAD COMPANY v. HANNA.

Opinion delivered January 29, 1923.

1. CARRIERS—NEGLIGENCE—ALIGHTING FROM MOVING TRAINS.—Though the transportation contract of a shipper accompanying live stock provided that he was to remain in the caboose and not get off from a moving train, he could nevertheless sue for personal injuries sustained in alighting from a moving train on the advice of the conductor; the suit being not for breach of a contract but for the negligence of the carrier's servant.
2. TRIAL—INSTRUCTION ASSUMING FACT.—In an action for personal injuries sustained by a passenger while alighting from a moving train on the advice of the conductor, an instruction which assumed that the conductor was acting within the scope of his authority in directing the passenger to get off was not erroneous where such fact was established by the evidence.
3. TRIAL—INSTRUCTION AS TO NEGLIGENCE.—In an action for personal injuries sustained by an owner accompanying a shipment of live stock while alighting from a moving train under advice of the conductor, an instruction which assumed that it was negligence for a conductor to advise a passenger to alight from a moving train was correct.

Appeal from Poinsett Circuit Court; *J. M. Futrell*, Judge; affirmed.

Thos. B. Pryor, and *Gordon Frierson*, for appellant.

1. The question of liability in this case is to be determined according to the law of the State of Illinois, where the injury occurred. 194 Fed. 79, 114 C. C. A. 157; 113 Ark. 265; 142 Ark. 59; 78 S. E. 925; 119 N. E. 539; Hutchinson on Carriers, § 205; Elliott on Contracts, § 3313.

2. Under the law of the State of Illinois appellee cannot recover in this action. 229 Ill. 608, 82 N. E.

403; 85 Fed. 945, 948; 171 N. W. 86. The contract involved was a rule and regulation of the company on the subject of transporting shippers in charge of livestock, which the conductor had no right to abrogate. Elliott on Railroads, § 2391; *Id.* 2480.

3. Instruction numbered 2 given by the court was erroneous in assuming that the conductor acted within the scope of his authority, and also in assuming that if he did invite plaintiff to alight from a moving train, such conduct constituted negligence on his part as a matter of law, whereas the question of negligence was one for the jury. 66 Ark. 109; 98 Ark. 370; 11 Ark. 309; 97 Ark. 438.

Irving M. Greer, for appellee.

1. The validity of the contract, which was made in this State, will be determined by the law of this State. 5 R. C. L. § 670; 174 Ill. 13; 50 N. E. 1097; 189 Fed. 153; 10 C. J., 1164, Carriers; 227 Fed. 127; 29 C. C. A. 503.

2. Negligence on the part of the railroad company or its employees deprives it of any protection under the contract, 1st, because such a contract is void as against public policy, and 2nd, because, under the statutes of this State, such a contract is void and not enforceable. 5 R. C. L. § 665; *Id.* § 667; 200 Fed. 197; *Id.* 207; 174 Ill. 13; 50 N. E. 1019; 40 Ark. 298; 105 Ark. 340; C. & M. Digest, §§ 843, 844. The procedure is governed by the *lex fori.* 113 Ark. 265. If negligence can be attributed to the defendant, liability attaches, irrespective of the contract. 4 R. C. L. § 596.

3. Instruction No. 2 was correct, and properly assumed that the conductor was acting within the scope of his authority, and also in assuming that he was guilty of negligence as a matter of law, in inviting the plaintiff to alight from the moving train. 88 Ark. 12, and cases cited; 113 Ark. 265; Minor, Conflict of Laws, 486; 108 Ark. 292; 177 Ind. 126; 97 N. E. 434; Ann. Cases, 1914-C, 1272.

HUMPHREYS, J. Appellee instituted suit against appellant in the Poinsett Circuit Court to recover damages in the sum of $2,000, on account of injuries received in alighting from its train at Gale, Illinois, through the alleged negligent act of its conductor in inviting and advising him to get off at that place. It was alleged that appellee was, at the time, accompanying a shipment of stock from Harrisburg, Arkansas, to St. Louis, Missouri, and in obedience to the advice of the conductor did alight from said train, with the result that he was thrown to the ground and seriously and permanently injured; that at the time it was so dark he could not tell how fast the train was moving, and in debarking acted solely upon the advice of appellant's employee.

Appellant filed an answer admitting that appellee was a passenger upon said train, accompanying a stock shipment to St. Louis, but denied all other material allegations in the complaint. Appellant also interposed the following defenses:

First, contributory negligence on the part of appellee in alighting from a moving train.

Second, the written contract for transportation, which required the appellee to remain in the caboose attached to the train, while the train was in motion, and to get on and off the caboose while the same was still.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court, which resulted in a verdict and judgment against appellant in the sum of $2,000. From that judgment an appeal has been duly prosecuted to this court.

Appellee, plaintiff below, introduced testimony to the effect that early in January, 1921, he shipped two carloads of cattle and one carload of hogs to St. Louis, Missouri, from Harrisburg, Arkansas; that he accompanied the livestock, riding by right as a passenger in the caboose; that when they were getting into Gale, Illinois, the conductor told the passengers to get off at the yard house, and it would save them walking through

the dark yards; that it was then about nine o'clock, and dark; that all of them got their baggage and followed the conductor to the door for the purpose of debarking; that, while standing in the door, the conductor again told them to get off; that the conductor got off first, J. E. Arnold next, and appellee next, who, by reason of the rapid movement of the train, was thrown violently to the ground, some twelve feet distant, and injured; that at the time he stepped off he thought the train was barely moving.

Appellant introduced testimony to the effect that the conductor told the passengers, if the train stopped at the hill, to get off so they would have time to eat; that the train was slowing down, and the conductor remarked, "I believe we are going to stop at the hill"; that the engineer took slack and started down the hill, whereupon the conductor told the passengers not to get off until they reached the bridge, about one hundred yards below the yard house; that the conductor himself got off at the yard house in order to register the train in; that Arnold succeeded in getting off safely, but that appellee fell in the attempt to do so. Appellant also introduced the bill of lading for the shipment of the livestock upon which appellant traveled, which contained a provision to the effect that the party in charge of the stock should remain in the caboose attached to the train while in motion, and to get on and off the caboose while the same was still.

Appellant's main contention for reversal is that, according to the undisputed facts, appellee was injured while attempting to debark from a moving train, in violation of his contract for transportation. In support of this contention, appellant cites the case of *Illinois Central Railroad Co.* v. *Jennings,* 229 Ill. 608, which decided that such a stipulation was valid. Conceding that the liability is determinable by the law of the State where the injury occurred, and that the Supreme Court of Illinois has upheld the validity of such a clause in a trans-

portation contract as being reasonable and just, the contract and adjudication, upholding its validity, have no bearing upon or application to the instant case. This suit is not for a breach of the contract, but for an injury resulting from an alleged negligent act of appellant's employee. The action is outside of the contract. It is based upon the maxim, "*respondeat superior,*" which imputes liability to a master for the negligent acts of his servant, within the scope of the servant's actual or apparent authority, irrespective of any contract. 4 R. C. L. § 596.

Appellant's next and last contention for reversal is, that the court erred in giving instruction No. 2, which is as follows:

"If you find from a preponderance of the evidence that, upon approaching, or while in or near the yards of the defendant at Gale, Illinois, the conductor in charge of said train of defendant advised the plaintiff to alight or get off of said train at the yard office, and if you further find that plaintiff acted upon the advice of said conductor, and attempted to alight from said train, and that in attempting to alight from said train he was in the exercise of due care for his own safety, and if you further find that the plaintiff was injured in alighting from said train and falling, you will find for the plaintiff; and, unless you find for the plaintiff under this instruction, your verdict will be for the defendant."

The instruction is assailed because it assumed that the conductor acted within the scope of his authority if he advised appellee to get off of a moving train at the yard house; and, if such advice was given, that it constituted negligence as a matter of law.

(1) The conductor was in command of the train, and necessarily possessed authority to direct passengers when and where to get off. His own testimony reveals that he had such authority. In instructing the jury it was therefore proper for the court to assume that he was acting within the scope of his authority if he directed appellee to debark at the yard house.

(2) It was also proper to assume, in instructing the jury, that if the conductor directed appellee to get off of a moving train, which threw him violently to the ground in the attempt to debark, it was a negligent act as a matter of law. The general law is that a carrier owes a passenger the highest degree of care consistent with the practical operation of its trains (2 Hutchinson on Carriers [3d ed.] § 1118), and to direct a passenger in the night time to debark from a moving train without furnishing ample means and protection for doing so is clearly in violation of this duty, amounting in the law to negligence. *Jones* v. *Chicago, M. & St. P. R. Co.,* 42 Minn. 183; *Eddy* v. *Wallace,* 49 Fed. 801; *Lake Erie & W. R. Co.* v. *Huffman,* 97 N. E. 434.

The issue of contributory negligence on the part of appellee in debarking from the moving train was submitted to the jury under proper instructions.

No error appearing, the judgment is affirmed.

JOHNSON *v.* SHY.

Opinion delivered January 29, 1923.

BILLS AND NOTES—INNOCENT PURCHASER.—In a suit by an indorsee of a note, evidence *held* sufficient to support a finding that the note was purchased by the indorsee with knowledge that it was procured from the makers through fraud and deceit and without consideration.

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

James B. Reed, Lewis Rhoton and *Robt. L. Rogers,* for appellant.

Appellant is by the record shown to be an innocent purchaser for value before maturity, and is entitled to recover. The equities are on appellant's side, and appellees, not he, should suffer. 49 Ark. 214, and authorities cited.

Trimble & Trimble, for appellees.

It is obvious from the facts and circumstances in evidence that the corporation whose stock appellant was selling was a bogus concern, the object of which was to sell stock through fraudulent misrepresentations and deceit, and that appellant knew this to be a fact. He cannot recover as an innocent and *bona fide* purchaser. 8 C. J. 1147; 230 Pa. 106, 107; 55 Tex. Civ. App. 144, 146; 118 S. W. 785; 26 Neb. 345, 352; 87 S. W. 740, 743, 6 Tex. Civ. App. 633, 638.

One cannot be a *bona fide* purchaser who has brought to his attention facts which should have put him on an inquiry, which, if pursued with due diligence, would lead to actual notice of some conflicting interest in the property. 76 Kan. 764, 765; 75 Minn. 542, 546, 78 N. W. 1; 15 N. Y. 354, 362

HUMPHREYS, J. This suit was instituted in the circuit court of Lonoke County by appellant against appellees to recover $750 and interest upon a note in said sum, executed by appellees to themselves and transferred to the Industrial Transportation Company, a corporation, for stock in the concern. It was alleged that the note was given for a valuable consideration, and was sold to and purchased by appellant for a valuable consideration, before maturity.

Appellees filed an answer admitting the execution of the note, but denying that it was given for a valuable consideration, and that the plaintiff purchased it before maturity for a valuable consideration, in good faith, and without notice of their equities. They also alleged that the note was without consideration, and was procured through fraud and deceit, in which appellant participated. They also alleged that the note had been annulled, and its collection enjoined, by the chancery court, in a suit wherein appellees and others were petitioners and said Industrial Transportation Company was respondent.

By agreement of the parties, the cause was transferred to the Lonoke Chancery Court, where it was heard

upon the pleadings, and oral and documentary evidence, which resulted in a decree dismissing appellant's bill with prejudice.

The cause is before this court upon appeal for trial *de novo*.

The Industrial Transportation Company, a Washington, D. C., corporation, established an office in Little Rock for the purpose of selling its preferred and common stock. Its plan was to sell a certain amount of stock in a town or city, and to build and operate a general store for the purpose of selling goods to its stockholders cheaper than they could purchase them elsewhere. The company employed a number of agents to sell stock, paying them a commission of fifteen or twenty per cent. The stock was sold at par for one-half cash and one-half on time, evidenced by promissory notes. The stock was to be delivered when the notes were paid. Appellant came to Arkansas from South Dakota, and was employed by the company in February, 1920. For the first few months he accompanied the other agents on stock selling tours. In April he began to sell stock, and made his first sale to appellees. He sold stock to the amount of $10,000 the first three months, and continued to work as a stock salesman until the following December. During the time he visited the offices every week or two and conversed and consulted with the officers of the company. Occasionally he sold on credit entirely, and took two notes in payment; one to the company for one-half the amount, and one to himself for the balance. When he did this, he sent the company its note and cash in lieu of the note executed to himself. When he quit working for the company, he had notes in about the sum of $3,000 which he had obtained in this way. The $750 note in question was the only one he ever purchased from the company. He testified that he gave $735 for it in adjusting his commission and account; that he never knew of the company ever selling any other note at a discount; that he bought the note from Gamble, the vice-president of the company.

who turned it over to Austin Hart to be used in settlement of commissions which the company owed him; that the company owed him about $2,300, all of which it would have paid him in cash had he not bought the note.

A copy of the note carrying the following indorsement was attached to the complaint:

"Pay to the order of Melvin Johnson, without recourse.

"Industrial Transportation Company,

"By _____

"Treasurer."

The note was introduced in testimony, and the name of Austin Hart appeared on the blank line after "By" and before "Treasurer." Appellant testified that he did not know when Austin Hart signed his name to the indorsement. He also testified that he sold appellees $1,000 of the stock, but not the particular stock for which the note in question was executed; that he represented the company to be solvent and prosperous, stating, in explanation, that he thought it was, and that, as far as he knew, he was telling the truth. He denied, on cross-examination, that he represented to the Shys and other stock purchasers that he had personal knowledge, or a knowledge from an examination of the records and books, that the company had a surplus, or sinking fund, to pay 8 per cent. interest on all stock all the time, and ample funds to maintain the stores; but that he stated the books of the company were subject to audit by the United States Government once a year. He also stated that he discovered the failing condition of the company in December, and quit working for them; that at that time he had in his possession $4,000 in notes which he had taken for stock in Texas, that he turned back to subscribing stockholders.

S. L. Shy, one of the appellees, testified in part as follows: "Q. This is a suit on a note for $750 for stock you bought; are you acquainted with the plaintiff? A.

Yes. Q. Who influenced you to buy this stock? A. Johnson. Q. What representations did he make to you? A. He stated that they would at all times keep a full stock of goods in the store; that they had a charter from the government, and it was under government control, and the company would investigate the books every thirty days, and the government would audit the books once a year, and the company would audit the books every thirty days, and that the stock would pay eight per cent. all the time. Q. Did he represent that he would guarantee that would be done, or that was his understanding? A. He said it was positive. Q. Did he say anything at all about paying eight per cent. interest? A. He said you could buy all the stock you wanted, and that the company would pay eight per cent. interest on all stock. Q. Did he say there was any surplus or sinking fund for that purpose? A. Yes, he said the money was already made; they had that before. Q. Did he state that as facts? A. Yes. Q. And that he knew about it? A. Yes. Q. He said he knew about it? A. He said he had examined the records and books to find out."

He also testified that, while he did not buy the stock for which the note was given, directly from appellant, it was purchased on account of representations made by appellant when he first sold him stock; that when he purchased this stock at the office he treated it as appellant's sale, and told them to allow appellant the commission on it.

It was agreed by counsel for the respective parties that Mrs. Neeson, Mr. Sanders, and other witnesses for appellees would testify to substantially the same representations made by appellant to them, when selling them stock, as Shy testified were made to him by appellant.

The decree of the chancery court of Lonoke County, of date February 17, 1921, in which appellees and others were petitioners and the Industrial Transportation Company was respondent, was introduced showing that the

note in question, as well as many others which had been executed for stock in said company, had been annulled for the want of consideration, and because procured through fraudulent misrepresentations.

Appellant contends that the decree is contrary to a preponderance of the evidence. He contends that the note was without consideration as between appellees and the Industrial Transportation Company, but contends that the record reflects, by a preponderance of the evidence, that he was an innocent purchaser of the note before maturity, for value. We cannot agree with him in this contention. The record reflects facts and circumstances sufficient to have put a man of ordinary prudence and caution upon inquiry, which, if followed up, would have revealed the fraudulent intent in selling its stock. This particular note was selected at random from a large number and sold, contrary to custom, at a discount. It was inferable from the evidence that the instrument was signed by Hart after the suit was instituted. The note was purchased by appellant with a knowledge that the stock, for which it had been given, had not been delivered, and without seeing to it that same was delivered. The whole testimony tends to show a very close relationship between the officers of the company and appellant. The weight of the testimony warranted a conclusion that appellant wilfully misrepresented the financial condition of the company in order to sell its stock.

The finding and conclusion of the court that the note was obtained by appellant with a knowledge that it was procured through fraud and deceit, and without consideration, is supported by the decided weight of the testimony.

The decree is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. HENDERSON.

Opinion delivered January 29, 1923.

1. EVIDENCE—MARKET PRICES.—Evidence of a live stock shipper as to a decline in the market price of cattle between the time they should have been delivered at destination by the carrier and the time they were delivered, based upon information from the consignee and from a regular market publication showing quotations from day to day on cattle, was sufficiently definite and competent as tending to establish the decline value of the cattle during the period of delayed shipment.
2. CARRIERS—WRITTEN NOTICE TO FURNISH CAR—WAIVER.—The rule that a railroad company when engaged in transporting live stock is bound to furnish suitable cars therefor on reasonable notice is controlled in interstate shipments by the character of notice approved by the Interstate Commerce Commission; and where it approved a rule requiring a written notice, an agent of a carrier could refuse to accept an oral order or notice to furnish a car for a shipper, but the requirements of written notice may be waived by the carrier's agent.

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

Pryor & Miles, for appellant.

R. W. Robins, for appellee.

HUMPHREYS, J. This suit was originally instituted by appellee in the Faulkner Circuit Court against the Missouri Pacific Railroad Company to recover $153 damages on account of the decline in prices of a carload of cattle in the St. Louis market occasioned by the alleged failure to furnish a car for the shipment thereof from Conway, Arkansas, on the sixteenth day of October, 1919, after notification. The shipment occurred during government control of railroads, and by agreement James C. Davis, as agent for the President, was substituted for the railroad company, and entered his appearance. Upon the trial of the cause before a jury, a verdict was returned and judgment rendered against appellant for $132 with interest at the rate of 6 per cent. per annum from June 16, 1920, until paid, from which an appeal has been duly prosecuted to this court.

Two contentions are made by appellant for a reversal of the judgment; first, that the proof was insufficient to justify the submission to the jury as to whether cattle declined in price at St. Louis between the time they should have been delivered in the National Stock Yards and the time they were delivered; and second, because the court erred in permitting appellee to recover upon a verbal contract for a car in which to ship the cattle.

(1). Appellee testified that the market price of the cattle he shipped was twenty-five cents less on the hundred pounds on the day the cattle arrived in the National Stock Yards, in East St. Louis, than on the day they should have arrived. The delay in shipment was eight days. He not only testified that he received this information from the man to whom he shipped the cattle, but that he obtained his knowledge from a regular St. Louis market publication, showing quotations from day to day of hogs, cattle, sheep, etc., which all the live stock men sent out regularly to shippers of live stock. Appellant was pressed closely on cross-examination concerning the character of the market publication, circular, or card, and he said it was published by the National Live Stock Company for use by all the live stock commission merchants and their patrons. We think the testimony sufficiently definite and competent as tending to establish the decline of the market value of the cattle during the period of delayed shipment. *St. Louis & S. F. R. Co.* v. *Pierce*, 82 Ark. 353; *St. L. I. M. & S. R. Co.* v. *Laser Grain Co.*, 120 Ark. 119.

(2) The appellant testified that on October 13, 1919, he called the agent at Conway, B. C. Benedict, and notified him to have a cattle-car ready on Saturday the 16th for shipment of a carload of cattle, belonging to him, from Conway, Arkansas, to the National Stock Yards at East St. Louis, Illinois; that the agent accepted the oral notice; that, pursuant to the notice, he drove his cattle a distance of twenty miles to Conway, where he

was compelled to wait for a week before he could get a cattle-car. As against appellee's right to recover, appellant cites a Missouri case, *Underwood* v. *Director General*, 222 S. W. 1037, in which it was held that "no verbal agreement for cattle-cars for shipment in interstate commerce can be relied on under the Carmack amendment, which requires a written contract, nor can a preliminary oral agreement for future interstate shipment." Appellee did not sue upon an oral agreement or contract of the government's agent to furnish him a cattle-car for an interstate shipment. He sued the carrier for not furnishing the car within a reasonable time after notice to do so.

"A railroad company, when engaged in the business of transporting live stock, is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business." (Syllabus) *Hines* v. *Mason,* 144 Ark. 11. Of course the above rule is controlled, in interstate shipments, by the character of notice approved by the Interstate Commerce Commission, and it approved a rule requiring a written notice. So, under the latter rule, the agent could have refused to accept an oral order or notice for a car. In the instant case, however, the agent accepted the oral notice or order, thereby waiving the form of notice. We know of no reason why the form of the notice or order might not be waived.

As the shipment occurred during government control, the judgment is reversed as to the Missouri Pacific Railroad Company, and affirmed as to James C. Davis, as agent for the President of the United States.

KANSAS FLOUR MILL COMPANY *v.* L. GORDON & COMPANY.

Opinion delivered January 29, 1923.

SALES—PLACE OF DELIVERY A JURY QUESTION WHEN.—In an action for an alleged breach of contract to accept a carload of flour and shorts when it arrived at destination, evidence of a letter and telegram made the issue as to whether the flour was ordered f. o. b. destination or f. o. b. mill a question for the jury.

Appeal from Conway Circuit Court; *J. T. Bullock,* special judge; affirmed.

C. A. Holland, for appellant.

Edward Gordon, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the Conway Circuit Court to recover $523.56 damages growing out of an alleged breach of contract to accept a carload of flour and feed when it arrived at Morrilton, Arkansas. The issue joined by the pleadings was whether the carload of flour and feed was ordered f. o. b. Morrilton, Arkansas, or f. o. b. mill, which was located at Kingman, Kansas, freight paid to Morrilton. The case was submitted to the jury upon the theory that, if it was found from a preponderance of the evidence that the order was f. o. b. Morrilton, Arkansas, a verdict should be returned for appellee. But if the order was an f. o. b. mill order, freight paid to Morrilton, a verdict should be returned for appellant. The jury returned a verdict for appellee, and a judgment was rendered dismissing appellant's complaint, from which is this appeal.

Appellant's only contention for reversal of the judgment is that the record contains no substantial evidence in support of the verdict and judgment. The testimony presented by appellant consisted of telegrams, confirmation contract signed by appellant alone, and a number of letters which subsequently passed between the parties. The first telegram was dated September 9, 1920, signed by L. Gordon in the following words: "We offer three dollars 300 gray shorts balance in flour at last quotation answer." After the exchange of several tele-

grams the car was ordered by appellee and booked by appellant for prices fixed in telegrams. Immediately after booking the order appellant mailed appellee the confirmation of the contract, which contained the following clause relative to place of delivery: "Sale and delivery f. o. b. Morrilton, Arkansas. On basis freight rate in effect."

Appellant requested appellee to sign the confirmation contract and return one of the copies to it. Appellee did not sign or return the confirmation contract. The confirmation contract was dated September, 1920. Subsequently appellant shipped the carload of flour and shorts to appellee at Morrilton, Arkansas, with bill of lading attached, which did not arrive at Morrilton until October 5, 1920. In the meantime the price had gone down. Appellee refused to accept the car and pay the draft on the ground that it was billed f. o. b. Morrilton, and because the price had gone down, claiming that under the contract the title thereto remained in appellant until received by appellee at Morrilton, and that appellant must look to the carrier for damages on account of unreasonable delay in transportation; appellant claiming that under the contract the title to the flour and shorts passed to appellee after being billed to him at the place of shipment, and that he must look to the carrier for the decline in prices on account of the unreasonable delay in transportation. Appellant sent a man to Morrilton to resell the flour and shorts, who sold same to appellee at a loss of $523.56, it being understood that neither party thereby waived his rights under the original contract.

Mayo Gordon testified in behalf of appellee that the telegrams ordering the flour and shorts were based upon a letter antedating the telegrams, in which appellee requested appellant to quote prices on the flour and shorts f. o. b. Morrilton, Arkansas, and that the said letter had not been introduced by appellant; that he had made a number of inquiries and orders for appellee

from time to time, all of which were for prices delivered at Morrilton.

The letter referred to, when read in connection with the telegrams, made the place of delivery a question to be determined by the jury. The testimony referred to is substantial and sufficient to support the verdict and judgment.

No error appearing, the judgment is affirmed.

KELLEY v. STATE.

Opinion delivered February 5, 1923.

CRIMINAL LAW—INQUIRY AS TO SANITY.—Neither at common law nor under the statute (Crawford & Moses' Dig., § 3251) is one convicted of a less than capital offense entitled to have an inquiry in the circuit court as to his sanity; Crawford & Moses' Dig., § 9669, providing relief for convicts in the State Penitentiary on being found to be insane.

Certiorari to Logan Circuit Court, Southern District; *James Cochran,* Judge; petition dismissed.

Evans & Evans, for appellant.

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

PER CURIAM. The petitioner, A. J. Kelley, states in his petition that at the January term, 1922, of the Logan Circuit Court he was convicted on a charge of murder in the second degree and sentenced to a term in the penitentiary, and that the judgment of conviction was, on appeal, affirmed by this court (*Kelley* v. *State,* 154 Ark. 246); that at the August term, 1922, of the said circuit court there was presented to the court by his wife, as next friend, a petition praying for a writ of error *coram nobis,* on the grounds that at the time of the trial and conviction he was insane and not capable of making a rational defense, but that the circuit court denied the writ, and on appeal to this court the judgment of the circuit court was affirmed (*Kelley* v. *State,* 156 Ark. 188); that

on January 22, 1923, petitioner appeared in the circuit court, surrendered himself into custody under his bond, and presented to the court, by his counsel, a petition stating that he was then insane, and asking the court to impanel a jury to inquire into the question of his sanity or insanity at that time, and that the execution of the judgment of conviction be postponed or suspended and petitioner committed to the State Hospital for Nervous Diseases for treatment, instead of being immediately sent to the penitentiary, and that the circuit court denied said petition and ordered immediate execution of the judgment of conviction, and denied an appeal to this court. The prayer of the petition is that this court issue a writ of mandamus to the circuit judge, sitting in term time, to grant an appeal as prayed for by petitioner, and that an order be made by this court admitting the petitioner to bail during the pendency of the proceeding here to review the action of the circuit judge.

The petition has been submitted to this court to determine, in the first instance, whether there is a showing made in the petition to justify the issuance of the writ and the allowance of bail during the pendency of the proceeding.

The court has reached the conclusion that the facts set forth in the petition are not sufficient to justify the issuance of the writ of mandamus, as it is clear that the petitioner asked for relief which the circuit court was not authorized to grant.

Learned counsel for petitioner rely upon the rule of the common law, which has been repeatedly recognized by this court, that the execution of a judgment of conviction against an insane person ought not to be carried out, and that the court wherein the conviction was had has power, before execution, to stay sentence during the period of insanity. *Taffe* v. *State,* 23 Ark. 34; *Ferguson* v. *Martineau,* 115 Ark. 317.

The common-law rule, however, was confined to relief sought in capital cases. 4 Blackstone, p. 24; 1 Haw-

kins' Pleas of the Crown, ch. 1, sec. 3; 1 Hale, pp. 34-35. Blackstone stated the rule as follows:

"If a man in his sound memory commits a capital offense, and before his arraignment he become absolutely mad, he ought not by law to be arraigned during such frenzy, but be remitted to prison until that incapacity be removed; the reason is because he cannot advisedly plead to the indictment; and this holds as well in case of treason as felony, even though the delinquent in his sound mind were examined, and confessed the offense before his arraignment. And if such person, after his plea and before his trial, become of nonsane memory, he shall not be tried; or if, after his trial, he become of nonsane memory, he shall not receive judgment; or if, after judgment, he become of nonsane memory, his execution shall be spared, for, were he of sound mind, he might allege somewhat in stay of judgment or execution."

Sir Matthew Hale stated the common-law rule in substantially the same terms as in Blackstone, and added the following qualifications:

"But because there may be great fraud in this matter, yet if the crime be notorious, as treason or murder, the judge, before such respite of trial or judgment, may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit." 1 Hale's Pleas of the Crown, p. 35.

There is nowhere found a statement of any rule of the common law which would extend relief in a felony case of less degree than a capital offense, the reason evidently being that it is a rule of extreme emergency to prevent the execution of the death penalty on an insane felon.

The lawmakers of this State, in the enactment of the Criminal Code, § 291 (Crawford & Moses' Digest, § 3251), provided a statutory remedy in such cases by empowering the sheriff charged with the execution of a death penalty to impanel a jury to determine the ques-

tion of sanity or insanity of the convicted felon. It is thus seen that the lawmakers saw fit to go no farther than the common-law rule in affording a statutory remedy.

There is also a statute providing for relief to a convict confined in the State Penitentiary who is found to be insane. Crawford & Moses' Digest, § 9669.

It is thus seen that there is no authority in the common law or in the statute for the remedy now sought by the petitioner, and the circuit court was correct in refusing to grant the prayer of the petition.

The prayer of the petition filed herein is therefore denied, and the petition is dismissed.

BRENTS v. STATE.

Opinion delivered February 5, 1923.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence that accused and his brother conspired either to kill deceased or to compel him to leave town, and that the fatal shot was fired pursuant to the conspiracy, *held* sufficient to sustain a conviction of voluntary manslaughter.
2. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—It was not error, in a prosecution for murder, to refuse an instruction that, if deceased first fired at defendant, that in itself would afford sufficient justification for defendant firing in return, regardless of all other circumstances.
3. CRIMINAL LAW—INSTRUCTIONS.—Defendant in a criminal case cannot complain that the charge given by the court was insufficient and that requested instructions were improperly refused unless the instructions requested by him were accurate.
4. CRIMINAL LAW—RES GESTAE.—In a prosecution for murder, statements made by deceased immediately preceding the shooting that he "hated to be run off just like a dog," and that "I am not doing anything or ain't going to do anything if they let me alone," were admissible as part of *res gestae.*
5. CRIMINAL LAW—EVIDENCE—HARMLESS ERROR.—In a prosecution for murder, a witness for the State was asked by the prosecuting attorney: "How long after the examining trial was it that your

house was burned down?" Objection to the question was sustained. He was also asked whether he had not received a note to leave town, which he answered in the affirmative. *Held* that defendant was not prejudiced, in view of a charge directing the jury not to consider the questions or answers.

6. HOMICIDE—HARMLESS ERROR.—Where, in a prosecution for murder, a witness testified over defendant's objection that he and deceased had served on a grand jury which had investigated charges that defendant had violated the liquor law, such testimony was not prejudicial error in view of the testimony of such witness that no hard feelings had resulted between deceased and accused; the verdict having eliminated the question of malice.

7. WITNESSES—CROSS-EXAMINATION.—Where, in a prosecution for murder, witnesses for the defense had testified that they had no hard feelings against deceased, it was not error to permit the State to cross-examine them as to circumstances tending to show that there was cause for feeling against deceased; such testimony being admissible for the purpose of testing the credibility of the witnesses.

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

W. P. Strait and *Isgrig & Dillon,* for appellant.

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

McCULLOCH, C. J. Appellant, John Brents, shot and killed one Leonard Hare in the town of Cleveland, in Conway County, on Saturday afternoon, June 24, 1922, and was indicted by the grand jury of that county for the crime of murder in the first degree. On the trial of the case the killing was admitted, but appellant claimed, and attempted to prove, that he acted in necessary self-defense. The verdict of the jury found appellant guilty of voluntary manslaughter, and assessed his punishment at three years in the State Penitentiary. According to the testimony adduced by the State, trouble first arose between Hare and Marvin Brents, one of appellant's brothers, and there was evidence tending to show that appellant was in conspiracy with his brother to kill Hare, or compel him to leave town and stay away.

Hare and Marvin Brents met on the street in Cleveland, and Marvin accused Hare of having interfered and prevented him from obtaining a school contract. Marvin struck Hare, and as the latter ran away Marvin drew his knife and started after Hare. The parties then separated without any further trouble at that time, and Hare went away in his car and returned in a short time with a rifle. Marvin also went away and returned with a gun, but both parties were disarmed by others, at least the rifles were taken away from them. Hare went into Frazier's store, where Marvin and some of his intimate associates were, and shots were fired there, the proof tending to show that Hare had a pistol, and fired one or more of the shots, and that one of the shots hit Marvin. Appellant was not in the store at that time, but was on the outside. Hare ran out the back door of Frazier's store, and as he ran across the street appellant, who was standing on the front porch of Frazier's store, fired at Hare and killed him.

Some of the witnesses testified that during the time that Hare was in the store appellant took a position on the porch where he could command a view of both the front and rear exits from the store, and others testified that he walked up the street, but that as soon as the firing commenced he ran back down to Frazier's store and stood on the porch.

There is also a conflict in the testimony as to whether or not Hare had a pistol in his hand when he ran out of the store and across the street at the time appellant shot him. One or more witnesses to the encounter testified that Hare had a pistol in his hand, but that he did not fire at appellant nor make any demonstration. Others testified that Hare did not have a pistol at that time. Appellant himself testified that Hare had a pistol in his hand, and fired at him before he fired the shot which killed Hare.

The testimony was abundantly sufficient to sustain the conviction of voluntary manslaughter; it was suffi-

cient, if accepted in the strongest light against appellant, to have justified a conviction of murder in the first degree, for there was proof tending to show that appellant joined with his brother in a conspiracy either to kill Hare or to compel him to leave town, and that the shot was fired pursuant to the conspiracy.

It is conceded that the killing was intentional, and the verdict of the jury has eliminated all the elements of malice and premeditation by confining the findings to the degree of voluntary manslaughter. The court instructed the jury as to law concerning all the degrees of homicide, and there are no objections urged to the rulings of the court in regard to the instructions, except in refusing to give certain requested instruction of the appellant which related to the question of self-defense. We are of the opinion that the subject was fully and correctly covered by the court's charge, and that there was no error in refusing to give those instructions on the subject which were requested by appellant.

It is especially urged that the court erred in refusing to give the following instruction on the subject of self-defense:

"4. You are instructed that if, at the time the defendant fired the shot which resulted in the death of the deceased, the deceased was in the act of firing, or had fired at defendant, or the defendant, in good faith, acting as a reasonable person, situated as he was, believed, and had reasons to believe, from the circumstances then surrounding him as he viewed them, that he was in imminent or immediate danger of receiving at the hands of the deceased some great bodily harm, or of losing his life, and, so believing, he fired the fatal shot, then such shooting would be justified under the law of self-defense; and if you find this to be true, or if you have a reasonable doubt relative thereto, then you should acquit the defendant."

The instruction was erroneous in more than one respect, and was properly refused. In the first place, it

stated the law to be that if deceased had first fired at appellant, that, in itself, would afford sufficient justification for appellant's firing in return, regardless of all other circumstances. In the next place, the instruction was erroneous in failing to incorporate the idea of appellant himself being free from fault or carelessness. Even if the subject had not been fully covered by another instruction, appellant could not complain without having first requested an accurate instruction.

We are of the opinion therefore that the case was submitted to the jury under instructions free from error, and that the court's rulings on appellant's requested instructions were correct.

There are numerous assignments of error with respect to admission of testimony.

J. H. Frazier, the owner of the store where the shooting occurred, was introduced as a witness by appellant, and he described that scene, and also told about the rifle being taken from Hare. He stated that he admonished Hare to go away and not have any trouble, and that Hare replied that he "hated to be run off just like a dog." This testimony was admitted over appellant's objection. There was likewise objection to the further statement of the witness that when the gun was taken away from Hare in Frazier's store and he was told by one Holbrook, who took the gun, to "stay in there and behave himself," he said, "I am not doing anything or ain't going to do anything if they let me alone."

The first statement of Hare was immaterial, and it is clear that it could not have had any prejudicial effect. We are of the opinion, however, that these statements were part of the *res gestae,* and for that reason were admissible. They occurred after the first trouble between Hare and appellant's brother Marvin and almost immediately before the second encounter. They were a part of the second encounter, which occurred just before appellant shot Hare on the outside of the store. The statements were close enough to the main incident to

constitute a part thereof, and were, we think, admissible. *Byrd* v. *State,* 69 Ark. 537; *Childs* v. *State,* 98 Ark. 430.

Dr. Stover was one of the most important witnesses introduced by the State, and he testified that he saw the killing, and that deceased had a pistol in his hand, but did not fire at appellant nor make any hostile demonstration toward the latter. One of the attorneys for the prosecution asked the witness: "How long after the examining trial was it that your house was burned?" On objection being made to the question, the court stated that it was not material. The witness did not answer the question, but the attorneys stated their respective contention with regard to this evidence, the prosecuting attorney insisting in his argument before the court that it was competent for him to show that witness' house had been burned after he testified in the examining trial. The court ruled that the testimony was not admissible. The State's attorney then asked the witness if he did not get a note to leave, and he replied that he had, whereupon objection was made, both as to the testimony and as to the statement of the prosecuting attorney concerning his reasons for insisting upon the admissibility of the evidence. The court directed the jury not to consider either the evidence or the statement of the prosecuting attorney. The rulings were all in favor of appellant, and were sufficiently emphatic to exclude the offered testimony and statement of the prosecuting attorney from consideration of the jury. We think there was no prejudice resulting from the incident.

Oscar Holbrook was one of the important witnesses introduced by the State, who testified concerning circumstances attending the killing. The witness testified, in response to questions propounded by the State, that he and deceased had served recently on the grand jury which had investigated charges against appellant and his kinsmen for violations of the liquor laws. Objection was made to this line of examination, but the State was permitted to proceed for the purpose of establishing its

theory that there was a conspiracy to do violence to deceased and Holbrook on account of their participation in the investigation by the grand jury. The witness was asked, after making the foregoing statement, whether his and deceased's investigations upon the grand jury had resulted in bitterness and hard feeling between them and the members of the Brents family, and the witness answered that he could not say that there was any such feeling, and that he had seen no indications of it. In view of this answer of the witness, we cannot see that there was any possible prejudice resulting from the admission of this testimony. Moreover, the prejudice, if any, has been removed by the verdict of the jury finding appellant guilty only of manslaughter and thus eliminating all questions of premeditation and malice. The testimony, if it had any effect at all, only tended to show malice on the part of the accused.

Exceptions were saved to other rulings of the court in regard to the cross-examination by the State of witnesses concerning feeling aroused by Hare's participation in the proceedings before the grand jury. These witnesses testified that they had no feeling towards Hare, but their statements tended to show that there was cause for feeling against Hare, and the testimony was admissible for that purpose in order to affect the credibility of the witnesses. We think that, while these matters may not have been admissible as original testimony, it was competent to thus interrogate the witnesses themselves for the purpose of testing their credibility.

On the whole, we find no error in the record, and the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. BURNETT.

Opinion delivered February 5, 1923.

1. CARRIERS—CONTRACT AS TO UNLOADING LIVE STOCK.—U. S. Comp. Stat., § 8651, requiring live stock to be unloaded for food or rest within a certain number of hours, operates as a restriction on the right of contract between a shipper and a carrier in an interstate shipment, and this restriction cannot be disregarded and contractual rights built on it, and a contract conflicting therewith is void, and there can be no recovery against a carrier therein.
2. CARRIERS—AGREEMENT AS TO UNLOADING LIVE STOCK AT DESTINATION.—An agreement of a carrier not to unload hogs in the public pens at destination does not violate U. S. Comp. Stat., § 8651, limiting the number of hours within which they may be carried without being unloaded for food or rest, as it was within the legal right of the carrier to perform an agreement not to unload at destination at any particular place or in any particular manner.
3. CARRIERS—SPECIAL DAMAGES—NOTICE.—Where a shipper of hogs explained to the carrier's agent that he did not want the hogs unloaded in public pens at destination, because, if they were, he could not sell them for the price which the consignee had agreed to pay, this was sufficient to charge the carrier with notice of special damages which might arise, and to render it liable for violation of the agent's agreement not to unload the hogs in public pens at destination.

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

Thos. B. Pryor and *Samp Jennings,* for appellant.

The court erred in refusing to give a peremptory instruction for defendant. No agreement between the shipper and carrier relieves the carrier from compliance with the statute. U. S. Comp. Statutes, 1918, §§ 8651 and 8653. See also 205 Fed. 337; 200 Fed. 597; 186 Fed. 541; 195 Fed. 241; 200 Fed. 406; 225 Fed. 676; 258 Fed. 289; 220 U. S. 94; 97 Ark. 82. The contract or bill of lading was binding. It could not be explained or varied by parol testimony. 8 Wall. 325; 19 L. ed. 455; 215 Fed. 886; 270 Fed. 426; 93 Ark. 537; 82 Ark. 353; 46 Ark. 236; 109 Ark. 537.

W. H. Gregory, J. F. Holtzendorff and *Trimble & Trimble,* for appellee.

There was no fraud shown in procuring this special contract, and defendant was bound by its terms. 95 Ark. 150; 215 S. W. 596; 140 Ark. 231.

McCULLOCH, C. J. This is an action against a public carrier to recover damages alleged to have been sustained in the transportation of a carload of hogs. The plaintiff alleges that he shipped the hogs under a special contract of sale for a particular purpose and for a stipulated price largely in excess of the market price, and that, by reason of the act of the carrier in unloading the hogs at destination in pens where other hogs had been unloaded, the consignment was rejected by the consignee, and that loss was sustained thereby, the price being reduced to the market price. There were 147 of the hogs in the car, weighing an average of 111 pounds each, and plaintiff had a contract for the sale of the hogs at 9¼ cents per pound, the market price of hogs for commercial purposes being considerably less. The aggregate value of the hogs, as per contract price, was $1,431.88, and the regular market price for ordinary purposes was $478.

On the trial of the cause the following state of facts was proved: Plaintiff was engaged in buying hogs, and had on previous occasions sold what is termed "stocker" hogs to Black & Atchinson, of Kansas City, who operated a serum plant, and one of the requirements of the latter was that the hogs should not be unloaded at public yards or pens.

After securing the contract with Black & Atchinson, and after making purchases in the vicinity of Gurdon, the plaintiff applied to the railroad agent at Gurdon for terms of shipment, stating that he would not ship his hogs unless he could make an arrangement whereby unloading in transit could be obviated. The agent assured plaintiff, so the latter testified, that such an arrangement could be made, and plaintiff gathered up the hogs and loaded them into the car, but when the bill of lading was

made out there was nothing in it about not unloading in transit. Plaintiff called the attention of the agent to this fact, and the agent stated that a notation would be made on the waybill, as it had no place in the bill of lading, and assured plaintiff that such a notation would be made for the instruction of the conductors and other trainmen. The agent informed plaintiff that it was necessary that he sign a waiver under the Federal statute requiring live stock to be unloaded for food or rest within twenty-eight hours, whereupon plaintiff signed the waiver, in accordance with the provisions of the statute permitting the time to be extended to thirty-six hours before unloading.

Plaintiff testified that he showed the shipping instructions to the agent, and told him that he would not be able to sell the hogs if they were unloaded in public stockyards or pens at Kansas City, which was the destination under the bill of lading.

According to the testimony adduced by the carrier, the shipment of a carload of live stock from Gurdon to Kansas City would be en route, under ordinary conditions, more than fifty hours.

Defendant's counsel objected to the introduction of the testimony about the agreement to put the notation on the waybill, on the ground that it was in conflict with the Federal statute requiring the unloading of live stock in transit.

There was no proof adduced tending to show whether or not the stock was unloaded prior to reaching its destination at Kansas City, but the proof shows that it was unloaded there, and that Black & Atchinson refused the consignment on that account, their contract with plaintiff to accept the consignment being dependent upon the stock not being unloaded in a public pen or at the stockyards. Mr. Black testified that, under their method of doing business, they could not use hogs thus unloaded in public pens, for the reason that there was danger of exposure to disease.

There was a verdict for the plaintiff for the amount of damages named in the complaint, and the defendant has prosecuted an appeal to this court.

It is earnestly insisted that the court erred in the admission of testimony, and that, if the plaintiff be permitted to recover damages in the case, it will be, according to the undisputed evidence, upon an alleged agreement which is clearly in violation of the Federal statute. U. S. Comp. Stat. 1918, § 8651.

It must be conceded that, if the recovery sought is based upon a contract which is in conflict with the Federal statute, the contract is void, and there can be no recovery. This principle has been recognized in one of our own decisions, though not expressly so decided. *St. L. I. M. & S. Ry. Co.* v. *Davenport,* 97 Ark. 82. See, also, *Webster* v. *Union Pacific R. Co.,* 200 Fed. 597; *B. & O. R. Co.* v. *United States,* 220 U. S. 94. The statute operates as a restriction upon the right of contract between the shipper and the carrier, and this restriction cannot be disregarded and contractual rights built upon it. *B. & O. R. Co.* v. *United States, supra.* We think, however, that the right to recover is not based upon a contract in conflict with the statute, but is based upon the conduct of the carrier, which misled the shipper to his detriment. *St. L. & S. F. R. Co.* v. *Vaughan,* 88 Ark. 138; *C. R. I. & P. Ry. Co.* v. *Butler,* 132 Ark. 37; *C. R. I. & P. Ry. Co.* v. *Stallings,* 132 Ark. 446.

The plaintiff testified that the railroad agent told him that the shipment would go through to Kansas City without unloading, provided he would sign a release so that there would be no unloading within thirty-six hours. There is no proof that the plaintiff knew anything about the length of time it would take to complete the shipment through to Kansas City, and the conduct and statement of the agent necessarily constituted an assurance that there would be no occasion to unload before the shipment reached destination. Moreover, the proof does not show that there was any contract to disregard the requirement

to unload within thirty-six hours, nor does it show whether or not the stock was unloaded before reaching Kansas City. The only proof as to unloading is that the hogs were unloaded in the public pens at the stockyards at Kansas City. Now, the agreement was that there should be no unloading at Kansas City, the destination, and this agreement constituted no violation of the statute, for it was within the legal right of the carrier to perform an agreement not to unload at destination, at any particular place or in any particular manner.

Plaintiff testified that he explained to the agent fully why he did not want the hogs unloaded in the pens at Kansas City, and he testified that he showed the agent the shipping instructions from the consignees.

The damages sought to be recovered in this case are special, but the carrier had notice of the circumstances upon which damages might arise, and is liable for violation of its duty. It constituted negligence on the part of the carrier to mislead the shipper to his detriment and to disregard the directions not to unload in the public pens at destination.

Our conclusion is therefore that there is no contract shown in violation of the statute, and that the plaintiff's right to recover has been established by sufficient testimony.

The judgment is therefore affirmed.

GRAND LODGE ANCIENT ORDER UNITED WORKMEN v. MODE.

Opinion delivered February 5, 1923.

1. INSURANCE—SUICIDE—EVIDENCE.—Evidence in an action on a fraternal benefit certificate *held* to sustain a finding that death resulted from suicide.
2. EVIDENCE—PRESUMPTION.—There is a presumption against death by suicide.
3. INSURANCE—DEATH IN DELIRIUM.—In an action on a fraternal benefit certificate reducing the amount payable in case of death

by suicide, except in "delirium resulting from disease," evidence *held* to show that deceased at the time he committed suicide was laboring under a delirium resulting from disease.

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

D. G. Beauchamp, for appellant.

R. W. Robins, for appellee.

McCULLOCH, C. J. This is an action instituted against appellant, a fraternal benefit society, on a benefit certificate or policy of insurance, issued by appellant to Henry C. Mode, one of its members, the amount of the benefit being the sum of $1,000, payable on the death of the member to the appellees, three of his minor children, who sue by their guardian.

Henry C. Mode joined the society and received his benefit certificate on March 19, 1920, and came to his death on May 11, 1920, from a pistol shot wound which entered his right temple and went clear through his head.

The application for membership contained a stipulation, in accordance with the laws of the order, which reads as follows:

"I further agree that if, within two years after becoming a member, and the date of my certificate, my death shall occur by suicide, whether sane or insane, except in delirium resulting from disease, or while under treatment for insanity, then the only sum which shall be paid or which is payable to my beneficiaries named in my beneficiary certificate shall be the amount which I may have paid into the beneficiary fund of the order during the term of my membership."

Liability on the part of the society is denied on the ground that Henry C. Mode came to his death by suicidal act which did not fall within any of the exceptions stated above. In other words, the contention is that death resulted from suicide committed while not in delirium resulting from disease. On the other hand, the contention of appellees is that the evidence is sufficient to warrant

the finding, in the first place, that death did not result from suicide, and that, even if it was suicide, the act was committed during "delirium resulting from disease." It is conceded that the deceased was not under treatment for insanity, and that there had been no judicial declaration of insanity. There was a trial of the issues before a jury, resulting in a verdict in favor of appellees.

There is little, if any, conflict in the statements of the witnesses concerning the facts of the case, but there are conflicting contentions of the respective parties concerning the inferences which may be drawn from the testimony. Appellees contend that the evidence warranted a finding that deceased did not take his own life, and that, if he did so, he was laboring under delirium resulting from disease. On the other hand, counsel for appellant contends that the undisputed evidence shows that deceased committed suicide, and that there was no evidence at all that he was laboring under delirium at the time.

Henry C. Mode and his wife resided in their own home at 1819 Louisiana Street, in the city of Little Rock, at the time his death occurred. Mode owned the property, and lived in the lower story, but rented the upper story to Mr. and Mrs. Chaney. About one o'clock on the day in question Mrs. Chaney was on her sleeping-porch, and heard two shots fired below. Other witnesses heard the shots, and when the house was entered Mrs. Mode was found dead in the doorway between the kitchen and the sleeping-porch, and Mode himself was found in a dying condition, lying on the bed on the sleeping-porch. Mrs. Mode was shot through the head, and Mode was, as before stated, shot through the temple. Mode had a .45 calibre army pistol in his hand when found, and died within a few minutes after his condition was discovered. The pistol turned out to be one owned by Mr. Chaney, which was kept in a scabbard lying on top of a wardrobe trunk on the sleeping-porch upstairs. Mr. Chaney was not at home on the day in question, and did not testify as a witness in the case. Mrs. Chaney was a witness, and

she identified the pistol as one belonging to her husband, and stated that she did not know how it came into the possession of Mode.

Mrs. Chaney testified that on the day in question she went up town for awhile, and on her return a little after noon she stopped in the rooms below for a few words with Mrs. Mode, the wife of deceased. She testified that before she left that morning Mrs. Mode stated, in a conversation with her, that Mr. Mode was angry, and the witness stated that when she returned she saw Mode sitting on a trunk on the sleeping-porch, and his appearance was such that it excited her fears, and that she went upstairs and locked herself inside the sleeping-porch. She said that Mode had a set, angry, or mean look, as she expressed it, on his face. She testified further that Mode was an automobile mechanic, but had not been at work for several days or longer. This witness testified that Mrs. Mode was ironing at the time with an electric iron, and, when the witness discovered the body, after the firing of the shots, the iron was found in the kitchen on the board, still heated, and had burned through the cloth on which it rested.

Mrs. Chaney testified that, after the shots were fired, when she came out on the sleeping-porch, she found in front of her door a sealed envelope addressed to Mode's brother at Conway, his former home; that she took the letter down stairs and laid it on the railing, where members of the police force, who came in a few minutes later, found it and picked it up. Captain Pitcock of the police force testified that he opened the envelope and found a letter therein signed by H. C. Mode, and addressed to his brother at Conway. He read the letter, and he and another police officer who heard the letter read testified concerning its contents. Proof was made that the letter had been lost. They testified that the letter spoke, in substance, of the writer preparing to commit some deed or leave for some place, and requested his brother to look after his children, and expressing the hope that they

would meet in heaven. The witnesses also testified that there was an inside envelope, on which was written the words, "fragments of our trouble," or "scraps of our trouble," and that on tearing open this inner envelope it was found to contain writings torn to fragments and in such small pieces that the writing on the paper could not be deciphered.

The proof shows that the two shots were fired a few minutes apart, and there were no sounds of voices heard, though one of the witnesses testified that after the first shot was fired he heard a sound like a body falling on the floor. A bullet hole was found through the pillow and mattress on the bed on which Mode's body was lying.

The shooting occurred, as before stated, in broad daylight, and the testimony of the various witnesses is conclusive of the fact that there were no other inmates in the house except Mode and his wife and Mrs. Chaney.

We are of the opinion that the proof is conclusive that the death of Mode resulted from his own act in firing a pistol shot through his head, immediately after having killed his wife.

There is, as we have often held, a presumption against suicide, but it is a rebuttable presumption, and we think that the presumption in this case has been entirely overcome by the undisputed proof. It is unnecessary to discuss in further detail the evidence in the case, but it would do violence to reason to say that, under the circumstances of this case, as proved, the death of Mode could have occurred in any other way except by his own act.

The further question arises whether or not there is enough testimony to warrant the conclusion that the act was committed by Mode while laboring under "delirium resulting from disease."

There are many reasons for believing that the act was not prompted by a sane and balanced mind. There are no sufficient reasons, in the first place, shown for the tragic homicide and the suicide which immediately fol-

lowed. Little, if any, motive is shown, even if the testimony as to Mrs. Mode's statement to Mrs. Chaney, introduced by appellant, be held to be admissible. The manner in which the man attempted to communicate with his brother and the fragments of the writing inclosed in the envelope afford strong circumstances tending to show that the man's mind was unbalanced.

Insanity alone, however, is not sufficient to justify the suicide under the contract and to permit recovery on the policy. Whether sane or insane, the act must be done under delirium resulting from disease in order to justify recovery on account of death caused by suicidal act.

There is sufficient proof that deceased was suffering from the disease of diabetes. A physician at Conway, the former home of deceased, testified that he examined deceased about three weeks before the tragedy and found that he was suffering from diabetes. This physician also testified as an expert witness, and stated that the disease in question ordinarily affects the nervous system and brain of the sufferer, that the subject becomes emaciated, loses appetite, and develops many complications; that it causes nervousness, loss of sleep, and affects the eyesight. He stated that sometimes patients suffering from that disease will lapse into coma and frequently into delirium—that they have hallucinations. In other words, the witness stated that the disease frequently causes delirium and hallucinations.

According to this testimony, if the jury found that the deceased was laboring under delirium or some hallucination at the time he committed the suicidal act, it was the result of the disease described by the physician.

We must accept the word "delirium," as used in the policy or benefit certificate, in its ordinary sense. The word is defined as follows: "A morbid condition, often the result of fever, in which mental action is abnormally rapid, incoherent, and characterized by illusions, hallucinations, or erratic fancies; wandering of the mind."

Standard Dictionary. In another dictionary it is defined as follows: "A more or less temporary state of mental disturbance, which manifests itself by mental irritation and confusion, more or less transitory, delusions and hallucinations, disordered, senseless speech, and motor unrest; mental aberration; a roving or wandering of the mind. It occurs in insanity, but usually results from a fever or some other disease, from intoxication, or from injury." Webster.

There was evidence sufficient to justify the conclusion that the deceased was laboring under a delirium resulting from disease at the time he committed the suicidal act. His own conduct at the time and immediately theretofore manifests the elements of delirium, illusions or hallucinations, which, according to the testimony of the physician, resulted from his physical disease. The testimony of Mrs. Chaney is not against the theory of delirium on the part of the deceased, but, on the contrary, it supports that theory. She testified that when she last saw Mr. Mode, as she started upstairs, he was sitting on a trunk and was "staring at Mrs. Mode;" that he had "a rigid expression," and "looked mean, too." The jury would have been justified in believing that Mrs. Chaney misinterpreted the emotions of deceased as manifested by the expression on his countenance, but it justified the conclusion that those emotions were unusual and manifested a state of mind not normal.

There is other evidence in the case tending to show that Mode had been a sick man for several weeks, and we are of the opinion that the inference was justified that he was in a state of delirium, within the meaning of the policy, at the time he committed the homicidal and suicidal acts.

The only question urged on this appeal is that of the legal insufficiency of the evidence, and we are of the opinion that the evidence was sufficient to justify the finding of fact upon which the contract imposes liability. The judgment is therefore affirmed.

WILSON v. PARKINSON.

Opinion delivered February 5, 1923.

1. EQUITY—ANCILLARY SUIT TO ENFORCE FORMER DECREE.—A complaint in equity against the Commissioner of State Lands, Highways and Improvements alleging that, in spite of a decree rendered in a suit by the State against plaintiff which quieted plaintiff's title to certain lands against the State, the commissioner threatened to issue, sell and give deeds to the lands embraced in the former decree, and that any deeds so issued would becloud plaintiff's title, with prayer that he be restrained from issuing deeds to any lands embraced in the former decree, *held* to state a cause of action within the jurisdiction of a court of equity to entertain a suit to enforce a decree previously rendered in order that complete justice may be done.
2. EQUITY—JURISDICTION OF ANCILLARY SUIT.—Where a decree is incomplete and ineffective for want of provision of any means for its execution, a bill in equity will lie to supply the imperfection so as to render the decree effective; and for the purpose of determining whether there is ground for equitable interposition the court may look to the real nature and character of the decree as it may appear in the light of surrounding circumstances.
3. STATES—RES JUDICATA.—Although the State may not be sued, yet if a suit be instituted by the State, the judgment therein rendered against the State will have the same effect as *res judicata* against it and all its officers and agencies as would a judgment against a private person in an action by or against him.
4. STATES—SUIT AGAINST LAND COMMISSIONER.—Where the rights of plaintiff and the State were adjudicated in a former suit by the State against plaintiff, and, to render the decree therein effective, plaintiff sues the Commissioner of State Lands, Highways and Improvements because of his failure to act in conformity with such decree, the suit is not one against the State within the prohibition of the Constitution against suing the State.
5. VENUE—RECOVERY OF LANDS IN SEVERAL COUNTIES—Under Crawford & Moses' Dig., § 1164, providing that actions for the recovery of real property must be brought in the county in which the subject of the action or some part thereof is situated, *held* that the statute applies to suits in equity to quiet title as well as to action of law, and that an ancillary action to enforce a former decree involving the title to lands situated in several counties may be brought in any county in which a part of the lands is situated.

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

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

An ancillary action is applicable to proceedings growing out of the original proceedings in the same court and dependent on such proceedings, and instituted for the purpose of enforcing a judgment or rendering complete justice among all parties in interest. 106 Fed. 170; Words & Phrases, vol. 1, p. 384. The question of jurisdiction, therefore, goes back to the jurisdiction of the court in the original suit.

1. Did the chancery court have jurisdiction to adjudicate title to land not located within the chancery district? Also did the chancery court sitting in one county have jurisdiction to adjudicate the title to lands in another county, though in the same chancery district? See Crawford & Moses' Digest, § 1164; 27 Ark. 482; 55 Ark. 442; 70 Ark. 346; 72 Ark. 376; 133 Ark. 250; 134 Ark. 337; 42 Ark. 442.

2. Jurisdiction could not be conferred, if originally lacking, by consenting to the amendment of the original complaint so as to embrace lands in another county in the same chancery district, and lands in another county in a different chancery district. 33 Ark. 31; 34 Ark. 399. See also, 5 Ark. 409; 29 Ark. 47; 90 Ark. 195; C. & M. §§ 3945, 3946, 3992-3; *Id.* §§ 4038-9; and 4048. We think that the venue statute should be limited in its application at least to the district constituting the court's venue.

Moore, Smith, Moore & Trieber, for appellee.

1. The jurisdiction of a court of equity to give effect, upon ancillary complaint, to a decree of the same court as the exigencies of the situation may require, is beyond question. 10 R. C. L. "Equity," § 106; 21 Corpus Juris, "Equity," § 867 *et seq.*

2. The principle of *res judicata* applies to the State and its officials. 15 R. C. L., Judgments, § 504.

3. The ancillary proceeding is not a suit against the State. Relief is asked against the Commissioner of State Lands, Highways and Improvements, who is bound by the original decree, and his acts in disregard thereof are not acts of the State, but an abuse of the authority conferred on him by statute. 25 R. C. L., par. 50; 245 U. S. 541.

4. The court in the original suit had jurisdiction of all the lands, although they were not parts of the same tract. C. & M. Digest, § 1164; 133 Ark. 250, 255. And it had jurisdiction of all the lands, although they were not all embraced within the same chancery district. The limitation suggested by appellant is unnecessary, since, under the statute, C. & M. Digest, § 6283, a certified copy of a decree affecting title to lands must be recorded in each county in which the lands lie. Moreover, the adoption of the suggested construction would require to be read into the venue statute words which are not there. Venue does not depend on the legal or equitable nature of the remedy sought, but solely on whether the action is *in rem* or purely *in personam*; if *in rem,* it is a local action, and if *in personam,* it is a transitory action, regardless of whether the action is brought at law or in equity. 42 Ark. 422, 439; 55 Ark. 442, 445; *Id.* 454; 133 Ark. 250, 257.

WOOD, J. In 1917 a suit was instituted by the State of Arkansas in the Drew Chancery Court against Mrs. Kate C. Parkinson. The object of the suit was to cancel the alleged title of Mrs. Parkinson to numerous tracts of land which she acquired from the State through mesne conveyances. The lands were situated in Drew, Ashley and Union counties. The chancery court entered a decree dismissing the complaint of the State for want of equity, and quieting the title to the lands in Mrs. Parkinson. No appeal was prosecuted from that decree. Some of the lands embraced in the decree Mrs. Parkinson still owns. Some she has sold, executing warranty deeds therefor. The records of the Commissioner of

State Lands, Highways and Improvements do not in any manner refer to the decree of the Drew Chancery Court above mentioned. This action was instituted by Mrs. Parkinson in the Drew Chancery Court in November, 1922, against the Commissioner of State Lands, Highways and Improvements. She attached as an exhibit to, and made a part of, her complaint, the decree of the Drew Chancery Court; also certificates of the records of Drew, Ashley and Union counties, respectively, showing that the decree had been recorded in those counties, and also the order of the Drew Chancery Court showing that the appeal prayed therefrom had been dismissed. Mrs Parkinson alleged, among other things, that in spite of the decree and the proceedings had thereunder, as shown by the exhibit attached to the complaint, the Commissioner of State Lands, Highways and Improvements threatened to issue deeds to lands embraced in the decree mentioned, to those who might apply to him for the purchase of the same from the State. Mrs. Parkinson alleged that the Commissioner was in receipt of applications, accompanied by the purchase price, from persons who do not claim by, through, or under her, for the purchase of various parcels of land from the State as swamp lands. She alleged that any deeds which he might issue would cloud her title and the title of those to whom she might convey. She prayed that the Commissioner be required to show the decree of the Drew Chancery Court above referred to on the records of his office, and that he be enjoined from issuing deeds to any of the lands embraced in that decree.

Herbert R. Wilson, Commissioner of State Lands, Highways and Improvements, was made defendant in the action. He, through the Attorney General, entered his appearance and demurred to the complaint, setting up, among other things, that the complaint failed to state a cause of action; that the court was without jurisdiction of the subject-matter. The cause was heard upon the demurrer, and, the defendant refusing to plead further,

the court entered a decree perpetually enjoining the defendant from issuing deeds or other instruments of conveyance affecting the lands embraced in the decree of the Drew Chancery Court entered January 4, 1917, and directing the Commissioner to execute to the plaintiff, Mrs. Parkinson, a deed or other instrument of conveyance in the name of the State of Arkansas, to each and all the tracts and parcels of land to which her title was quieted by the decree of January 4, 1917, and to enter upon the records of his office a memorandum of the disposition made of such lands by the decree of the Drew Chancery Court of January 4, 1917, to the end that the records of his office might show that the State of Arkansas does not have or claim any right, title or interest in and to any of said tracts of land embraced in that decree. From the decree is this appeal.

1. This appeal is from the decree of the Drew Chancery Court between the same parties in interest and pertaining to the same subject-matter that was embraced in the original decree of the Drew Chancery Court of January 4, 1917. By this action the appellee seeks to enforce that decree, by enjoining the appellant from selling any of the lands involved in that decree, and by entering upon the records in his office a memorandum or notation showing the effect of the decree of the Drew Chancery Court as to the lands that were the subject-matter of that decree. The allegations of the complaint bring it well within the original and undoubted powers of a court of chancery to entertain an action ancillary to the original proceeding in the same, or a different, court, and dependent upon such proceeding, and which has for its purpose the enforcement of a judgment or decree previously rendered, in order that complete justice may be done to the parties in interest, as the exigencies of the case may require. 10 R. C. L. p. 357, § 105; *Coltrane* v. *Templeton,* 106 Fed. 370-74, and cases there cited, 21 C. J., § 867.

"Where a decree is incomplete and ineffective for want of provision of any means for its execution, a bill in equity will lie to supply the imperfection so as to render the decree effective. For the purpose of determining whether there is ground for equitable interposition, the court may look to the real nature and character of the decree as it may appear in the light of surrounding circumstances." *Gay* v. *Parpart,* 106 U. S. 679-699. The chancery court unquestionably had jurisdiction of the subject-matter of this action, and it had jurisdiction of the appellant, who was the Commissioner of State Lands, Highways and Improvements. The original action in which the decree of the Drew Chancery Court of January 4, 1917, was rendered, quieting title to the lands embraced and described therein in the appellee, was brought by the State, through her Attorney General and her special counsel, for that purpose. In 15 R. C. L., § 504, p. 1029, it is said: "Although neither the United States nor a State can be sued without its consent, yet if an action is instituted by the State or the United States, or against either, in a case where the law permits it to be sued, the judgment therein rendered will have the same effect as *res judicata* against it and all its officers and agencies as would a judgment in an action against a private person in an action brought by or against him."

2. The present ancillary action cannot be classed as a suit against the State. The rights of the State were adjudicated in the original chancery action. The decree in that action is now sought to be rendered effective by the present action because of the failure of one of the officers of the State to do certain things in order that the beneficiary of the decree in the original action may have that decree completely enforced so as to give her the relief to which she is entitled under it. Should the Commissioner of State Lands execute deeds to lands owned by the appellee, and whose title to which was quieted by the original decree, he would be performing an unauthor-

ized and illegal act. The complaint alleges that he threatens, and will do so, because the effect of the original decree is not reflected by the records of his office; that, so far as the records of his office are concerned, title to the lands appears yet to be in the State, notwithstanding the decree; that, should he execute deeds to these lands, it would cloud title of the appellee. The alleged threatened acts of the Commissioner of State Lands, if done by him, would be in contravention of any authority lodged in him by virtue of his office, and the present action is therefore one against him to prevent him from doing an illegal or unauthorized act, and to require him to make the necessary memorandum or notations of record to preserve the rights of the appellee secured to her by the original decree, and to make those rights effective.

As the title of the State has already been adjudicated, its Commissioner of State Lands, Highways and Improvements, by this action, can and should be required to do the things necessary to give the appellee the complete relief which she seeks and to which she is entitled under the original decree. As said in *Johnson* v. *Lankford,* 245 U. S. 541, "surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both." See also 25 R. C. L. § 50, p. 414. In this action no relief is sought against the State. It is not charged that the State owes to the appellee any duty or that there is any liability on the part of the State growing out of any obligation to the appellee. The suit is not against the State.

3. In the original action in the Drew Chancery Court that court had jurisdiction of all the lands mentioned and described in the complaint and the decree. Section 1164 of Crawford & Moses' Digest provides as follows: "Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated: First: For the re-

covery of real property, or of an estate or interest therein. Second: For the partition of real property. Third: For the sale of real property under a mortgage, lien or other incumbrance or charge. Fourth: For an injury to real property."

The cause of action, as shown by the allegations of the complaint, is single and entire. It affects all the lands embraced in the original decree in the same manner, although these lands were situated in different counties, and some of them not within the territorial boundaries of the chancery district where the action was instituted. Since the lands situated in Drew County constituted a part of the subject of the action, the action instituted in that county drew to it, under the statute, jurisdiction over the lands situated in other counties. Under our decisions there is no distinction as to venue between the jurisdiction of courts of law and chancery. The jurisdiction of either cannot be made to depend upon the territorial boundaries of the district of which the particular court may be a part. So far as venue is concerned under the statute, it is the same whether the action be brought in the circuit court or in the chancery court. *Cox* v. *Railroad Company,* 55 Ark. 454.

The allegations of the complaint and the exhibits thereto show that the original action was brought in the chancery court of Drew County, where a part of the lands was situated. As between the State and the appellee, all of the lands embraced in the action, including those in Ashley and Union counties, as well as those in Drew were similarly affected by the decree, and the present action, which is ancillary to that, likewise involves and affects all of the lands in the same way. See *Harris* v. *Smith,* 133 Ark. 250-255. The subject of the action is the enforcement of the decree of the Drew Chancery Court. That decree was recorded in each of the several counties where the lands were situated, under the provisions of § 6283 of C. & M. Digest. As the subject-matter of this action involves all the lands embraced in the original

action and decree in the Drew Chancery Court in precisely the same manner, it is in the nature of a proceeding *in rem* operating directly upon the estate or title to the lands involved; and therefore a local action could have been brought in any county in which a part of the lands were situated. *Jones-McDowell & Co.* v. *Fletcher,* 42 Ark. 422-439; *McLaughlin* v. *McCrory,* 55 Ark. 442-445; *Harris* v. *Smith, supra.*

As we have shown, the action, having been brought in the Drew Chancery Court, where a part of the lands were situated, drew to it and gave that court jurisdiction over all the lands similarly affected, although situated in different counties, that were described in the complaint and embraced in the decree of the Drew Chancery Court of January 4, 1917.

The decree is in all things correct, and it is therefore affirmed.

KEFAUVER *v.* OAKLEY.

Opinion delivered February 5, 1923.

SALES—BREACH OF CONTRACT.—A contract for the sale of the seller's entire apple crop, although severable in that the apples were to be delivered in car lots at so much per hundred, and were to be paid for as they were received by the buyer, was entire in the sense that if the buyer complied with its terms as to payment he could then have compelled the seller to deliver to him the remainder of the crop; but where the seller refused to pay for the apples as delivered, he violated the contract and was not entitled to delivery of the remainder.

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

Sullins & Ivie, for appellant.

The contract was entire, although delivery of all the apples was not to be made at one time. 115 Tenn. 610; 9 L. R. A. (N. S.) 979; 106 Ark. 310; 160 Calif. 324; 121 N. Y. 288. The contract did not state when pay-

ments should be made, and the refusal of appellee to deliver more apples because those first delivered had not been paid for constituted a breach of the contract by appellee. See 93 Ark. 478; 88 Ark. 491; 88 Ark. 422; 56 Ark. 320. Under an entire contract, failure to deliver all the goods purchased precludes recovery for that delivered. 21 N. Y. 397; 52 N. C. 290, 75 Am. Dec. 463; 243 Pa. 313. Where the contract is entire and no time stipulated for payment, it is to be made only after complete performance. 136 Ga. 693; 103 Atl. 417; 67 Pa. 182; 100 Am. Dec. 560; 49 N. Y. 552.

John W. Nance and *Vol T. Lindsey,* for appellee.

When the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the whole is in its nature single and entire, the contract is severable. 88 Ark. 496; 67 Ark. 158; 2 Parsons Cont. 577; 100 Pac. 236; 13 N. Y. Supp. 552; 104 Mich. 242. A contract will be construed most favorably against the party who writes it. 112 Ark. 1; 90 Ark. 88; 73 Ark. 338.

WOOD, J. This is an action brought by the appellee against the appellant to recover the sum of $409.83, which the appellee alleged the appellant was due her on the following contract: "This confirms sale to W. E. Kefauver of my entire crop of Ben Davis and Gano apples in bulk, knots and rots out, delivered to Rogers, at $1.90 per cwt. (Signed) W. E. Kefauver. S. M. Oakley." Appellee delivered to the appellant, under the contract, at various times, apples the total amount of which was 21,570 pounds. Appellant, after demand, refused to pay for the apples thus delivered.

The appellant answered, denying the material allegations of the complaint. By way of cross-complaint he alleged that he purchased of the appellee her entire crop of apples for the year 1919, consisting of Ben Davis and Gano, as evidenced by the contract set up in the complaint; that the appellee delivered to the appellant several barrels of apples, which were accepted by the ap-

pellant and for which appellant made payment to be applied on the purchase price; that the apples delivered to the appellant by the appellee were inferior in quality, consisting principally of windfalls and drops; that, after delivering these faulty apples under the contract, appellee wholly failed to carry out her contract with the appellant, by refusing to deliver to the appellant the remainder of her crop, which consisted of the best quality of apples, and which appellant believed would have amounted to 100,000 pounds, and for which appellant would have received seventy cents per hundred profit if the appellee had complied with her contract. Appellant further alleged that he had incurred certain damages and expenses in a litigation between himself and the appellee which he had been compelled to institute on account of the breach of the contract by the appellee. The appellant alleged that the appellee, at the time of entering into the contract with the appellant, only intended to deliver to the appellant the inferior grade of apples from her orchard, and did not intend to deliver to appellant choice apples; that, by falsely representing that she would deliver to him the entire crop, she had induced the appellant to enter into the contract and to receive the inferior apples. The appellant prayed for a special master to state an account between himself and the appellee, and that the cause be transferred to equity, and that he have judgment for his damages and costs. The cause was tranferred to the chancery court.

The appellee testified to facts which tended to sustain the allegations of her complaint. It was agreed that she had delivered to appellant 21,570 pounds of apples which, at $1.90 per cwt., would amount to the sum for which she prayed judgment; that she had made demand upon the appellant three different times for the amount, and he refused to pay the same. On cross-examination she stated that, after the appellant refused to pay her, she sold what was left of her crop to another for the sum of $1,500. Before she sold the apples the ap-

pellant had paid her for the Jonathans that she had delivered to him early in the season in the sum of $180.14. This sale was a separate deal before the contract in suit was entered into. Each time the appellee made demand on appellant for the amount due, the appellant stated that he did not intend to pay for them until he got them all hauled. Appellant sent word to the appellee that he wanted to buy her apples. She went to his store on September 30th, and he told her that he was offering fifteen cents more than any other person was paying. After appellee had sold her apples to the appellant, she ascertained on the same day that other parties were paying more. Men at the car offered her $2.25 per hundred. Appellee could have sold to them, but did not because she had offered to sell to the appellant, and, she says, "I stayed with it."

The testimony of the appellant was to the effect that he entered into the contract with the appellee as set up in the complaint; that the contract provided that the apples were to be delivered in bulk, and that the appellee asked the appellant to let her deliver some in barrels, and he told her she could deliver them in any way she preferred; that the contract specified so much per hundred in bulk. Appellant thought appellee could get more by barrels. The appellee did not comply with her contract to deliver the entire crop for the year 1919. Appellant stated that the apples appellee brought in were under-sized, wormy and inferior. He took the apples to keep her satisfied so she would deliver the apples under the contract. He received apples from her that he would not have received from any one else. When the appellee demanded pay for the apples she had already delivered to the appellant, he told her that he had heard that she was trying to sell the apples for more money, and stated to her that if she would promise, in the presence of the four or five men who were there, that she would deliver to appellant the balance of the apples under the contract, he would pay her in full. Appellee

objected to that, and therefore appellant felt justified in withholding payment for the apples appellee had already delivered to him. Appellant further stated that he did not cancel the contract when he found that the appellee was delivering to him inferior apples, because he knew that she had better apples, and thought that she would certainly bring in better apples than she had brought in; otherwise he would have canceled his contract in the first place. Appellant testified that his total loss, by reason of the failure of the appellee to deliver all the apples she had agreed to deliver under the contract, amounted to the sum of $522.20.

The above are substantially the facts upon which the trial court rendered a decree in favor of the appellee against the appellant for the sum of $409.83, with interest from October 28, 1919. From that decree is this appeal.

In *Harris Lumber Co.* v. *Wheeler Lumber Co.*, 88 Ark. 491-496, we held: "Where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the whole is in its nature single and entire, the contract is severable. (Citing cases). * * * The contract in this case was entire in the sense that, if appellee had complied with its terms as to payment, it could then have compelled appellant to ship it the balance of the lumber, or else have responded in damages for its failure to do so. But here the uncontroverted proof shows that appellee was guilty of the first breach of the contract." The doctrine of the above case is peculiarly applicable to the facts of this record. The contract here under review was severable in the sense that the apples were to be delivered in car lots at so much per hundred, and were to be paid for as they were received by the appellant, but the contract was entire in the sense that if the appellant had complied with its terms as to payment, he could then have compelled the appellee to deliver to him the remainder of the crop. But the appellant was guilty of the first breach in refusing to pay for the apples as they were delivered.

The testimony warranted the court in finding that the appellee had not breached her contract at the time the appellant refused to pay for the apples which had already been delivered to him. On the other hand, the appellant breached the contract by refusing to pay for the apples that had been already delivered by the appellee, until she had delivered her entire crop. This the appellant had no right to do.

The decree is correct. It is therefore affirmed.

OTTINGER v. SCHOOL DISTRICT No. 25.

Opinion delivered February 5, 1923.

1. SCHOOLS AND SCHOOL DISTRICTS—DISCHARGE OF TEACHER—JUSTIFICATION.—It was no justification for discharging a teacher that he permitted the schoolhouse to become dirty where his uncontradicted testimony shows that it became dirty and littered with trash when the inhabitants of the district held box suppers and other entertainments in the house at night without his knowledge or consent, and that he always cleaned it as soon as possible thereafter.
2. SCHOOLS AND SCHOOL DISTRICTS—DISCHARGE OF TEACHER—JUSTIFICATION.—The fact that a teacher chewed tobacco and spit the juice through the screen windows of the school did not justify his discharge, especially where he had been employed by the school board to teach two previous terms and his personal habits were well known.
3. SCHOOLS AND SCHOOL DISTRICTS—DISCHARGE OF TEACHER—JUSTIFICATION.—Conduct of a teacher under a previous contract of employment is not ground for his discharge.
4. SCHOOLS AND SCHOOL DISTRICTS—WRONGFUL DISCHARGE OF TEACHER—DAMAGES.—A teacher wrongfully discharged was entitled to recover as damages his salary for the unexpired term of his employment where he was unable to secure another school during that time.

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

E. F. Duncan and *H. P. Cleveland,* for appellant.

The court should have instructed the jury as to any evidence that tended to prove a breach of his contract,

which occurred under a previous contract. 1 Greenleaf on Evidence, p. 85. Evidence of a similar crime committed at some other time than that alleged does not prove the crime alleged. 7 Ark. 470; 7 Ark. 474; 39 Ark. 340. Proof of bad conduct cannot be proved by specific acts. 67 Ark. 112. School board could not discharge for cause without notice and a hearing. 57 Ark. 237; 68 Ark. 526; 27 Ark. 61; 81 Ark. 194; 14 Col. App. 311; 59 Pac. 385; 45 Ark. 124; 89 Ark. 258; 95 Tenn. 532; 32 S. W. 631; 150 Pa. St. 78; 24 Atl. 348; 238 S. W. 9; 170 S. W. 561. Defendant districts discharged the plaintiff. 194 S. W. 32; 78 Ark. 336; 79 Ark. 220; 68 Ark. 226; 51 Mich. 539. If the contract was invalid in the making, it was ratified. 81 Ark. 143. The court should have instructed the jury on the question of notice. 82 Ark. 179; 84 Ark. 415; 87 Ark. 607; 84 Ark. 4.

Fred M. Pickens, for appellee.

HART, J. A. E. Ottinger sued School District No. 25 of Jackson County, Ark., to recover $250 alleged to be due him for a breach of contract to teach school. The directors of the school district denied that they had committed a breach of the contract sued on.

It appears from the record that the school directors of School District No. 25 of Jackson County, Ark., entered into a written contract with A. E. Ottinger to teach a common school in said district for the term of seven months, commencing on the 5th day of July, 1920, and agreed to pay him therefor the sum of $125 for each school month. After Ottinger had taught the school for five months, the directors discharged him and refused to let him teach the remaining two months. Ottinger asked the directors upon what grounds they discharged him, and they refused to tell him. They told him that if he brought suit for the balance alleged to be due him, they would give their reasons for his discharge in defending the suit.

Ottinger was unable to secure another school for the remaining two months of his contract, and sued the district to recover his salary for two months.

The jury returned a verdict in favor of the defendant school district, and the plaintiff, Ottinger, has duly prosecuted an appeal to this court.

The main reliance made by the plaintiff for a reversal of the judgment is that the undisputed evidence shows that he was discharged without cause, and that he was entitled to a directed verdict in his favor.

The law applicable to cases of this sort was well stated by Judge HEMINGWAY in *School District* v. *Maury*, 53 Ark., 471. In discussing a contract made by a school teacher with directors to teach a school, the learned justice said:

"If the defect arises from the failure of the teacher to carry out his undertakings, the keeping of the school in the way that the law contemplates demands that he be required to comply with his contract. This contract necessarily implies that he is competent to teach properly, and that he will conduct himself in a moral and skilful manner in discharging his undertakings. If he cannot or will not do either, he violates the contract, and its termination comes through his breach. We do not mean to say that every act of immorality would be a breach of the contract to justify its termination; but it would be such whenever, from the character or notoriety of the act, it impaired the services of the teacher in properly instructing or advancing the pupils. A teacher might properly instruct, yet his character for morality be so notoriously bad that he would lose the respect of his pupils and fail to advance them. He would not then be a competent teacher, though there were no defects in his learning or facility to impart it."

The undisputed evidence shows a valid contract to teach the school for seven months, and that the plaintiff was discharged by the directors after he had taught five months. The directors seek to justify their act in dis-

charging the plaintiff on the grounds that he permitted the schoolhouse to become dirty, and also that he would chew tobacco during school hours and spit through the screen windows.

With regard to the first ground, the plaintiff testified that the inhabitants of the district would have box-suppers and other entertainments at night in the schoolhouse without his knowledge or consent, and that the schoolhouse would in this way become dirty and littered up with scraps of paper and boxes. He stated further that he always cleaned the schoolhouse as soon as possible after finding it in this condition. His testimony in this respect is uncontradicted.

He admitted that he chewed tobacco, but denied chewing it during school hours, or that he spit through the screen windows. Conceding that he did spit tobacco juice through the screen windows on the several occasions testified to by some of the pupils, we do not think that his conduct in this respect was sufficient ground for his discharge. He had been employed by the school district to teach two schools prior to the execution of the contract in question, and his personal habits were well known. Besides, we do not think that this conduct would justify his discharge in the application of the rule above announced. It might be a good reason for not employing him in the first instance, but it would not be a sufficient ground for his discharge after he had been employed.

Some other testimony was admitted as to remarks made by him while teaching his first school in the district. We do not deem it necessary to set out these remarks, for the reason they would not be grounds for the discharge of the plaintiff under the contract sued on. Matters which occurred under a previous contract would not be grounds for the avoidance of a subsequent contract.

It follows that, under the undisputed evidence as disclosed by the record, there should have been a judgment in favor of the plaintiff against the defendant for the sum of $250, his salary under the contract for two months.

He was discharged the latter part of January, 1921, and had two more months to teach under his contract. This would have made his contract terminate the latter part of March, 1921, and the balance of his salary would have been due at that time. Hence the clerk is directed to enter judgment here against the district in his favor for the sum of $250, with interest thereon at the rate of 6 per cent. per annum from April 1, 1921, until paid.

It is so ordered.

MORELAND v. YOUNGBLOOD.

Opinion delivered February 5, 1923.

1. JUDGMENT—DECREE ON CONSTRUCTIVE SERVICE—VACATION.—Where a defendant who has been constructively served seeks a new trial under Crawford & Moses' Dig., § 6266, he cannot have the judgment or decree vacated on motion, but it remains until the case is retried, to be then confirmed, modified or set aside.
2. JUDGMENT—CONSTRUCTIVE SERVICE—NEW TRIAL.—On application by defendant constructively summoned to set aside the decree, a meritorious defense must be shown by him.

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

STATEMENT OF FACTS.

This is an application by Ella Moreland, a nonresident defendant, under § 6266 of Crawford & Moses' Digest, to have a decree foreclosing a mortgage on real estate set aside and to have the action retried.

It appears from the record that W. H. Youngblood brought a suit in equity against Harrison Larkins, Ella Moreland, and others, to foreclose a mortgage on certain real estate in the Eastern District of Carroll County, Ark. W. H. Larkins owned the land in his lifetime, and had executed a mortgage on it to W. H. Youngblood to secure him in the sum of $100, which he owed him. The mortgage was executed by W. H. Larkins and his wife, Amanda Larkins. W. H. Larkins died without having

paid the mortgage debt, and W. H. Youngblood brought this suit against Harrison Larkins and others to foreclose said mortgage. He obtained personal service on Harrison Larkins and constructive service on Ella Moreland and the other defendants as nonresidents of the State. It was alleged that Harrison Larkins, Ella Moreland and others were the children and sole heirs at law of W. H. Larkins, who had died intestate. The chancellor found the amount due under the mortgage, and a foreclosure decree was duly entered of record. The land was duly sold under the foreclosure decree by a commissioner in chancery appointed for that purpose. J. J. Erwin was the highest bidder, and the land was struck off and sold to him. The commissioner duly made a report of his proceedings, and the chancery court approved and confirmed his report, and ordered him to make a deed to the land to the purchasers.

Ella Moreland, one of the nonresident defendants, who had been constructively summoned in said foreclosure proceedings, made an application, under the statute, after the rendition of the decree, to have the action retried. She introduced evidence tending to show that she was the only child and sole heir at law of W. H. Larkins, who had died intestate. For the reasons given in the opinion it will not be necessary to set out this testimony.

Upon hearing her application the court found that no showing was made to set aside the decree, and the petition of Ella Moreland was denied and dismissed for want of equity. She has duly prosecuted an appeal to this court.

Johnson & Simpson, for appellant.

Appellant filed motion and answer within two years of the original decree, and was entitled to have the case retried. 64 Ark. 126.

Festus O. Butt, for appellee.

HART, J., (after stating the facts). The practice in this State is that, where a defendant who has been constructively served seeks a new trial under the statute,

he cannot have the judgment or decree vacated on the motion. The judgment or decree remains until the case is retried, to be then confirmed, modified, or set aside. *Gleason* v. *Boone,* 123 Ark. 523.

In the present case Ella Moreland showed no ground for setting aside the mortgage foreclosure proceedings. The proceedings themselves were regular in all respects. There was a valid mortgage and a subsisting debt due, which it was given to secure.

The court found the amount due under the mortgage, and ordered a sale of the land for the satisfaction of the debt secured by the mortgage. A commissioner was appointed to make the sale, and the land was duly sold by him. The sale was made in due time, and was also reported to the chancery court and approved and confirmed by the court. The court then directed the commissioner to execute a deed to the purchaser to the land, which was done. No showing was made by Ella Moreland to have these procedings set aside. She does not show that the foreclosure proceedings were erroneous in any respect. So far as the record discloses, the mortgage was a valid one, and was executed by the father of Ella Moreland in his lifetime. He owned the land and owed the debt for which he mortgaged the land. Therefore the court was right in denying the petition of Ella Moreland and dismissing it for want of equity. It did not make any difference whatever whether she was the sole heir of W. H. Larkins, deceased, or not. She would have just as much right in the one case as the other to have the case retried; but in either event she must show some meritorious defense to the action, and this she has failed to do.

It follows that the decree will be affirmed.

PARKER v. STEPHENS.

Opinion delivered February 5, 1923.

1. CONTRACTS—DAMAGES FOR BREACH—EVIDENCE—In an action by a subcontractor to recover damages for breach of contract for hauling stone for the contractors of a road improvement district, evidence *held* to sustain a verdict for the plaintiff.
2. CONTRACTORS—CONCLUSIVENESS OF ENGINEER'S ESTIMATES.—Where, under a contract for hauling stone, it was the plaintiff's duty to roll as well as haul the stone, in his action for stone hauled and for damages for breach of the contract, he was not concluded as to the amount hauled by him by monthly settlements based on the engineer's estimates, if they included only the stone that was rolled, and not the stone that was hauled but not rolled.
3. APPEAL AND ERROR—MODIFICATION OF JUDGMENT.—Where a subcontractor of a road improvement district agreed to return certain trucks in good condition, in his action against the contractors for hauling stone and for breach of the contract, where the evidence was not conclusive that an amount paid by defendants for repairs of the trucks was necessary to place them in as good condition as when they were received, and it cannot be shown from the amount claimed by plaintiff and the amount of the verdict that the whole of the repair bill was not allowed by the jury, the judgment will not be reduced in the amount of the repair bill.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict must be upheld on appeal if there is any evidence of a substantial character to uphold it.
5. CONTRACTS—BREACH—PREMATURE ACTION.—Although a contract provided that a subcontractor should not be paid a retained percentage until the contract was completed, an action by him before its completion was not premature where defendants prevented him from performing the contract.

Appeal from Logan Circuit Court, Northern District; *James Cochran*, Judge; affirmed.

STATEMENT OF FACTS.

John B. Stephens sued R. C. Parker and C. R. Lowery to recover a judgment in the sum of $9,837.02 for an alleged breach of contract for hauling stone by him for the defendants, to be used by them in constructing and improving a highway in Logan County, Ark. The defendants denied any breach of the contract on

their part, and asked for a judgment against the plaintiff in the sum of $1,739.33 for damages sustained by them by reason of an alleged breach of the contract on his part.

It appears from the record that the defendants, R. C. Parker and C. R. Lowery, made a contract with the commissioners of a road improvement district to construct and improve a road between Paris and Roseville, in Logan County, Ark. On Oct. 1, 1920, R. C. Parker and C. R. Lowery entered into a written contract with John B. Stephens whereby the latter was to do the work of hauling all the crushed stone to be used in constructing the Paris and Roseville Highway for the price of $1.50 per cubic yard, from any quarry selected by said contractors. Said contractors also agreed to pay Stephens at the end of each month after the work began 75 per cent. of the total amount earned during the preceding thirty days, and to pay the remaining 25 per cent. at the conclusion of the entire contract. Said contractors also agreed to let to Stephens the hauling of all the sand required, at $2.50 per cubic yard, from any location within five miles of the place to be delivered. Said Stephens agreed to furnish trucks to remove the crushed stone from the station to location, and also to roll the stone when spread on the roadbed, as required by the road engineer. Stephens also agreed to return to the county, in good condition, the government trucks which should be furnished to him with which to haul the crushed stone.

John B. Stephens was a witness for himself. The written contract contained no provision for the measurement of the crushed stone which should be hauled by Stephens. According to his testimony, the crushed stone was to be hauled in government trucks which were furnished by the county judge for that purpose. Stephens was substituted for another person to whom had been let the contract for hauling the crushed stone by Parker and Lowery. It was understood by the parties to this suit that the amount of crushed stone hauled by Stephens

under the contract should be ascertained by measuring the bed of the truck in which the stone was hauled. There were two trucks that had indentically the same size bed, and they measured to hold a fraction over two yards each. The other truck used in hauling the stone held three yards, according to measurement.

According to the testimony of Stephens, he hauled 3,733 cubic yards of rock under the contract. Mr. Ellis and Mr. Kirkpatrick hauled for him, respectively, 684 and 1,564 yards. This made a total of 5,981 yards hauled under the contract. At $1.50 per cubic yard, the amount due would be $8,971.50. Stephens was paid $5,691.30, and this left the defendants owing him a balance of something over $3,000. The defendants stopped Stephens from fulfilling his contract, and owed him over $1,100 damages on that account. Stephens in every way complied with the contract on his part.

The above is a brief summary of the testimony of Stephens himself, and it is corroborated by that of other witnesses. In every particular the other parties whom he hired to haul stone for him corroborated his testimony as to the amount of stone hauled by them for Stephens, and also as to the amount hauled by Stephens himself. On the other hand, the evidence for the defendants tended to show that the amount of crushed stone hauled by Stephens under his contract was to be determined by the estimates furnished by the engineer of the road district. All the witnesses for the defendants said that a more accurate measurement of the stone hauled could be made after the stone was laid on the roadbed than by measuring the bed of the trucks in which the stone was hauled.

The secretary of the road district was a witness for the defendants, and made a detailed statement of the monthly estimates of the crushed stone hauled by Stephens under the contract, and the various payments made thereunder. Stephens accepted these estimates and settlements as the amount due him under the contract.

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

The jury returned a verdict for the plaintiff in the sum of $2,783.87, and from the judgment rendered the defendants have duly prosecuted an appeal to this court.

R. J. White and *J. H. Carmichael,* for appellants.

1. Appellee, by his acceptance of the estimates and settlements, and his failure to show any other manner of settlement, is concluded by the figures of the engineer. When there is nothing to do but make additions of figures, and the verdict is contrary to the results so obtained, the verdict is not supported by the evidence. 79 Ark. 530.

2. Under the contract appellant should have been allowed credit for the sum necessary to place the trucks in proper repair.

3. The suit was prematurely brought. The road was not completed and the contract fulfilled, and the retained percentages were not due. 148 Ark. 192. See also 90 Ark. 236.

4. Appellee first breached the contract by not doing the work promptly, by not staying diligently on the job, and by not fulfilling contract in reference to rolling the rock. The party to a contract who commits the first substantial breach cannot maintain a suit upon the contract. 98 Ark. 160; 60 C. C. A. 623.

Thos. H. Rogers and *W. B. Rhyne,* for appellee.

Appellant's contentions 1 and 2 are not supported by the record. They concerned disputed facts, and the verdict of the jury is conclusive. The question of the suit being premature, even if sustained by the facts, cannot be considered, for the matter was not urged in the trial court and cannot be presented here for the first time. 76 Ark. 48; 68 Ark. 71. The evidence shows that the contract was ended by consent of all parties.

HART, J., (after stating the facts). The main reliance of the defendants for a reversal of the judgment

is that the verdict is not supported by the evidence. The evidence of the plaintiff as to the amount of crushed stone hauled under the contract is based upon the measurement of the beds of the trucks in which the crushed stone was hauled. A measurement of the beds of two of the trucks shows that they held a fraction over two yards each, and the other, three yards of crushed stone at a load.

The witnesses for the plaintiff testified that the beds of the trucks were well filled at each load.

It is contended by the defendants, however, that this method of measuring the amount of crushed stone hauled is not accurate. They introduced evidence tending to show that a more correct method of ascertaining the crushed stone was to measure it after it had been spread on the roadbed. Hence they contend that the measurement made by the engineer of the road district in this way should govern. This may be true, but their contention is not conclusive. The evidence for the plaintiff shows that the measurement of the truck bed was a correct and convenient way of ascertaining how much crushed stone had been hauled under the contract. The testimony of the plaintiff also showed that this method had been used by the party with whom the first contract to haul rock had been made, and that, when he was substituted for that party, it was understood that the amount of crushed stone hauled under the contract should be ascertained by measuring the truck beds and filling them up as each load was hauled. Hence the jury had a right to use this method in ascertaining the amount of stone hauled under the contract.

It is also contended by the defendants that the estimates made by the engineer of the road district were more accurate as to the number of yards of stone hauled. This may be true, but it cannot be said that the evidence of the plaintiff is not of a substantial character, and therefore cannot support the verdict. He testifies in positive and definite terms as to the amount of stone

hauled by himself and by two other parties for him. His testimony in this respect is corroborated by the two persons who hauled stone for him. The jury had a right to believe the testimony of these witnesses and to base its finding upon their testimony.

Again, it is insisted by the defendants that the plaintiff accepted the estimates made by the engineer of the road district, and, having received payment based upon the percentage he was to receive under the contract, he is concluded by the settlements, and the district is only liable to him for the retained percentage of 25 per cent. We do not think the testimony of the defendants on this point is uncontradicted. Under the contract it was the duty of the plaintiff to roll the stone after it was placed on the surface of the road. According to his testimony, the defendants would not pay him for stone which had been hauled by him and which had not been rolled at the time the monthly payments were made. In this way he accounts for the shortage in payment, and says that the defendants would not pay him for stone which had been hauled and spread on the road but which had not been rolled at the time the settlement was made. Hence it cannot be said that, under the undisputed testimony, he is bound by the settlements made with the defendants as shown by the report introduced in evidence by the defendants.

Again, it is insisted by the defendants that the undisputed evidence shows that the defendants paid $800 to repair the government trucks borrowed from the county, and that it was the duty of the plaintiff to make these repairs. Hence they insist that the judgment should be reduced by this amount in any event.

There are two answers to this contention of the defendants. While it is true that the uncontradicted evidence shows that the defendants paid $800 to repair the trucks, still the uncontradicted evidence does not show that these repairs were necessary to place the trucks in as good condition as they were when they were received

from the county. According to the testimony of the plaintiff, all that was necessary to place the trucks in as good condition as they were when received from the county would be to put in a missing differential in two of the trucks. This would not cost anything near the sum of $800. In the second place, we cannot know but that the jury might have allowed the whole of the $800 in arriving at its verdict.

Besides the testimony of the plaintiff, abstracted above, he testified that the defendants owed him $2,456.93, for the 25 per cent. retained by them under the contract. His testimony as to this amount is unequivocal, and he says that it is based on the actual yardage of crushed stone hauled by him. In the same connection he testified that the defendants owed him an additional sum of $1,137 for stone hauled and for which they had made no settlement with him. He also claims an additional amount for damages because they stopped him from completing his contract, and thereby prevented him from earning a profit of something over $1,000 for stone which he was not allowed to haul.

But it is insisted by the defendants that the testimony of the plaintiff is inconsistent, and in some respects contradictory, and that this is shown by the fact that the verdict of the jury is not based on the estimates made by the plaintiff, but is in the nature of a compromise between the claim by the plaintiff and that made by the defendants.

The contention of the defendants in this respect cannot operate to reverse the judgment. If we were trying the case *de novo,* it would be proper to consider it in order to determine whether the finding of facts made by the chancellor was against the weight of the evidence. This is an appeal from a judgment at law, however, and we can only review it for errors made by the circuit court in trying the case. We cannot undertake to determine whether or not the verdict of the jury is in all respects consistent. Under the settled practice in this

testimony in this respect is contradicted by that of the State, the verdict of a jury must be upheld on appeal if there is any evidence of a substantial character to support it. We are not required, and indeed we are not permitted, to inquire into the consistency of the verdict of the jury. The jury has the exclusive right to weigh the testimony and to accept all or any portion of it which it believes to be true.

While, according to the plaintiff's testimony, if accepted by the jury in its entirety, he was entitled to a larger verdict, yet his testimony is of a substantive character and is sufficient to support the verdict for a less amount.

Finally, it is insisted by the defendants that the suit was prematurely brought, and for that reason the judgment should be reversed. Their contention is that the record does not show that the road was completed at the time the suit was brought, and that, under the contract, the defendants were not liable for the retained percentage until the road was completed.

This would be true if the defendants had allowed the plaintiff to complete his contract of hauling. According to their testimony, the plaintiff breached the contract, but according to his testimony the defendants breached the contract and prevented him from completing it, and thus the contract was ended in so far as he was concerned. The plaintiff testified that he was not given the right to haul the sand as provided in the contract, and, while his defendants, yet the verdict of the jury in his favor is conclusive upon us. Hence it can not be said that the suit was prematurely brought.

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

McFARLANE v. MORGAN.

Opinion delivered February 5, 1923.

1. TAXATION—EFFECT OF LAND COMMISSIONER'S DEED.—A Land Commissioner's deed, reciting that the State had title under forfeiture and sale for taxes of a specified year, would also convey any other title the State may have had.
2. TAXATION—OVERDUE TAX SALE—CONFIRMATION.—Where a tract of land was ordered to be sold in an overdue tax proceeding, but was omitted from the order confirming sales thereunder, the State acquired no title thereto.
3. TAXATION—EFFECT OF OVERDUE TAX PROCEEDING UPON PREVIOUS FORFEITURES.—Under the overdue tax act requiring the court to inquire into the sufficiency of tax sales or forfeitures to vest title in the State, and, if found insufficient, to proceed to order the assessor to assess the lands for the years the taxes were unpaid, *held*, where the court found that a sale to the State of a certain tract was insufficient to vest title and ordered the land to be assessed and thereafter ordered it to be sold, but the sale was never confirmed, such proceedings vacated the prior sale, and the State acquired no title to the land.
4. ADVERSE POSSESSION—PAYMENT OF TAXES FOR SEVEN YEARS.—Under Crawford & Moses' Dig., § 6943, payment of taxes for seven consecutive years on unimproved and uninclosed land gives title.

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

Jesse B. Moore, for appellant; *H. B. Martin*, of counsel.

The burden of proof upon the issues presented and upon the whole case was on the appellee. 95 Ark. 445; 142 Ark. 609; 110 Ark. 571; *Id.* 577. The deed of the State Land Commissioner was effective to convey whatever right the State had without reference to its recitals. 43 Ark. 543, 544; 7 Ark. 427; 15 Ark. 331; 76 Ark. 450 *et seq.*; C. & M. Digest, § 6669. The State is not complaining against appellant's title, and the appellee, in view of the title acquired by the State under the overdue tax proceeding, which was duly conveyed by the commissioner to appellant, is in no position to complain. 76 Ark. 450, 458-9. See also 74 Ark. 202,

205-6; 81 Ark. 170, 172-3; 50 Ark. 188, 191-2; 91 Ark. 95 *et seq.*; 72 Ark. 101. Succession of title and possession from former owner for a series of years, together with continuity of tax payments without break, are requisite to raise any presumption of redemption from forfeiture of land to the State for taxes under previous adjudications of the court. 47 Ill. 17; 53 Pac. 421 (Cal.); 80 Ark. 520, 522-3; 89 Ark. 300, 307. There can be no presumption of redemption from tax sales to the State except in favor of the former owner, his heirs and assignees, coupled with possession and payment of taxes without break. 135 Ark. 353, 366-7; 139 Ark. 333; 147 Ark. 247.

Marsh & Marlin, for appellee.

In order to vest title in the State to the land in controversy, it was necessary that these things affirmatively appear: (1) That the land was actually sold to the State at the overdue tax sale. (2) That such sale was reported by the commissioner who conducted the sale to the chancery court having jurisdiction, and that it confirmed the sale, and (3) that a list of the lands contained in the report of sale as confirmed was filed in the office of the Commissioner of State Lands and in the office of the Auditor of State. That the land in controversy appears in a descriptive list filed with the Auditor Nov. 8, 1883, which list was never filed in, nor ever confirmed by, any court, is no sufficient evidence of a sale to the State under the overdue tax act of 1881. The certificate of the State Land Commissioner that the land in controversy is not contained in the list filed in his office, as sold to the State at overdue tax sale, is competent evidence of the fact that it was not sold to the State. But, if the list filed with the Auditor in 1883 be treated as competent evidence of a sale to the State, the proof is ample, and the presumption is overwhelming, that the land was redeemed. 135 Ark. 354; 147 Ark. 247; act No. 621, Acts of 1921.

SMITH, J. Appellee brought this suit to effect the cancellation of a deed executed by the Commissioner of State Lands on April 21, 1920, conveying to appellant the title of the State to the northeast quarter of the northwest quarter of section eleven, township eighteen south, range sixteen west, as a cloud on his title.

Appellee purports to deraign his title from the United States by an unbroken chain of conveyances; but appellant says that, under the testimony, there are some broken links in this chain. We do not stop to inquire whether there are missing links in this chain of title or not, for the reasons hereafter stated, and the point to be decided is the effect of this deed. The Land Commissioner's deed recites that the State had title to the land conveyed under a forfeiture and sale for the taxes of 1868; but it would, of course, convey any other title the State may have had. *Walker* v. *Taylor,* 43 Ark. 543.

The answer of appellant alleged the fact to be that the land had been sold to the State under an overdue tax decree; that this sale had been duly confirmed and the State acquired the title thereby, and conveyed it to appellant by the deed of the Land Commissioner stated above. We have before us the record in the overdue tax suit of Union County, a proceeding had under act 39 of the Acts of 1881 (Acts 1881, p. 63). This was a general act entitled "An act to enforce the payment of overdue taxes," and under it proceedings were had in Union County substantially similar to proceedings had under said act in all the other counties of the State. Many cases have reached this court which grew out of these proceedings, and we shall attempt no review of this legislation at this time.

The records of Union County, at least the court records, are intact in so far as this overdue tax proceeding is concerned, and this litigation arises out of a difference of opinion as to what the records show in regard to this statutory proceeding.

The first order of the court was that of the clerk in vacation, made pursuant to section 2 of the overdue tax act, warning all persons to appear within forty days and show cause why a lien should not be declared on the lands there described for unpaid taxes, and the same ordered sold. The land in litigation is there described, and this order was made July 13, 1882.

The next order of the court is one in which a decree *pro confesso* is taken, pursuant to section 5 of the act. The court finds that the sales to the State for the non-payment of the taxes for the year set out in the complaint are void, and the assessor of the county was directed to proceed forthwith to reassess the land. This order was made November 1, 1882. The next order recites the filing of the assessment by the county assessor pursuant to the directions of the court.

The next is an order before the clerk in vacation made on October 21, 1882. This order recites that the order of the court requiring the owners of the land in this State to show cause why a lien should not be declared has been duly published, and that the State Auditor has been duly summoned, and no answers have been filed as to the lands therein set out. It is ordered that the complaint be taken as true and confessed. The land here involved is there described.

The next order is found in chancery record "D," and extends from page 576 to page 605, and was made on November 1, 1882. This order recites the previous proceedings, and adjudges that all sales to the State for taxes for the years 1868 to 1878, with the exception of the sale for the taxes of 1871, were void for the reasons therein set forth. It was adjudged that those sale were null and void, and that no title had passed to the State thereby; but it was also adjudged that there were taxes due on these lands, and the amount thereof was set opposite each tract, as was also the cost chargeable against each of said tracts. The taxes so adjudged against the land in suit were $12.03, and the cost as-

sessed at $1.03, making the total taxes and cost $13.06. M. H. Gladden was appointed commissioner, and was directed to advertise and sell the lands in satisfaction of the lien which the court declared against each of said tracts of land for the taxes and costs found due thereon. It was directed that the sale should begin on January 1, 1883, and should continue until all the lands therein described should be sold, unless they had been previously redeemed.

The next record appearing in the transcript is a certificate made by James Guy Tucker, Auditor of State, on August 9, 1921. This certificate of the Auditor recites that there was filed in that office on November 7, 1883, a document containing the following recitals:

"In the Union Circuit Court

"April Term, 1883.

"Commissioner's Report.

"To the Hon. Circuit Court of Union County on the Chancery side thereof.

"Your Commissioner, M. H. Gladden, respectfully submits the following as his report:

"The following tracts and lots of land were each and every one of them on the first and subsequent days of January, 1883, to the 15th day of said month, sold or knocked off to the State of Arkansas, for the aggregate amount of taxes, penalty, costs and attorneys' fees due upon each tract.

"That the sale of said lands was duly advertised in the Union County Times and El Dorado Eagle, two weekly newspapers, published in El Dorado, Union County, of general circulation in said county, for twenty days next before the first day of January, 1883, the date for beginning said sale, in the manner and form, at the time and place, and on the terms required in the decree condemning said land, and as required by law in all respects, and according to the manner, time, terms, quantity and place of said advertisement or notice. The

said tracts and lots of land were duly sold to the State of Arkansas, to-wit:

"Northeast quarter of northwest quarter of section 11, township 18 south, range 16 west (among other lands not included in this case).

"Your commissioner respectfully submits the foregoing report, and asks to be discharged herein.

"M. H. GLADDEN, as Commissioner.

"Sworn and subscribed to before me this 16th day of April, 1883.

"J. C. WRIGHT, Clerk."

Attached to this document was the following certificate:

"State of Arkansas, County of Union.

"I, J. C. Wright, circuit clerk and ex-officio county clerk, do hereby certify that the above and foregoing 62 pages is a full, true and perfect copy of the list of lands sold to the State of Arkansas as at a sale made on the 1st and subsequent days of January, 1883, by M. H. Gladden, comr. appointed by the court to sell said lands, under a decree of the circuit court of Union County, chancery side, Oct. term, 1882, in a suit in said court wherein Union County was plft. and SW¼ of NE¼ of sec. 9, T. 18, R. 10 W., and other lands upon which taxes are due and unpaid, are defts., as appears from the report of said com., now on file in this office, and as the same also appears of record in chancery court record 'D,' pages 579 to 602 inclusive. (Shows lands sold to State including land in controversy).

"Witness my hand and official seal this 3rd day of Nov. 1883.

"J. C. WRIGHT, Clerk.
"By O. A. Mills, D. C."

There is nothing about this document to indicate that this report of the commissioner was ever filed anywhere except in the Auditor's office. The significant thing about this certificate of the clerk is the recital that

the list of lands is that appearing of record in chancery court record "D," pages 579 to 602. That record happens to be the decree of sale. As we have before stated, that decree begins at page 576 and extends to page 605, and necessarily includes pages 579 to 602 mentioned in the clerk's certificate as being the list of lands which he certified as having forfeited to the State. Evidently the pages of the decree preceding page 576 and the pages following page 602 contained the recitals and directions of the decree, and the pages from 579 to 602 contained the descriptions of all the lands ordered sold, of which there were 2,329 tracts, as shown by the report of the commissioner to which we next refer.

And next follows the commissioner's report showing that there were 2,329 tracts of land ordered sold. This report was dated April 27, 1883, and was filed with the clerk of the court on April 28, 1883. This report is as follows:

"To the Hon. Circuit Court of County of Union:

"The commissioner of this court appointed at the October term thereof, 1882, to make sale of certain lands situated in said county in pursuance of the decretal orders of said court in two certain cases therein rendered, to-wit: Union County v. NE SW section 6, township 18, range 10, and Union County v. SW NE section 9, township 18, range 10, respectfully represents that, in pursuance of said orders and decree, he did, after advertising same as required by law, on the 1st day of January and from thence to the 15th January, 1883, inclusive, sell at public outcry the lands mentioned and embraced in said decree, giving his certificates of purchase to the purchasers thereof, and for such tracts or parcels of land and not purchased by individuals were struck off to the State of Arkansas, and a list whereof has been filed in the office of the clerk of said county, as required by law."

The report then recites the collections made by the commissioner, his disbursements thereof, and a state-

ment of the money on hand, but it does not describe any lands.

The next order of the court was made on May 1, 1883, and we copy it in full. It reads as follows:

"Tuesday, May 1, 1883.

"COMMISSIONER'S REPORT.

"Union County, No. 380, against SW NE sec. 9, T. 18, R. 10 W.

"On this 1st day of May, 1883, it being the 8th day of the term, the court takes up the report of the sale of the commissioner, M. H. Gladden, of the sale of lands for overdue tax, and, the same being in due form, and there being no exceptions filed thereto, and it appearing to the court that said lands were duly advertised and sold in accordance with the statute of the State of Arkansas in such cases made and provided.

"It is therefore considered, ordered, adjudged and decreed by the court that said commissioner's report is hereby in all things approved, except as to the NE¼ of SE¼ of section 25, in township 17 south of range 18 west, the order of sale whereof is set aside and held for naught, and the commissioner is ordered to refund the money. And

"It further appearing from said commissioner's report that he collected for and on account of overdue tax and on account of the sale of the said lands the sum of eight hundred and fifty and 92/100 dollars, that said commissioner has paid out and expended out of said sum to the clerk of this court, attorney for the county, printers and commissioner, commissions amounting in the aggregate to the sum of seven hundred and seventy-one and 73/100 dollars, and filed the vouchers for the same, leaving still in commissioner's hands a balance of eighty-eight and 19/100 dollars in Union County scrip."

Evidently the report here approved and confirmed by the court is the report of the commissioner, copied above, in which that officer accounts for the funds re-

ceived and disbursed by him. It appears quite clear that the court here confirmed only one report, and it is equally manifest that the report confirmed was the financial report, which did not purport to show what lands had been sold to the State.

It appears therefore that there is no record showing what lands were sold to the State, except a list of lands which appears to have been filed in the Auditor's office, and not to have been filed anywhere else, and which list appears to have been made by copying the entire list of lands embraced in the decree of sale.

The conclusion which we have announced is reenforced and fortified by the court proceedings which thereafter follow.

The next order of the court was made on October 10, 1891, and is entered in chancery court record "E," pages 376 and 377. This order recites that one C. W. Hearin had theretofore been appointed to make report of the sale of certain lands sold under an overdue tax proceeding by M. H. Gladden, special commissioner, and bought by the State of Arkansas. Hearin himself now reports that Gladden did, on the 1st to 15th days of January, 1883, offer the lands for sale described in the report of sale, and he attaches to his report, as exhibit "A" thereto, a report which Gladden had himself prepared, showing the lands which he had sold to the State and which had not been redeemed. This report of Hearin was sworn to before the judge of the court where the proceeding was pending, on October 9, 1891. The court found that this exhibit "A" was the report made up by Gladden himself showing the lands sold to the State, and the specific finding is made that this sale to the State was never reported by Gladden to the court or confirmed by the court. The court found Hearin's report to be correct and confirmed it, and vested in the State title to the lands there described. The land in suit did not appear in that report as having been sold to the State.

The effect of this confirmation was to complete the sale and to vest title to the lands sold to the State in the State; but the sale was not complete and the title did not vest until there had been a confirmation thereof. *St. L. I. M. & S. R. Co.* v. *Greeson,* 81 Ark. 170; *Kelley* v. *Laconia Levee Dist.,* 74 Ark. 202. As no confirmation of the sale of the land in suit is shown, it follows that the State did not acquire the title as the result of that suit.

We have therefore the following record. Under section 7 of the overdue tax act it was made the duty of the court to inquire whether the tax sales or forfeitures were sufficient in law to vest title in the State, and the direction was given by the act that, if the court found that no title had passed to the State by virtue of the tax sale, the court should proceed as if no forfeiture had taken place, in which event section 8 provided that the court should make an order requiring the assessor of the county to assess the lands for the years during which the taxes were not paid. This assessment was made, and taxes amounting to $12.03 were assessed against the land in suit. This proceeding necessarily operated to set aside the sale for the taxes of 1868, the court having expressly found that the sale for the taxes of that year was void. As there has been no confirmation of a sale to the State, the State did not acquire title as a result of that proceeding; and we think the inference fairly deducible from the records quoted is that the land was in fact redeemed from the decree of sale, as it might have been under the act.

The Land Commissioner's deed purports to be based upon a sale to the State for the taxes of 1868, and, as the State is not shown to have had any other title to the land, that deed conveyed no title, because the sale for 1868 was expressly canceled by the overdue tax decree.

It is stipulated that the Land Commissioner would testify that the land in litigation does not appear in the list of lands certified to his office as having been sold and confirmed under the overdue tax proceedings.

The law required a list of the lands sold to the State to be filed with both the Auditor and the Commissioner of State Lands. But the list filed with the Land Commissioner was the only list which the law required to be recorded. Permanent records were provided in which the Land Commissioner recorded the lists coming from all the countiees, and the land in litigation does not appear in the list as recorded from Union County, where the land was, and is, situated. The Land Commissioner was, and is, the State's land agent, and these records which he was required to make, and still keeps, are the records preserving the evidence of the State's title to lands acquired through the overdue tax proceeding.

To summarize: There is no writing anywhere to indicate that the report of the commissioner showing the land in litigation was ever sold and confirmed to the State, except the ambiguous record found in the Auditor's office. The court records relating to this overdue tax proceeding are intact, and no court order shows any confirmation of any list of lands sold to the State. The only report confirmed was the financial report of the commissioner. The recital of the certificate to the list of lands in the Auditor's office can be read to include the land in litigation; but the certificate identifies that list, which it designates as the list of lands on designated pages of the chancery court records, which we know to be the decree of sale including all the lands embraced in the suit, many of which, we know were never sold to the State, from the fact that the financial report of the commissioner referred to shows that he had on hand a large sum of money derived from the sale of lands to individuals, who paid him the amounts of their bids at his commissioner's sale. In addition, there must necessarily have been many tracts of land redeemed either before the sale or within the period allowed for redemption. Yet this list, referred to as being the list of lands

sold and confirmed to the State, includes all of the lands embraced in the decree.

In addition, the Land Commissioner's records in which these lists were required to be recorded do not contain the land in litigation; and, when the Commissioner undertook to sell the State's title, he recited in his deed the forfeiture to the State for the taxes of 1868 as the basis of the State's title.

We also have the solemn adjudication of the court in which the overdue tax proceeding had been had that there had never been any confirmation of the report of the commissioner showing the lands sold to the State; and the decree of confirmation which adjudged there had been no prior confirmation, and which described the lands reported as sold to the State, did not include the land in litigation.

From all these facts we conclude the land was never sold to the State; but, if so, there was a redemption within the time allowed by law.

The court found that appellee was the owner of the land by an unbroken chain of conveyances of the original title, and canceled the commissioner's deed as a cloud upon that title. We do not stop to decide questions raised in regard to that finding, as it appears that appellee, and his predecessors in title, had at least color of title, and had paid the taxes for seven consecutive years thereon before the institution of this suit, and this makes a title, unless during that time the land was owned by the State. Sec. 6943, C. & M. Digest.

Appellant paid taxes after the institution of this suit, and thus broke the continuity of the payments; but there had been seven payments by appellees and his predecessors in title before this break in the payments occurred.

It follows, from what we have said, that the decree of the court below should be affirmed, and it is so ordered.

HART, J., (concurring.) I concur in the opinion affirming the decree of the court below, on the ground

that a presumption should be indulged that the land had been redeemed from the decree of sale, because of the tax payments which the record shows were made, and in support of that view I rely on the doctrine announced in the cases of *Wallace* v. *Hill,* 135 Ark. 353; *Lloyd* v. *Thornton*, 147 Ark. 247, and *Carter* v. *Stewart,* 149 Ark. 189.

The facts in regard to the payment of taxes are as follows: There was a conveyance of the land to Jerry Tatum in 1878, and the taxes were assessed in his name for the year 1882, and in the name of his estate for the years 1883 to 1888, inclusive, and in the name of Louise Tatum for the years 1889 to 1892, inclusive; and the taxes from 1893 to 1896, inclusive, were assessed in the name of B. W. Reeves; and the taxes for all these years were paid, although the records extant do not show by whom the payments were made, and the relationship between Jerry Tatum and Louise Tatum does not affirmatively appear. Reeves acquired his title by the foreclosure of a deed of trust executed in 1881 by Jerry Tatum to Reeves & Gresham; and Reeves conveyed to Kinard, who paid the taxes for the years 1897 and 1898. From 1897 the records show by whom the taxes were paid. Payments from 1899 to 1903, inclusive, were made by J. Z. Robertson, in whose name the lands were assessed. The record does not show under what claim of title Robertson paid; but in 1904 Kinard resumed the payment of taxes; and thereafter the taxes were either paid, or were redeemed after having been sold for nonpayment, by persons in the Kinard chain of title.

The taxes were paid during the time when, under the law, redemption could have been made, and, in view of the payments of taxes set out above, I am of opinion that a presumption should be indulged that the right of redemption had been exercised.

WOOD, J., dissents.

JOHNSON v. JONES.

Opinion delivered February 5, 1923.

1. CORPORATIONS—PREFERENCE BY INSOLVENT CORPORATION—LIMITATIONS.—Under the statute prohibiting preferences by insolvent corporations, which provides that no such preference shall be set aside unless complaint be made within 90 days, a mortgage by an insolvent corporation cannot be assailed as a preference several years after it was executed.
2. SUBROGATION—FIRST AND SECOND MORTGAGE.—Where trustees of a corporation, authorized to borrow $16,000 to pay part indebtedness, executed a mortgage for $10,000, and, this amount proving to be insufficient, executed a second mortgage for $5,000, the holders of the second mortgage could not claim equality of lien under the doctrine of subrogation, since none of the money was used to pay the first loan.
3. MORTGAGE—EFFECT OF SUCCESSIVE DEEDS.—Where corporate stockholders authorized the directors to mortgage the corporate assets to the extent of $16,000 to pay existing indebtedness, and the directors first borrowed $10,000, executing a mortgage to secure same, and thereafter borrowed $5,000, and executed a second mortgage therefor, in which the warranty excepted the prior mortgage, *held* that the first mortgage gave a prior lien, and the holders of the notes secured by the second mortgage were not entitled to claim the entire transaction as a single loan.
4. MORTGAGES—PRIORITY.—Where a corporation executed two mortgages at different times to different persons and for different debts, the priority of lien in the first deed is not discharged because the proceeds of both instruments were applied to the payment of corporate debts which were outstanding before either deed was executed.
5. MORTGAGES—FORECLOSURE OF JUNIOR MORTGAGE.—In an action to have a mortgage declared equal in priority with another mortgage which was prior in time, with alternative prayer for foreclosure of the first-mentioned mortgage, where the first relief was properly denied, it was error to deny the alternative relief.

Appeal from Garland Chancery Court; *J. P. Henderson,* Chancellor; reversed in part.

A. B. Belding and *Gibson Witt,* for appellant.

The corporation is, and was at the time both loans were made, insolvent, and the money received by it on

the loans inured to the benefit of all its stockholders alike. It is manifest that a preference is being sought in favor of one class of creditors over other creditors, contrary to the law. C. & M. Digest, §§ 1798, 1799 and 1800; 67 Ark. 11; 124 Ark. 422. All the assets of an insolvent corporation are equally liable for the payment of all of its creditors. 96 Ark. 1; 54 Ark. 580; 58 Ark. 17; 107 Ark. 424; 107 Ark. 118; 123 Ark. 575. The beneficiaries under the two deeds of trust are entitled to be subrogated to the rights of the original creditors whose claims they furnished the money to pay. 37 Cyc. 363; 108 Ark. 558; 39 Ark. 542; 3 Pom. Eq. Juris. 1212; 37 Cyc. 378, and authorities cited in note; 38 Cyc. 395.

Calvin T. Cotham and *L. E. Sawyer,* for appellees.

1. Appellant's reference to the statute dealing with preferences has no application in this case. This corporation has never been adjudged insolvent by the chancery court; and there are no proper allegations in the complaint and amended complaint of insolvency, nor is there any prayer that the court take charge of the assets of the corporation. 39 Ark. 562; 102 U. S. 148. There is no sufficient allegation in the pleadings or exhibits that the action of the corporation in executing the deeds of trust was in contemplation of insolvency. C. & M. Digest, § 1800. The statute does not prevent a corporation from giving a first and second mortgage, if necessary, for the payment of its debts. It was never intended to destroy the priority of mortgages given in good faith to secure present advances of money for use in the payment of the corporation's debts. 10 Cyc. 1261; 7 R. C. L. 751; *Id.* 755. See also 97 Ark. 57.

2. Subrogation has no application under the facts in this case. If appellant had paid off the first deed of trust for his own protection, he might be subrogated to the rights of his fellow mortgagees in the first deed of trust, but that is not the case. 34 Ark. 113; 76 Ark. 245; Sheldon on Subrogation, 127, par. 3; Harris on Sub-

rogation, par. 29; 90 Ark. 51; 6 Pomeroy, Eq. Jur., par. 866.

SMITH, J. After twice amending her complaint, appellant elected to stand upon it, a demurrer thereto having been sustained, and this appeal is from the decree dismissing it.

Appellant is the widow and administratrix of Thomas E. Holland, who was a stockholder, director and president of the Pasteurized Milk Company, a domestic corporation having its principal place of business in the city of Hot Springs.

The complaint alleged that on and prior to November 3, 1917, the corporation had become largely indebted to various parties in sums aggregating approximately $16,000. On that date a stockholders' meeting was held for the purpose of considering the affairs of the corporation, and a resolution was adopted by them authorizing the directors of the corporation to borrow the sum of $16,000 for the purpose of paying the existing debts and to mortgage all the assets of said corporation as security to the persons making the loan. A copy of this resolution was made an exhibit to the complaint.

It was alleged that, pursuant to said resolution, and under and by virtue thereof, the directors of said corporation, on the 11th day of December, 1917, borrowed the sum of $10,000 from certain of the defendants, who were directors and stockholders of the corporation, and notes were executed by the corporation to each of said parties for the amount loaned. The complaint further alleged that "said sum" ($10,000) "being thought at the time sufficient to liquidate the indebtedness of the company sufficiently to enable it to continue the operation of its business." And further, "that thereafter, to-wit, on the 16th day of October, 1918, it having first been ascertained that the loan first made by the above named defendants was not sufficient to liquidate the indebtedness of said company, and that the amount first borrowed by said company was left to the determination of the board of directors, who fixed the amount at ten

thousand dollars, a further resolution by the said board of directors was passed, authorizing the completion of the loan first authorized, by the execution of notes of the said company in the sum of five thousand dollars, and the execution to defendant Robt. Neil, as trustee, of a second mortgage on the property described in the deed of trust executed as security for the amount of money first loaned to said company," etc.

It appears from the exhibits to the complaint that a resolution of the board of directors preceded each of these loans, and the resolution under which each loan was made was incorporated in the deed of trust securing the loan.

In the first resolution it was recited that, "whereas, the said party of the first part, desiring to raise money for the purpose of discharging or paying the debts against said corporation heretofore necessarily incurred in its business, has, by a resolution of its board of directors, duly authorized the negotiation of a loan in the sum of $10,000, and the execution and delivery of a deed of trust, conveying all of the property, both real and personal, belonging to said corporation, for the purpose of securing said loan," etc.

The second deed of trust recited that a resolution of the board of directors had been duly adopted authorizing the negotiation of a loan in the sum of $5,000, and the execution of a second deed of trust conveying all the property of the corporation for the purpose of securing that loan. This second deed of trust recites that the authority of the directors was derived from the resolution of the stockholders adopted on November 3, 1917, and contained the usual covenants of warranty, but excepted from the warranty the first deed of trust dated December 11, 1917.

After setting out these facts, the complaint prayed that the two deeds of trust be treated as a single instrument, securing a single debt, and there was a prayer that the court take over the assets of the corporation, order them sold and prorate the proceeds of such sale to the

holders of the indebtedness secured by the second deed of trust in proportion to the amount of their holdings, and without reference to the deed of trust by which the indebtedness was secured.

In other words, the stockholders authorized the directors to borrow $16,000. The directors were of opinion that a loan of $10,000 would suffice, and borrowed that sum of money on December 11, 1917, and executed a mortgage of the company's assets. This loan proved insufficient, whereupon the directors, under the authority of the original resolution of the stockholders, borrowed an additional $5,000, and gave a second mortgage on all the company's assets, being the same property conveyed in the first deed of trust. The second deed of trust recited the second resolution of the board of directors adopted when it was decided to borrow the $5,000, and mentions the fact that the first loan was not for the full amount authorized by the stockholders' resolution, and that the $5,000 was badly needed to pay off and discharge pressing debts and obligations and to successfully carry on the business of the company.

It is first argued, for the reversal of the decree of the court sustaining the demurrer to the amended complaint, that the court permitted an insolvent corporation to prefer certain of its creditors, in violation of the statute preventing preferences among creditors of insolvent corporations.

The good faith of these mortgages is not questioned. Indeed, appellant's intestate was the president of the company, and, as such, executed both deeds of trust. It appears that the persons advancing the money under both deeds of trust were stockholders, and five of them were directors. The resolutions authorizing the loans did not specify that the money should be borrowed from either directors or stockholders, and the loans could have been made under the resolutions by any person who was willing to make them. The first $10,000 was advanced as follows: Rix, Van Leer and Jones, each $2,000; Collings, $1,000; Stearnes, $1,500; Holland and Hebert,

$500 each; Solmson and Berg, $250 each. The loan covered by the second mortgage was made by Rix, Jones, Van Leer, Collings and Holland, who each advanced a thousand dollars. Stearnes, Hebert, Solmson and Berg advanced no part of the $5,000. Holland is the only person who advanced parts of both loans, and whose interest in the second loan was greater than his interest in the first loan. It would therefore be to the advantage of his estate if the court should hold that the two mortgages covered a loan of $15,000, negotiated under the resolution of November 3, 1917; and we think the real point in the case is whether it is true there was in fact but a single loan.

In answer to the contention that the corporation is preferring certain of its creditors, it is pointed out that the beneficiaries in the deeds of trust were not creditors prior to the execution of those instruments; and those instruments were not executed for the benefit of the *cestuis que trust* in the sense that they were being paid demands due them, but they themselves advanced money to be used in paying other creditors, and the deeds of trust were executed to secure those advances.

However that may be, the statute sought to be invoked cannot be applied, for the reason that these deeds of trust were executed on December 11, 1917, and October 17, 1918, and this suit was not filed until November 3, 1921; whereas the statute against preferences provides that "no such preference shall be set aside unless complaint thereof be made within ninety days after the same is given, or sought to be obtained."

We think appellant is not entitled to the relief prayed under the doctrine of subrogation, as contended by her. The loan of $10,000 did not pay all the debts; the loan of $5,000 did not pay any part of the $10,000 loan; and the beneficiaries in the two deeds of trust are not the same. The beneficiaries in the $10,000 deed of trust are entitled to their security, whatever it is, and they are not required to share it with the beneficiaries in the second deed of trust, unless those instruments are

construed as being in fact one instrument, securing one debt, and that a debt of $15,000 incurred under the stockholders' resolution authorizing the negotiation of a loan of $16,000.

As we have said, the beneficiaries are not the same in the two deeds of trust. It is true the money secured by both deeds of trust was used in paying debts outstanding before the execution of either deed of trust; but the loans were made under separate resolutions of the board of directors, and the first resolution passed by that body recited the fact that $10,000 was believed to be sufficient to answer the purpose of the stockholders' resolution. Under that resolution, and the recitals of the first deed of trust, the beneficiaries therein were given a first lien on the company's assets. Can we assume, as a matter of law, that they would have made this loan if they had not been offered the security which the deed of trust purported to convey, and had not relied upon the recital in the directors' resolution that a loan of $10,000 would suffice? We answer this question by saying that we do not feel warranted in dividing or diminishing the security which the first deed of trust purports to give. We reach this conclusion from a consideration of the recitals of that instrument itself, and are reenforced in that view by the recital in the covenant of warranty in the second deed of trust that the warranty excepts "the deed of trust heretofore executed by the party of the first part to the party of the second part, bearing date December 11, 1917."

This case is distinguishable from the case of *Hoehler* v. *W. B. Worthen Co.*, 154 Ark. 444. There we held that bonds, issued at different times, to construct the same improvement, were without priority, the one issue over the other; but we did so because the holders of each issue derived their right to a lien on the property in the improvement district from the statute under which the district was organized. There was but a single statute authorizing a bond issue, and the lien was derived from that statute.

The case of *Penzel* v. *Brookmire,* 51 Ark. 105, was cited in the above-mentioned case. The case of *Penzel* v. *Brookmire* involved the question of priority between notes maturing at different times, and held by different parties, but secured by the same mortgage. The court held that, in the absence of any special equities arising out of the assignments of the notes secured by the mortgage, the proceeds of the sale of the mortgaged property should be applied *pro rata* in part payment of the several notes, irrespective of the dates of their maturity or assignment, and in announcing that conclusion Judge BATTLE, for the court, said: "The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one 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."

Here the deeds of trust cover the same property, but the dates are different; the beneficiaries are not the same, and the debt itself is different, and the priority of the lien of the first deed of trust is not discharged because the proceeds of both deeds of trust were applied to debts outstanding before either deed of trust was executed.

It appears that the trustee has sold certain real estate owned by the corporation, and included in both deeds of trust, for the sum of $4,000, and, as has been shown, a prayer of the complaint was that the $4,000 be distributed among the beneficiaries of the two deeds of trust ratably in proportion to the amount of the indebtedness owed by them; but, for reasons stated, that relief will be denied.

The complaint, however, contains a prayer in the alternative for judgment against the corporation for the $1,500 advanced by appellant's intestate, and for a foreclosure of this second deed of trust. The indebtedness secured by this second deed of trust is past due and unpaid, and the beneficiaries therein are, of course, entitled to foreclose this second deed of trust, subject, of course, to the prior deed of trust; and, as all parties in interest appear to have been made parties, the decree of the court below will be reversed and the cause remanded, with directions to grant the alternative relief prayed in the complaint.

CONLEY v. BENEDICT.

Opinion delivered February 5, 1923.

1. EJECTMENT—SUFFICIENCY OF GENERAL DENIAL.—A general denial of plaintiff's ownership of land sued for in ejectment, where the complaint specifically sets forth the plaintiff's title, raises no issue.
2. EJECTMENT—JUDGMENT AGAINST PARTY NOT DISCLAIMING.—Where a party in an ejectment suit made no disclaimer, but joined in the answer claiming adverse possession, judgment on the verdict was properly rendered against her for possession and costs.

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

R. G. Davies, for appellant.

There was no proof of title by appellee at all. In suits in ejectment plaintiff must recover upon the strength of his own title and not the weakness of the defendant's title. 138 Ark. 396, and cases cited. The instructions of the court made it necessary for appellant to prove title by limitation, which was erroneous. The issues tendered were not only the statute of limitations, but by answer a denial of ownership on the part of appellee.

Calvin T. Cotham, for appellee.

No request for instructions was made by appellant. It was his duty to request such instructions as would cover his contentions. 60 Ark. 613; 69 Ark. 289; 70 Ark. 136; 95 Ark. 593. Appellee, in her complaint, set forth her muniments of title. C. & M. Dig., 3692. Appellant did not comply with this statute in his answer. She entered a general denial of ownership on the part of appellee, but set up on title in herself. 74 Ark. 417. The statute does not require, in suits in ejectment, that the plaintiff be in actual possession at the time the suit is brought. C. & M. Dig., § 3686.

HUMPHREYS, J. Appellee instituted suit in ejectment, in the Garland Circuit Court, against appellants to recover the possession of "all that part of lot six, block eleven, of the U. S. Hot Springs Reservation, as surveyed, mapped and platted by the Hot Springs commissioners, bounded and described as follows: beginning on the division line between lots six and nine, a distance of 115 feet southerly from lot eight; thence southerly along the division line between lots six and nine for a distance of 45 feet; thence northwesterly parallel with the division line between lots five and six, for a distance of 27 feet; thence northerly for a distance of 40 feet to a point that is 39 feet from the place of beginning; thence easterly for a distance of 39 feet to the place of beginning, situated in Garland County, State of Arkansas." Appellee alleged ownership and right to possession of said parcel of land through mesne conveyances from the United States.

Appellants filed an answer denying the ownership of said land by appellee or the grantors in the chain of her title, naming them; also alleging ownership in themselves by adverse possession.

At the conclusion of the testimony appellants requested a peremptory instruction, which was refused by the court, to which ruling they objected and excepted.

Over the objection and exception of appellants the cause was then submitted to the jury upon the sole issue of whether they had acquired title to the parcel of land under the seven years' statute of limitation. Upon conflicting evidence responsive to this issue, the jury returned a verdict in favor of appellee, and from the judgment rendered in accordance therewith an appeal has been duly prosecuted to this court.

Appellants' contention for reversal is, that the trial court erred in holding that the pleadings presented only the one issue for determination by the jury. It is argued that the court should have also presented the issue of the sufficiency of appellee's record title to the jury for decision, as the undisputed testimony disclosed that appellee, nor her predecessors in title, had ever been in actual possession of the land. We think not. Appellee set out her chain of title in the complaint, to which a general denial was entered by appellants. This court ruled in *Pace* v. *Crandell,* 74 Ark. 417 (quoting from syllabus 1) that "a general denial of plaintiff's ownership of land sued for in ejectment, where the complaint specifically sets forth the plaintiff's title, raises no issue."

Malinda Greer, one of the appellants, makes the additional contention that the trial court erred in rendering judgment against her for possession and costs, because it was not shown that she claimed or occupied the property. She was made a party defendant to the suit, and did not enter a disclaimer. On the contrary, she answered jointly with Hester A. Conley that they claimed title by adverse possession. The jury determined the issue thus tendered against her, so it was proper to render judgment against her for possession and costs.

No error appearing, the judgment is affirmed.

L. D. POWELL COMPANY *v.* ROUNTREE.

Opinion delivered February 5, 1923.

1. CORPORATIONS—FOREIGN CORPORATION DOING INTRASTATE BUSINESS.—Suits cannot be maintained in this State by foreign corporations on their contracts covering intrastate transactions without complying with Crawford & Moses' Digest, §§ 1826, 1832, requiring the filing of copies of their articles or certificates of incorporation as a prerequisite to doing business in the State.
2. COMMERCE—RESALE OF BOOKS AS CONTINUATION OF INTRASTATE TRANSACTION.—Where law books were shipped into the State by a foreign corporation under a contract which constituted an interstate transaction, the recovery of the books under the contract amounted to a collection growing out of the interstate transaction, and a resale of them in order to collect the purchase money was a continuation of such transaction.

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

J. S. Butt, for appellant.

A contract identical with this one was construed and held in that case that the business conducted was interstate. 148 Ark. 151. Unless there is a continuous business carried on by the foreign corporation, there is not any "doing business" as contemplated by the statute. 60 Ark. 120; 90 Ark. 73. Whether doing an unauthorized business or not, still appellant would have the right to maintain this action. 94 Ark. 621. If it be interstate business at the outset, it continues so to the end. *Rose City Bottling Works* v. *Godchaux Sugars,* 151 Ark. 269.

Pinnix & Pinnix, for appellee.

Appellee, although the beneficiary of the unlawful transaction, is not estopped to raise the question of the disability of appellant to maintain the suit. 106 Ky. 472; 9 Bush (Ky.) 590; 17 B. Mon. (Ky.) 349; 54 Ala. 150; 85 Minn. 121; 204 Pa. St. 22; 92 Tenn. 587; 60 Neb. 636; 60 Ark. 122; 115 Ark. 166; 124 Ark. 539; 128 Ark. 211; 136 Ark. 52. The transaction was purely an intrastate one. See Arkansas authorities cited above, and in

addition 233 U. S. 16; 196 S. W. 1132; 87 S. E. 598; 56 So. 961; 128 S. W. 1136; 95 Ark. 588.

HUMPHREYS, J. Suit in replevin was commenced in the Pike Circuit Court by appellant, a foreign book corporation, against appellee, who had purchased certain law books under written contract that the title to them should remain in appellant until the payment of the entire purchase money. At the time of the institution of the suit a balance of $95.25 was due on the books, which appellee refused to pay. The written contract was made the basis of the suit.

The main defense interposed by appellee, and the only one presenting a question for determination on this appeal, was that the contract is void and non-enforceable because made in this State by a foreign corporation, without complying with the laws of the State of Arkansas authorizing them to do business in the State.

The cause was submitted to the court, sitting as a jury, on the pleadings and testimony, which resulted in a judgment in favor of appellee, from which is this appeal.

The facts are undisputed, and, in substance, are as follows: Two sets of law books, the Encyclopedia of Evidence and of Procedure, were sold to one McNeill, a resident of Pike County, upon order secured by appellant's traveling salesman, subject to approval of appellant at its home office in Los Angeles, Calif., and to be shipped from a point outside of Arkansas to McNeill at Murfreesboro, Arkansas. Volumes 1 to 14 inclusive of the Encyclopedia of Evidence and six volumes of the Encyclopedia of Procedure were shipped to and received by McNeill. Under the written contract the title of the books was retained in appellant until the purchase money should be paid. Judge T. W. Rountree obtained the books from McNeill in payment of a law fee. Subsequently the agent of appellant ascertained the whereabouts of the books and claimed them for appellant under the McNeill contract. Judge Rountree examined the contract, and told the agent to take them. The books

were at the time in the grand jury room. Judge Rountree was county judge, and had the books in the grand jury room where he could conveniently use them. In about two hours, and before moving the books, the agent returned and proposed to resell the two sets of books complete, with supplements, to appellee under contract similar to the McNeill contract in form. A price was agreed upon, and the proposed contract entered into, subject to the approval of appellant at its home office in Los Angeles. The books in the grand jury room were delivered to appellee, and the remaining books necessary to complete the sets were to be shipped to him upon his order, by appellant. The contract was approved and the undelivered books afterwards shipped to and received by appellee. All of the purchase money except $95.25 was paid by appellee. Appellant made no attempt to comply with the laws of Arkansas so that it might transact business in the State.

Suits cannot be maintained, either in law or equity, by foreign corporations upon their contracts covering intrastate transactions, without complying with the statutory requirements as a prerequisite to doing business in this State. Section 1826 and 1832, Crawford & Moses' Digest.

The sole question therefore presented by this appeal for determination is, whether the facts relating to this sale made it an intrastate transaction. In the recent case of *Coblentz & Logsdon* v. *L. D. Powell Co.*, 148 Ark. 151, this court, in considering a contract in which L. D. Powell Company retained title in books until the purchase money was paid, which it sold on order and shipped into this State, said:

"The taking of an order from the appellants by the appellee's traveling salesman for certain books, which order was transmitted to the appellee and accepted by it and the books shipped to the appellants under a contract by which the title was reserved in the appellee until the purchase money was paid, is not the doing of business in this State, in contemplation of act of May 13,

1907, p. 744 (Crawford & Moses' Digest, § 1826); see also § 1832."

The larger part of the books in the instant case were not sold on order to Judge Rountree for future delivery, but were in the State when sold, and were immediately delivered to him. Appellee contends that the presence of the goods in the State at the time of the sale, and the immediate delivery thereof to the purchaser, made it an intrastate transaction. The case of *Hogan* v. *Intertype Corporation,* 136 Ark. 52, is cited in support of the contention. In the Hogan case the machinery had been shipped into the State to shipper's own order for the purpose of selling same to Hogan after demonstration, and was retained as the sole and independent property of the Intertype Corporation until after demonstration and sale to him. In the instant case the books were not shipped into the State as the sole and independent property of appellant for the purpose of selling them to appellee or any other person. On the contrary, they were shipped into the State by appellant to McNeill on an order for future delivery, obtained by appellant's traveling agent. The McNeill contract clearly covered an interstate transaction. *Coblentz & Logsdon* v. *L. D. Powell Co., supra.* The recovery of the books under the McNeill contract amounted to a collection growing out of an interstate transaction. The collection was made in books instead of money, and we think the resale of them, in order to convert them into money, was a continuation of the interstate transaction. It was the only practical method by which a collection could be completed against one who had defaulted on an interstate contract. Otherwise it would have been necessary to incur the expense of shipping the books out of the State in order to convert them into money. The statutes of this State requiring foreign corporations to comply with certain conditions before doing intrastate business were not intended to place such a burden upon the enforcement of good faith interstate transactions. We think the doctrine announced in the case of *Rose City Bottling Works* v. *Godchaux*

Sugars, Inc., 151 Ark. 269, is applicable and controlling in this case.

On account of the error indicated, the judgment is reversed, and the cause is remanded with instructions to render judgment for appellant.

DAVIS v. DUNN.

Opinion delivered February 12, 1923.

1. LIMITATION OF ACTIONS—DAMAGE BY NUISANCE.—Where a nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original and may at once be fully compensated, in which case the statute of limitations begins to run upon the construction of the nuisance; but where, although the structure constituting a nuisance is permanent in its character, its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated is only the damage which has happened, and there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run from the happening of the injury.
2. LIMITATION OF ACTIONS—NUISANCE—ORIGINAL INJURY.—That the extent of an injury is difficult to determine or its ascertainment is inconvenient or expensive does not prevent the injury from being original.
3. LIMITATION OF ACTIONS—ORIGINAL INJURY.—An action against a railroad company for damages to crops by reason of its failure to provide sufficient openings in a dump to permit overflow waters from a river to pass off, *held* barred by the three-year statute; the damage being caused by the original construction of the dump.
4. EMINENT DOMAIN—INJURY TO NON-CONTIGUOUS LAND.—Injuries to crops by reason of a railroad's failure to provide sufficient openings in its dump to permit overflow waters to pass off is a compensable injury to property within the meaning of the Constitution, whether it abuts on the railroad or not.

Appeal from Calhoun Circuit Court; *Charles W. Smith*, Judge; reversed.

Thos. S. Buzbee, H. T. Harrison and *C. L. Johnson*, for appellant.

The damage was original, and any cause of action is now barred by the three-year statute of limitation, which runs from the completion of the obstruction to the watercourse. 35 Ark. 622; 62 Ark. 364; 86 Ark. 406; 92 Ark. 406; 107 Ark. 330. The government was in the attitude of a lessee. To render it liable, it must have had notice of the existence of the defect, or have had time to acquire such knowledge. 20 R. C. L. 395. However, damages were sought from the government by reason of its construction of a nuisance—a thing which was in existence for such a length of time before United States control as to have become permanent, and with which the government had nothing to do in creating.

C. L. Poole and *J. S. McKnight,* for appellees.

There was no injury prior to 1919. Where a structure is permanent, and its construction and maintenance are not necessarily injurious, but may become so, the injury to be compensated is only the injury which has happened, and there may be as many successive recoveries as there are successive injuries. In such cases the statute of limitations begins to run from the happening of the injury. Greenleaf, Ev. 433; Wood on Nuisances, sec. 865; Wood on Limitation, 180; Angell on Limitation, sec. 300; 52 Ark. 244. Unless the injury was certain or apparent upon the construction of the dump, the statute would not begin to run until some damage had actually occurred. 56 Ark. 612; especially is this true where the damages are only speculative and conjectural. 107 Ark. 65; 95 Ark. 297; 92 Ark. 465; 107 Ark. 330. This court has distinguished between a complete obstruction of a drainway and a partial obstruction, which determines whether the damage was original in the following cases. 80 Ark. 237 and 76 Ark. 542.

It was the duty of appellant as lessee and operator to keep the drain open. 80 Ark. 238.

McCULLOCH, C. J. Appellees own and operate a farm in Calhoun County and in the valley of Ouachita River, near the place where the line of railroad of the Chicago, Rock Island & Pacific Railway Company crosses that stream, and they instituted separate actions in the circuit court of Calhoun County against said railway company and the Director General of Railroads for damages to crops in the year 1919, alleged to have been caused by the overflow waters from the Ouachita River. The right of action in each case was based upon alleged acts of negligence on the part of the defendants, in failing to provide sufficient openings in the railroad dump to permit the waters to pass off.

The causes were consolidated, and the court sustained demurrers in favor of the said railway company and dismissed the complaint as to that defendant, leaving the cause to proceed against appellant Davis, Director General of Railroads, as agent. The trial of the consolidated causes resulted in a verdict in favor of each of the appellees for the recovery of damages.

Among other defenses there was a plea of the statute of limitations, and a denial of responsibility of the Director General of Railroads for failure to provide for additional openings in the dump constructed by the railroad company prior to the time the railroad came under government control. In other words, the question raised by this answer was that the damage to the crops of appellees was caused by the original construction of the dump, which occurred more than three years before the commencement of these actions, and was barred by limitation, and that the government was not liable for the original injury caused by a negligent act of the railway company. Appellant asked the court to give the jury a peremptory instruction in his favor on the grounds stated above.

This line of the Chicago, Rock Island & Pacific Railway Company was constructed during the year 1907. At the place where the railroad crosses the Ouachita River there is a low bottom, about three miles wide,

which is subject to inundation by overflowed waters of the river. At the time of the original construction of the railroad there was a trestle across this bottom, but in the year 1912 the railway company filled in the trestle so that the track rested on a dump. There was an open space of 3,200 feet for the railroad trestle and bridge across the river, and about a mile and a half from the river there was an opening of 425 feet left in the dump for the passage of water. The theory of appellees is that the opening in the dump was insufficient to let the water pass out, and that this constituted a continuing act of negligence for which damages might be recovered from time to time as injury resulted from the overflow.

There is evidence tending to show that the height of the overflow and the length of time it consumed in passing off were increased by the construction of the dump, and that the opening was insufficient to permit the water to flow through.

The overflow came in October, 1919, and damaged the crops of cotton grown by each of the appellees. The evidence adduced by the appellees tended to show that the height of the water during the overflow had been increased from the time the dump was erected, but that no damage had been done prior to the year 1919, for the reason that the overflow had not come at a season of the year when there were growing crops.

We are of the opinion that, according to the undisputed facts, the injury, if any, was original, and that appellees' cause of action against the railroad company was barred by the statute of limitations; and that, for the same reason, there was no liability at all on the part of the government for damage caused during its operation of the railroad.

The decisions of this court on this subject are very numerous, and there is no uncertainty as to the law. Doubts which arise on the subject are concerning the application of the law. All of the cases are cited in *C., R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, and it is un-

necessary to review all of the decisions. Special reference to a few of them is necessary in order to show the varying application of the rule of law announced by this court. One of the leading cases on the subject in this court is *St. L. I. M. & So. Ry. Co.* v. *Biggs,* 52 Ark. 240, and the following statement of law, in the opinion in that case, has often been quoted in subsequent cases:

"Whenever the nuisance is of a permanent character and its construction and continuance are *necessarily* an injury, the damage is original, and may be, at once, fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. * * * But when such structure is permanent in its character, and its construction and continuance are *not necessarily* injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitation begins to run from the happening of the injury complained of."

We said in *C. R. I. & P. Ry. Co.* v. *Humphreys, supra,* that the fact that "damage is probable, or that even though some damage is certain," does not necessarily make the injury original so as to start the running of the statute of limitations. But it may be added that the fact that the extent of the injury is difficult to determine, or its ascertainment is inconvenient or expensive, does not prevent the injury from being original so as to permit recoveries for recurring injuries.

The following cases may be especially considered in determining the application of the law on this subject: *St. L. I. M. & So. Ry. Co.* v. *Biggs, supra; St. L. I. M. & So. Ry. Co.* v. *Anderson,* 62 Ark. 360; *C. R. I. & P. Ry. Co.* v. *McCutchen,* 80 Ark. 235; *Turner* v. *Overton,* 86 Ark. 406; *St. L. I. M. & So. Ry. Co.* v *Magness,* 93 Ark. 46: *Board of Directors of Levee District* v. *Barton,* 92 Ark. 406; *C. R. I. & P. Ry. Co.* v. *Humphreys, supra.*

In the present case it is evident that the obstruction, by reason of insufficient opening in the dump, was permanent in its nature, and that damage would result to adjacent lands if the natural flow of waters was obstructed. If the height of the overflow had been raised prior to this injury and at the time the injury occurred, as contended by appellees, this was a fact ascertainable by ordinary means in the beginning. All of the lands in the valley of the Ouachita were subject to overflow from that river, and this was just as certain in the beginning as it was at the time the injury occurred. Even though difficult to determine to what extent damage would result, it was, in fact, known or could have been known when the dump was completed. The only reason shown in the evidence why damage had not resulted theretofore was that the overflow had come at times of the year when there were no crops to be damaged. In this instance it so happened that the overflow came during the crop-gathering season, and the ungathered crop was damaged.

If the damage from this structure was not original, it is difficult for us to conceive a case where there would be such original injury. It is not material, in considering this question, that the railroad did not run through the lands of appellees. If the building of the dump caused the injury to lands, whether abutting on the railroad or not, it constituted an injury to the property within the meaning of the Constitution, for which there must be compensation, and appellees could have, in the beginning, recovered compensation for such injury.

Our conclusion being that there was no liability on the part of the government by reason of the fact that the injuries resulted from the original construction of the dump, it follows that there is no evidence upon which a recovery can be sustained, and the judgment is therefor reversed, and each of the consolidated actions is dismissed.

SONSEE v. JONES & GREEN.

Opinion delivered February 12, 1923.

1. ATTACHMENT—WRONGFUL ISSUANCE—COMPENSATORY DAMAGES.—Compensatory damages arising from the loss of or injury to attached property are recoverable by the defendant only in the action in which the attachment was dissolved.
2. ATTACHMENT—DAMAGES FOR MALICIOUS PROSECUTION.—Damages arising from the malicious prosecution of an attachment or on account of injury to credit or loss of prospective profits are not recoverable in the attachment suit on the dissolution of the attachment, but must be recovered, if at all, in a separate action.
3. ATTACHMENT—MEASURE OF DAMAGES.—The measure of damages for the wrongful detention or loss of attached property is the usable value of the property during detention or its market value at th time of its loss.
4. MALICIOUS PROSECUTION—COMPLAINT.—A complaint for malicious prosecution which does not show that the suit was instituted or the writ of attachment was issued without probable cause does not state facts sufficient to state a cause of action.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman,* Judge; affirmed.

E. F. Duncan, for appellant.

Unlawful imprisonment is an actionable wrong. 70 Ark. 136. The questions of wrongful attachment, false arrest, restraint and detention of plaintiff were not in issue in the former trial, and the plea of *res judicata* should not have been sustained. 41 Ark. 75. The justice of the peace was without jurisdiction to try this cause, for the amount involved exceeded $300; neither did he have jurisdiction in a case of false imprisonment. See 61 Ark. 33; 44 Ark. 377; 29 Ark. 455; 21 Ark. 573. Damages for injury to credit and loss of prospective profits in business are not recoverable in an action on the attachment bond nor in the attachment suit, but must be by a separate action. 34 Ark. 707. Where such profits are ascertainable, they are recoverable. 113 Ark. 556.

Smith & Gibson, for appellee.

All damages recoverable by appellant in this suit were awarded him in the former suit, and that suit is a bar to this one. 134 Ark. 571; 217 S. W. 478; 218 S. W. 189; 136 Ark. 115.

McCULLOCH, C. J. This is an action to recover damages alleged to have been sustained on account of the wrongful issuance and levy of a writ of attachment. It is against Jones & Green, a copartnership, which was the the plaintiff in the original action, and against the constable who levied the attachment, and the sureties on his official bond.

It was alleged in the complaint that the plaintiff was a resident of Lawrence County, Arkansas, and was the owner of four horses, a wagon and harness, and some household goods, all of the value of $185, and that, while he was removing from Lawrence County to Jackson County, for the purpose of farming, the defendant, Jones & Green, sued him before a justice of the peace in Lawrence County, and sued out a writ of attachment and caused the same to be levied on the aforedescribed property of the plaintiff. He alleged in his complaint that his said property was seized by the constable, and that he was arrested under the writ, that he and his property were taken into custody, and that the property was sold to pay the debt of Jones & Green, plaintiffs in that action.

It was further stated in the complaint that "by reason of the taking of this property, as aforesaid, the plaintiff was rendered unable to go to Jackson County and make said crop, or to make any crop in 1920, and from moving to Jackson County, that plaintiff was also deprived of his legal and constitutional rights as a citizen of Arkansas, and restrained in his liberty and in his person, to his actual damage in the sum of $1,000, and to his good name and reputation in the sum of $1,000 punitive damages."

The court sustained a demurrer to that part of the complaint which claimed compensatory damages,

The defendant answered, and, among other things, pleaded, as a former adjudication of the issues involved, the judgment of the circuit court of Lawrence County, on appeal from the justice of the peace, dissolving the attachment in the case of Jones & Green against the plaintiff in this action and ordering the return of the proceeds of the attached property to the plaintiff. On the trial of the issue, the court sustained the plea of *res judicata,* and judgment was accordingly rendered against the plaintiff.

The court was correct in sustaining the demurrer. Compensatory damages arising from the loss of, or injury to, the attached property were recoverable only in the original action in which the attachment was dissolved. *Davidson* v. *Mayhue,* 120 Ark. 344.

Damages arising from malicious prosecution, or on account of injury to credit and loss of prospective profits, were not recoverable in the original action, and must be recovered, if at all, in a separate action. *Holliday Bros.* v. *Cohen,* 34 Ark. 707; *Goodbar* v. *Lindsley,* 51 Ark. 380.

The loss of profits set forth in the complaint was too remote to be recovered, as the measure of damages for the detention or loss of the attached property was the usable value of the property during detention or the market value at the time of its loss.

The complaint does not state facts sufficient to constitute a cause of action for malicious prosecution, as it does not show that the suit was instituted, or that the writ of attachment was issued, without probable cause.

It is unnecessary to determine whether or not the allegations were sufficient to constitute a cause of action for false imprisonment, since there was a trial of that issue so far as it related to the recovery of punitive damages, and there was no proof adduced tending to show that the plaintiff was arrested and taken into custody. The testimony is directed only to the fact that his property was seized and taken away from him under the writ.

On the trial of the cause the court found that the plaintiff was barred by the judgment in the original action from recovering compensatory damages in a separate action, and this was correct. As there was no evidence of false imprisonment, there could be no recovery on that account.

Finding no error in the record, the judgment is affirmed.

CARL-LEE v. ROAD IMPROVEMENT DISTRICT NO. 16.

Opinion delivered February 12, 1923.

1. HIGHWAYS—VACATION ORDER LEVYING ASSESSMENT.—In the absence of express statutory authority for the county court to be opened at any time for the purpose of making an order levying an assessment against the property of a road improvement district, such an order cannot be made except during the regular term, and a vacation order would be void.
2. HIGHWAYS—COUNTY COURT COMPELLED TO ENTER ORDER OF ASSESSMENT.—Under Sp. Act No. 183, Extra. Sess. 1920, providing that the order of the county court levying an assessment on the property of a road improvement district may be made at the time the assessment of benefits is filed, or at any subsequent time, the court can enter the order at any time after the assessment list has been filed, and can be compelled by mandamus to do so if it refuses; the entry of such order being ministerial.
3. HIGHWAYS—GENERAL AND SPECIAL ACTS.—Crawford & Moses' Dig., § 5456, providing that county courts shall be open at all times for the purpose of making an order or entering any judgment for the carrying forward of the work of a highway improvement being a part of a general statute, has no application to districts organized under special statutes.
4. HIGHWAYS—GENERAL AND SPECIAL ACTS.—Crawford & Moses' Dig., § 5458, providing that, if a county court refuses to make the necessary orders relative to a road improvement district, the circuit court is vested with jurisdiction to hear and determine an application for mandamus or injunction, and that a ruling by that court in vacation shall have the same effect as if made in term time, being a part of the general statute for

the establishment of road improvement districts, is not applicable to districts organized under special statutes.

5. HIGHWAYS—GENERAL AND SPECIAL STATUTES.—Crawford & Moses' Dig., § 5462, providing that it shall not be construed to repeal any special act for the creation of road improvement districts, and shall be liberally construed for the purpose of aiding and promoting improvement of public roads in the State, and on trial of any question relating to the establishment of any district or the collection of any tax thereunder after a district has been established by the county court, the presumption shall be in favor of the establishment of said district, or the collection of the tax thereunder, has no application to road improvement districts subsequently formed under special statutes.

6. MANDAMUS—VACATION ORDER.—An order of the circuit judge in vacation awarding a writ of mandamus is without authority and void.

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

R. M. Hutchins, for appellant.

A hearing upon mandamus is by the court and not by the judge in chambers. 26 Ark. 452. The district in question was created by special act, and the general laws on the subject are not applicable. Secs. 5456-5458, relied upon by appellee, refer to the road created under the Alexander road law. When a special act covers the subject-matter, the general law is excluded. 84 Ark. 329; 68 Ark. 130; 142 Ark. 95. The county court must act in term time unless otherwise provided. Mandamus will not lie to compel it to act in vacation for the benefit of a special road district. 55 Ark. 216; 32 Ark. 676.

J. W. House, Roy D. Campbell, Harry M. Woods, for appellee.

The general law was applicable to grant the relief asked, unless the provisions of the special law repealed the general law. There was no such repeal here, and the county court should be construed to be open at all times for the purpose of perfecting the district.

McCULLOCH, C. J. Section 9 of the special statute creating Road Improvement District No. 16 of Wood-

ruff County (act No. 183, extraordinary session of January, 1920, unpublished) provides, in substance, that, after the assessment of benefits to lands in the district is completed, the list shall be filed with the county clerk and notice given by publication, and that on the day mentioned in the notice the commissioners shall meet to hear complaints against the assessments and to readjust the same.

Section 11 of the statute provides that "the county court shall, at the time the assessment of benefits is filed, or at any time subsequent, enter upon its record an order, which shall have the force and effect of a judgment," levying the assessments as a tax against the property in the district, etc.

The commissioners of the district, after the time for hearing complaints on the assessments had expired, filed an application in the county court asking that an order be entered levying the assessments in accordance with the provisions of the statute, but the county judge refused to enter such an order, and the commissioners then filed a petition with the circuit judge of the district praying for a writ of peremptory mandamus to compel the county judge to perform the duty imposed upon the county court by the statute. There was a hearing of the application upon notice, and the circuit judge made an order in vacation awarding the writ of peremptory mandamus as prayed for in the petition, and an appeal has been prosecuted to this court.

The county judge appeared by counsel before the circuit judge at the hearing and filed a response challenging the authority of the circuit judge to hear the petition in vacation, and also setting forth the fact that there had been no refusal of the county court to enter the order, but that, on the contrary, the court had not been in session on any day since the assessment list was filed. Proof was adduced showing that the county judge had announced his refusal to enter an order levying the assessments.

The contention of appellant is that there is no authority in the statute for the county court to enter an order except in term time; that there is no provision for a special term or for the judge to act in vacation, and that there is no provision in the law for the circuit judge to hear a mandamus case in vacation.

Counsel for appellee rely upon certain provisions of the general statutes governing road improvement districts for authority of both the county court and circuit court to make orders in vacation. Crawford & Moses' Digest, §§ 5456, 5458, 5462.

In the absence of express statutory authority for the county court to be opened at any time for the purpose of making such an order, the order cannot be made except during the regular term, and a vacation order would be void. *State* v. *Canal Construction Co.,* 134 Ark. 447; *Light* v. *Self,* 138 Ark. 221.

Section 11 of act No. 183, *supra,* provides, however, that the order of the county court may be made "at the time the assessment of benefits is filed, or at any time subsequent," therefore the court can enter the order at any time after the assessment list has been filed, and can be compelled to do so if it refuses. The entry of the order is ministerial, involving no discretion, and on refusal the court can be compelled by mandamus to enter the order. It appears, however, from an examination of act No. 183 that it contains no provision with reference to special sessions, either of the county court or of the circuit court, to enter orders or judgments with respect to the operation of the district.

We cannot agree with counsel for appellee that the sections referred to in the general statute are applicable, for those sections in express terms apply only to proceedings inaugurated under that particular statute.

Section 5456, Crawford & Moses' Digest, provides that county courts "shall be open at all times for the purpose of making an order or entering any judgment necessary for the carrying forward of the work of im-

provement contemplated by this act." That section is a part of the general statute for the establishment of road improvement districts, approved March 30, 1915, Crawford & Moses' Digest, § 5399 *et seq.* It has no application to districts subsequently organized under special statutes.

The same may be said of § 5458, which provides that, if a county court refuses to make the necessary orders, the circuit court is vested with jurisdiction to hear and determine an application for mandamus or injunction, and that "the ruling made by the circuit judge in vacation shall have the same force and effect as if made in term time." This section refers to orders having reference to "said district," meaning a district organized under general statutes.

Counsel place much reliance on § 5462, which reads as follows:

"This act shall not be construed to repeal any special act providing for the creation of road improvement districts in the various counties, and road improvement districts may be created in counties where a special act is applicable, either under the provisions of said special act, or under the provisions of this act, as deemed best by the petitioners, and this act shall be liberally construed by the courts for the purpose of aiding and promoting the improvement of public roads in Arkansas, and upon the trial of any question relating to the establishment of any district, or the collection of any tax hereunder, after a district has been established by the county court, the presumption shall be in favor of the establishment of said district, or the collection of any tax hereunder."

This section has no application to districts formed under special statutes enacted subsequent to the enactment of the general statute. The section merely provides that the act shall not be construed to repeal any special statute, and this is necessarily a reference to a special statute already in existence. We discover no

language in it which can be construed to confer authority upon a road district formed under a special statute thereafter enacted.

The order of the circuit judge awarding the writ of mandamus was strictly judicial, and could not be rendered by the circuit judge in vacation, in the absence of statutory authority. Finding none, we are forced to the conclusion that the order of the circuit judge was void.

The judgment is therefore reversed and quashed, and the cause is remanded to await a hearing before the circuit court in term time.

ELLIS v. BAKER-MATTHEWS LUMBER COMPANY.

Opinion delivered February 12, 1923.

1. TRUSTS—CONTROL OF BENEFICIARY OVER TRUST FUND.—Where the owner of timber land entered into an agreement for clearing land, to secure the performance of which he retained a lien upon all timber, logs and products thereof, and subsequently released such lien in consideration that the purchaser of the lumber derived from the land would hold for his benefit a stipulated sum per 1000 feet on all the lumber cut and delivered, the accumulation of the sum represented by such agreement created a trust fund in the hands of the purchaser of which the owner of the lands was the sole beneficiary, the assignment of which the trustee could not challenge.
2. SET-OFF AND COUNTERCLAIM—TRUST FUND.—As a trustee is not a debtor, he cannot set off a debt due to him individually against a trust fund, which must be paid to the beneficiary or to the person to whom the trust is properly assigned.

Appeal from Craighead Chancery Court, Eastern District; *Archer Wheatley,* Chancellor; reversed.

Horace Sloan, for appellant.

1. The stumpage fund was a trust fund. 31 Kan. 170, 1 Pac. 767; 49 Colo. 186, 112 Pac. 326; 17 Wyo. 268, 98 Pac. 590. Failure to pay Ellis' assignment constituted a breach of trust. 21 R. C. L., 10, § 5; 123 N. Y. 316, 25

N. E. 499, 11 L. R. A., 116. Appellee would have no right to set-off this trust fund against the indebtedness of Rhoads Brothers. 60 Ill. App. 506; 133 Mass. 359; 197 Mo. 438, 93 S. W., 337 129 Ark. 149.

2. Under the terms of the stumpage agreement, appellee was obligated to pay out the fund in question upon the mutual agreement of Yount and Rhoads Brothers, without reference to the state of account of Rhoads Brothers on other matters with appellee. 24 R. C. L. 808, § 16.

3. Under the laws governing assignments, appellee has no right to set-off against appellant an indebtedness due to it by Rhoads Brothers. C. & M. Digest, § 1195; Pomeroy, Eq. Jur., 3d ed., 1273, § 706; Words and Phrases, "Set-Off."

4. The instrument held by Ellis is an assignment, and not a release. 5 C. J., 846; § 6; 101 Ark. 582, 586; 87 Iowa, 443; 43 Am. St. Rep. 391; 81 N. Y. 454, 37 Am. Rep. 515; 141 N. Y. 495, 36 N. E. 394; 96 Me. 294, 90 Am. St. Rep. 346; 35 Ark. 293; 123 Ark. 24; 9 Ark. 118.

5. A debtor cannot set-off against an assignee plaintiff a debt due him by an intermediate assignee. The right of set-off is purely statutory, and the statute of this State precludes such a right of set-off. 2 Ark. 198, 206; C. & M. Digest, § 477; 46 Pa. 262; 2 Bailey (S. C.) 354; 32 Ala. 494; 50 Ala. 10; 32 Tenn. (2 Swan) 494; 75 Mo. App., 567; 63 Pa. St. 322; Pomeroy, Eq. Jur. 3d ed. 1230, § 704.

6. The Rhoads Brothers indebtedness to appellee was unmatured and unliquidated at the time of the assignment from Yount to Rhoads Brothers, and from the latter to Ellis, hence not a proper set-off. 34 Cyc. 748; § 3; *Id.*, 746, § 2; 2 Ark. 198; 5 C. J. 963, § 150.

7. Appellee is estopped to claim that the stumpage fund should be applied on its debt. 2 R. C. L. 631, § 41; 16 Mass. 397; Pomeroy, Eq. Jur., 3d ed. 1231, § 704.

Lamb & Frierson, for appellee.

1. From the allegations of the complaint it will be seen that, under the rules of equity, it is a bill in the nature of a bill of interpleader, coupled with a bill for an accounting. 4 Pomeroy, Eq. Jur., §§ 1481, 1482; 92 Ark. 446; 192 Fed. 890. The right of equitable set-off, counterclaim or recoupment is so much broader than the statutory right that the complaint brings appellee well within the doctrine. 24 R. C. L. 865, § 70; *Id.* p. 843, § 48; *Id.,* p. 823, § 30; *Id.,* pp. 803-7, §§ 12-15; 34 Cyc. 633, *et seq.*

This court has held that in equity unliquidated damages arising from breach of independent contract between the parties can be set-off. 101 Ark., 493; 92 Ark. 594. Moreover, under the amendatory statute of 1917, C. & M. Digest, §§ 1195-6-7, any suit which the defendant could maintain as an independent cause of action is made the proper subject-matter for a counterclaim. 134 Ark. 311; 138 Ark. 38; 135 Ark. 531; 215 S. W. 622; 141 Ark 87. Ellis, as a plaintiff, could not have sued alone, but would have had to join both Yount and Rhoads Brothers in such suit. 235 S. W. 995; 47 Ark. 541.

2. If the stumpage fund was ever a trust fund, it was for the protection of Yount against Rhoads Brothers, and of the latter against the former; hence, when Yount released it, the trust terminated.

3. The instrument signed by Yount is not an assignment, but a release to Rhoads Brothers; and, being a release, there is no intermediate assignee, because there is only one assignment, that of Rhoads Bhothers to Ellis. If there is only one assignment, all defenses and equities availing against the assignor can be set up against the assignee. 24 R. C. L. 819, § 26; 34 Cyc. 744, *et seq.*; 5 C. J. 962, § 150; 2 R. C. L. 625, § 34; *Id.*, 629, § 39. The general rule is that consent of a debtor is necessary before a part of a debt can be assigned. 2 R. C. L. 624, § 31; 5 C. J. 894, § 60.

4. There is nothing in the evidence on which to base estoppel.

WOOD, J. The appellee is a foreign corporation, engaged in the lumber business and having its principal office in Memphis, Tennessee. Dr. W. E. Yount is a physician residing at Cape Girardeau, Missouri. He owned some timbered land in Arkansas, near Rhoads Bros. & Company's sawmill. Rhoads Bros. & Company was a partnership, composed of J. T., W. W., and S. S. Rhoads, engaged in running a sawmill near Black Oak, Arkansas. E. B. Ellis was a merchant of Black Oak, Arkansas. On October 17, 1917, W. E. Yount entered into a contract with the Rhoads Bros. & Company whereby he sold to them all the timber standing on 880 acres of land, more or less, for the consideration named in the contract of $17,600. No cash was to be paid, but the consideration named represented the value of clearing the lands mentioned in the contract. The provisions of the contract in regard to the clearing are as follows:

"In consideration of the foregoing, and to pay for said timber, the parties of the second part (Rhoads Bros.) agree to clear all said land ready for cultivation and ready for the plow, by removing therefrom all standing timber and underbrush and all down timber and logs and all other foreign matter which interferes with farming said land, except only the tract fenced off into a field at the tenant house, which tract is east of the cultivated field, and is grown up in young timber, but has no saw timber thereon. This tract was formerly cleared, but has now grown up in young timber. The parties of the second part agree that they will begin the work of cutting the timber and clearing said land during the month of October, 1917, and will give said work their time and attention and push the same forward to completion as rapidly as can be, and will finish all said work of clearing within two years from this date, and will thus finish not less than two hundred acres thereof before May 1, 1918. All land when thus cleared is to be turned back to said Yount for cultivation.

They also agree that they will begin at the south side of said land near the present millsite, and will cut timber and clear for cultivation as they advance from the south end of said land northward, in strips about four hundred feet wide, and that they will cut no timber on more than forty acres of said land in such strips in excess and advance of land cleared for cultivation as aforesaid, and that said Yount shall have a lien on all of the timber, logs and products thereof on the yard to secure the prompt and faithful performance of this agreement on the part of the second parties; but no lien herein mentioned shall ever be construed to authorize said Yount to prevent or interfere with the selling or marketing of said timber products, so long as second parties are not in default under the terms of this contract; and it is distinctly understood and agreed that the said sum of $17,600 is to be paid by second parties by and through their above described clearing work, and that said sum of $17,600 shall be deemed fully paid when said clearing work has been fully performed by said second parties under this contract."

Prior to May 12, 1919, Rhoads Bros. & Co. had entered into a contract with L. D. Leach & Co. of Chicago, Illinois, by which Rhoads Bros. & Co. was to manufacture lumber for that company, and it was to make advances to Rhoads Bros. & Company as the lumber was manufactured. Baker-Matthews Lumber Company took over the Leach & Company contract and reimbursed it for the advances it had made to Rhoads Bros. & Company. On the 12th of May, 1919, Rhoads Bros. & Co. entered into a contract wtih the Baker-Matthews Lumber Company. This contract provided for the manufacture of 2,250,000 feet of various kinds of lumber at specified prices, which was supplemented by an agreement of August 12, 1919, changing the prices. On September 22, 1919, Rhoads Bros. & Co. entered into a supplemental agreement with Yount whereby the terms of the former contract for clearing, which would have expired on October 22, 1919, were to remain in full force

and effect for an additional period of eighteen months. This contract of Sept. 22, among other things, provided:

"In consideration of the foregoing the parties of the second part do hereby agree that they will forthwith proceed in a diligent and business-like way to clear said lands ready for cultivation as provided in said former contract, and that they will clear not less than one hundred acres per month, and that they will, before the last day of October, 1919, clear one hundred acres of said land in addition to what is already cleared, and that they will likewise clear one hundred acres each month thereafter until they have fully complied with the terms of said original contract by having all the lands cleared ready for cultivation on which they have cut any timber, less only forty acres, by May 1, 1920. * * * It is further agreed and understood that this extension agreement is not in any way to release or impair the lien which was retained by party of the first part on timber and the products thereof as provided in the original agreement, and it is further agreed that, if the parties of the second part make default in any of the provisions and conditions of this contract, they are to have no further right to cut or remove any timber from any of said land or to remove any lumber from said land until this contract is fully complied with."

On November 3, 1919, Rhoads Bros. & Company entered into another contract with Baker-Matthews Lumber Co., which was entirely independent of the former contract between those parties of May 12, 1919. The contract between Rhoads Bros. & Company of November 3, 1919, provided that Rhoads Bros. & Company should manufacture for the Baker-Matthews Lumber Co. 2,000,000 feet of lumber at prices specified therein, and this contract also provided: "Performance of this contract by parties of the second part (Baker-Matthews Lbr. Co.) is contingent upon said first parties obtaining from Dr. W. E. Yount a release from any and all claims which he has, or might have, against the lumber to be

delivered under this contract; such release to be subject to the approval of said second parties."

On November 7, 1919, W. E. Yount executed the following instrument: "For and in consideration of the sum of one ($1) dollar and other good and valuable considerations in hand paid, the receipt of which is hereby acknowledged, I hereby release any and all liens or claims I may have against any and all lumber cut from and off my property in Craighead County, Ark., and also any lien or claim which I may have against any and all timber and lumber which may hereafter be cut from and off of any land owned by me in said county, and in lieu of said lien or claim Baker-Matthews Lumber Company agree to hold the sum of six ($6) dollars per thousand feet on all lumber hereafter cut and delivered to them by Rhoads Bros. & Co. coming from my property, and particularly all lumber to be cut on a certain contract executed November 3, 1919, between Rhoads Bros. & Company and Baker-Matthews Lumber Company for two million feet of lumber; said sum of six ($6) dollars per thousand feet to be held by said Baker-Matthews Lumber Company, to be paid out by them on the mutual agreement between myself and Rhoads Bros. & Company. It is understood that Baker-Matthews Lumber Company are not to retain the sum of $6 per thousand feet on any lumber except that manufactured and delivered under a certain contract dated November 3, 1919, between Rhoads Bros. & Co. and Baker-Matthews Lumber Company."

A sum in excess of $2,000 had accumulated in the hands of Baker-Matthews Lumber Comapny under the provisions of the last-mentioned instrument. On June 3, 1920, Yount executed to Rhoads Bros & Company the following instrument:

"For value received I hereby transfer, set over and assign to Rhoads Bros. & Company, all of my right, title and interest in and to the sum of two thousand dollars ($2,000) now in the possession of Baker-Matthews Lumber Company under the provisions of the contract dated

November 3, 1919, between Rhoads Bros. & Company and Baker-Matthews Lbr. Co., or under any contract subsequently executed between the same parties, and also under the release or contract of date of November 7, 1919, and signed by me, and also signed by Rhoads Bros. & Co., agreeing to the provisions of the release or contract of date November 7, 1919, hereby waiving all my rights of every kind and description which I may, or might, have under any of said contracts as to the said sum of two thousand dollars ($2,000).

"Witness my hand this 3rd day of June, 1920.

(Signed) "W. E. YOUNT.

"Witnesses: Frank Kelley, W. E. Walker."

On June 7, 1920, Rhoads Bros. & Company wrote to Baker-Matthews Lumber Company as follows:

"Gentlemen: As we have been in an awful pinch, and Mr. E. B. Ellis was one of our largest creditors and has helped us out on the balance of the $2,000, we hereby ask that you pay the $2,000 released and mentioned above to him and charge to our account.

"RHOADS BROS. & COMPANY
"By J. T. Rhoads."

Upon receiving the above communication, Ellis presented same to the Baker-Matthews Lumber Company, and they wrote him the following letter on June 8, 1920:

"Memphis, Tenn., June 8, 1920.

"Mr. E. B. Ellis,

"Black Oak, Arkansas.

"Dear Sir: You have presented to us this morning the assignment and release of W. E. Yount dated June 3, 1920, transferring $2,000 of the fund in our hands arising under certain contract of date November 7, 1919, and some subsequent contracts, with an order to pay the amount of this fund to you.

"We desire to advise you that we cannot pay this sum today, for the following reason: First. We do not know what amount will be due Rhoads Bros. & Co. under our contract until all the lumber is taken up and shipped

out, which we hope to have done this week. If you are not already advised, it is true that Rhoads Bros. & Company, under their contracts with us, guaranteed the title to this lumber to be free and clear of all incumbrances. We are in litigation with a creditor of Rhoads Bros. & Co. at Jonesboro in which this question is involved, and we therefore must say to you at this time we cannot pay out this money to you."

On June 11, 1920, Baker-Matthews Lumber Co. instituted this action against Yount, Ellis, and Rhoads Bros. & Company. Plaintiff alleged that it had in its hands over $2,000 which it had been holding for the protection of Yount; that it had advanced large sums of money to Rhoads Bros. & Company to pay for labor and to purchase timber; that, according to the contract with Rhoads Bros. & Co., the lumber manufactured by them was to be kept free from all liens; that this provision had been violated by permitting A. B. Jones Company to procure a judgment for over $2,500 and to levy an execution on the lumber, for which plaintiff had brought replevin. The plaintiff alleged that Yount had attempted to assign the sum of $2,000 to Rhoads Bros. & Co., who had attempted to reassign the same to Ellis; that plaintiff had refused to accept the assignment; that the account between plaintiff and Rhoads Bros. & Co. involved large sums of money; that final settlement was not due until time of shipment of the lumber, a portion of which had not yet been shipped; that the account was so complicated and uncertain that it could not be determined whether plaintiff would be indebted to Rhoads Bros. & Company or not on the completion of their contract. The plaintiff then tendered the sum of $2,000 into court, to be held pending the replevin litigation with A. B. Jones Company and final completion of the contract with Rhoads Bros. & Company and a settlement of its account with the plaintiff.

Ellis filed a separate answer, setting up his ownership of the $2,000 under the instrument signed by Yount and Rhoads Bros. & Company, above mentioned, and

denied the right of plaintiff to withhold payment of the same. He also set up that Rhoads Bros. & Company were indebted to him for supplies furnished it in opening up and clearing the lands for W. E. Yount, and alleged that the transfer and assignment of the $2,000 was made for his benefit to enable him to furnish Rhoads Bros. & Company the supplies necessary to enable the latter to perform its contract with Yount. He made his answer a cross-complaint, and asked for judgment in the sum of $2,000 with interest from June 8, 1920, the time plaintiff refused to pay him.

Rhoads Bros. & Company also answered denying the allegations of the complaint, and made their answer a cross-complaint, setting up a breach of the lumber manufacturing contract between it and Baker-Matthews Lumber Company. Yount also filed a separate answer and cross-complaint against the Baker-Matthews Lumber Company, alleging its failure to pay him $6 per thousand feet for stumpage. The matters growing out of this cross-complaint were settled, and Yount has passed out of the case. It is not necessary to make further reference to the pleadings filed by him.

The plaintiff filed a supplemental complaint against Rhoads Bros. & Company to foreclose a mortgage executed by it to the plaintiff, which was answered by Rhoads Bros. & Company. Further reference to the pleadings on the foreclosure of this mortgage is also unnecessary.

Upon the pleadings and the documentary evidence as above set forth, and the depositions of witnesses, the court found that the only issue presented to it for decision was that raised by the complaint of the plaintiff and the answer and cross-complaint of Ellis concerning the sum of $2,000 which had been tendered into court and deposited with the American Trust Company, under the court's direction. On this issue the court found "all the issues of fact and law in favor of the plaintiff, Baker-Matthews Lumber Company, and against the defendant and cross-complainant, E. B. Ellis," and en-

tered its decree dismissing the cross-complaint of Ellis for want of equity, and directing that the sum of $2,000 in the hands of the depository trust company be paid over to the plaintiff. The court also found that the defendant, Rhoads Bros. & Company, was indebted to the plaintiff in the sum of $3,202.60, for which amount it rendered judgment against the individual members of the partnership. This decree was entered on January 7, 1922, from which Ellis prayed an appeal. Later, on April 21, 1922, the court made findings and rendered a final decree against Rhoads Bros. & Company, from which they prayed an appeal, but which has not been prosecuted by them to this court. At least, no brief has been filed in their behalf, and therefore their appeal will be treated as abandoned. We will decide only the issues presented by this record as they pertain to the controversy between Ellis and the Baker-Matthews Lumber Company. Such other facts as we deem necessary will be referred to as we proceed.

For convenience, the Baker-Matthews Lumber Company will hereafter be called the appellee, Ellis will be referred to as the appellant, and Rhoads Bros. & Company will be called Rhoads Bros.

It will be observed that the contracts between Yount and Rhoads Bros. provided for the clearing of the timber on the lands of Yount by Rhoads Bros. within a certain time and in a certain manner therein specified. To secure the performance of the contract on the part of Rhoads Bros., Yount retained a lien on all timber, logs and products thereof. The fact is established by the undisputed evidence that Rhoads Bros. had not complied with the terms of the contract, and were therefore in default, which, under the express terms of the contract, rendered the lien of Yount effective. As shown by the contract between appellee and Rhoads Bros. of November 3, 1919, the appellee had knowledge of the lien retained by Yount on all the timber and products manufactured by Rhoads Bros. from Yount's land, because on that day appellee entered into a contract with

Rhoads Bros. for the purchase of two million feet of lumber, at certain prices therein specified, to be manufactured from the timber on Yount's land, and the performance of this contract on the part of the appellee was contingent upon Rhoads Bros. obtaining from Yount a release of any and all claims which Yount had or might have against the lumber, such release to be approved by the appellee. Rhoads Bros. obtained such release, as evidenced by the instrument of November 7, 1919, signed by Yount, the effect of which was to release his lien on all the lumber cut from his land, provided the appellee would hold for his benefit the sum of $6 per thousand feet on all lumber cut and delivered to the appellee by Rhoads Bros., which sum was to be held by the appellee and to be paid out by it on the "*mutual agreement between Yount and Rhoads Bros.*" By an indorsement on the instrument, Rhoads Bros. authorized the appellee to carry out the terms of the instrument.

The allegations of the complaint and the undisputed testimony show that the $2,000 now in controversy had accumulated in the hands of the appellee under the terms of the contract of November 3, 1919, between Rhoads Bros. and the appellee, and the instrument of November 7, 1919, which hereafter, for convenience, will be referred to as the "stumpage agreement." On the third day of June, 1920, for value received, Yount transferred or assigned his interest in the $2,000 to Rhoads Bros., waiving all rights of every kind which he had on said $2,000 under his contract with Rhoads Bros., and on June 7, 1920, Rhoads Bros., by letter, requested the appellee to pay the same to Ellis, which the appellee refused to do.

Now, considering the various written instruments set out above, especially the contract between Rhoads Bros. and the appellee, of November 3, 1919, and the stumpage agreement of November 7, 1919, to which the appellee became a party, and by which it was bound in purchasing and receiving from Rhoads Bros. the lum-

ber manufactured by them, with knowledge of Yount's lien; and considering likewise the correspondence between Yount and the appellee, and the oral testimony, we have reached the conclusion that the $2,000 in controversy was a trust fund, of which Yount was the sole beneficiary. A letter in the record from Yount to the appellee designates the same as a "trust fund," and a letter from appellee to Yount refers to the fund, and states that it is to be paid out by the appellee on the joint agreement of Yount and Rhoads Bros., and asks Yount to get Rhoads Bros.' written order authorizing the appellee to pay the balance due on the fund. Baker, in his testimony, designates it as "a sort of trust fund held for these parties, to be determined *between them* as to whom this was to be paid." The fund was in lieu of the lien which Yount had on the lumber which the appellee had purchased from Rhoads Bros. The appellee, knowing that Yount had a lien on the lumber, agreed, in effect, that, if Yount would release his lien and allow it to purchase the lumber from Rhoads Bros. unincumbered by such lien, they would hold this sum of $2,000 for his sole benefit and would pay the same on the *mutual agreement between Yount and Rhoads Bros.* Such is the unambiguous wording of the stumpage agreement, by which, as we have said, the appellee was bound. The assignment of June 3, 1920, of Yount to Rhoads Bros. and the written order of Rhoads Bros. of June 7, 1920, asking that the appellee pay the $2,000 to Ellis, was tantamount to a *mutual agreement between Yount and Rhoads Bros.* that Ellis should receive the fund. The testimony of Yount and J. T. Rhoads was to the effect that the $2,000 in controversy was to constitute a kind of budget, the larger part of which was to be paid to Ellis. Yount so understood it at the time he executed the assignment. Yount realized that he would receive the benefit from the use of the fund by Rhoads Bros. in paying Ellis the amount advanced by him to Rhoads Bros., because that would better enable Rhoads Bros. to carry out their contract of clearing Yount's land. At

any rate, that was a matter solely for the determination of Yount and Rhoads Bros., a right which appellee, the trustee, could not challenge.

Having reached the conclusion that the fund in controversy was a trust fund, the appellee could not refuse to pay Ellis, to whom the fund had been assigned, without a breach of the trust. The appellee could not hold the fund as if the same belonged to Rhoads Bros. and claim the right to set-off against it any indebtedness that Rhoads Brothers might be due the appellee. A trustee cannot set-off against the trust indebtedness an independent debt due him individually. The trustee is not a debtor. Therefore, any debt owing by him or due to him individually is not due in the same right or capacity as a trustee, and lacks mutuality. He cannot set-off such debts against the trust fund, but must pay the same to the beneficiary or the one to whom the trust is properly assigned. The trustee cannot in this way reap a personal advantage from his trust relation. 39 Cyc. 479; 24 R. C. L. sec. 16, p. 808; *Knowles* v. *Goodrich,* 60 Ill. App. 506; *Dodd* v. *Wishi,* 133 Mass. 359; *Smith* v. *Perry,* 197 Mo. 438. See also *Sorrels* v. *Childers,* 129 Ark. 149.

Having reached the conclusion that, as between Ellis and the appellee, the fund in controversy belongs to Ellis, the other interesting questions presented in the elaborate briefs of counsel pass out. The decree is therefore reversed, and the cause will be remanded, with directions to enter a decree for Ellis in accordance with the prayer of his cross-complaint.

ROACH v. SCOTT.

Opinion delivered February 12, 1923.

1. MARRIAGE—PROOF OF, IN ACTION FOR ALIENATION.—In an action for alienation of affections, direct proof of a formal marriage is not necessary, but evidence of cohabitation, reputation and acknowledgment by the parties, or a holding themselves

out to the world as husband and wife, is sufficient proof of the fact of marriage, and the testimony of the plaintiff that he and his wife were married was sufficient to establish his marriage.

2. MARRIAGE—SUFFICIENCY OF EVIDENCE.—A legal marriage may be proved either by direct testimony or by circumstances.

3. APPEAL AND ERROR—GENERAL OBJECTION.—A general objection is insufficient to direct attention to an instruction that is not inherently erroneous.

4. HUSBAND AND WIFE—BURDEN OF PROOF IN ACTION FOR ALIENATION.—In an action for alienating the affections of plaintiff's wife, the burden is on plaintiff to show, not only that there was infatuation of the wife for the defendant, but that defendant by wrongful act was the cause of it; he must show a wrongful attempt on defendant's part to alienate the affections of his wife and that the attempt was successful, and without the consent of plaintiff.

5. APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE.—In testing the sufficiency of the evidence on appeal, the Supreme Court must view it in the aspect most favorable to the verdict.

6. HUSBAND AND WIFE—ALIENATION—SUFFICIENCY OF EVIDENCE.—In a suit for alienation of affections brought by a husband, evidence *held* sufficient to sustain a verdict for plaintiff.

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

Gregory & Holtzendorff, for appellant.

Before appellee could maintain this action, it was incumbent upon him to show affirmatively a marriage valid in every sense. 112 Me. 389; 31 Mich 127; Rodgers on Domestic Relations, p. 131, § 175. There is no testimony in the record that appellant in any way alienated the affections of appellee's wife. To recover in an action for alienation, it is essential that it be established that the alienation arose, at least in part, through the fault of the defendant. 123 Ill. App. Ct. 121; 129 Ky. 7; 113 N. Y. Supp. 163; 133 S. W. 396.

W. A. Leach and *Glenn H. Wimmer,* for appellee.

The authorities cited by appellant, placing upon appellee the burden to show affirmatively a marriage, are cases arising out of criminal conversation. Proof of marriage may be established by evidence of collateral

facts and circumstances from which its existence may be inferred. 127 A. S. R. 114; 26 Cyc. 822; 21 Cyc. 1630; 18 Am. Dec. 344; Enc. of Ev., vol. 3 L. 782. In an alienation suit a showing that the parties held themselves out to the world as husband and wife, or the admission by one that they were married, is sufficient. Enc. Ev. vol. 1, p. 756; Am. & Eng. Enc. of Law, 15, p. 863; 2d ed. Abbott, Trial Ev. 859; Elliott's Ev., § 1647; 8 Enc. of Ev. p. 466; Ann. Cases, 1916-A, p. 651; 173 (Ark.) S. W. 200. When the marriage is proved, the general rule is that every fact necessary to its validity will be presumed. 8 Enc. Ev. p. 455; 34 Ark. 511; 67 Ark. 278; 26 Cyc. 877. There is a presumption that a former marriage of one of the parties was dissolved by divorce, and the burden of proving that such is not the case is on the party disputing the validity of the second marriage. 8 Enc. Ev. p. 463; 26 Cyc. 880; 67 Ark. 278. A general exception to an instruction is of no avail unless the same is entirely erroneous. 60 Ark. 250; 59 Ark. 370; 75 Ark. 181.

In testing the sufficiency of evidence to support a verdict, the court must view it in the strongest light favorable to the finding of the jury. 97 Ark. 486; 87 Ark. 109; 97 Ark. 438; 102 Ark. 200; 101 Ark. 90.

WOOD, J. This action was instituted by the appellee against the appellant. The appellee alleged that on the 5th of November, 1921, he was remarried to Elsie Barnard Scott (Roach) and that from that date until the 5th of December, 1921, they lived happily together as husband and wife; that the appellant, by false representations, induced the appellee's wife to believe that the appellee was unfaithful to her and had no affection for her, and also induced her to believe that the appellant would provide her with more luxuries than the appellee could, and thus wrongfully, maliciously and wickedly lessened appellee's influence over his wife and alienated her affections from the appellee and induced her to

leave and abandon him, all to his damage in the sum of $15,000, for which he prayed judgment.

The appellant answered, denying all the material allegations of the complaint.

The appellee testified that he had known appellant since 1919; that appellee was first married on the 16th of April, 1911, at Pangburn. Two children were born of the marriage, a boy and a girl. The woman whom he married was named Elsie Barnard. They lived together until January, 1919, when he moved to Jospoda, south of Des Arc. Up to that time he and his wife had never had any trouble. In November she went over to the appellant's place of business, where she remained. Appellant was running a boarding-house. In November following appellee's wife obtained a divorce from him. The court awarded the children to him, but his wife took the girl and he took the boy. After the divorce, appellee moved to Pangburn, and later to Searcy. When he returned to Searcy, his wife was there, and they were remarried there. They then moved to Griffithsville, where they lived together five or six weeks. She went to DeValls Bluff, where she made her home with a brother of the appellant. The appellee had done nothing to cause her to leave him. He did not know that she was going to leave and did not have anything to do with it. The appellant was at Griffithsville during the time the appellee was living there with his wife. Appellant wrote to appellee's wife while she and appellee were living at Griffithsville together. Appellee saw some of the letters.

On cross-examination appellee testified that at the time he and his wife separated in November, 1919, he knew no excuse whatever for it. He suspected that Roach had something to do with it; didn't know for sure. The appellee's wife sued for divorce on the ground of cruelty and nonsupport, but he denied that the divorce was obtained on that ground. The decree didn't amount to much. His wife came and asked if he would give her a divorce if she would give him the chil-

dren. He permitted her to get the divorce. He denied that she quit him because he would not provide for her, and denied that she went to work for Roach because appellee would not provide for her. He denied that, while they were living at Griffithsville, his wife supported the family. Appellee didn't remember writing her any letters while she was living with Roach. He never asked her to quit Roach and come to him. Appellee turned the children over to her after she went to live with Roach. Afterwards appellee went down and picked the children up in the road and carried them off, and left his wife crying for them. Appellee did not tell Kirk or McIlroy that he was going to get the children and get the woman and give Roach all the trouble he could, and never had any talk with Edwards about the matter. Appellee's wife left him in December. He presumed that Roach was the cause of it; that was the way appellee figured it. Appellee wrote the following letter:

"August 2—7.

"Elsie, Kind friend: Elsie, I don't want you to think I am interfering with your family affairs, but only to the condition of the children I feel so sorrow for them and you to. The children is almost killed about you leaving them. Ellord is broke down and is sick now. Now, Elsie, I no that you love your children, and I believe you will appreciate me letting you know about them, and I was talking with Andy, and I pumped this much from him. That you have a chance of raising the children yet, and you wont have to live with Andy neither. And so you will be welcome when you get ready to come back to see them. He is very sorrow that he told you that he and the children would turn you down. Now, Elsie, if you will write him your wants, he will tell how the children can become yours again. Now, Elsie, this is enuff said. Now, Andrew don't know that I am writing this letter, but he said that he would like for you to know that everything was pretty yet for you to get the babys. Now, Elsie, this is the best friend you ever had on earth.

Now, he is not mad at you or Mr. Roach either, but is hurt so bad. See how bad it hurts the children because you went away."

Appellee testified that at the time he wrote the letter Elsie Barnard was not Roach's wife. She had married Roach, but had been divorced from him, but was still with him. The letter was written the second day of July. Elsie and Roach were divorced in October, 1921, and he wrote the letter in July, 1921. He denied that he was trying to get Elsie away from Roach. The reason why he was writing such a letter was because he had the children. Appellee didn't remember writing Elsie any other letters.

On redirect examination he stated that he bought his children some clothes and grub and bought his wife a pair of shoes after she returned to him. Appellee testified that the expense of procuring his wife's first divorce was paid by Roach. The woman and Roach were living together at the time he wrote the letter referred to. The suit for divorce had been filed prior to that time, and the decree was rendered and held off of the record at Roach's request.

Witness Barnes testified that he knew the appellant; that he recently did some work for him; knew Elsie Scott or Elsie Roach, and knew that she lived with Roach. He had a conversation with Roach with reference to the woman. He said something about going up to see her while she was at Searcy, and tried to get witness to go up there, and offered to take witness to Jospoda to see whether or not he could get the woman to come back and live with him. Something to that effect. Witness didn't know exactly when it was. It seemed to witness that it was about a week after the woman separated from Roach and went away. Witness didn't know whether she and Scott had remarried at that time. Appellant told witness that the woman was working at that time in a hotel in Searcy for a man named Hutchins. Witness knew that it was about a week, not over two

weeks at the outside, after she left Roach. The day she left witness saw her putting some clothes in a little grip; that was before Roach tried to get witness to go and try to get her to return. John Howell started to come in and pick up the trunk, and Mrs. Roach was helping to carry it, and witness offered to take her place and assist in lifting it; that was the day her things were going away, when she was leaving Roach. That occurred on Saturday, and on Monday, when witness returned, she was gone.

Howell testified that he lived about six miles southeast of Des Arc. He knew the appellant Roach, lived about three and a-half or four miles from him, and also knew Elsie Roach. He remembered the time she left Roach's house. She left her things at witness' house. The things were taken away from his house by Roach. Witness had a conversation with Roach after he removed Elsie's things from witness' house. Roach was talking about Mrs. Scott—about her leaving. He said, "She is married, but I don't intend for them to live together if it is in my power." Of course there were other things said too numerous to mention, but that was about it. It was after Scott and his wife were remarried. Witness stated that it was somewhere along about September that he had the conversation. Witness stated that he farmed for a living, and about the time Roach had the conversation with witness, witness was working for him, helping him harvest some sorghum hay that grew up after the first crop was cut. They usually cut the first crop about the last of August or the first of September. It was while they were cutting the second crop, somewhere along in September. Witness didn't know whether Scott and his wife were remarried—only what Roach told him. He brought the subject up himself.

Witness Romber testified that he was acquainted with Roach. He met him some time in November, at Griffithsville. He spent the night with witness. The next morning witness had a conversation with him. He

asked Roach his name, and Roach hesitated for a few moments, and told witness that his name was Roach, and that he came up to see about the woman who used to be his wife. That was all that passed between them. Scott's name was not mentioned in the conversation. The woman he spoke about was living at Hutchins'. Witness didn't know what she was doing. The witness was asked if the woman had said that she and Scott were remarried at that time, and replied that they said they were. Witness didn't know for sure, as he never saw any license. Scott at that time was working at the tram shell at Griffithsville. Witness had dealings with Scott along about that time or before then.

Mrs. Julia Flowers testified that she lived at Griffithsville; that she knew Scott and Elsie Scott, his wife, at the same time. They lived at Hutchins', just across the lane from her. They came there the 9th day of October or November, and remained until the last of November or the first of December. Witness didn't know what time Mrs. Scott came to Des Arc. Witness was quite intimately acquainted with them, and Scott was just as good to his wife as he could be. Witness supposes he provided for her as far as he was able. They had a little trouble over a trip or two that his wife made. She went down to Des Arc, and the only trouble they had was over that. Mrs. Scott told witness that she left Roach, and had remarried Scott to get her children. She told witness that directly after she came there.

Witness Hutchins testified that he was running a restaurant at Mesa. He knew Roach; had first met him at Searcy, and had known him since last fall. Also knew Scott and his wife. Roach came to Griffithsville after he wrote to Mrs. Scott to meet him at the train. Witness knew of Roach's writing letters to Mrs. Scott at Griffithsville. They were addressed to witness to be delivered to Mrs. Scott. Roach told witness that if any letters came to witness from Jospoda to give them to Mrs. Scott, and witness did so. Scott and his wife were

living together at that time. Witness read one of the letters that Roach wrote to her. It was mailed at DeValls Bluff and was addressed to G. H. Hutchins. Witness gave it to Mrs. Scott to read, and she handed it over to witness. It was signed by Roach. Witness gave the letter back to Mrs. Scott, and had not seen it since, and didn't know where it was. Witness didn't remember all that the letter contained, but Roach told her he would give her the rest of that week to make up her mind what she was going to do, and if she didn't come he would get another cook. Another letter came, saying that he wanted her to meet him at the train, and Mrs. Scott had witness meet Roach and tell him not to come to the house. The next morning Mrs. Scott left. As well as witness remembered, that occurred the last of November or the first of December. The woman came back to witness' place after he moved to Searcy. The woman worked and cooked for witness before he moved to Searcy. That was before she and Scott were remarried. After they were remarried they all moved down to Griffithsville, and Mrs. Scott continued to cook for witness. Scott furnished half the grub and witness the other half. Witness stated that he had two living wives and one dead. He had not been trying to marry Mrs. Scott. Wouldn't have any woman that wanted some one else more than she did witness. He didn't try to take another man's wife. Witness and his former wife had discussed this woman, and witness told her that he wouldn't have this woman. Roach had sent money by witness to Mrs. Scott when he was at Griffithsville. This occurred along the last of November or first of December. Roach handed witness the money, and told witness to tell Mrs. Scott to use it like she wanted to. The sum was two dollars. Witness supposed it was to pay her way to Jospoda. Witness had a conversation with Roach before Roach gave witness the money. Witness told Roach he had better not go over there; that he could go over and stay at Mrs. Romber's if he wanted to. Witness

didn't know what Roach's business was up there. He seemed to want to see her to see if he couldn't get her to go back. Witness never paid any attention to the date. The woman was without shoes. Witness joked with Scott, and told him if he or Roach one didn't get her some shoes, witness would have to. Scott got her the shoes, and also got shoes for the children. When Scott got a check, he turned it over to Mrs. Scott, and also turned over his wages to her.

Witnesses on behalf of the appellant testified substantially as follows: One witness stated that she knew Scott and the woman alleged to be his wife, and knew Hutchins, the latter part of October when they were at the Roberts Hotel at Searcy. She was working for Hutchins at that time. Scott was there, in and out: came in at night and went out in the morning. Witness Kirk testified that some time in September he had a conversation with Scott in regard to the separation from his wife and the cause of it, and Scott said he didn't blame Roach at all for the separation; that Bill Chandler's folks were the cause of the separation between him and his wife. He stated that he was going to take his children, and he didn't believe that his wife could stay long with Roach after that. Scott took the children away in September, 1921. In the conversation Scott said something about his wife wanting to come back to him, but he didn't know whether he would take her back or not. He was afraid she was betraying him. He stated that he told his wife "to go ahead and live with the old devil; that she had married him, and to go ahead and stay with him." Another witness, McIlroy, stated that he knew Scott and Roach; that he had a conversation with Scott last fall with reference to the trouble between himself and his wife, and the separation. Scott said something about his children being down there, and witness asked him if he was going to let them stay. Scott replied, "No," when he left he was going to take them

with him. He also stated that he guessed the woman would not stay long with Roach after that.

Another witness testified that he heard Scott say, after his former wife had married Roach, that he was going to take his children, and that if he did that Elsie would not stay with Roach over thirty days. Other witnesses testified to the effect that they saw Mrs. Roach on the day that Mr. Scott took the children away from her in the road, and that she was crying.

The appellant himself testified that the woman alleged to be Scott's wife was previously his wife. He married her on the 21st of April last. They lived together about three months, when she went away and was gone about ten days. After she had been at home about ten days she went away again on Saturday, saying she would be back on Monday. Witness then details, after he had married the woman, and during the time of his marriage, the efforts that Scott had made to induce her to leave appellant and return to him, and stated that after Scott took away his children appellant's wife stayed with appellant only four or five days. She then left, and never came back. Appellant next saw her at Searcy, when she claimed that she had remarried Scott. She was then working for Hutchins. She was married on the 5th day of November, and the next day was at the appellant's house. Witness had not seen her from the time she stated she had married on the fifth of November until she appeared at his place. Witness had talked to her, however, over the 'phone, and told her she could get her children. At that time she wasn't married. Witness denied having written her any letters during the time it was claimed that she had remarried Scott. Witness was divorced from the woman in October, and after her remarriage to Scott he didn't do anything to induce her to leave Scott and come back to him. Witness didn't pay for her divorce from Scott the first time, and was not the cause of their separation. Witness admitted that, after the alleged remarriage to Scott, at

Hutchins' request he had given him $2 for the woman, and he admitted writing a letter to Mrs. Scott, addressed to Hutchins, but stated that Hutchins' statement as to what the letter contained was not true. Appellant testified that he told Mrs. Scott in the letter not to come back to him. The letter was also about buying the children. He wanted to buy the children because the woman wouldn't stay with him without them. She was not with him at the time, and had left him. He knew at the time this letter was written that she was remarried to Scott. Scott had offered at one time to sell the children for $50 and to grant her divorce, and witness was seeking to buy them because Scott had made that remark. Mrs. Scott didn't come to work in appellant's boarding-house until she left Scott. She worked for appellant one and three-quarter days before she and Scott were separated. Witness paid the bill for the woman's divorce from Scott, but it was her money, which appellant had borrowed from her previously. Appellant was divorced from his wife, who lived somewhere in the west, and was married to Mrs. Scott right away. He went to see Scott about buying the children, and found that he had changed his mind in regard to selling them. Appellant didn't see the woman. After the woman had left appellant, and before she had remarried Scott, appellant had made two trips, on the advice of his attorney, to see if he couldn't get the children from Scott and then get out of the State. At that time the woman was his wife. Witness explained that he had made the trips which witness Hutchins testified about in response to Scott's statement that he wanted to sell the children.

In rebuttal, Scott testified that, before his wife procured a divorce from him, and while she was staying at Roach's, Roach overtook him in the road and asked if he had ever studied over the proposition about selling his children to Roach, and at that time stated that, if he (Scott) would divorce the woman and turn her loose so he could live with her, he (appellant) would pay for the

divorce and give Scott $50 for the children. Appellant, being recalled, testified that no such conversation occurred as that last testified to by Scott.

The jury returned a verdict in favor of the appellee in the sum of $2,000. The appellant moved for a new trial, one of the grounds being that the verdict of the jury is contrary to the evidence. The court overruled the motion, and rendered judgment in favor of the appellee in the sum of $2,000, from which judgment is this appeal.

1. The appellant contends that there was no evidence to support the verdict, because there was no evidence to prove that the appellee and Elsie Barnard-Scott-Roach were legally remarried after her divorce from the appellant, as alleged in the complaint. The law as to proof of marriage in actions for alienation of affections is correctly declared in Ency. of Evidence, vol. 1, p. 756, as follows: "In an action for alienating the affections, direct proof of a formal marriage is not necessary, the general rule being that evidence of cohabitation, reputation, and acknowledgment by the parties, a holding themselves out to the world as husband and wife, is a sufficient proof of the fact of marriage, and the admission of the defendant that the plaintiff and his alleged wife were married is sufficient." See also 8 A. & E. Ency. of Law, 863; 2 Abbott's Trial Evidence, 859; Elliott's Evidence, § 1647. "The fact of marriage may be proved by one of the contracting parties." 8 Ency. of Evidence, p. 466; Ann. Cases, 1916-A, 651; 18 R. C. L. 424, § 50.

The appellee testified that he and his wife were married. Under the above rule, the testimony was amply sufficient to establish the remarriage of appellee to his former wife, from whom he had been previously divorced.

2. The court, among other instructions, gave the following: "The burden is upon the plaintiff to prove by a preponderance of the testimony these allegations in

the complaint, which, as stated to you, are that they had been legally married, but that is not denied, however, in a formal way."

Appellant contends that in the use of the words, "but that is not denied, however, in a formal way," the court meant to say that a legal marriage need not be strictly proved. At least that such might have been the impression made on the jury. It occurs to us that the instruction is not susceptible of that construction, but, if so, the instruction was not prejudicial, for the reason that the court would have been fully warranted, under the law, as already stated, in instructing the jury that a legal marriage could be proved either by direct testimony or by circumstances from which marriage might be inferred. In other words, in actions of this character it is not essential that the marriage be proved only by the testimony of the parties themselves, or eye-witnesses to the marriage. Marriage may be proved by these or by circumstances which justify the inference that the parties were married.

Furthermore, the instruction is not inherently erroneous. The objection here urged is only to the concluding phraseology as above quoted. Only a general objection was made in the court below, and that was not sufficient to draw the attention of the trial court to the objection which the appellant here urges. Hence the alleged error cannot avail the appellant. *Keirsey* v. *State,* 131 Ark. 487; *Chancellor* v. *Stevens,* 136 Ark. 175; *Miller* v. *Fort Smith Light & Trac. Co.,* 136 Ark. 272.

3. The most serious question, and the one that has given us the greatest concern, is whether or not, under the law applicable to such cases, the evidence is legally sufficient to prove that the appellant had alienated the affections of appellee's wife.

In *Boland* v. *Stanley,* 88 Ark. 562-69, we said: "The loss of what is termed in law '*consortium*', that is, the society, companionship, conjugal affection, fellowship, and assistance of the wife, is the principal basis for ac-

tions of this kind. Tiffany's Persons and Domestic Relations, p. 75, and authorities cited in note. 15 Am. & Eng. Enc. Law (2 ed.) 862 (b), note 6. Whoever invades the hallowed precincts of a home, and, without justifiable cause, by any means whatsoever severs the sacred tie that binds husband and wife, alienating her affections from him, and depriving him of the aid, comfort and happiness of a loyal union between them, is liable in civil damages for his wrongful conduct. Rodgers Dom. Rel., § 177; Schouler's Dom. Rel., § 41; Tiffany's Per. & Dom. Rel., 74; 15 Am. & Eng. Enc. Law, 862. In such cases, whether or not there were malevolent or improper motives is always a material consideration. In case of a stranger in blood the causes must be extreme that will warrant him in interfering with the relation of husband and wife. If he, by advice or enticement, induces a wife to leave her husband, or takes her away, with or without her consent, and encourages her to remain from him, or harbors and protects her while away from him, he does these things at his peril, and the burden is on him to show good cause and good faith for his conduct."

"To entitle the plaintiff to recover, in an action for alienating affections, the burden of proof is upon the plaintiff, and the plaintiff must show that there was a direct interference upon the part of the defendant, that not only was there infatuation of the husband or wife for the defendant, but that the defendant, by wrongful act, was the cause of it. The plaintiff must show a wrongful attempt on the part of the defendant to alienate the affections of plaintiff's husband or wife. The burden is also upon the plaintiff to show that the attempts were successful and without the consent of the plaintiff." Elliott on Evidence, § 1643; *Smith* v. *Gilapp*, 123 Ill. App. 121. See also *Scott* v. *O'Brien*, 129 Ky. 7; *DeFord* v. *Johnson*, 133 S. W. 396; *Hanor* v. *Housel*, 113 N. Y. Supp. 163.

It would unduly extend this opinion to reiterate the testimony and discuss it in detail. In testing the sufficiency of the evidence on appeal, the rule is that this court must view it in that aspect which is most favorable to the verdict. We might have reached a different conclusion from that reached by the jury had we been triers of fact, but, after carefully considering the argument of counsel in their briefs, as well as the oral argument pro and con, we are convinced that the evidence is legally sufficient to sustain the verdict. The jury were the judges of the evidence and the credibility of the witnesses. When all of the testimony is considered, it cannot be said that there was no evidence to sustain the verdict. There is no error. Let the judgment be affirmed.

HART, J., dissenting.

SCOLES v. WEAVER.

Opinion delivered February 12, 1923.

1. APPEAL AND ERROR—CONCLUSIVENESS OF FINDING OF COURT.—The finding of the circuit court sitting as a jury will not be disturbed on appeal if supported by substantial evidence.
2. BAILMENT—LIABILITY OF GRATUITOUS BAILEE.—A gratuitous bailee is bound to use only slight care in the protection of property intrusted to him, and is responsible for its loss only in case of gross negligence.
3. NEGLIGENCE—GROSS NEGLIGENCE DEFINED.—Gross negligence by a bailee is nothing more than a failure to bestow that care which the property in its situation demands.

Appeal from Sharp Circuit Court, Northern District; *J. B. Baker*, Judge; affirmed.

STATEMENT OF FACTS.

J. S. Scoles sued Lee Weaver to recover the sum of $109, alleged to be the value of a bale of cotton placed by the plaintiff in the hands of the defendant as a bailee, and lost through his negligence.

According to the testimony of J. B. Scoles and his son, they carried a bale of cotton weighing 545 pounds from the gin and deposited it in the warehouse of the defendant, Lee Weaver. Before putting the cotton in the defendant's warehouse, they asked his permission to place it there, and received the key of the warehouse for that purpose. After putting the bale of cotton in the warehouse, they put a tag with the name of the plaintiff on it. They then locked the door and carried the key back to Weaver. This was about the last of January, 1921. During the first part of October, 1921, the plaintiff went to get his cotton for the purpose of selling it, and found that it was not in the warehouse of the defendant. He went to see the defendant about it, and offered to pay him the customary price for storage, but the defendant refused to receive the money, and denied that the cotton had ever been placed in his warehouse.

Other witnesses for the plaintiff testified that they put their cotton in the defendant's warehouse during the month of January, 1921, and that they considered it an accommodation to do so, because it was the only place in town where they could store the cotton and keep it out of the weather. They had no special agreement with the defendant to pay him for keeping the cotton. After it had been in the defendant's warehouse about two months, he notified them to take the cotton out, and they did so. They paid him twenty-five cents storage per month on each bale. They tagged the cotton so as to identify it when they put it in the warehouse, and went and got it out themselves. Most of the witnesses said that the defendant had no control over the cotton, except that he let them store it in his warehouse. One of them said that it was his understanding that they were to pay for storing the cotton in the defendant's warehouse; but that he did not get this impression from any agreement with the defendant. Quite a number of people were storing cotton in the defendant's warehouse about the same time, and it was generally under-

stood among them that they were to pay the defendant for storing the cotton with him.

According to the testimony of the defendant, he let a number of people store their cotton in his barn in January, 1921, simply as a matter of accommodation. He told the people that they might put their cotton in there until he got ready to use his barn. About two months thereafter the defendant notified the people that he would need his barn, and they came and got their cotton out of it. Some of them paid him storage charges, and some did not pay him. He made no storage charges to any one, and only received payment as it was voluntarily made. The defendant had no control over the cotton whatever, and it was placed in his warehouse and was taken out of it without his ever exercising any control whatever over it. The defendant did not have any recollection whatever of the plaintiff storing a bale of cotton in his warehouse, and did not know what became of it, if the plaintiff did store it with him. The bale of cotton was not in the warehouse when the plaintiff came for it in October, 1921, and no trace of it could be found.

The case was tried before the court without a jury. The court found that the plaintiff had stored the cotton in the defendant's warehouse, and that it had been lost. The court further found that the defendant was a gratuitous bailee, and had not been guilty of gross negligence in the premises. Therefore judgment was rendered in favor of the defendant, and the plaintiff has appealed.

David L. King, for appellant.

Appellee was not a gratuitous bailee, but a bailee for hire, as appears by his own testimony. The bailment being reciprocally beneficial, appellee is answerable for want of ordinary care. 67 Ark. 284; 74 Ark. 277; 137 Ark. 79; 101 Ark. 75; Ann. Cases, 1912-B, 430; 21 Ann. Cas. 96; *Id.* 842; 60 Ark. 62; 52 Ark. 364; 16 Ark. 104; 20 Ark. 583.

Arthur Sullivan and *C. E. Elmore,* for appellee.

Appellee was a gratutious bailee, and answerable only for gross negligence. 144 Ark. 146; 23 Ark. 61; 52 Ark. 564; 103 Ark. 12; 42 Ark. 200; 97 Ark. 290; 142 Ark. 100; 67 Ark. 284; 145 S. W. 532 (Ark.).

HART, J., (after stating the facts). Where a cause is tried before the court, the finding of a court sitting as a jury will not be disturbed on appeal if there is any substantial legal evidence to support it. *Greenspan* v. *Miller,* 111 Ark. 190; *Youngblood* v. *Thorn,* 145 Ark. 466; and *Thomas* v. *Thomas,* 150 Ark. 43.

According to the testimony of the defendant, he was a gratuitous bailee, and, under the rule just announced, the finding of the circuit court to that effect will not be disturbed on appeal. A gratuitous bailee is only bound to use slight care in the protection of the property intrusted to him, and is responsible for its loss only in case of gross negligence. *Baker* v. *Bailey,* 103 Ark. 12; *Strange* v. *Planters' Gin Co.,* 142 Ark. 100, and *Rollins* v. *East St. Louis Cotton Co.,* 144 Ark. 146.

According to the cases cited, gross negligence is nothing more than a failure to bestow that care which the property in its situation demands; and whether this existed was a question of fact for the court sitting as a jury to determine.

According to the testimony of the defendant, he had no control whatever over the cotton stored in his warehouse. The persons owning the cotton placed it in there and tagged it themselves. When the defendant got ready to use his warehouse he notified them, and they came and took away their cotton. The defendant had no control whatever over it, and it cannot be said, under the facts and circumstances, as viewed from his standpoint, that he was guilty of gross negligence in the premises. The court having found in his favor on this point, we are not at liberty to disturb the finding on appeal.

It follows that the judgment must be affirmed.

HOUPT v. STATE.

Opinion delivered February 12, 1923.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—In a prosecution for grand larceny committed by stealing an automobile, evidence *held* to connect defendant with the theft of the automobile.
2. LARCENY—SUFFICIENCY OF OWNERSHIP.—Where an indictment charged that an automobile was the property of B., proof that the automobile was owned jointly by B. and wife, and that B. had exclusive possession of the car at the time it was stolen, *held* sufficient to sustain conviction.

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

William G. Bouic, for appellant.

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

HART, J. Sam Houpt prosecutes this appeal from a judgment of conviction against him for grand larceny, charged to have been committed by stealing one Dodge touring car of the value of $500 from E. L. Barkley in Garland County, Ark.

According to the evidence for the State, E. L. Barkley and his wife jointly purchased and owned a Dodge touring car in August, 1921. It was a five-passenger car, and had nickel-plated bumpers on the front and rear of the car. The lights were also nickel-plated, and the car had been in use less than a year at the time it was stolen on the night of Saturday, July 1, 1922. E. L. Barkley was the proprietor of a Piggly-Wiggly store in the city of Hot Springs, Garland County, Ark., and a young man who works in the store drove the car in front of the store on the night in question and left it there. He then delivered the key to E. L. Barkley, and no one could drive the car after it had been locked without a similar key with which to unlock it. Soon afterwards, on the same night, the car was driven away by some unknown person, and in about ten days thereafter it was recovered. The car was worth about $1,000 at the time it was stolen. E. L. Barkley had the

car in his care and custody at the time it was stolen. On the night the car was stolen a captain of police in the city of Hot Springs saw Sam Houpt driving the car. The captain of police knew Barkley's car and recognized the car by its similarity to that of Barkley. Immediately after he saw the car pass he heard that Barkley's car had been stolen. The car was found out in the country near where Sam Houpt lived. After Sam Houpt was arrested, he admitted that he was driving a car on the streets of Hot Springs on the night that Barkley's car was stolen, but said that the car belonged to Tolbert Teague. The officer who saw Sam Houpt driving the car testified that he knew the car of Tolbert Teague, and that the car he saw Sam Houpt driving was not Teague's car.

This evidence clearly shows that Barkley's car was stolen, and it is sufficient to identify the defendant as the person who stole the car. An officer saw the defendant driving a car immediately after Barkley's car was stolen, and the car driven by the defendant exactly fitted the description of Barkley's car. In fact the officer, when he saw Barkley's car after it had been recovered, identified it as the car which he saw the defendant driving just after Barkley's car was stolen. This was sufficient to connect the defendant with the larceny of the car. Hence the assignment of error of the defendant that the evidence is not legally sufficient to convict him is not well taken.

The main reliance by the defendant for a reversal of the judgment is an alleged variance between the allegation in the indictment and the proof of ownership of the car. The indictment charges that the car was the property of E. L. Barkley.

On cross-examination E. L. Barkley testified that the car had been paid for by a check signed by himself and by his wife. He stated that the car was owned jointly by himself and wife. He stated further, however, that on the night the car was stolen it had been

locked, and that he had the key to it and was in the exclusive possession of it.

Counsel for the defendant claim that this testimony is not sufficient to prove ownership in E. L. Barkley, and rely upon the case of *Merrit* v. *State,* 73 Ark. 32. In that case the indictment charged the stealing of a steer, the property of W. N. Marshall. The proof showed that the steer was the joint property of W. N. Marshall and his brother, as partners. The steer was running in the range, and neither of the partners was in possession of it. Hence the court, following its former decisions, held that there was a variance between the allegations of the indictment and the proof introduced. The court in that case, as well as in other later cases, recognized that an allegation of general ownership will be sustained by proof of special ownership.

In the instant case, while the indictment charged general ownership in E. L. Barkley, the proof showed that he had the car exclusively in his possession at the time it was stolen, and this created a special ownership in him. The accused had no special concern as to the exact state of the title of the stolen property, and evidence of the exclusive possession is ordinarily sufficient proof of ownership. *Cook* v. *State,* 80 Ark. 495, and *State* v. *Esmond,* 135 Ark. 168.

It follows that the judgment must be affirmed.

ARMSTRONG v. MCGOUGH.

Opinion delivered February 12, 1923.

1. TIME—COMPUTATION.—In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted, but when the last day for performance falls on a Sunday it is not to be taken into computation; and this rule applies to optional contracts, such as an oil lease authorizing payment of rental to cover the privilege of deferring commencement of a well.

2. MINES AND MINERALS—PAYMENT OF RENT—FORFEITURE.—Though a bank, which by the terms of an oil lease was made the lessor's agent to receive the rent agreed to be paid for the privilege of deferring commencement of a well, did not receive a letter containing a check therefor until after banking hours on the day it was due, and did not credit the amount until the next day, this did not work a forfeiture.

Appeal from Union Chancery Court; *J. Y. Stevens*, Chancellor; reversed.

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to cancel and set aside a certain oil lease given by appellees to appellants as a cloud upon their title.

Appellants defend on the ground that the lease was valid and still in full force.

On the 11th day of September, 1920, J. W. McGough and Dovie McGough, his wife, executed a written oil lease to W. A. Spear on forty acres of land in Union County, Ark. The clause of the lease which is particularly involved in this lawsuit reads as follows:

"If no well be commenced on said land on or before the 11th day of September, A. D. 1921, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessors or to the lessors' credit in the Citizens' National Bank of El Dorado, Ark., or its successors, which shall continue the depository regardless of changes in the ownership of said land, the sum of forty dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for 12 months from said date."

The lease also contained a clause expressly allowing the assignment of the whole or any part of the lease. Spear made an assignment of his interest of one-half of the land described in the lease to the other appellants who were his codefendants in the chancery court.

J. W. McGough, one of the appellees, and one of the plaintiffs in the chancery court, was a witness for him-

self. According to his testimony, the First National Bank is the successor to the Citizens' National Bank of El Dorado, Ark. He called at the First National Bank on September 10, 1921, before the bank closed in the afternoon, and inquired if any money had been paid there for him under the lease in question. He inquired again about noon on September 12, 1921, and was informed each time that there was nothing to his credit. September 11, 1921, fell on Sunday.

According to the testimony of M. G. Wade, the cashier of the bank, on the morning of September 12, 1921, the bank received a registry notice, and on the afternoon of the same day actually received a registered letter containing a remittance of rental for the oil and gas lease on the land in question. In the letter was inclosed a check for $20 to be deposited to the credit of J. W. McGough and Dovie McGough, for rental on an oil and gas mining lease on the twenty acres of land which is described in the letter. The twenty acres of land described in the letter is a part of the land described in the oil and gas lease above referred to.

The letter stated further that this was for the extension of the lease for a period of from September 11, 1921, to September 11, 1922. The letter was received too late to be entered on that day's work by the bank, and the check was not entered on the books to the credit of McGough until the next day.

According to the testimony of the postmaster, this letter arrived at the postoffice in El Dorado, Ark., on Saturday afternoon, September 10, 1921, and was delivered to the bank on Monday, September 12, 1921.

The court found that the lease in question had been forfeited by the nonpayment of the rental as provided in it, and it was decreed that it should be canceled as a cloud upon the title of appellees, the plaintiffs in the chancery court. The case is here on appeal.

Dwight L. Savage, for appellants.

1. Since the last day for the payment of the rental money as provided for in the lease fell on Sunday, pay-

ment thereof on the next day, Monday, was effective. 43 Ark. 534; 228 S. W. 353-4; 214 S. W. 896; 14 L. R. A. 120, note, and cases cited; 10 Gray, 307; 4 Bos. 299.

2. Payment by check to the bank which was made the depository by the lease, which was accepted by the bank and credited to the lessor, was sufficient. 164 Ind. 563, 74 N. E. 7.

3. Having received and accepted the rent in this case on Monday, the failure of the bank to credit it to the lessor on that day is not chargeable to the lessee. 70 S. E. 707; 220 S. W. 163; 245 Fed. 979; 213 S. W. 286.

E. W. McGough and *Marsh & Marlin,* for appellees.

1. The contractor provided for its own termination in express terms, if no well was drilled on the land on or before the 11th day of September, 1921, unless the rental agreed upon was paid on or before that date. There was no enforceable obligation on the part of the lessee, either to drill a well or to pay delay rentals. He terminated the lease by failure to pay the stipulated rentals by the time it was due. 145 Ark. 574; 84 So. 485; 85 So. 59, and cases cited; 93 Ark. 257.

2. At the common law, Sunday was not a *dies non.* 21 R. C. L. 13. The statutory provision that an enforceable contract to pay a debt falling due on Sunday may be deferred to the next day, is the only respect in which the common law has been changed, and it has not been changed in respect to the exercise of an option. The payment of the rental was an option which the appellant did not exercise by payment at the place and within the time specified.

HART, J., (after stating the facts). In *Epperson* v. *Heltron,* 145 Ark. 566, the court held that, under an oil and gas lease stipulating that if no well is completed within one year from date it shall become void unless the lessee pays $60 for each additional year, the lessor may declare a forfeiture at the end of the first year unless payment for such extension is made in advance.

It will be observed from the statement of facts that the lease in question provides for the payment of the annual rental on or before September 11, 1921, and that September 11th fell on Sunday. The fact that the last day for the payment of the rent fell on Sunday raises the question of whether or not payment could be made on the following Monday.

The general rule with regard to contracts is that, when an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation. The majority rule is that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted, but when the last day for performance falls on Sunday, it is not to be taken into computation. 28 A. & E. Enc. of Law, 2 ed. p. 224, and cases cited; *Monroe Cattle Co.* v. *Becker,* 147 U. S. 47; *Avery* v. *Stewart,* 2 Conn. 69; 7 Am. Dec. 240; *Owen* v. *Howard Insurance Co.,* 87 Ky. 571; *Seibert* v. *Stiles,* 39 Wis. 533; *Barnes* v. *Eddy,* 12 R. I. 25; *Post* v. *Garrow,* 18 Neb. 682; *L. R. & F. S. Ry. Co.* v. *Dean,* 43 Ark. 529, and *St. Louis Southwestern Ry. Co.* v. *Furlow,* 81 Ark. 496. See also *Street* v. *United States,* 133 U. S. 290, where the rule was recognized in the exercise of a power.

The leading case on the subject is *Hammon* v. *American Mutual Life Ins. Co.,* 10 Gray (Mass.) 306. The insured in that case contracted to pay his premium quarterly and not later than noon on the quarter day. The failure to make the payment forfeited his policy. One of the quarter days came on Sunday, and the insured died in the afternoon of that day. It was held that, as it was unlawful to transact business on Sunday, a tender of the premium on the day following was a compliance with the contract. In that case the court said:

"But as to other contracts, which by the face of the instrument require a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October in each and every year during the life of the party assured. The defendants had no office open on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured, in not paying the premium fully due on the 1st of October, as should be held to terminate the policy."

In *Edmundson* v. *Wragg,* 104 Pa. 501, where the right to recover usury paid was limited to six months after the payment of the usury, it was held that the last day of the six months being Sunday, the party had a right to bring his suit on the following day.

In *Sands* v. *Lyon,* 18 Conn. 18, where a testator devised to his son a tract of land upon condition that he pay, within a year after the testator's death, certain legacies, and the last day of the year being Sunday, it was held that a tender on the following day was sufficient to save his right to the land. In that case the court said that the nonpayment of the money was in the nature of a forfeiture, and that the general rule should be applied so as to prevent this effect.

In *Campbell* v. *International Life Assurance Society of London,* 4 Bosworth's (N. Y. Superior Court) Repts., 298, the general rule was applied in a life insurance case where the insured had the option to pay his premium on or before a certain date, which fell on Sunday, and the court held that he might pay the premium on the following day.

In *Semmes* v. *Adams,* 228 S. W. 353, the Court of Civil Appeals of Texas held, under a mineral lease providing that the lessee might prevent forfeiture by paying a specific annual rental in advance, that, the last day of the payment of the rental being on Sunday, payment on the following day was in time. The holding was in application of the general rule that, when the last day of the performance of a contract falls on Sunday, performance on the next day is sufficient.

Again, in *Plumber* v. *Southern Oil Co.,* 214 S. W. 896, the Court of Appeals of Kentucky followed the general rule in a suit to cancel an oil lease for the nonpayment of rental.

As said by the court in *Craig* v. *Butler,* 83 Hun (N. Y.) 286, contracts mature and rent falls due on Sunday as well as on any other day of the week, and the only effect of the rule of *dies non* is to postpone the enforcement of the contract to a day which is open to transactions of a secular nature.

Following these decisions, we are of the opinion that the general rule fixing the time for the performance of all contracts which, by their terms, mature on Sunday, should be uniform, and that no distinction in this respect should be made between optional and other contracts.

The lease by its express terms was assignable in whole or in part, and we hold that the lessee and his assigns had a right to pay the rental on Monday, September 12, 1921.

It is insisted, however, by counsel for appellees that, inasmuch as the bank did not receive the letter containing the check for the rent until after banking hours on

the 12th day of September, 1921, and did not credit the amount until the next day, the forfeiture occurred. This did not make any difference. By the terms of the lease the bank was made the agent of the lessors to receive the rent. It actually received the letter containing a check for the rent on the afternoon of Monday, September 12, 1921, and credited the amount of the check to the lessors on the next day. The time when the credit was extended to the lessors cuts no figure. This was merely the method by which the bank transacted its business. The main purpose in the minds of the parties was met and the payment was effected when the bank received the check and accepted it as a payment. This was on the afternoon of Monday, September 12, 1921, and was within the time allowed by the contract under the rule announced above.

Of course the officials of the bank would not have to remain there after their customary banking hours in order to receive letters containing checks or other matters, but the fact remains that they did stay there and receive the letter containing the check, and accepted it as payment, on the 12th day of September, 1921. The lessees were not concerned in whether the bank gave the lessors credit on that day or on a subsequent day. They were only concerned in the bank's receiving the letter containing the check and accepting it as payment on the 12th day of September, 1921. See *Yoke* v. *Shay,* 47 W. Va. 40, 34 S. E. 748, and *Friend* v. *Mallory,* 43 S. E. 114.

It follows that the decree must be reversed, and the cause will be remanded with directions to the chancellor to dismiss the complaint of appellees for want of equity.

CATES v. CATES.

Opinion delivered February 12, 1923.

1. REFORMATION OF INSTRUMENTS—DESCRIPTION.—Where an administrator's deed inadvertently described the land sold as "frl part" of the northeast quarter of a certain section, instead of "frl. northeast quarter" of the section, the land being properly described throughout the proceedings, and being fractional according to the government survey, the use of the word "part" was a mere clerical error, and the deed will be reformed.
2. DEEDS—DESCRIPTION.—A deed describing land conveyed as containing 66 acres, when in fact it contained 69.47 acres, is not by that fact rendered invalid.
3. REFORMATION OF INSTRUMENTS—ADMINISTRATOR'S DEED.—Where an administrator's deed purports to describe 15 acres more than belonged to the decedent, to which the grantee lays no claim, the deed was properly reformed to make it speak the truth.

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

George M. LeCroy, for appellant.

1. The widow's dower had not been assigned, at the time these proceedings were had, and the sale was void for that reason, since it amounted to a sale free of dower. 40 Ark. 17. The description of the lands in this case was void throughout. 92 Ark. 299, 122 S. W. 639. The chancery court was without authority and jurisdiction to reform the orders and proceedings of the probate court.

2. The decree amounts to making the orders of the probate court speak what they ought to have spoken, and is in fact a substitute for the orders actually made. Even the probate court was without authority to amend them so as to make them speak what they did not speak but ought to have spoken. 72 Ark. 21; 87 Ark. 438.

3. The description of the land was too indefinite and uncertain to describe anything, and the defects could not be supplied by proof *aliunde*. 60 Ark. 487; 86 Ark. 443; 75 Ark. 6.

Mahony & Yocum and *Saye & Saye,* for appellee.

The court, in testing the sufficiency of the description, will take into consideration the entire record of the court authorizing the sale, and if the technical description is sufficiently aided by other recitals in the record to identify the lands with reasonable certainty, the sale will be upheld. 18 Cyc. 749; 41 Minn. 266; 43 N. W. 4. The section in question is a fractional section, according to the government survey, and, being shown in that survey as such, the word fractional was copied therefrom and has remained associated with the description since that time. In such case, while its use is not necessary, it is not improper, and affords a sufficient description. 128 Ark. 180; 117 Ark. 151. If, by treating the word "fractional" as surplusage, a description is sufficient, the sale will be upheld. 129 Ark. 334, 336. The fact that the acreage was incorrectly stated following the general description did not invalidate the description. 128 Ark. 180; 8 R. C. L. 1081; 13 Cyc. 635, and cases cited; 3 Ark. 18; 166 S. W. 405; 100 Ark. 105; 106 Ark. 83; 148 Ark. 623; *Id.* 634, 638. See also 142 S. W. 248; 43 So. 919. The fact that the widow's dower had not been assigned at the time of the sale did not affect the validity of the sale so far as appellant is concerned. 78 Ark. 479; 33 Ark. 306. Appellee did not seek to have the order and proceedings in the probate court reformed, but only sought reformation of the administrator's deed to conform to the proceedings of the probate court. This was within the power of the chancery court. 4 Pomeroy, Eq. Jur. § 1376, p. 3280; 85 Ark. 25; 28 Ark. 372; 92 Ark. 63. It is not material whether or not chancery had jurisdiction to reform the administrator's deed. This is a suit to quiet and confirm appellee's title, and the administrator's deed was not necessary to vest title in appellee, the title having vested upon confirmation of the sale by the probate court. Appellant could not take advantage of any defects in the administrator's deed. 19 Ark. 499.

SMITH, J. This is a suit by appellee to quiet his title to two tracts of land which were owned by one J. H. Cates at the time of his death. The complaint alleges the proceedings in the probate court whereby the administrator of Cates was directed to sell the land, and at the administrator's sale appellee, John Henry Cates, was the purchaser. This sale was duly approved and confirmed by the probate court, and on the — day of January, 1914, the administrator executed and delivered his deed to said lands to John H. Cates, and that deed was approved by the court and duly recorded. Actual and continuous possession of the land by appellee since the date of this deed was alleged and proved.

The description contained in the administrator's deed to appellee was "frl part of NE¼ section 6, township 19 S., range 15 W., 126.81 acres; frl E½ of NW¼ section 6, township 19 S., range 15 W., 66 acres."

It is conceded that the administrator's sale was regular in all respects except as to the description of the land. In all the court proceedings leading up to the administrator's sale the land was described as follows: "Fractional NE¼ section 6, township 19 S., range 15 W., 126.81 acres. Fractional E½ of NW¼ section 6, township 19 S., range 15 W., 66 acres."

The fractional E½ NW¼ section 6 was described as containing 66 acres, when, in fact, its area is 69.47 acres; but the intestate owned it all.

The area of fractional NE¼ section 6 was recited in the deed is 126.81 acres, when, in fact, that quarter section contained 141.81 acres, there being 15 acres in this quarter section owned by a man named Johnson which was never claimed by the intestate Cates.

Section 6 is shown by the government survey to be a fractional section, and the word "fractional" was copied from the survey, and has remained associated with the description thereof since the survey was made, and was used in the patents from the United States, and appears to have been used in the mesne conveyances.

The heirs and the administrator of J. H. Cates were made defendants. One of these heirs is Desimus Cates, who is a minor and a grandson of J. H. Cates, and there was a prayer that a guardian *ad litem* be appointed for this minor, and, upon that appointment being made, an answer was filed for him attacking the entire probate proceedings, and praying judgment for an undivided one-sixth interest in the land, this being the interest the minor has in the land if the probate sale is void. The other defendants made default, and the court granted the relief prayed, and this appeal has been prosecuted on behalf of the minor child.

The appellee contends, and the court found, that the description of the land employed in the proceedings of the probate court leading up to the execution of the administrator's deed sufficiently described the land, and that the use of the word "part" in connection with the description of the NE fractional quarter of section 6 in the administrator's deed is a mere clerical error, and does not affect the validity of the sale, and that appellee was entitled to have the administrator's deed reformed to conform to the description employed in the court proceedings.

Appellant contends that the description employed in the probate court proceedings was also insufficient, and that the sale was therefore void.

It is insisted that the abbreviation "frl.," when used in connection with a land description, is synonymous with the word "part," and when that term is used the description is void for uncertainty. A number of cases are cited in which this court has held that the word "part" is an insufficient description.

But the words "fractional" and "part" are not synonymous. In the case of *Graysonia-Nashville Lbr. Co.* v. *Wright,* 117 Ark. 151, this court held that "fractional," when used in connection with a subdivision of a section in describing it, means either that there is more or less land than is usually contained in such de-

scriptions, and generally less, in the sectionizing of same by the government survey.

It is pointed out that the fractional E½ NW¼ section 6 is described as containing 66 acres, when the correct area of this half of the quarter section is, in fact, 69.47. This difference is not of controlling importance. The description, fractional E½ NW¼ section 6, purports to convey the east half of the quarter section, and is sufficient to do so, although the acreage is not correctly stated.

In the case of *Rucker* v. *Arkansas Land & Timber Co.,* 128 Ark. 180, it was said: "A description used on taxbooks, like a description used elsewhere, has reference to government surveys, and a mere specification of the section or subdivision thereof is sufficient. If it is in fact a fractional section or subdivision, it is so indicated on the government survey, and it is unnecessary to use the word 'fractional' as a descriptive word, and, on the other hand, the improper use of the word, when the section is not fractional, does not invalidate the description. The fact that the acreage is stated incorrectly does not lessen the certainty of the description."

Counsel argues that this court, in so holding, misapplied the decision in the case of *Little Rock & Ft. Sm. Ry. Co.* v. *Evins,* 76 Ark. 261, which was there cited, for the reason that in the last-mentioned case the abbreviation "frl." followed the quarter section to which it related, whereas in the Rucker case the abbreviation "frl." preceded the quarter section to which it related.

We think this difference unimportant. "Frl. E½ NW¼ section 6" is identical in meaning with "E½ NW frl. ¼ section 6." Either description would cover all the land in the E½ NW¼ section 6, and the employment of the abbreviation "frl." would indicate only that the half of the quarter section described was of irregular size. This is the necessary effect of the two cases cited above. See also *Brinkley* v. *Halliburton,* 129 Ark. 334.

What we have just said is equally applicable to the description frl. NE ¼ section 6. It is insisted, however, that, while appellee claimed all of the E½ NW¼ section 6, he admits that he did not acquire title to 15 acres in the NE¼ section 6. This is true; but both descriptions purport to convey all the land the intestate owned in both quarter sections. The administrator sold all land owned by the intestate in both quarter sections, and there was employed throughout the court proceedings a description sufficient to cover that interest, as it included the half of one quarter section and all of the other. There is no attempt to acquire, or to cloud, the title to Johnson's 15 acres. Indeed, a description is now furnished which expressly excludes Johnson's land from the description in the deed.

The effect of the decision of the court below is that the proceedings in the probate court sufficiently described the land owned by the intestate to pass his title thereto upon the confirmation of the sale thereof; and, this being true, it was proper to so reform the administrator's deed as to properly evidence that fact. 4 Pomeroy's Eq. Jur. §§ 871 and 1376.

The decree of the court below is therefore affirmed.

PATTERSON v. ADCOCK.

Opinion delivered February 12, 1923.

1. CERTIORARI—ACT OF JUDGE IN MINISTERIAL CAPACITY.—A county court or judge thereof in making an order for an election as to the question of restraining the running of stock in the county in pursuance of a petition of voters to that effect, as provided by Sp. Acts 1921, p. 1, and in entering, after the election, the order declaring such law to be in effect, acts in a ministerial, and not in a judicial or *quasi* judicial, capacity.
2. CERTIORARI—MINISTERIAL ACTS.—Certiorari will not lie to correct ministerial acts, even though involving discretion.
3. CERTIORARI—REVIEW OF COURT'S JUDGMENT IN STOCK LAW ELECTION.—If the county court has jurisdiction to hear a contest

over the result of a stock law election held under Sp. Acts 1921, p. 1, which is not decided, a judgment of that court sustaining a demurrer to and dismissing a petition attacking the legality of the election was not void on its face, however erroneous it may have been, and a review of it must be by appeal to the circuit court, and not by certiorari.

4. CERTIORARI—EFFECT OF QUASHING.—Though the Supreme Court will quash a writ of certiorari, seeking to bring up for review proceedings of a lower court, where appeal, and not certiorari, is the proper remedy, it will not affirm the order of the lower court where such order was not a judgment but merely a ministerial act, such as an order of a county judge declaring a stock law to be in effect as provided by Sp. Acts 1921, p. 1.

5. ANIMALS—CONTEST OF STOCK-LAW ELECTIONS.—Since Sp. Acts 1921, p. 1, providing for a special stock law election, does not provide for hearing of such election contests, and no other statute makes provision therefor, the county court has no jurisdiction to hear such contest.

6. ANIMALS—CONTEST OF STOCK-LAW ELECTIONS.—Where nothing is involved except a contest of the result of a stock-law election, the circuit court has jurisdiction, but where property or contractual rights are involved, the chancery court likewise has jurisdiction to determine such election contest and to afford relief where the statute has not been properly put into force.

7. STATUTES—VALIDITY OF STOCK LAW.—Sp. Acts 1921, p. 1, providing for a special election on the question of restraining stock, is not invalid for failure to provide for a contest of such election, as a remedy therefor exists under the general laws of the State.

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

B. E. Carter and *J. M. Carter,* for appellants.

1. The demurrer to the petition for certiorari should have been sustained. The writ will not lie for the mere correction of errors or irregularities in proceedings in the inferior court. 61 Ark. 605; 144 Ark. 169, 35 Ark. 95; 25 Ark. 213; 47 Ark. 511; 70 Ark. 71; 37 Ark. 318; 80 Ark. 200.

2. The county court had jurisdiction of the whole proceeding. See act No. 4, Special Acts 1921, approved January 21, 1921, section 1.

3. Petitioners had the right of appeal open to them under the general statute, and it is immaterial that the special act did not specifically provide for an appeal. C. & M. Digest, § 2287; 134 Ark. 292.

4. The circuit court erred in overruling the motion to quash the writ and to affirm the judgment of the county court, putting in force the stock law in the township. 147 Ark. 581.

Louis Josephs, James D. Head and *Pratt P. Bacon,* for appellees.

1. Since the demurrer was general, it was proper to overrule it, if the complaint stated a cause of action in any particular, even though defectively. If, as alleged in the complaint, the county court had no jurisdiction to order the election, because twenty-five per cent. of the voters of the township had not petitioned in writing therefor, and if it exceeded its jurisdiction in ordering the election, this entitled appellees to the writ of certiorari. 61 Ark. 605; 126 Ark. 125. The circuit court has the right, and it was proper for it to hear evidence *de hors* the record, to determine the jurisdiction of the county court in the particulars alleged in the complaint. C. & M. Digest, § § 2237, 2238; 126 Ark. 125, 134; 153 Ark. 188.

2. The complaint alleges, and the demurrer admits, that the appellant failed to give the notice of the election for the time and in the manner required by the statute. See § 2 of the special act. This notice was a necessary prerequisite to a valid election. If it was not valid, all proceedings grounded on the election were void, and the county court exceeded its jurisdiction when it issued the restraining order. 116 Ark. 291; 153 Ark. 50; *Id.* 188. The notice required was jurisdictional. 83 Ark. 542, see also 94 Ark. 54. This is a special statutory proceeding, and jurisdictional facts must affirmatively appear of record. 51 Ark. 39; 65 Ark. 142; 103 Ark. 405; 117 Ark. 258; 129 Ark. 207; 134 Ark. 100.

3. The county court was performing ministerial duties under this act, and, that being true, there was no right of appeal. 153 Ark. 50.

4. Appellees appealed from the order and judgment of the county court sustaining a demurrer to their petition, and also from the restraining order, and afterwards obtained the certiorari issued in this case, and at all times have prosecuted both remedies. They cannot therefore be held to have made an election of one remedy over the other, as was done in the Bertig case, 147 Ark. 583; and if the judgment here is reversed, appellees should be left free to prosecute their appeal. 15 Cyc. 262; 71 N. W. 634.

McCULLOCH, C. J. There is a special stock law in Miller County, enacted by the General Assembly of 1921 (Special Acts 1921, p. 1), which provides, in substance, that whenever twenty-five per cent. of the electors of any township shall petition the county court for the privilege to vote on the question of restraining stock in that township, "the county court, or the judge thereof, shall make an order for an election in such township," the election to be held at the general election, if there be one within six months of the date of the filing of the petition, and if not, at a special election to be held within ninety days after the filing of the petition; that notice of the election shall be given by publication in a newspaper, and that the election shall be held in accordance with the general election laws of the State. The statute further provides that the judges of the election shall make returns to the county election commissioners, who shall canvass the returns and make and file a certificate of the result with the county clerk, and publish the same for one insertion in a newspaper having a circulation in the township. It is further provided that, if a majority of the vote be in favor of restraining stock in the township, "the county court, or judge thereof, shall, immediately after the filing of said certificate by the county election commissioners,

make an order restraining such animals specified in the petition from running at large in said township."

A petition was filed with the county court of Miller County, asking that an election be held in Sulphur Township, pursuant to the terms of said statute, for the purpose of putting the law into effect in that township. An election was ordered by the county judge, or county court, and was held in accordance with the order, the majority of the votes, as certified by the election commissioners, being in favor of putting the law into effect in the township.

Immediately after the filing of the certificate by the election commissioners, appellees, who are residents and property owners in Sulphur Township, filed in the county court a petition alleging errors, irregularities and fraudulent voting in the election, and alleging that a majority of the qualified electors voting at the election did not vote in favor of putting the law into operation. The appellants appeared in response to this petition and asked that they be made parties for the purpose of resisting it, which was done.

Appellants demurred to the petition in the county court on the ground that there was no authority for the county court to hear a contest of the election, and the county court sustained the demurrer, and entered an order, in accordance with the statute, restraining the running at large of stock in the township. Appellees then filed their petition in the circuit court of Miller County, praying for a writ of certiorari to bring up and quash the order of the county court ordering the election and entering the order restraining the running at large of stock. They alleged in their petition that the order of the county court for the election was void for the reason that twenty-five per cent. of the electors of Sulphur Township had not petitioned the court, and that the election was void for the reason that notice had not been published in the manner prescribed by the statute.

Appellants appeared and demurred to the petition, and the court overruled the demurrer, and appellants stood upon the demurrer without pleading further, whereupon the circuit court entered a judgment quashing the orders of the county court, and an appeal has been prosecuted from that judgment.

The county court, or the judge thereof, in making the order for the election and entering the order pursuant to the election acted ministerially, and not in a judicial or *quasi*-judicial capacity. *Thompson* v. *Trice,* 145 Ark. 143; *Capps* v. *Judsonia-Steprock Road Improvement District,* 154 Ark. 46.

The order restraining the running at large of stock was a mere entry of the result of the election as certified by the election commissioners, and was likewise ministerial in its nature.

Certiorari will not lie to correct a purely ministerial act, even though the performance of the act involves discretion. *Pine Bluff Water & Light Co.* v. *Pine Bluff,* 62 Ark. 196; *McConnell* v. *Ark. Brick & Mfg. Co.,* 70 Ark. 568; *State* v. *Railroad Commission,* 109 Ark. 100; *Hall* v. *Bledsoe,* 126 Ark. 125.

The statute contains no provision conferring upon the county court authority to hear a contest over the result of the election, but if that court possesses jurisdiction to hear such a contest—which we do not deem it necessary to decide at this time—a review of the judgment in such a contest must be by appeal and not by certiorari, unless the judgment is void on its face. *Pritchett* v. *Road Improvement District,* 142 Ark. 509.

Conceding, as before stated, that the county court had jurisdiction to hear a contest, the judgment of that court sustaining the demurrer and dismissing the petition was not void on its face, however erroneous it might have been.

The general statutes of the State provide for appeals from all judgments of the county court, and an appeal might have been prosecuted under that statute.

Crawford & Moses' Digest, § 2287; *Missouri Pacific R. Co.* v. *Conway County Bridge District,* 134 Ark. 292.

It follows therefore that the judgment of the circuit court is erroneous, and the same is reversed, with instructions to sustain the demurrer of appellants and quash the writ.

It is so ordered.

McCULLOCH, C. J., (on motion to modify the judgment and opinion of this court). Counsel for appellants insist that the directions to the lower court should be to quash the writ of certiorari which brought up for review the proceedings in the county court, and affirm the judgment of the county court, in accordance with the rule of practice announced in the case of *Bertig Bros.* v. *Independent Gin Co.,* 147 Ark. 581.

In the case referred to there was a judgment of the circuit court, and, after reviewing it on certiorari, we found that the judgment was valid on its face, and we not only quashed the writ but affirmed the judgment. The difficulty, however, in the present case is that, according to the views expressed in the original opinion, there was no judgment of the county court to affirm. There was merely the order of the county court, or county judge, made in a ministerial capacity and not in any judicial or *quasi*-judicial capacity. All that can be done now is to quash the writ of certiorari, as was directed in the former opinion and judgment of this court.

It is insisted, further, that we should decide whether or not the county court had jurisdiction to hear the contest, and, if not, where the jurisdiction was vested.

The statute under which the proceedings were had in the organization of the district makes no provision for a contest before any court or other tribunal, nor is there any other statute which provides for a contest of an election of this kind. The provisions of the Constitution of 1874 and all of our general statutes on the subject of contests of elections relate solely to contests of

elections of public officers. It is clear therefore that, since there is no statutory provision for hearing a contest of this sort in the county court, such jurisdiction cannot be there exercised. In the former opinion we refrained from passing on that question, but we deem it proper now to extend the opinion by expressly holding that there is no authority for such a contest in the county court.

The further inquiry presents itself as to where the jurisdiction rests. In *Harrington* v. *White,* 131 Ark. 291, we permitted the exercise of jurisdiction in such a case by the chancery court, without deciding whether the jurisdiction should properly have been exercised by the circuit court or by the chancery court. All unassigned jurisdiction under the Constitution is vested in the circuit court (art. 7, § 11, Constitution of 1874), and it has been held by this court that jurisdiction in election contests not otherwise provided for fall within the jurisdiction of the circuit court under this provision of the Constitution. *Payne* v. *Rittman,* 66 Ark. 201; *Whittaker* v. *Watson,* 68 Ark. 555; *Sumpter* v. *Duffie,* 80 Ark. 369.

It follows from these decisions that, where nothing is involved except a contest of the result of an election, the circuit court has jurisdiction. This, however, does not exclude the jurisdiction of the chancery court under all circumstances. On the contrary, we are of the opinion that where property or contractual rights are involved in the result of an election putting into force a statute like the one involved in this inquiry, the chancery court has jurisdiction to hear and determine the contest and to afford relief where the statute has not been properly put into force. 8 Standard Proc. p. 16; *Red River Furnace Co.* v. *Tenn. Central R. Co.,* 113 Tenn. 697; *Pickett* v. *Russell,* 42 Fla. 116; *Wilton* v. *Pierce County,* 61 Wash. 386.

It would be premature to discuss now the limitations upon the exercise of this jurisdiction, but we merely content ourselves by deciding that either the circuit court or

the chancery court has jurisdiction under certain circumstances to hear and determine a contest like the one involved in this case.

We do not think that the validity of the statute authorizing the formation of the district is affected by the fact that the statute makes no provision for a contest of the election. If a remedy exists in any of the courts under the Constitution and general laws of the State, the special statute is not invalid by reason of its failure to provide a remedy.

The motion to modify the judgment of this court is overruled.

DORMON FARMS COMPANY v. STEWART.

Opinion delivered February 12, 1923.

1. MINES AND MINERALS—OIL AND GAS LEASE—MUTUALITY.—An oil and gas lease giving the right to explore for oil for five years, and providing that, if no well is commenced within the first year, a rental charge of 50 cents per acre paid on or before the expiration of the year would keep the lease in force for another year, and that similar payments each year thereafter would continue the lease in force, though no well was started, *held* not void for want of mutuality.
2. MINES AND MINERALS—PAYMENT OF RENTAL TO DEPOSITARY.—Under an oil and gas lease which reserved an annual rental, and provided that any assignment or sale by the lessor should not be binding on the lessee until notice in writing had been given him, *held* that the lessee and his assignees had a right to make the rental payments to the lessor by leaving them at a depositary bank named in the lease for the credit of the lessor until advised by writing of a sale of the land.
3. MINES AND MINERALS—ASSIGNMENT OF OIL LEASE.—An assignment of an oil and gas lease which did not describe the lands involved, but referred to a previous recorded lease in which the lands were described, *held* a sufficient description.
4. TENDER—SUFFICIENCY.—Under an oil and gas lease providing that any assignment or sale of his interests by the lessor shall not be binding on the lessee until after notice in writing had been given him, *held* that, though the lessor subsequently sold

the property, the lessee and his assignees, in the absence of any notice of the sale, by tendering the rental to the lessor's designated bank, made a sufficient tender to keep the lease in force.

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

J. S. Butt and *W. P. Feazel,* for appellant.

1. While equity usually abhors forfeitures, this does not appear to be true of oil and gas leases, and the courts, where there is a failure of development, will usually cancel such leases upon slight defaults. 152 Pac. 597; 157 Pac. 308; 127 App. Div. 761; 112 N. Y. Sup. 13; 119 La. 793; 22 La. Ann. 280; L. R. A. 1917-B, 1190; 29 Okla. 719; 26 Okla. 772.

2. In this case the contract is immaterial and void. If not binding on the lessee, it is not binding on the lessor, and may be canceled at his option. 32 Tex. Civ. App. 47; 95 Tex. 586; 134 La. 701; 25 Okla. 809; 138 Am. St. 942; 47 W. Va. 107; L. R. A. 1917-B, 1184; Thornton on Oil & Gas, § 270; *Id.* §§ 54-62.

3. It was incumbent on appellees to designate the particular part of the land embraced in the original lease upon which they desired to pay rent. This they failed to do. Thornton on Oil & Gas, § 328; 220 S. W. 140.

4. There was no proper tender. Payment of rent to Goodlett, with knowledge that he had transferred the land and had no right to receive the rent, was not sufficient. *Harrell* v. *Saline Oil & Gas Co.,* 153 Ark. 104.

Thomas, Frank, Milam & Touchstone, of Dallas, Texas, *W. C. Rodgers,* and *J. H. Brennan,* of Wheeling, W. Va., for appellees.

1. The rule which appellant seeks to invoke with reference to enforcement of forfeitures in oil and gas contracts applies to the peculiar nature of the mineral; but where, as in this case, there is no question raised as to adjoining wells taking oil from the land by drainage,

the reason for the rule does not exist. 91 Ark. 407, 418; 109 Ark. 465-6-7; 101 Ark. 331, 335; 126 Ark. 389, 399; 141 Ark. 280, 285; 139 Ark. 542, 556; 155 U. S. 665. The liberal construction sought by appellant has never been carried to the extent of forfeiting rights of a lessee who has faithfully kept his part of the contract. 155 U. S. 665. Moreover, the facts in the case relied on by the appellant are substantially different from the facts in this case. 112 Ark. 342, 352; 123 Ark. 365, 368; 150 Ark. 43, 48.

2. To sustain appellant's contention, it would be necessary to eliminate portions of the contract, such as the clause authorizing the payment in cases of partial assignments, and the clause requiring the furnishing of a written transfer before the lessee or assignees would be justified in paying the rentals to any one other than the original owner, and the stipulation that the down-payment applies as a consideration to every part of the lease. The courts will not make or modify contracts for parties. 66 Ark 295; 111 Ark. 173. No useful purpose could be served by the lessee at the time of making the deposits stating what part of the lease he owns. Therefore the law does not require it. 96 Ark. 376; 132 Ark. 289; 133 Ark 16; 104 Ark. 119; 109 Ark. 465; 114 Ark. 359; 127 Ark. 261; 141 Ark. 235.

3. The original lease and the various assignments of parts thereof were recorded. Appellant, when it purchase from Goodlett, took with notice of the provisions of the lease and these assignments. 14 Ark. 69; 15 Ark. 184; 35 Ark. 100; 50 Ark. 322; 103 Ark. 425; 107 Ark. 484; 97 Ark. 397; 58 Ark. 84; 23 Ark. 735.

4. Appellant's contention that the royalties mentioned in the lease must be the "sole and moving consideration for the execution of the contract" is not borne out by the instrument itself, which provides, among other things, that "the consideration first recited herein, the down-payment, covers not only the privilege granted to the date when said first rental is payable, * * *

but also the lessee's option of extending that period * * * and any and all rights conferred." The primary consideration is thereby tied to every part of the contract, and the court will not inquire into the adequacy of the consideration. 145 Ark. 310; *Rogers* v. *Magnolia Oil & Gas Co.,* 156 Ark. 103; 33 Ark. 97; 99 Ark. 233; 127 Ark. 28; 23 Ark. 735; 106 Ark. 1. A primary consideration of one dollar is sufficient consideration. Mere inadequacy of consideration is not a ground for cancellation. 23 Ark. 735.

5. The assignment to Carmen Oil Company was not void for uncertainty of description, since its assignor's title was duly recorded and contained a correct description, and reference thereto was made in the assignment to Carmen Oil Company. 6 Ark. 191; 28 Ark. 75; 30 Ark. 513.

SMITH, J. On January 20, 1920, W. V. Goodlett, who was then the owner of 640 acres of land in Howard County, executed to Earl A. O'Hara an oil and gas lease thereon. On November 20, 1920, O'Hara executed to the Superior Producing and Refining Company an assignment of the lease on 200 acres of the land; and that company, on September 19, 1921, reassigned the lease to the 200 acres to the Carmen Oil Company. One of the questions in the case is whether this last assignment is void for the reason that it fails to describe the land. The lease to O'Hara was filed for record January 20, 1920; the assignment to the producing company was filed for record December 9, 1920; and the assignment from the producing company to the Carmen Oil Company was filed for record September 24, 1921.

On January 30, 1920, O'Hara assigned to W. P. Stewart the lease on 120 acres of the land. This assignment was filed for record December 20, 1920. On January 30, 1920, O'Hara assigned to C. A. Gates the lease in so far as it covered 160 acres of the land; and this assignment was filed for record February 20, 1920. On March 18, 1921, W. V. Goodlett, the original lessor, exe-

cuted and delivered to the Dormon Farms Company his warranty deed wherein he conveyed the entire 640 acres.

The original lease from Goodlett to O'Hara contained the following provisions:

"If the estate of either party hereto is assigned (and the privilege of assigning in whole or in part is expressly allowed), the covenants herein contained shall extend to their heirs, executors, administrators, successors and assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment, or copy thereof; and it is hereby agreed that, in the event this lease shall be assigned as to a part or as to parts of the above described lands, and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due him or them, such default shall not operate to defeat or affect the lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental. * * * *

"It is agreed that this lease shall remain in force for a term of five years from this date (January 20, 1920), and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee. In consideration of the premises the said lessee covenants and agrees, if no well be commenced on said land on or before the 20th day of January, 1921, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit in the Planters' Bank & Trust Company bank at Nashville, Arkansas, or its successors, which shall continue as the depository, regardless of changes in the ownership of said land, the sum of $320, which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon like

payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first mentioned herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred."

The Dormon Farms Company brought this suit to cancel these leases, and, as ground therefor, alleged that the lease to O'Hara was void for lack of mutuality, and that the assigned leases were void because the sublessees claiming them have not paid or properly tendered the rental provided for in the lease to O'Hara.

The lease to O'Hara was evidently prepared by an attorney whose chief concern was to protect the rights of O'Hara, the original lessee, and the sublessees. At any rate, the lease serves that purpose most excellently.

We think the contract was not void for the want of mutuality. For the recited consideration the right to explore oil for five years was granted. It is true there was no requirement that the lessee develop the land during the first year; but, as appears from the portion of the lease quoted above, it was provided that the lease should expire on its first anniversary, unless on or before that date the lessee had paid the annual renewal charge of fifty cents per acre. A similar payment before each subsequent anniversary was essential to continue the lease in force. This annual payment of fifty cents per acre, aggregating $320 on the entire acreage, was a substantial and sufficient consideration to support the lease, although during the time covered by it no attempt was made to explore for oil. There was no allegation or proof that the land was in or near a developed field. We proceed therefore to a consideration of what we regard as the real question in the case, that is, whether the payments due on or before January 20, 1921, were made or properly tendered.

It will be observed that the lease to O'Hara expressly gave him the right to assign the lease in whole or in part, and provided that any assignee should have the same rights to the part assigned him as O'Hara originally had to the whole tract. It will be observed also that the lease to O'Hara imposed on him no duty to advise Goodlett as to any assignments he might make. On the other hand, the lease did impose on Goodlett the duty of advising the lessee of any change in the ownership of the land, and provided that no change in the ownership or assignment of rentals or royalties should be binding on the lessee until after the lessee had been furnished with a copy of the transfer or assignment. It is not contended that Goodlett ever advised the lessee of his sale and conveyance of the land to the plaintiff, Dormon Farms Company.

The evident purpose of this provision was to leave the lessee in no doubt as to where the annual rental should be paid. The contract made the Planters' Bank & Trust Company, of Nashville, the depository for the purpose of receiving this annual rental, and the lessee, or his assignee, had the right to make the payments there, and to the credit of Goodlett, until advised in the manner provided by the contract to make them otherwise. The plaintiff, Dormon Farms Company, was affected with notice of this provision, because the lease to O'Hara and the assignments thereof were in the chain of its title and were all of record at the time it received its deed from Goodlett.

The question whether the sublessees have continued in force the leases to themselves must be decided by a consideration of the facts attending the separate payments or tenders of payments by each of them, for the reason that the lease to O'Hara provides that the default of any assignee in the payment of the proportionate part of the rent due by him "shall not operate to defeat or affect the lease in so far as it covers a part or

parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental."

The court found the facts to be that the assignees had paid the annual rental provided for by the O'Hara lease, and dismissed the complaint as being without equity, except as to a portion of the land upon which the court found the rent had not been paid. The O'Hara lease, in so far as it related to that portion of the land, was canceled, and, as there is no appeal from that finding, that tract passes out of the case.

As to the sufficiency of the description of the land in the assignment of the lease by the Superior Producing & Refining Company to the Carmen Oil Company, it may be said that, while the land was not there described in terms, that assignment referred to the assigned lease to the Superior Producing & Refining Company in which the lands were described, and in this manner the descriptions were made definite and certain. 8 R. C. L., sec. 134, p. 1078; 18 C. J., sec. 67, p. 184; *Cooper* v. *White*, 30 Ark. 513.

On the question of the sufficiency of the tender made by the Carmen Oil Company the facts are as follows. In apt time that company wrote the bank at Nashville as follows: "Inclosed please find New York draft for $100, which please place to the credit of W. V. Goodlett, the same being a 12 months' rental of an oil and gas lease containing 200 acres and located in Howard County, Arkansas, due January 22, 1922, and described as follows: The E½ of the E½ of section 14, and all of section 13, except the E½ of the E½, all in T. 9 S., R. 29 west." These were the only directions given by that company as to the lands on which it wished to pay the rent. The letter stated the purpose of paying on 200 acres, but did not describe the particular land. Payments by the other sublessees were made in the same manner without describing the land. It also appears that when Gates remitted to the bank the sum of $80 with directions to credit the account of Goodlett, the bank returned the remittance

and directed Gates to make the check payable to Dormon Farms Company; but Gates responded by again remitting the $80 to be credited to the account of Goodlett.

The remittances under the circumstances were properly made to the bank at the designated depository. No one questioned the right of the appellant, Dormon Farms Company, to appropriate these remittances, and the leases which were in its chain of title showed the lands on which each of the sublessees were offering to pay. They each remitted fifty cents for each acre covered by their leases. This was the sum required by the O'Hara lease, and the Dormon Farms Company should have assumed that the sublesses were offering to pay on the land respectively covered by their leases.

It was not contended that either Goodlett or the Dormon Farms Company had given Gates, or the other sublessees, notice of the conveyance by Goodlett to the Dormon Farms Company, and the president of that company admitted that he would not have accepted the tender had it been made to him in the manner in which it was made to the bank. The bank was not a party to the lease contract except in so far as it consented to act as the named depository, and there was nothing about this contract which authorized the bank to direct the sublessees how payments should be made. The information given Gates by the bank was correct, but, had incorrect information been given by the bank, as a result of which the tender might have been made to the credit of one not entitled thereto, there is nothing in the record to show that the Dormon Farms Company would have been bound by the improper tender resulting from the erroneous direction to the bank. Gates had the right, therefore, to disregard the suggestion of the bank, and the second remittances made by him to the bank must be regarded as a continuance of the original tender, which was made in apt time and manner.

What we have said about the tender by Gates and the

Carmen Oil Company is decisive of the case of the other sublessees.

It follows, from what we have said, that the court properly refused to cancel the leases, and that decree is affirmed.

SHANNON v. STATE.

Opinion delivered February 12, 1923.

1. HOMICIDE—INSTRUCTION AS TO INFERENCE FROM FACT OF SHOOTING.—In a trial for assault with intent to kill, an instruction that "if you believe from the evidence beyond a reasonable doubt that the defendant fired a pistol at" the assaulted person "you should find that he intended to kill" was erroneous in declaring intention proved as a matter of law from the fact of shooting.
2. HOMICIDE—EVIDENCE AS TO INTENT.—Evidence that one accused of assault with intent to kill stated, "I have done what I intended to do," and that he told the sheriff that he thought he had killed a man, *held* not so conclusive of his intent to kill as to relieve from prejudice a charge that intent to kill was inferable as matter of law from firing a pistol at the assaulted person.

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

Randolph & Cobb, for appellant.

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

SMITH, J. Appellant was indicted for assault with intent to kill, alleged to have been committed by shooting one W. M. Emerson. He was convicted and given a sentence of ten years in the penitentiary, and has appealed.

The evidence is amply sufficient to sustain the jury's verdict, and there appears to have been no error committed at the trial, except that the court gave an erroneous instruction, to which appellant duly excepted. The instruction is as follows:

"2. If you are convinced from the evidence, beyond a reasonable doubt, that the defendant wilfully and with malice aforethought shot at the witness Emerson with intent to murder the said Emerson, then it would be your duty to find the defendant guilty of an assault with intent to kill, as charged in the indictment. If you believe from the evidence, beyond a reasonable doubt, that the defendant fired a pistol at Emerson, you should find that he intended to kill."

The Attorney General concedes the instruction is erroneous, but contends that it was not prejudicial for the reason that the undisputed testimony shows that it was appellant's purpose to kill Emerson.

The facts relating to the shooting, briefly stated, are as follows: Emerson was appellant's tenant, and there was a disagreement about the amount of rent. Emerson had been twice ordered to vacate the premises. On the morning of the shooting appellant went to the house, and found Emerson still in possession. Emerson stated, however, that he was fixing to leave, whereupon appellant, without any provocation, drew a .45 caliber revolver from his pocket and commenced firing. The first shot was wild; but the second shot went through Emerson's shirt and slightly burned his side, but inflicted no real injury.

Appellant did not testify, and offered no testimony in his own behalf, but sought by his cross-examination of the State's witnesses to show that he was about to be assaulted by Emerson at the time he commenced firing. Emerson's wife testified that when the second shot was fired she went to the door where appellant was standing and ordered him to leave, saying to him, "Go on away; you have done enough here already." To this remark appellant replied, "I have done just what I intended to do." Appellant left the house, went to the sheriff's office, and surrendered, and told the sheriff he had shot a man and thought he had killed him.

In defense of the court's instruction the case of *Coulter* v. *State,* 110 Ark. 209, is cited. An instruction was there given reading as follows: "You are further instructed that every sane man is presumed to intend the natural and probable consequence of his acts."

The instruction was held not prejudicial under the facts of that case, because Coulter admitted he shot the prosecuting witness with the intent to kill him because he thought his life was in danger. Here appellant did not say to Mrs. Emerson that he intended to kill Emerson. It is only an inference that such was his purpose, drawn from the remark that he had done what he intended to do. The jury might have drawn some other inference from the remark, as, for instance, that what he intended to do was to make Emerson vacate by frightening him, or by inflicting some slight injury on him. It is true the testimony on the part of the State shows that appellant stated in the sheriff's office that he thought he had killed a man; but there was no testimony that he stated, in that connection, that he had done what he had intended to do. He may have reached the conclusion that he had killed a man after having said to Mrs. Emerson that he had done what he intended to do.

Moreover, this testimony was not appellant's admissions at the trial. It was testimony as to what appellant had said on the day of the shooting, and the jury may or may not have accepted it as true; and while, if believed, it would have supported the inference, in connection with the other facts and circumstances in proof, that appellant did intend to kill Emerson, still this was an inference to be drawn by the jury from the testimony as a matter of fact, and should not have been so declared by the court as a matter of law.

This identical question was so thoroughly considered by this court in the cases of *Chrisman* v. *State,* 54 Ark. 283, and *Beavers* v. *State,* 54 Ark. 336, that we need only to cite those cases to support the conclusion that the instruction was erroneous and prejudicial.

In the first of these cases the appellant, Chrisman, had assaulted one Stanfield with a knife, and had inflicted upon him a dangerous wound. The court said that, from the nature of the wound, and from the character of the knife, it could well be inferred that the knife was a deadly weapon. The court charged the jury that "if you believe from the evidence that the defendant assaulted and stabbed the prosecuting witness with a knife calculated ordinarily to produce death, without provocation, the law presumes that he did it with the felonious design to kill; and the burden of proof is on the defendant to show to the contrary, either by proof on the part of the State or defense."

It will be observed that this instruction merely imposed on the defendant the burden of proof to show that he did not intend to kill, if the jury found that defendant had assaulted and stabbed the prosecuting witness with a knife, calculated ordinarily to produce death, without provocation; while the instruction here complained of tells the jury to find that there was an intent to kill, if they found that appellant shot at Emerson. In other words, there was not a mere shifting of the burden of proof, but an absolute direction as to the inference to be drawn. Judge MANSFIELD, for the court, said: "Whether the defendant assaulted Stanfield with the specific intent alleged in the indictment was a question of fact which it was his right to have determined by the jury upon the whole evidence in the cause. But, under the instructions copied above, the jury were at liberty to presume the existence of a felonious intent to kill from the facts mentioned in the court's charge, without considering any others. We do not hold that it would have been improper to instruct the jury that the defendant should be presumed to have intended the natural and probable consequences of this act in stabbing the prosecuting witness. For it was clearly the province and duty of the jury to consider the nature of the weapon used by the defendant and his manner of using it, to-

gether with all the other circumstances of the case, in determining whether the assault was in fact committed with the intent alleged in the indictment. 1 Bishop Crim. Law, sec. 735 and note 1. But the objectionable charge shifted the burden of proof as to the question of such intent, which would still remain for the determination of the jury, although they believed that the facts recited by the court's instruction had been established by the evidence. *Ogletree* v. *State,* 28 Ala. 693; *State* v. *Neal,* 37 Me. 468; Starkie, Ev. (10 ed.), 72; *State* v. *Jefferson,* 3 Harrington, 571."

In the case of *Beavers* v. *State, supra,* the defendant was convicted of assault with intent to kill by shooting at one Pridmore with a pistol. Judge HUGHES, for the court, there said: "The intent to take life, even where a deadly weapon is used in making the assault, is not a presumption of law arising from the assault or the use of the deadly weapon, in a prosecution for assault with intent to kill; it is a question of fact for the jury to determine from the evidence. It is competent for the jury to infer, or find as a fact from the use of a deadly weapon, if the circumstances of the case warrant, that the person using it intended to take life. The presumption of such intent does not arise as a matter of law from the act, but the use of a deadly weapon is an evidentiary fact or circumstance to be considered by the jury in making up their conclusion. The burden of proof as to the intent is upon the State."

The instruction complained of was erroneous, and does not appear not to have been prejudicial, and the judgment will therefore be reversed, and the cause remanded for a new trial.

SHULTZ v. CARROLL.

Opinion delivered February 12, 1923.

1. TAXATION—SCHOOL TAX—VALIDITY OF TAX DEED.—An entry of a school tax levy in the record of the levying court having a column for "Amt. Taxes Voted," under which appeared the number "7", and a column "For What Purpose," under which appeared "5 gen. 2 bldg.", there being nothing to show whether these numbers referred to dollars, cents, or mills, was insufficient to sustain a tax deed based thereon.
2. TAXATION—PUBLICATION OF NOTICE OF TAX SALE.—A notice of the sale of lands for delinquent taxes published for two full weeks consecutively before the sale, the first insertion being two full weeks and the second being one full week before the day of sale, was sufficient publication.

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

Rice & Rice, for appellant.

The entry as to the purported levy of taxes is meaningless. The figures used stand alone without even the dollar mark. There is nothing to indicate whether the levy was in cents or mills. It is void for ambiguity. 27 Pac. 356; 38 S. W. 283; 103 Ark 581. The record discloses that the delinquent list was published, but it does not show that it was filed in apt time, and is void for that reason. *Pride* v. *Gist,* 152 Ark. 368; 84 Ark. 567. The clerk's certificate of publication of the delinquent list was not recorded before the day of sale as required by C. & M. Digest, § 10085, and the sale is therefore invalid. 68 Ar. 248; 74 Ark. 583. The clerk's certificate of publication recites that he "advertised." He does not say "published." There is a difference. There must be a strict compliance with the statute. 37 Cyc. 1281. The clerk wholly failed to certify any publication of notice of sale of this land as delinquent or otherwise. 84 Ark. 1; 84 Ark. 320; 68 Ark. 250; 37 Cyc. 1291. The clerk made no certificate whatever of the publication of the notice *attached* or otherwise to the delinquent list; he simply had the editor file his proof. Only the clerk

can do that. 74 Ark. 583; 65 Ark. 595; Cooley on Taxation, 218-219.

Sullins & Ivie, for appellee.

There is no difference between the words "advertised" and "published." 2 C. J. P. 294, 80 Ark. 31. There was no allegation or proof that the land involved was in school district No. 103. Where there is no proof as to the time the list was filed with the clerk, it will be presumed that it was filed in time. 21 Ark. 578. The notice of sale by the clerk and the certificate of publication were amply sufficient and meet the requirements of the statutes. 91 Ark. 117; 80 Ark. 31.

HUMPHREYS, J. Appellants brought this suit in the Benton Chancery Court against the appellees to cancel a tax deed for the S. E. ¼ N. E. ¼ sec. 23, tp. 19 N., R. 30 W., Benton County, Ark., obtained by appellee, F. G. Carroll, from the State of Arkansas on July 21, 1919. Appellant, H. L. Shultz, alleged that he was the owner; and appellant, Peoples' Savings Bank, Inc., that it had a special interest in said lands by reason of a mortgage lien acquired thereon. It was also alleged in the bill that the title acquired by F. G. Carroll was based upon a void forfeiture of the lands for the nonpayment of the taxes for the year 1916.

Appellees filed an answer denying the invalidity of the tax title acquired from the State of Arkansas.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a decree upholding the tax title and dismissing appellants' bill for the want of equity, from which is this appeal.

Appellants assailed the tax title upon many grounds, and now insist upon the reversal of the decree because the trial court did not sustain any ground of attack. We deem it unnecessary to set out or discuss, *seriatim,* the various grounds of attack. We think the eighth ground of attack should have been sustained by the court. It is as follows:

"Said sale and proceedings thereunder are null and void because the levying court failed to levy the taxes for which said property was sold."

The record of the levying court was introduced, and contains the following entry relative to the levy for school purposes:

"No. of Dist.	Amt. taxes voted	For what purpose
103	7	5 gen. 2 bldg."

This entry as to amount is meaningless unless a presumption is indulged against the landowner that the figures 7, 5, and 2, standing alone, mean mills. Even the dollar mark does not appear in the heading above the figure 7 or above the figures 5 and 2, to indicate that 7, 5, and 2 were intended as some proportional part of dollars. We think the record should have affirmatively shown whether the levy for school purposes was voted in cents or mills. This court said, in *Morris* v. *Levy Lumber Co.*, 103 Ark. 581, that: "Every essential proceeding in the course of the levy of taxes must appear in some written and permanent form in the record of the bodies authorized to act upon them," meaning, of course, that the recorded proceeding should be free from ambiguity.

Appellants suggest that the notice of sale of delinquent lands for the year 1916 was fatally defective in several respects, but we think the notice in form and substance complied with all the requirements of § 10084, Crawford & Moses' Digest. There was no defect in the publication of the notice. It was published for two full weeks, consecutively, between the second Monday in May and the second Monday in June, the first insertion being two full weeks and the second one full week before the day of sale. In construing this section the court ruled in the cases of *Townsend* v. *Martin*, 55 Ark. 192, and *Martin* v. *McDiarmid*, 55 Ark. 213, that the first insertion must be two full weeks before the day of sale, and thereby impliedly ruled that the second insertion must be one full week before the day of sale.

For the error indicated, the decree is reversed and the cause remanded, with directions to cancel the tax title acquired by said F. G. Carroll from the State of Arkansas.

McCULLOCH, C. J., (dissenting). It seems to me that it is entirely too strict a rule of interpretation to say that the record of the levying court does not show that a levy of five mills was made for school purposes. It is true we have held that "to validate a tax levy it is essential that it be done in the manner prescribed by the statute, and this should be shown in the manner therein described," but the record should be given a reasonable interpretation in determining what is meant by its language. Neither the members of the levying court, the presiding judge nor the clerk are required to be learned in law, and literal accuracy in the narrative of the proceedings in this record should not be exacted in order to make a valid levy.

The decision of the majority is, I think, out of harmony with the liberal rule of interpretation adopted in *Beasley* v. *Bratcher,* 114 Ark. 512.

The only defect in the record is the failure to specify the denomination of the figure indicating the amount of the tax. In other words, the clerk merely failed to insert the word "mills." It is clear that the figure "5" referred to the amount of the levy, for that is indicated at the top of the column. The intention to levy a tax being manifest, and an amount being indicated by the figure used, we should indulge the presumption that the lowest unit was intended, which is the one specified in the Constitution in fixing the limit of school taxes.

The Constitution authorizes the school tax in mills, and we should indulge the presumption that the figure in the record was intended to refer to the amount of tax thus authorized. It could not have had reference to dollars or cents, therefore it must have meant mills. The omission was a mere clerical error.

GOFF v. BEATY.

Opinion delivered February 12, 1923.

1. LIMITATION OF ACTIONS—CONTRACT IN WRITING.—A right of action in favor of an heir under a written contract to make a will accrued against the coheirs upon the promisor's death, and was governed by Crawford & Moses' Dig. § 6955, providing that suit on contracts in writing must be brought within five years.
2. ADVERSE POSSESSION—NOTORIETY.—Where plaintiff's mother agreed to will him land in consideration of his taking care of her, and the character of his subsequent possession of the land was not changed either before or after her death, his possession after her death was not adverse to his coheirs.

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

McNalley, Kitchen & Harris, for appellant.

An agreement to will property upon the consideration that the promisee will perform certain services is good, where it is shown that the services were performed. 102 Ark. 30; 105 Ark. 494; 128 Ark. 1; 117 Ark. 228; Elliott on Contracts, vol. 3, § 2325, 40 Cyc. p. 1063, § 6; 33 L. R. A. 369. The heirs, devisees or trustees of the deceased promisor will be treated as trustees charged with the express duty of making proper conveyance. 3 Elliott on Contracts, § 2325; 33 L. R. A. 369; 102 Ark. 30. The statute of limitations will not run against the beneficiary of an express trust, unless the trustee expressly repudiates the trust or the circumstances are such as to raise a presumption of the extinguishment of the trust. 46 Ark. 25; 101 Ark. 230; 52 Ark. 76; Story's Eq. Juris. 14 ed. vol. 3, § 1973. A trustee cannot acquire title to real estate by limitations, when there has been no disclaimer of the trust. 52 Ark. 76; 101 Ark. 230. The rule that the statute of limitations will not bar a trust applies to those express trusts that are not cognizable of law. 20 Ark. 195; 16 Ark. 124. The statute does not move in favor of a vendor who is under obligation to convey the legal title, unless he has given notice of his intention not to convey. 44 Ark. 452; 79 Ark. 100; 85 Ark. 584.

Pope & Brown, for appellee.

Under a contract to make a will, where promisor dies without doing so, the breach occurs at the death of the promisor, and the cause of action arises at that time, and the statute of limitations then begins to run. 40 Cyc. 1071; 117 Ga. 94; 42 S. W. 46; 63 N. E. 782; 7 Fed. 82. Unless action be commenced within five years from such time, the promisee's rights are barred. C. & M. Digest, § 6955. Appellees were not parties to an express trust, such as would avoid the running of the statute. See 11 Am. Dec. 417; 46 Ark. 34; 25 Cyc. 1153. There was no relation of vendor and vendee here.

HUMPHREYS, J. On the 27th day of April, 1921, appellant instituted suit in the Union Chancery Court against appellees to compel them to convey the frl. W. half of sec. 5, and frl. E. half of sec. 6, tp. 20 S. R. 16 W., Union County, Ark., to him, in performance of the terms of a contract entered into on the 20th day of June, 1901, between appellant and his mother, Alvira Goff, whereby she agreed in writing to will him all her real estate in consideration that he remain with and take care of her during the remainder of her life. It was alleged in the bill that he immediately entered upon the performance of the contract, and fully complied with the terms and conditions thereof by caring and providing for his mother until her death on the 1st day of December, 1915; that on said date she died intestate the owner of said real estate, leaving surviving, as her only heirs, appellant and appellees; that during the lifetime of his mother they resided upon said lands, and that after her death he occupied them openly, exclusively, and adversely, paying the annual taxes thereon, under absolute claim of ownership.

Mrs. M. J. Reams, one of the defendants in the case, conveyed her undivided interest in said lands to appellant, and filed no answer.

Annie Beaty for herself, and Walter Brown, guardian *ad litem* for G. W. Goff, filed a joint answer, admitting that their mother died intestate, owner of said lands, but denying all other material allegations in the bill; and, by way of further defense, pleading the five-year statute of limitations in bar of appellant's right to enforce the alleged contract.

The cause was submitted to the court upon the pleadings and testimony introduced by the parties responsive to the issues, which resulted in a dismissal of appellant's bill because the action was not commenced within five years after the death of Alvira Goff.

The record reveals that Alvira Goff donated the land in question in 1880 from the State of Arkansas; that she and all her children, except Annie Beaty, immediately moved on the place, cleared it up, and established a home; that the family consisted of the mother and four children, George, Mary, Rachel, and Bruce (appellant); that at the time George was twenty-one and Bruce nine years old; that the girls, as well as the boys, cleared and cultivated the land; that Rachel resided in the home until she attained to the age of thirty, at which time she died, leaving no direct heirs; that Mary lived in the home a number of years before she married and moved to a home of her own; that three years after moving on the place George developed a mild form of insanity and was sent to the asylum for treatment, where he remained for six months; that he was not entirely cured, but returned and continued to reside in the home and cultivate a part of the land until two years after the mother died, when he was again sent to the Hospital for Nervous Diseases, where he has since remained; that, when affliction incapacitated George, the management of the farm devolved upon Bruce; that on the 20th of June, 1921, Bruce accompanied his mother to town, where she executed the contract sought to be enforced, which is as follows:

"Junction City, Arkansas, June 20, 1901.

"I have agreed to will all my real estate of land to my son, B. B. Goff, for taking care of me and caring for me, Alvira Goff.

"W. half W. half S. 5 T. 20 R. 16 ..... 55.92
"E. half E. half, S. 6, T. 20, R. 16 ..... 56.35

"One dollar to other heirs. 112.27

her
"ALVIRA X GOFF.
mark

"J. R. Bishop, J. P."

That when executed the contract was delivered to and accepted by him as an inducement to get him to remain at home; that he had expressed an intention to leave home unless some such arrangement was made; that the execution and delivery of the contract was not divulged to appellant's brother and sisters until three months before the institution of this suit; that, prior to the execution of the contract, Bruce was manager of the farm, and handled all the proceeds derived therefrom, expending same in the maintenance of the farm and family; that his relationship to the place before and after the agreement was the same; that six or seven years before his mother died he married and took his wife into the home; that after his mother died appellant, his immediate family, and George remained upon the place for about two years; that George was then sent to the asylum, since which time appellant has resided upon the farm and applied the proceeds therefrom to the payment of improvements, repairs, taxes, and support of his family, accounting to no one for rents and profits; that no demand was made upon him for rents and profits by his brother and sisters; that about three months before bringing suit appellant attempted to get his sisters to join him in an oil lease upon the lands to J. M. Brown; that they refused to do so, whereupon he asserted title to the lands under the contract for a will to them.

While the testimony is somewhat conflicting as to the contributions of the several children toward the support of their mother, the decided weight thereof shows that the appellant met all the requirements of the contract after June 20, 1901, in maintaining and supporting his mother.

Appellant contends that under the record made he is entitled to the specific performance of the contract, or, failing in that, to a decree quieting his title by reason of seven years' adverse possession of the land.

(1) The right of action, under the contract, accrued against the heirs of Alvira Goff at the time of her death. 40 Cyc. 1071. She died on the first day of December, 1915. Under § 6955, Crawford & Moses' Digest, suits upon contract in writing must be brought within five years after the right of action accrues. This suit was not commenced until the 27th day of April, 1921, more than five years after the action accrued, hence was barred by the five years' statute of limitations.

(2) There was no change in the attitude of appellant toward the land before and after the execution of the contract in question. The character of his possession was exactly the same. He resided with his mother upon it, managing it, and controlling it for the benefit of the family. No claim of adverse or exclusive possession was asserted or claimed against his mother. In fact, absolute secrecy was maintained concerning the execution of the contract for a will. After the death of Alvira Goff, appellant and appellee, G. W. Goff, occupied the farm together for two years, each cultivating a part of it. Five years after the death of Alvira Goff, appellant tried to get his sisters to join in an oil lease upon the lands to J. M. Brown. All of appellant's acts and conduct relating to the possession of the lands, after the death of Alvira Goff, are perfectly consistent with, and may be attributed to, a tenancy in common.

The decree is therefore affirmed.

SEASE v. STATE.

Opinion delivered February 19, 1923.

1. CRIMINAL LAW—INSANITY—ERROR CORAM NOBIS.—Where the question of accused's sanity was suggested either formally or informally at or before trial, the writ of error *coram nobis* is not available after conviction to raise that question for the purpose of setting aside the judgment.
2. CRIMINAL LAW—REFUSAL OF CONTINUANCE—ERROR CORAM NOBIS. —Refusal of a continuance in a murder trial on the ground that defendant was insane, if error, could be corrected only by appeal, and not by writ of error *coram nobis*.
3. CRIMINAL LAW—INSANITY—ERROR CORAM NOBIS.—Where, in a murder trial, there was evidence which suggested defendant's insanity, and, in support of a writ of error *coram nobis*, the evidence adduced was merely cumulative of that adduced at the trial, and tended to show general insanity, which began long before commission of the homicide, it was not error to refuse the writ.

Certiorari to Baxter Circuit Court; *Walter L. Pope*, Judge; affirmed.

W. U. McCabe, Joe George and *Mehaffy, Donham & Mehaffy,* for appellant.

It is within the province of the circuit court, or the judge thereof in vacation, upon a proper showing, to issue a writ, returnable to the court, to inquire into the alleged insanity of a prisoner at the time set for execution. 115 Ark. 317; 35 Ark. 517; 124 Wis. 634; 4 A. & E. Ann. Cases, 389, and note on p. 393. When the application is made to the judge in vacation for the writ, a full and complete hearing is not contemplated in law, hence at that time a *prima facie* showing is sufficient, or at most such showing as would raise reasonable grounds to believe that the prisoner is insane. C. & M. Digest § 3055. Though the court is held in *Kelley* v. *State,* 156 Ark. 188, that the writ of error *coram nobis* will not be to inquire into the convict's mental condition at the time of the trial, where his insanity was brought to the attention of the court by suggestion of counsel during the trial, yet we think the "suggestion" meant was

a calling of the court's attention thereto in such manner as to require action by the court. However that may be, we think the writ will lie to inquire into the insanity of a prisoner at the time set for his execution.

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

The writ of error *coram nobis* will not lie to contradict or put in issue any fact that has already been adjudicated in the case. 58 Ark. 229. It is available to set aside a judgment of conviction after the expiration of the term of court, if the defendant was insane at the time of the trial, and that fact was *not made known or suggested at the trial. Kelley* v. *State,* 156 Ark. 188. But it will not lie to contradict or put in issue any fact already adjudicated in the action. *Id.* Petitioner's insanity has already been put in issue and decided against him. *Sease* v. *State,* 155 Ark. 130. His sanity having been affirmatively established in the murder trial, it will be presumed to continue until the contrary is shown. 19 Ark. 533; 59 Ark. 246; 10 R. C. L. 872, and cases cited; *Id.* 879. And the burden was on the petitioner to overthrow this presumption.

McCULLOCH, C. J. At a special term of the circuit court of Baxter County held in May, 1922, the petitioner, Herbert Sease, was convicted of the crime of murder in the first degree and sentenced to death by electrocution. The judgment of conviction was, on appeal, affirmed by this court. *Sease* v. *State,* 155 Ark. 130. After the judgment of affirmance by this court the date of the execution was fixed by executive proclamation, and on December 12 the petitioner, through his counsel, presented to the judge of the circuit court in vacation a petition for a writ of error *coram nobis* for the purpose of inquiring into appellant's sanity at the time of his trial and conviction. Numerous affdavits were presented to the circuit judge in support of the petition, but upon examination thereof he refused to issue the writ. The record made be-

fore the judge in vacation has been brought here on certiorari for review.

The case is, we think, ruled by the principles announced by this court in the recent case of *Kelley* v. *State,* 156 Ark. 188. We decided in the case just cited that, where the question of the insanity of the accused was suggested, either formally or informally, at or before the trial, the writ of error *coram nobis* was not available after conviction to raise that question for the purpose of setting aside the judgment.

The testimony offered in support of this writ was merely cumulative of the testimony that was offered in the trial and tended to show general insanity dating back prior to the day of the homicide. The accused, at the trial, asked for a continuance of the cause on the ground that he was insane, and the refusal of the court to grant the continuance was one of the assignments of error on the appeal to this court. If the trial court erred in failing to suspend the trial on account of the alleged insanity of appellant, it was an error which could only be corrected by appeal.

The petition now before us is sufficiently broad, however, to constitute an allegation of insanity at the present time and to invoke relief by suspension of the sentence as long as the condition of insanity of the accused exists.

In our former decisions we have recognized the power of the court to grant relief in capital cases, where the convict is insane when the time comes for executing the judgment. This remedy, however, as shown in the Kelley case, *supra,* must be exercised with caution, and the court determines, as a preliminary question, whether there is sufficient ground for entering upon an investigation of the question of the insanity of the convict. As we have already said, the testimony now adduced is merely cumulative of that which was adduced at the trial, and tends only to show general insanity, which began long before the commission of the homicide. It is true

there were introduced the affidavits of physicians who testified as experts, but that testimony is merely cumulative. There was no showing of a substantial change in petitioner's condition since the original trial.

We are of the opinion that the circuit judge was justified, under the circumstances, in refusing to grant the writ. The writ of certiorari is therefore quashed, and the judgment of the circuit judge in vacation is affirmed.

JEROME HARDWOOD LUMBER COMPANY v. BEAUMONT LUMBER COMPANY.

Opinion delivered February 19, 1923.

1. SALES—FAILURE TO ACCEPT GOODS—DEFENSE.—In an action against a buyer of lumber for refusing to accept lumber sold, a defense that lumber bought from plaintiff under another and independent contract was inferior and not up to the contract was no justification for refusal to accept the lumber in question, regardless of the fact that the same kind of lumber was specified in both contracts.
2. CONTRACTS—EFFECT OF BREACH.—The rule that one who first breaks a contract cannot maintain a suit to recover upon it and that such breach releases the other party from performance applies to performance by the respective parties of the same contract, not to performance of an independent contract.
3. APPEAL AND ERROR—ADMISSION OF EVIDENCE—HARMLESS ERROR.—In an action by a seller against a buyer for refusing to accept lumber, where, on undisputed testimony, the seller was entitled to recover, assignments of error with reference to the introduction of evidence were immaterial.
4. SALES—ORDER FOR LUMBER NOT INDEFINITE.—An order for four carloads of lumber, specifying the kind and grades, was not too indefinite as to the quantity nor as to the quality of the different grades ordered; as the seller had a right to deliver four carloads of at least minimum capacity, and of any of the kinds specified, without regard to the quantity of the different grades.
5. SALES—VERDICT.—Evidence as to the amount of damage sustained by breach of a contract to accept four carloads of lumber *held* sufficient to sustain verdict.

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

Williamson & Williamson, for appellant.

1. The purported contract is void and unenforceable for vagueness and uncertainty. No contract has been proved for any definite quantity of lumber, nor for any legally ascertainable total contract price. 23 Ark. 63; 117 Mo. App. 19; 96 Ark. 188.

2. The court erred in refusing to submit appellant's defense to the jury. The failure of one party to a contract to comply with its terms releases the other party from compliance. 65 Ark. 320; 119 Ark. 1; 88 Ark. 422.

Rogers, Barber & Henry, for appellee.

1. A properly identified contract was proved. As to the contention that no contract for a definite quantity of lumber was proved, the cases relied on by appellant are not in point. The law applicable is stated in 96 Ark. 184, 188. See also 7 Ind. App. 462, 34 N. E. 579.

2. Testimony as to the two contracts prior to the one sued upon was not within the issue raised by the pleadings, and was inadmissible. 7 Ark. 470; 33 Ark 307; 24 Ark. 371. The contracts were separate and distinct. An alleged breach of one of the prior contracts was not admissible. 85 S. W. 850; 68 Ark. 225; 58 S. W. 252.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages arising from an alleged breach of a contract for the sale by appellee to appellant of four carloads of lumber to be shipped from Starks, Louisiana, to appellant's place of business in Drew County, Arkansas.

It is alleged in the complaint that appellant entered into an agreement (in the form of a written order and written acceptance) whereby appellant agreed to purchase four carloads of lumber of the description set forth in the written order, and that appellant subsequently broke the contract by refusing to accept the lumber. Damages are laid in the sum of $1,324.12, alleged

to be the difference between the contract price and the price for which the lumber sold on the market after appellant's refusal to accept it.

There was a trial of the issues before a jury, and the verdict was in appellee's favor for $617.06 damages.

Appellants defended below on the ground that appellee had committed the first breach of the contract by shipping inferior lumber not up to contract under a former order, but the court ruled that this constituted no justification for appellant's refusal to accept the lumber, and gave the jury a peremptory instruction in favor of appellee on that issue. We are of the opinion that the trial court was correct in giving the peremptory instruction in appellee's favor.

Appellee was doing business at Beaumont, Texas, and appellant was engaged in the lumber business at Jerome, in Drew County.

All the communications between the parties with respect to this and other transactions between them were in writing. Appellant sent in a written order to appellee on April 1 for two carloads of lumber, and they were shipped, one from Devers, Texas, and the other from Hawthorne, Louisiana. An order was sent in for another car on April 6, 1920, and this car was shipped from Starks, Louisiana. The order involved in the present case embraced four carloads, and was dated May 15, 1920, the acceptance of appellee being dated May 18. Each of the orders was separate and had no reference to each other. There is not in the record any antecedent correspondence which could be treated as a part of either of the contracts or which throws any light upon them.

When the first carload of lumber shipped under the order of April 1, 1920, reached appellant's place of business, there was a refusal of acceptance, on the ground of its being not up to the terms of the contract, but appellee accepted appellant's inspection and settled on the

latter's terms. When the second car under the order of April 1 was received by appellant's place of business, it was also found to be not up to specifications, and appellee accepted appellant's inspection on this car and permitted settlement to be made on appellant's own terms. This car was received after the order of May 15, 1920, was given and accepted, and it was at that time that appellant undertook to cancel the order on the ground that the shipments under a prior order were not up to the specifications of the contract. The car shipped under the order of April 6, 1920, was inspected by a national inspector, in accordance with the terms of the contract, and was accepted by appellant without complaint.

The contention of appellant is that the fact that the two carloads of lumber shipped under the order of April 1, 1920, not being up to the terms of the contract, justified a refusal to perform the contract represented by the order of May 15, 1920.

We recognize the well-established rule that one who first breaks a contract cannot maintain suit to recover upon it, and that the failure of one party to comply with a contract releases the other party from performance. *Missouri Pacific Ry. Co.* v. *Yarnell,* 65 Ark. 320; *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336; *John A. Gauger & Co.* v. *Sawyer & Austin Lbr. Co.,* 88 Ark. 422; *Ford Hardwood Lbr. Co.* v. *Clement,* 97 Ark. 522; *Keopple* v. *Delight Lbr. Co.,* 105 Ark. 233; *Ensign* v. *Coffelt,* 119 Ark. 1.

The application of this rule is confined, however, to performance by the respective parties of the same contract, and not to the performance of distinct and independent contracts. The breach by one party to a contract does not release the other party from performance of another independent contract. 5 Page on Contracts, § 2976.

There is not a particle of proof in this case of any relation between the different contracts, nor is there any proof that the cars of lumber last ordered were not in

accordance with the contract. Each order was separate, and constituted a distinct and independent contract, and, as before stated, the fact that some of the lumber shipped under the first order was not up to specifications affords no justification for the refusal to accept the lumber tendered under the last contract.

One of the witnesses introduced by appellant testified that it was their method of business to buy lumber of certain grades for a special trade, but there is no testimony that this was communicated to the appellee or that it was incorporated in the order, for the order itself is in writing, and gives sufficient specification of the lumber to be shipped. Nor does the fact that all of the orders specify the same kind of lumber affect the question of appellant's right to refuse performance of the contract on account of the lumber shipped on the former order being defective. Each order contained its own specifications of lumber to be shipped, and appellant undoubtedly had the right to reject any lumber which was not in accordance with the specifications, but this is quite another thing from a refusal to permit performance of the last contract because there had been a breach in the performance of an independent contract.

There are several assignments with reference to the introduction of evidence, but these assignments become immaterial since we hold that, according to the undisputed evidence, appellant committed an unjustified breach of the contract, and appellee is entitled to recover damages on that account.

It is also contended that the order for the lumber is too indefinite to constitute a binding contract, in that it merely described the quantity of lumber as four carloads, without any other further specifications as to quantity. The order in this regard reads as follows:

"4 carloads 4-4" No. 2 common and better plain oak as follows:

"4-4 FAS	$150.00
"4-4 No. 1 common	110.00
"4-4 No. 2 common	65.00"

The argument is that four carloads of lumber may mean any quantity that appellee might see fit to ship in four separate cars. It appears from the record that the capacity of railroad cars is from 8,000 to 15,000 feet of lumber. Under the terms of the contract, appellee had a right to deliver four carloads of at least minimum capacity, and the specification, we think, was not too indefinite to constitute an enforceable contract.

It is also contended that the contract was too indefinite because it did not specify the quantity of lumber of the different grades. The effect of the contract is to bind the purchaser to accept carloads of lumber of any of the kinds specified without regard to the quantity of the different grades. In other words, the contract constituted an undertaking to accept lumber of any of the grades specified.

Finally, it is contended that the verdict is not sustained by evidence sufficient to show the extent of the damage, but we are of the opinion that the evidence shows even more damages than the jury allowed. It is disclosed in the evidence that the parties corresponded for a time after appellant's attempt to cancel the order, in an effort on the part of appellee to induce appellant to accept the lumber, and that the lumber was resold on the market within a reasonable time after appellant refused to accept it.

Judgment affirmed.

WOOD and HART, JJ., dissent.

TOLER v. BROWN.

Opinion delivered February 19, 1923.

1. WILLS—HOLOGRAPHIC WILL.—Under Crawford & Moses' Dig., § 10494, an unattested will written in the handwriting of the testator may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signatures, and, where there is no testimony tending to impeach the

credibility of the witnesses offered in support of a holographic will and no evidence tending to contradict the fact that the instrument is in the handwriting of the alleged testator, the testimony must be treated as undisputed, and the will established.

2. WILLS—FINDING THAT LETTER WAS NOT HOLOGRAPHIC WILL.—Testimony held to sustain a finding that a certain letter was not a holographic will.

3. APPEAL AND ERROR—OBJECTIONS NOT RAISED BELOW.—Objections to instructions in proceedings to contest will, not made in trial below, will not be considered on appeal.

4. WILLS—CONTEST—AMBIGUOUS VERDICT.—A verdict, "We, the jury, find that the instrument purporting to be the will of * * * was not executed by him, or, if executed by him, is not a valid will, as it was not his intention at the time it was written that it should be his will," *held*, though slightly ambiguous, a sufficient finding that the instrument was not a will, particularly where the objection to its form was not made below.

Appeal from Grant Circuit Court; *W. H. Evans*, Judge; affirmed.

Thos. E. Toler and *R. R. Posey*, for appellant.

The burden of proof rested upon the contestant to show fraud or forgery. 13 Ark. 479; 19 Ark. 533; 29 Ark. 151; 49 Ark. 367; 31 Ark. 175; 80 Ark. 204. It is not necessary that a writing, to be a valid will, be in any particular form or be couched in language technically appropriate to its testamentary character. It is sufficient if it discloses the intention of the maker. 1 Jarman on Wills (6th ed.); 7 Appeal Cases 409. Instances where wills have been held valid which were expressed in even less direct language may be found as follows: 50 Cal. 595; 1 Jones' Law (N. C.) 150; 118 N. C. 202; 107 Ky. 293; 6 Dana 257; 21 L. Ann. 280; 99 Am. Dec. 729; 130 Pa. St. 342; 61 Md. 206; 67 Md. 449; 105 Ark. 554. The letter was testamentary in character and intended to direct the disposition of his property after death. 90 Ark. 152; 98 Ark. 553; 104 Ark. 439; 122 Ark. 407. The expression in the letter "and will the rest a dollar apiece" was sufficient to designate the child of the testator. 86 Ark. 368; 94 Ark. 39; 141 Ark. 484.

T. Nathan Nall and *Isaac McClellan,* for appellee.

The jury had ample grounds for declaring the purported will a fraud or forgery. The credibility of the witnesses was a question for the jury. 222 S. W. 722; 80 Ark. 204; 122 Ark. 411; 222 S. W. 725. Verdicts will not be overturned where there is substantial evidence to support them. 130 Ark. 465; 142 Ark. 159. Appellant's peremptory instruction was properly refused. Conflicting evidence is always a matter for the jury to pass on. 65 Ark. 116; *Id.* 225; 73 Ark. 377; 76 Ark. 326. Appellant raised no objection at the trial to instruction No. 1 for appellee, and it is too late now. 78 Ark. 490; 81 Ark. 195; 85 Ark. 326; 91 Ark. 43. Objection cannot be made for the first time to the form of the verdict, on appeal. 119 S. W. 267; 90 Ark. 482. The newly discovered evidence upon which a new trial was asked was only cumulative. 66 Ark. 523; 96 Ark. 400; 97 Ark. 92; *Id.* 290; 99 Ark. 78; 103 Ark. 589.

McCULLOCH, C. J. Finis Gallion, a young man residing in Grant County, Arkansas, entered the military service of our government during the war with the Central Powers of Europe, and was sent to Camp Beauregard for training. Later he went to France, and died there while still in the military service.

A letter purporting to have been written by Finis Gallion during his stay at Camp Beauregard to his brother, Ed Gallion, was offered for probate in Grant County as a last will and testament, and the probate court admitted the instrument of writing as a holographic will of Finis Gallion, on proof that the signature and body of the instrument were in the handwriting of the alleged testator. There was an infant son of the alleged testator, and his guardian prosecuted an appeal to the circuit court of Grant County from the order admitting the instrument to probate as a will, and on the trial of the issue before a jury the following verdict was returned:

"We, the jury, find that the instrument purporting to be the will of Finis Gallion, deceased, was not executed by him, or, if executed by him, is not a valid will, as it was not his intention, at the time it was written, that it should be his will, therefore we find for the contestant, Mrs. G. N. Brown, as guardian of Carl Gallion, a minor."

The court rendered a judgment upon the verdict to the effect that the instrument offered was not the will of Finis Gallion, and an appeal has been prosecuted by the executor and by Ed Gallion, the legatee under the will.

At the trial of the cause appellant introduced three witnesses, who testified that they were familiar with the handwriting of Finis Gallion, and that the offered instrument was in his handwriting. One of the witnesses testified that he was present at Camp Beauregard when the letter was written, and that he recognized it as one which Gallion had handed him to read before he mailed it.

Our statute provides that an unattested will, written in the handwriting of the testator, "may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature * * *." Crawford & Moses' Digest, § 10494.

There was no testimony directly impeaching the credibility of the witnesses offered in support of the will, and, in the absence of any evidence tending to contradict the fact that the instrument is in the handwriting of the alleged testator, the testimony must be treated as undisputed and the will established. *Arendt* v. *Arendt,* 80 Ark. 240. In the present case, however, there is testimony tending to show that the instrument in question is not in the handwriting of Finis Gallion. The letter is on two separate sheets, the testamentary portion of the letter being found entirely on the second sheet.

Tom Gallion, a brother of Finis, testified that he was familiar with his brother's handwriting, and that the second sheet of the letter was not in his brother's hand-

writing. The contestant also introduced three other witnesses, who testified as experts, and stated that they had examined the letter, and that the two sheets were not in the same handwriting.

There are other circumstances adduced in evidence which tend to contradict the fact that the whole of the letter was in the handwriting of Finis Gallion. There was sufficient evidence, therefore, to support the finding of the jury.

The only objection made by appellant in regard to the court's charge to the jury is the objection to the refusal to give a peremptory instruction. This ruling was correct, as there was sufficient evidence to submit the issues to the jury.

Objections are urged here to several of the instructions given by the court at the request of the contestant, but as timely objection was not made at the trial below, we cannot consider these assignments.

It is also urged here, for the first time, that the verdict is in the alternative and does not support the judgment. There is a slight ambiguity in the form of the verdict, but the court interpreted it to be a finding against the execution of the will, and appellant made no objection to the form of the verdict. It is reasonably certain, from the language of the verdict, that the jury meant to find that the instrument was not executed by Finis Gallion, and if it was thought to be in doubt there should have been objection made to its form.

Finding no error on the record of the trial, the judgment must be affirmed, and it is so ordered.

ROBERT v. BROWN.

Opinion delivered February 19, 1923.

1. EVIDENCE—COPY OF RECORD.—If a plaintiff in ejectment is not able to introduce an original deed in evidence a purported copy from the record is not admissible under Crawford & Moses' Dig., § 1531, unless certified by the recorder.
2. EJECTMENT—TITLE OF PLAINTIFF.—A plaintiff in ejectment must rely on his own title, and not upon the weakness of his adversary's title.

Appeal from Lawrence Circuit Court, Eastern District; *Dene H. Coleman,* Judge; affirmed.

E. H. Tharp, for appellant.

The court's theory that only certified copies of deeds in the chain of title could be considered by the jury was erroneous. That is a convenient method by which deeds may be certified by the clerk and introduced in evidence without other proofs, but it was not intended as the exclusive method. If the court holds, however, that certified copies of the exhibits should have been introduced, we ask that the case be remanded to the end that it may be more fully developed. 75 Ark. 423.

W. A. Cunningham, for appellee.

1. Crawford & Moses' Digest, § 1531, in providing that proof of a recorded instrument, when lost or not within the power or control of the party wishing to use the same, might be made by introduction of the record, or a copy thereof, certified by the clerk, intended to provide an exclusive method of making such proof.

2. In ejectment the plaintiff can rely only on the strength of his own title, not upon the weakness of his adversary's. 122 Ark. 375.

WOOD, J. The appellant instituted this action against the appellee to recover certain lands which are described in appellant's complaint. He deraigned title from the State through various mesne conveyances, which he sets out, copies of which he purports to make exhibits to his complaint.

The appellee, in his answer, alleged that he was the owner of the land described in the complaint, and specifically denied each and every muniment of title set up in appellant's complaint.

In setting out the various conveyances in the chain of title appellant alleged that they were duly recorded. To establish his title appellant called as a witness E. H. Tharp, who testified that he was the attorney for the appellant, and as such examined the record of title, and he exhibited what he designated muniments of title dating back from the government on up to the present. He stated that the deeds which he exhibited were copies of the record; that the originals could not be introduced. He had compared the records and made copies of the deeds and instruments affecting appellant's title, and offered these copies in evidence.

The court refused to permit the instruments to be considered as evidence, because same were not certified copies and therefore did not meet the requirements of the law to show the chain of title set up by the appellant. At the conclusion of the testimony the appellee moved the court to instruct the jury to return a verdict in his favor, which motion the court granted. The jury returned a verdict as directed. The court entered a judgment in favor of the appellee in accordance with the verdict, from which is this appeal.

Section 1531 of Crawford & Moses' Digest provides as follows: "If it shall appear at any time that any deed or instrument, duly acknowledged or proved and recorded as prescribed by this act, is lost or not within the power and control of the party wishing to use the same, the record thereof, or a transcript of such record certified by the recorder, may be read in evidence without further proof of execution."

The appellant did not meet the requirements of the statute. He did not introduce the original deed, but offered only purported copies from the records, which were not certified by the recorder, as the statute requires. When the purported copy of the record of a deed is of-

fered in evidence it must be certified by the recorder, as prescribed by the statute. "A plaintiff in ejectment must rely upon his own title, and not upon the weakness of the title of his adversary." *Boynton Land & Lumber Co.* v. *Hawkins,* 122 Ark. 374.

The judgment is correct, and it is therefore affirmed.

DAVIS v. METCALF & HALEY.

Opinion delivered February 19, 1923.

1. BROKERS—JURY QUESTION.—In an action against brokers for the excess for which they sold plaintiff's land over the list price, and for the commission paid them, based on the ground that they fraudulently concealed the price paid and retained the excess, the question whether plaintiff agreed to allow defendants as their commission all they might receive over the list price *held* for the jury; hence it was error to direct a verdict for defendants.
2. BROKERS—AGREEMENT AS TO COMMISSION.—A broker may make a contract whereby he will be entitled to the difference between the price the seller agrees to accept and the amount the purchaser agrees to pay; but such a contract must be plainly expressed, in order to relieve the broker of the duty he owes his principal to make full disclosure concerning the terms of the negotiations.
3. BROKERS—FRAUD—JURY QUESTION.—Whether brokers perpetrated a fraud on their principal by failing to disclose the fact that they had sold his land for a price in excess of the list price and appropriated the difference, *held* for the jury.
4. BROKERS—FRAUD—FORFEITURE OF COMMISSION.—If a broker violates his duty to his principal and fraudulently misrepresents the facts concerning his transaction, and undertakes to derive any advantage therefrom to himself, he forfeits any compensation that would otherwise be due him, and all gain thereby belongs to his principal.

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

Appellant *pro se.*

The case should have been submitted to the jury on the disputed question of fact as to whether or not

the plaintiff agreed to give the defendants all over the sum of $1,500. It is the duty of a broker to make to his principal a full, fair and prompt disclosure of all the facts and circumstances affecting his principal's interests. Any advantage accruing to him by violation of this duty must be made good to the principal, and not only so, but he forfeits his compensation also. 126 Ark. 61; 196 Pa. St. 205; 79 Am. St. Rep. 702; 62 So. 254; 7 Ala. App. 358; 80 Atl. 164; 114 Md. 418; 165 N. W. 294; 36 Neb. 869; 55 N. W. 279; 113 Pac. 1133; 58 Ore. 195; 166 Ill. App. 402; 190 Ill. App. 493; 140 N. W. 892; 159 Iowa 424; 169 Ill. App. 456; 178 S. W. 566; 95 Minn. 350; 104 N. W. 543; 2 App. Cases (D. C.) 387; 124 Mich. 417; 46 N. J. Eq. 595; 110 N. W. 1031; 133 Iowa 567. The burden of proof, in such cases, is on the agent to establish his fairness in the transaction. 48 Cal. 215; 1 Hun (N. Y.) 303; 2 Strob. (N. C.) Eq. 262; 22 N. J. Eq. 481. A broker guilty of fraud in executing his agency forfeits his right to commission. 66 Kan. 427; 87 N. E. 70; 80 Kan. 515; 87 N. Y. App. Div. 518; 20 Pa. Sup. Ct. 369; 92 Fed. 32, 34 C. C. A. 190; 81 Conn. 623.

WOOD, J. This is an action by the appellant against the appellees. The appellant alleged that in the fall of 1919 he placed in the hands of Metcalf & Haley, real estate brokers, certain lands for sale. The price fixed for the sale of the land was $1,500; that they were to receive ten per cent. commission for making the sale. They sold the land for the sum of $1,700, and prepared a deed to the purchaser in which they fraudulently concealed from the appellant the fact that the land had been sold for $1,700, and fraudulently represented that they had sold the same for $1,500. Appellant further alleged that by reason of the fraud and concealment he had been cheated out of the sum of $200, and that appellees were not entitled to retain the sum of $150 which he had paid them as their commission. He prayed judgment in the sum of $350.

The appellees, in their answer, admitted that they sold the land for $1,700, but denied that they were to receive only a commission of ten per cent. of the purchase price. They alleged that, when the land was listed with the appellees, the appellant represented that Wilson Mercantile Company of Imboden had a lien on the land for $1,200, which would have to be paid when said land was sold, and that the appellant would have to receive the sum of $150 before he would execute a deed to his equity in the land, which was all the interest he owned therein, and that after these two amounts were paid the appellees could have, as their remuneration for selling the land, all it brought over and above those amounts, and that the land was sold under such agreement, and they had settled with the appellant on those terms. They therefore denied that they were indebted to the appellant in any sum.

The appellant testified in his own behalf that he was the owner of 160 acres of land which he listed with appellees to be sold for $1,500, and they were to receive ten per cent. commission for making the sale. Appellant ascertained later that appellees had sold his land for $1,700. He demanded the $200 which appellees had received over the price for which the land was listed, and appellees denied that such was the contract. Metcalf, with whom the appellant had the conversation, stated, "Oh, well, that is some of Mr. Haley's doings. He is in the habit of pulling off that kind of a deal." Witness asked Metcalf what they were going to do about it, and he replied that they would straighten it up. Witness testified that one E. B. Sims and LeRoy Sims were present when they had this conversation, and Metcalf promised that he would settle it. The appellant signed the deed and received $50, but didn't know at the time that the place was sold for more than $1,500. He afterwards discovered it when Sims came to see about the interest due on the mortgage. Sims then showed ap-

pellant the sale contract. Appellant received but $150 out of the sale.

There was testimony corroborating the testimony of the appellant to the effect that the appellant listed the land with the appellees to be sold for $1,500, and that the appellees were to receive ten per cent. commission for selling the same. Witness A. B. Sims also corroborated the testimony of the appellant as to the conversation with Metcalf after the sale was consummated.

Appellee Haley testified that he and Metcalf were partners in the real estate business, and that appellant listed with them 160 acres of land to be sold for $1,500, but afterwards it was agreed that they should receive all they could over $1,500. Appellant stated to witness that all he wanted was the sum of $150, and the buyer to assume the mortgage on the place in the sum of $1,200. Witness detailed the circumstances under which the contract between them was entered into. A contract was introduced in evidence between the appellees and one Sims, showing that the property was sold for $1,700. The testimony of the appellant tends to show that he had no knowledge that the contract specified that the land was sold for $1,700.

The appellant requested the court to instruct the jury to the effect that, if appellees sold the property for a greater sum than that fixed by the plaintiff, it was their duty to advise him of such fact and to account to him for the excess; that, if they concealed from him the fact that they were receiving for the property more than the listed price, and failed to so advise him, they should return a verdict for the appellant for such sum over and above the sum of $1,500 and in addition the sum of $150 which the appellant paid for his commission; that they forfeited the sum of $150 by reason of the fraudulent concealment of the true facts. The court refused to give the appellant's prayer for instruction.

The court instructed the jury as follows: "He (appellant) testified that he got exactly what he was to get under the contract, which was $150 and the mortgage as-

sumed by the buyer, and he was released from it, and the undisputed evidence shows that he (appellant) got the $150 and the mortgage released or assumed by the other party, so you will return a verdict for the defendant." The jury returned a verdict as directed. The court entered a judgment in favor of the appellees, dismissing appellant's complaint and for costs, from which judgment is this appeal.

The court erred in directing the jury to return a verdict in favor of the appellee. Under the testimony in the record it was an issue of fact for the jury as to whether or not the appellant had agreed to allow the appellees as their commission for making the sale of the land all they might receive over the listed sale price of $1,500. There was a sharp conflict on the issue, and the same should have been submitted to the jury, under proper instructions.

The law applicable to this branch of the case is announced in *Bennett* v. *Thompson,* 126 Ark. 61 (quoting syllabus): "The duty rests upon a broker, the same as upon any other agent, to make disclosures to his principal of the terms of the negotiation so that the principal may act advisedly in determining whether or not the proposal is satisfactory. A broker may make a contract whereby he will be entitled to the difference between the price the seller agrees to accept and the amount the purchaser agrees to pay, regardless of what that amount is, but such a contract must be plainly expressed in order to relieve the broker of the duty he owes to his principal to make full disclosure concerning the terms of the negotiation."

On the issue as to whether or not the appellant is entitled to recover from the appellees the sum of $150 which they had received as commission for making the sale, it suffices to say that the appellant conceded that the appellees were entitled to this amount for making the sale, if there was no fraud perpetrated by appellees on appellant. There was no testimony tending to prove that the appellees had perpetrated any fraud upon the

appellant in making the sale. The appellees sold the property for more than $1,500, and if they perpetrated a fraud at all upon the appellant it was in concealing from him the amount they had received in excess of the listed price and in retaining the same. The issue as to whether the appellant was entitled to recover the excess over $1,500, as we have stated, should have been submitted to the jury, under correct instructions. The issue as to whether or not appellees forfeited the $150 commission received by them, by reason of fraud perpetrated on the appellant, was one of fact also, which should have been submitted to the jury, under correct instructions.

The law is well settled that "it is the duty of one acting for another in the sale of real estate, whether for compensation or otherwise, to faithfully and truthfully make known to his principal all matters pertaining to the transaction; and if he violates this duty and fraudulently misrepresents the facts concerning his transactions, and undertakes to derive an advantage therefrom to himself, he forfeits any compensation that would otherwise be due him, and all gain made thereby belongs to his principal." *Jeffries* v. *Robbins,* 71 Pa. 852, and other cases cited in brief of learned counsel for appellant.

The prayer of appellant for instruction on the issue as to whether the appellees were entitled to hold the $150 commission was, in effect, a peremptory one, telling the jury that the appellees were guilty of fraudulent concealment, and that they thereby had forfeited the $150. The court did not err in refusing this prayer.

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

DEQUEEN LIGHT & POWER COMPANY v. CURTIS.

Opinion delivered February 19, 1923.

ELECTRICITY—AUTHORITY OF RAILROAD COMMISSION.—Acts 1919, No. 571, § 13, empowering the Corporation Commission to grant public service corporations a certificate of convenience and necessity, being repealed by Acts 1921, No. 124, § 25, and the latter act conferring jurisdiction on municipalities to regulate public service corporations operating within their limits, the Railroad Commission had no authority to grant a certificate of convenience and necessity to a company distributing electricity in a city under franchise from it.

Appeal from Pulaski Circuit Court, Second Division; *W. B. Brooks,* Judge; affirmed.

Abe Collins and *Lake & Lake,* for appellant.

1. The right of the Legislature to pass the repealing act No. 124 of 1921 falls within the powers reserved to the General Assembly by sections 6 and 11, art. XII, Constitution of 1874. 153 Wis. 592, 142 N. W. 491, L. R. A. (N. S.) 1915-F, 744; 25 U. S., Law. ed., 185; 146 U. S. 258; 36 U. S. Law. ed. 963; 25 L. ed. 185; 58 Ark. 407; 64 Ark. 83-87; 13 Fed. 754; 69 Ark. 521, 527; 82 Ark. 309, 318.

2. The alleged contract relied upon by appellee would amount to a surrender of the police power of the State, and as such is not binding on the State. *Pocahontas* v. *Central Power & Light Co.,* 152 Ark. 276; 153 Wis. 592; L. R. A. (N. S.) 1915-F, 751; 25 L. ed., 1079; 24 L. ed. 1036; 42 L. ed. 948; 19 R. C. L. 12; 28 L. ed. 585.

3. If, since the passage of act 124, *supra,* appellant was required to have a certificate of convenience and necessity, either the Arkansas Railroad Commission or the city council had the right to grant it, since the jurisdiction of the Corporation Commission was divided by the repealing act between the two. We do not believe such certificate is necessary, but as a matter of precaution have applied to both. As supporting the jurisdiction of the city council in the matter, see §§ 5, 17 and 25 of

the act. If there is any power in the Railroad Commission to grant it, it must come from section 1 of the repealing act.

4. Appellee succeeded to no exclusive rights through the alleged contract with the State. 200 U. S. 22, 34; 50 L. ed. 353, 359; 201 U. S. 400, 471, 50 L. ed. 801, 830; 246 U. S. 396, 412; 62 L. ed. 793, 801; 12 R. C. L. 194; Governor's Message to Legislature, 1921, p. 16; 25 R. C. L. 1037.

Pryor & Miles, for appellees.

1. It is clear that the Railroad Commission exceeded its authority in granting a certificate of convenience and necessity. By section 25 of the act No. 124, Acts 1921, section 13 of the act No. 574, Acts 1919, creating the Corporation, and defining its powers and duties, was repealed, and therefore, when this petition was filed, there was no law in existence conferring authority upon the Railroad Commission to grant such a certificate. This is the only question presented here for decision, and the other questions discussed by appellant are moot. However,

2. The Legislature had no right to pass act 124 of 1921, in so far as the rights of the appellees are concerned, if thereby "injustice shall be done to the corporators." Sec. 6 (concluding clause), art. XII, Const. 1874. Appellee, in good faith, and acting in accordance with the provisions of the act of 1919, surrendered its franchise in exchange for an indeterminate permit. It cannot be deprived of the right to operate under that permit by virtue of any certificate of necessity and convenience issued either by the Railroad Commission or by the city council of DeQueen without its day in court. This indeterminate permit amounted to a contract between the State and appellee. 153 Wis. 592, concurring opinion of Judge TIMLIN and cases cited; 135 N. W. 131. See also 224 U. S. 649; 233 U. S. 195; 111 N. Y. 1; 230 U. S. 58; *Id.* 101; 66 Mich. 606.

3. The indeterminate permit having been acquired by contract, it cannot be taken away or destroyed without impairing the obligation of the contract. 4 Wheat. 517; 3 Wall. 51; 95 U. S. 104; 115 U. S. 650; *Id.* 683; 172 U. S. 1; 3 Mich. 330; 113 Fed. 930; 201 U. S. 559; 67 Mich. 539; 62 Wis. 32; 227 U. S. 544; 43 Mich. 140; 111 Mich. 498; 73 Mich. 318; 6 Cranch, 87; 125 Mich. 673; 124 Mich. 449; 119 Mich. 655. Under the reserve power to amend, alter or repeal acts of incorporation, the Legislature may make any alteration or amendment of a charter which will not defeat or substantially impair the object of the grant or any rights vested under it. 15 Wall. 500; 107 U. S. 468; 151 U. S. 556; 13 Gray (Mass.) 239; 160 U. S. 1; 15 Wall. 454. The power of alteration and amendment is not without limit. Alterations must be reasonable, in good faith, and consistent with the scope and object of the corporation. 95 U. S. 319. See also 9[illegible] U. S. 710; 160 U. S. 1; 139 Fed. 661; 193 U. S. 207; 175 Fed. 365. The franchise rights of a public utility have uniformly been recognized by this court, beginning with 5 Ark. 599. See also 239 S. W. (Ark.) 3; 141 Ark. 18, 216 S. W. 38.

4. The city council of the city of DeQueen had no jurisdiction to grant appellant a certificate of necessity and convenience. The power conferred on the Corporation Commission to grant such a certificate was expressly repealed by the act of 1921.

Wood, J. DeQueen Light & Power Company, hereafter called appellant, is a domestic corporation under a charter issued to it by the State on the 16th day of May, 1921. On the 13th day of June, 1921, it was granted a franchise by the city of DeQueen, Arkansas, authorizing it to sell and distribute electric current in that city. Commonwealth Public Service Company, hereafter called the appellee, is a foreign corporation authorized to do business in this State. It had a franchise authorizing it to distribute and sell electric current, power and water to the inhabitants of the city of DeQueen as early

as the year 1918. W. L. Curtis was appointed receiver for the appellee on May 25, 1920. He surrendered the franchise which appellee held authorizing it to do business in the city of DeQueen, and on January 22, 1921, applied for and was granted by the Arkansas Corporation Commission "an indeterminate permit" authorizing it to continue the public utilities mentioned above to the inhabitants of the city of DeQueen. On March 14, 1922, the appellant filed its petition before the Arkansas Railroad Commission setting up its franchise above mentioned, authorizing it to distribute electric current in the city of DeQueen, and that it was efficiently performing such service, and that the appellee, for various reasons stated in the petition, was not rendering the service it should to the inhabitants of the city of DeQueen, and that appellant was chartered and received its franchise from the city of DeQueen for the purpose of remedying the condition caused by the failure of the appellee to render proper service.

The appellant alleged in its petition that the "public convenience and necessity of the city and the inhabitants thereof imperatively requires that a certificate of convenience and necessity be issued to the petitioner," and the petition concluded with a prayer that such certificate be issued to it.

The appellee, through its receiver, appeared specially, and filed its demurrer and motion to dismiss. Among other things it alleged "that the Arkansas Railroad Commission has no jurisdiction over either the person or property sought to be affected by such petition." The Railroad Commission overruled appellee's demurrer and motion to dismiss, and issued the certificate to appellant. The appellee appealed to the Pulaski Circuit Court, where the appellee's demurrer and motion to dismiss the petition of appellant was sustained, and a judgment rendered dismissing the petition. From that judgment is this appeal.

The only question for determination on this appeal is whether or not the Railroad Commission had jurisdiction to issue a "certificate of convenience and necessity" to appellant.

Section 13 of act 571 of the Acts of 1919, creating the Arkansas Corporation Commission and defining its powers and duties, vested such Commission with the power to grant to public service corporations, upon certain conditions therein specified, a certificate authorizing such corporations to furnish public utilities. The section concludes as follows: "Every license, permit, contract or franchise hereafter granted to any public service corporation by the State or any municipality, and all future contracts, ordinances, rules, regulations and orders entered into or made by any municipality relating to the use or enjoyment of rights and franchise granted to any public utility, shall be subject to the exercise, by the Corporation Commission, of any and all of the powers of regulation provided for in this act."

Section 31 of the act abolished the Railroad Commission then existing and conferred all the powers and duties of that Commission upon the Corporation Commission.

The General Assembly of 1921 passed act 124 entitled "An act to amend act No. 571 of the General Acts of the General Assembly of the State of Arkansas for the year 1919, entitled 'An act to create the Arkansas Corporation Commission and to define its powers and duties,' approved April 1, 1919, and to regulate public utilities and public service corporations, and for other purposes." This act was approved February 15, 1921.

Section 5 of Act 124, *supra,* provides: "The jurisdiction of the Arkansas Railroad Commission created by the act shall extend to and include all matters pertaining to the regulation and operation of all common carriers" (naming them), and among other public utility corporations mentioned are "pipe-line companies for transportation of oil, gas and water, electric lighting companies and

other companies furnishing gas or electricity for light, heat or power purposes," and hydro-electric companies and water companies, and provides that "nothing in the act shall vest the Commission with jurisdiction as to any rate, charge, rule, regulation, order, hearing, investigation, or other matter pertaining to the operation within the limits of any municipality of any street railroad, telephone company, gas company, pipe-line company for transportation of oil, gas or water, electrical company, water company, hydro-electric company or other company operating a public utility or furnishing public service as to which jurisdiction may be elsewhere conferred in this act upon any municipality, council or city commission; notwithstanding, however, the jurisdiction of the municipality as to the above matters within the limits of such municipality, the said Arkansas Railroad Commission shall have and is hereby delegated the authority and duty to require all utility companies now furnishing public service within the limits of any municipality to furnish and continue furnishing such service to such municipality, though the right of regulation of such utility as to rates and all other matters within such municipality is herein elsewhere conferred upon the municipal councils or city commissions, subject to right of appeal to the courts."

Section 15 of the act gives all public utility corporations now operating under indeterminate permits granted by the Arkansas Corporation Commission ninety days after the passage of the act to make application in writing to the municipal council or city commission of the municipality which granted the original franchise, contract or lease, for reinstatements of said franchise, contract or lease, and when such application is made and filed with the clerk or recorder of said municipality it shall be granted as a matter of right, and reinstated by the municipal council or city commission having jurisdiction, under the same conditions as existed at the time said indeterminate permit was granted by the Arkansas

Corporation Commission, and unless the application for reinstatement is made within said time it shall be a waiver on the part of the public service corporation to insist upon the fulfillment of said franchise or contract rights.

Section 17 provides, in part, as follows: "The jurisdiction of the municipal council or city commission of any municipality shall extend to and include all matters pertaining to the regulation and operation within the limits of any such municipality of any street railroad, telephone company, gas company furnishing gas for domestic or industrial purposes, pipe-line company for transportation, distribution or sale of oil, gas or water, electrical company, water company, hydro-electric company, or other company operating a public utility or furnishing public service within such municipality."

Section 25 of the act is as follows: "That sections 13, 14, 15, 20, 26, 29, 31 and 35 of act No. 571 of the General Acts of the General Assembly of the State of Arkansas for the year 1919, approved April 1, 1919, hereinbefore referred to, be and the same are hereby repealed."

It will be observed that section 13 of act 571 of the Acts of 1919 which conferred jurisdiction upon the Corporation Commission to grant public service corporations a certificate of "convenience and necessity" is expressly repealed by act 124 of the Acts of 1921, and the latter act, as shown by the various provisions above quoted, as well as other provisions which it is unnecessary to set out, confers upon municipalities exclusive jurisdiction over public utilities, like the appellant, operating within their limits.

In *Pocahontas* v. *Central Light & Power Co.*, 152 Ark. 276, speaking of the jurisdiction of the Railroad Commission under the Acts of 1921, we said: "The public service corporations over which the jurisdiction of the Commission shall extend is specifically stated in § 5 of the act, *and jurisdiction by municipalities to*

regulate public service corporations or public utilities operating within the limits of such municipalities is conferred by sec. 17 of the act.''

It follows that at the time of the filing of the petition of the appellant on the 31st of March, 1922, asking the Railroad Commission to grant it a certificate of "convenience and necessity," the Commission had no jurisdiction to grant such certificate. Having reached this conclusion, the other interesting questions presented and elaborately argued in the briefs of learned counsel pro and con pass out, and we therefore pretermit a discussion and decision of these questions.

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

ARKANSAS LAND & LUMBER COMPANY *v.* COOK.

Opinion delivered February 19, 1923.

1. MASTER AND SERVANT—AUTHORITY OF FOREMAN.—A member of a section crew, occupying his regular place on a motor car while riding home from work, is as much under authority of the foreman of the crew as when actually at work on the tracks.
2. MASTER AND SERVANT—INSTRUCTION AS TO LIABILITY FOR INJURY TO SERVANT ON MOTOR CAR.—In an action by a section man for injuries received while returning from work on a motor car, where the evidence showed that he was a member of a crew which worked under a foreman, an instruction authorizing recovery if the jury found that plaintiff was in defendant's employ, and was working under its foreman's orders, and was injured on account of defendant's negligence, was not objectionable on the ground that there was no evidence that he was working under the orders of the foreman, or was injured by reason of obeying any order of his foreman.
3. TRIAL—INSTRUCTION—ASSUMING NEGLIGENCE OF MASTER.—In an action by a section man for injuries received while returning from work on the defendant company's motor-car, an instruction that if the evidence showed that he was injured on account of the company's negligence the jury should find for him did not assume that defendant was negligent.

4. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE.—In an action by a section man for injuries received while returning from work on a motor-car which jumped the track, where there was evidence that the ties were rotten, that the rails had spread because spikes had come out of them, and that there were low joints, an instruction that it was the duty of defendant to exercise ordinary care to see that its motor car and tracks were kept in a reasonably safe condition, and that this duty required defendant to make reasonable inspection, was not objectionable on the ground that there was no evidence of failure to make an inspection, and that the plaintiff knew of the condition, as it was not his duty to make inspection.

5. DAMAGES—INSTRUCTION AS TO PERMANENT INJURY.—Where there was medical testimony tending to prove that plaintiff's injuries were permanent, an instruction to assess such damages as would compensate plaintiff for loss from diminished earning capacity was not erroneous.

6. EVIDENCE—EXPERT OPINION.—A medical witness may testify as to the probable effects of an injury or other conditions observed by him in his examination and treatment of a patient.

7. RELEASE—INSTRUCTION.—In a personal injury action, where the evidence as to whether plaintiff signed a release was conflicting, an instruction that if plaintiff did not sign the release nor authorize another to sign it for him, it would be no defense, was not erroneous.

8. MASTER AND SERVANT—NEGLIGENCE CONCURRING WITH ACT OF GOD.—In an action by a section hand for injuries received when a motor-car on which he was riding jumped the track, which was covered with sleet, an instruction that no one can recover for injuries caused by the act of God alone, but that if the act of God, coupled with the act of man, causes injury, a recovery is not barred by the act of God, was not error.

9. DAMAGES—WHEN NOT EXCESSIVE.—Where a section man, injured when defendant's motor-car jumped the track, was permanently injured in his hip and had a limp in his walk, could not lift heavy loads, and his spermatic cord was enlarged and became hardened, a verdict of $1,000 damages was not excessive.

10. MASTER AND SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a finding that the defendant was guilty of negligence causing plaintiff's injuries.

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

STATEMENT OF FACTS.

Granville Cook sued the Arkansas Land & Lumber Company to recover damages for physical injuries received by him by being negligently thrown from the front end of a motor-car on which he was riding while in the employment of said company. The defendant denied that the plaintiff was injured on account of its negligence.

On the 12th day of January, 1921, Granville Cook was injured by being thrown from a motor-car of the Arkansas Land & Lumber Company while returning from work. The defendant owns and operates a railroad from its mill to a point something like twenty-five or thirty miles in the country. The company used a motor-car with a trailer attached to it to carry its section crew and bridge crew to and from their work. Each crew worked under the direction of a foreman, and both together had fourteen men. The section crew rode on the motor-car, and the bridge crew on the trailer attached to it. The section foreman usually drove the motor-car with the trailer attached, but on the day in question the car was driven by the assistant section foreman. It had been sleeting on that day, and this made the track slick. The entire crew of fourteen men started to the mill on the motor-car and trailer. Granville Cook was riding on the right-hand corner of the motor-car, which was his usual and customary place to ride. As the car approached a sharp curve, the driver cut off the gas in order to check the speed of the car. Then he turned the gas on again, and the car ran off of the track on the inside of the curve. Its speed was about twenty-five miles an hour when it left the rails, and the car then ran along on the ties until it fell over. The plaintiff was pinned under the car and was severely injured. There was a low joint where the car ran off the rails. The surface under the rails and ties had become soft, and the heavy loads drawn over the rails had caused them to sink down into the earth. The ties had become rotten to an extent, and this caused the spikes

which fastened the rails to the ties to become loose and let the rails spread. The railroad was used for hauling the logs of the defendant. The customary speed at which the motor-car was run in carrying the crew to and from work was twelve miles an hour. Some of the crew testified that there was no slacking of the speed of the car when the car ran into the curve, and that it was going at the rate of twenty-five miles an hour.

According to the evidence for the defendant, the track was in good condition and the ties were sound. There were no low joints in the rails, and the rails had not spread. The motor-car had been inspected four or five days before the accident, and was in good condition. It had been in use about six months. The front axle of the car was not bent, as testified to by some of the plaintiff's witnesses.

The assistant section foreman, who was driving the car at the time of the accident, was also a witness for the defendant. According to his testimony, the track was covered with sleet, and was very slick. When he got to the point of the curve he threw the gas off, and when he thought he was safe he threw the gas back on to hold his speed. When he put the gas on the car again, it jumped the track. He testified that the sleet was hitting him in the face when he turned the gas on. He said that he turned the gas on in the ordinary and usual way, but because of the sleet hitting him in the face he might have put on too much gas.

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

The jury returned a verdict in favor of the plaintiff for $1,000, and the defendant has appealed.

Henry Berger and *Mehaffy, Donham & Mehaffy,* for appellant.

D. D. Glover and *D. M. Halbert,* for appellee.

HART, J., (after stating the facts). The first assignment of error is that the judgment should be reversed

because the court gave instruction No. 1, over the objection of the defendant. The instruction is as follows:

"The court instructs the jury that, if you find from a preponderance of the evidence in this case that the plaintiff was in the employ of the defendant company and was working for it under the orders and directions of its foreman, and you find from the evidence that he was in the exercise of ordinary care for his own protection, and you find from the evidence that he had not assumed the risk, and you find from the evidence that he was injured on account of the negligence of the defendant company, its agents, servants or employees, as alleged in his complaint, it will be your duty and you are instructed to find for the plaintiff in this case."

Counsel specifically objected to the instruction because there was no evidence to the effect that the plaintiff was working under the orders and directions of his foreman, or that he was injured by reason of obeying any order or direction of his foreman.

We do not think this objection is tenable. The evidence shows that the plaintiff was a member of a section crew which worked under a foreman. He necessarily gave them orders about doing their work, and the instruction simply means that, at the time the plaintiff was injured, he was working under his foreman. It was true he was coming home from his work on a motor-car, but this was his usual and customary way of going to and from work. He had a regular place on the motor-car in which to sit, and he was occupying this place at the time the car ran off of the track. He was as much under the authority of the foreman at this time as he was when he was actually at work on the tracks. *Arkadelphia Lumber Co.* v. *Smith,* 78 Ark. 509; *Gilkey* v. *La. & Ark. Ry. Co.,* 103 Ark. 231. The instruction did not mean to submit to the jury that the plaintiff was injured while doing a particular act at the command of his foreman. This interpretation is negatived by all the testimony in the case. There is no dispute whatever about how the

accident occurred. The only dispute is about the defective condition of the track and the negligence of the driver of the motor-car. We do not think that the jury could have been in anywise misled by this instruction.

The court gave, at the request of the defendant, instructions covering every phase of the case presented by the evidence.

Again, it is insisted that the instruction assumes that the defendant was negligent. We do not think so. The instruction plainly predicates the right of the plaintiff to recover upon a finding by the jury of negligence as alleged in the complaint.

It is next insisted that the court erred in giving instruction No. 7, which reads as follows:

"You are instructed that it was the duty of the defendant company to exercise ordinary care to see that its motor-car and its track and roadbed were kept in a reasonably safe condition, and you are further instructed that this duty that rested on the defendant company required it to make reasonable inspection to see that they were kept in a reasonably safe condition."

It is first contended that there is no evidence to the effect that the defendant failed to make an inspection, and that the plaintiff knew as much about the condition of the track and roadbed as any one. The evidence for the plaintiff to the effect that the ties were rotten and that the rails had spread because the spikes had come out of them was evidence tending to show that the defendant had not inspected its tracks. Then, too, there was evidence of low joints in the rails which was caused by heavy loads being hauled over the rails and pressing them down into the ground, without a proper surfacing of the tracks. This evidence was sufficient to constitute negligence on the part of the defendant; for it was its duty to exercise ordinary care in furnishing the plaintiff a safe place in which to work. It is true that the plaintiff was a section hand, and rode

over the rails every day, but this did not make it his duty to inspect the rails and the roadbed for defects in them. Therefore we hold this assignment of error is not well taken.

The next assignment of error is that the court erred in giving instruction No. 8, which reads as follows:

"The court instructs the jury that, if you find for the plaintiff, from the evidence in this case, you will assess his damages at such a sum as will compensate him for the injuries sustained, if any; the physical pain and mental anguish suffered and endured by him in the past, if any, by reason of the said injuries; his loss of time, if any; and his pecuniary loss from diminished capacity for earning money, if any; and from these, as proven by the evidence, assess such damages as will fairly compensate him for the injuries received."

Counsel for appellant claim that there is not sufficient evidence in the record upon which to predicate an instruction for damages for permanent injuries, and rely upon the case of *St. L. I. M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, to support this view.

We do not think that the facts in the two cases are similar. In that case one of the physicians, in testifying whether or not the injury was permanent, said that there was a probability that it was permanent, and that it was just about equally balanced in his mind whether or not the injury was permanent. Another physician testified that it was questionable whether the injured person would ever get well, and that, looking at his condition as a matter of probability, it was discouraging to him as a physician. The court held the testimony to be insufficient, and said that, unless the testimony tended to show with reasonable certainty that the injury was permanent, the court should not permit the jury to assess any damages for permanent injuries.

Here there is something more than the balancing of probabilities by the physician. Dr. Williams was a

graduate physician and surgeon, and had been practicing his profession for over forty years. He testified that he had examined the plaintiff several times, and described minutely the result of his several examinations. Then, in response to a direct question, he testified that the plaintiff had a permanent injury of the hip and possibly of the soft part of the pelvis. Dr. Williams gave this as his positive opinion, based upon his personal examination of the plaintiff upon several different occasions, and, as above stated, described with particularity the result of his examination.

But it is contended that Dr. Williams should not have been allowed to give his opinion of the permanency of the plaintiff's injuries. We cannot agree with counsel in this contention. A medical witness may be permitted to state the probable effects of an injury or other conditions observed by him in his examination and treatment of a patient. *Mo. & N. Ark. Rd. Co.* v. *Collins,* 106 Ark. 353; *K. C. So. Ry. Co.* v. *Cobb,* 118 Ark. 569; and *Himes* v. *Patterson,* 146 Ark. 367.

It is next insisted that the court erred in giving instruction No. 9, which is as follows:

"You are instructed that, if you find from the evidence in this case that the plaintiff did not sign the release pleaded in this case, or authorize any one else to sign it for him, or cash it, it would be no defense in this case."

It is claimed that there is no evidence upon which to base this instruction. It is true that the evidence for the defendant tended to show that it settled with the plaintiff, and that he signed a release of all claims against the defendant with full knowledge of its purport. It was also shown by the defendant that the draft which was issued to G. C. Cook for $4.50 in settlement of his claim was cashed by the Bank of Malvern and paid by the drawee in due course of business.

It cannot be said, however, that this testimony is undisputed. The plaintiff denied in positive terms that

he signed the release, cashed the draft, or made any settlement whatever with the company. He testified further that he had never heard of any settlement until the day before he testified. This was testimony of a substantive character tending to contradict the evidence of the defendant on this point, and warranted the court in giving the instruction now complained of. The credibility of the witnesses was for the jury, and we hold that this assignment of error is not well taken.

It is also insisted that the court erred in giving instruction No. 6, which reads as follows:

"You are instructed that no one can recover damages for injuries caused by the act of God alone, but you are further instructed that if the act of God, coupled with the negligence of man, causes injury or damage to persons or property, a recovery is not barred by the act of God."

This court has held that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the act of God, the defendant is responsible if his negligence is one of the proximate causes of the damage. *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297, and *St. L. I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520.

It is contended, however, by counsel for the defendant that the instruction is erroneous because it made the defendant responsible if the jury should find that its negligence, concurring with the act of God only in a remote degree, caused the injury. We do not think so. As stated in the above opinion, the act of God which excuses must be not only the proximate cause, but the sole cause. We think, under the language of the instruction, the concurring negligence of the defendant, with the act of God as an efficient and co-operating cause, was submitted to the jury under the principles of law above announced.

It is next insisted that the verdict of $1,000 is excessive. According to the evidence of the plaintiff, he

was permanently injured in his hip, and had a limp in his walk at the time of the trial. He cannot lift heavy loads, and his spermatic cord has been enlarged and become hardened as a result of his injury.

It is true that, according to the evidence for the defendant, he is not permanently injured, but the jury has settled the conflict between the witnesses on this point in favor of the plaintiff. Assuming the evidence for the plaintiff, on the character and extent of his injuries, to be true, it cannot be said that the verdict is excessive.

According to the evidence for the plaintiff, he was going home from work in a motor-car of the defendant, and was still in its service. *Arkadelphia Lbr. Co.* v. *Smith,* 78 Ark. 505, and *Gilkey* v. *La. & Ark. Ry. Co.,* 103 Ark. 231. Hence it was the duty of the defendant to exercise ordinary care for the safety of the plaintiff while carrying him to and from his work, and it was also its duty to make reasonable inspection to see that the motor-car and track were in safe condition.

Bearing this in mind, it is readily apparent that, under the evidence adduced for the plaintiff, the jury was warranted in finding the defendant guilty of negligence in one or both of these respects, as alleged in the complaint.

It follows that the judgment must be affirmed.

HARMON v. WINEGAR.

Opinion delivered February 19, 1923.

1. HUSBAND AND WIFE—LIABILITY OF WIFE'S PROPERTY FOR HUSBAND'S DEBTS.—The creditor of an insolvent husband, seeking to have his wife's property subjected to payment of his debts, must prove that he gave credit to the husband upon the faith of, and in the reasonable and justifiable belief in, the fact that the husband was the actual owner of the property in controversy, and without notice of any facts and circumstances that would lead to the belief that such property was claimed by the wife.

2. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.—Where the wife of an insolvent debtor with her own means purchased and afterwards foreclosed a mortgage on a farm and bought in the property, intending to sell the property to her husband, *held,* in the absence of proof that the husband had possession or that she permitted him to use it as a source of credit, the land is not subject to his debts.

3. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.—An automobile given to an insolvent debtor's wife in appreciation of medical services rendered to a patient by the debtor is not subject to his debts, in the absence of proof that it was intended as payment for such services, or that it was used by the debtor as the basis of credit.

4. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.—Where the furniture of an insolvent doctor's office was the property of his wife, it is not subject to payment of his indebtedness where the debt was not contracted on the faith of his ownership of the furniture.

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

STATEMENT OF FACTS.

Bertha Harmon first brought this suit in the circuit court against E. F. Winegar to recover the amount due her on two promissory notes, dated respectively Nov. 2, 1916, and Feb. 20, 1917, and also for $100 in cash furnished the defendant by the plaintiff in October, 1918. The first note was for $1,203.77 and the second for $300, and each was due one year after date.

Subsequently the complaint was amended by making Melissa Winegar, the wife of E. F. Winegar, a party to the suit. It was alleged that E. F. Winegar was the owner of certain real property, the title to which was taken in his wife's name for the purpose of defrauding his creditors in the collection of their debts against him. It was also alleged that the title to certain office furniture used by the defendant, E. F. Winegar, in his office was taken in his wife's name for the purpose of defrauding his creditors. The same allegation was made concerning an automobile.

Mrs. Melissa Winegar denied the allegations of the amended complaint, and moved to transfer the cause to

equity. The plaintiff agreed to the motion, and the cause was transferred and tried in the chancery court.

C. D. Harmon, a young man twenty-seven years of age, and the son of the plaintiff, Bertha Harmon, was the principal witness for her. According to his testimony, the notes sued on were made payable to himself, and indorsed by him to his mother. The notes were given to secure money borrowed by E. F. Winegar from Bertha Harmon. The witness had no interest in the matter, and simply negotiated the loan for his mother. The witness always cared for his mother's business. He had known Dr. Winegar for fourteen years, and after he became a man he began to work for Dr. Winegar. Dr. Winegar and his associate, a Mr. Onffroy, contemplated building a sanitarium near the city of Hot Springs, Ark., which should cost $10,000,000, and they devoted several years to the promotion of the enterprise. Dr. Winegar at different times, while C. D. Harmon was in his employment, told the latter that all of his property was in his wife's name. It does not appear whether he told Harmon this before or after the money was loaned to Dr. Winegar. After spending a good deal of time and money in promoting the $10,000,000 sanitarium, the enterprise failed, and it turned out that Onffroy and Dr. Winegar were insolvent. The witness also testified that subsequently an effort was made to get Mrs. Winegar to sign the notes, but that she refused to do so.

Mrs. Melissa Winegar was a witness for herself. According to her testimony, her father during his lifetime first gave her money with which to buy a home in Hot Springs, and she did so. Subsequently her father gave her $10,000 with which to improve her home, and she let her husband have that to promote his $10,000,000 sanitarium. After her father's death she received $40,000 as her part of his estate. She let her husband have all of this amount to promote his $10,000,000 sanitarium, and the understanding between them was that, if the enterprise was a success, he would pay her back, and, if not, she realized that he would be unable to re-

pay her. During the course of the promotion of the sanitarium a tract of land known as the Barry farm near Hot Springs was selected as a probable site on which to locate the sanitarium. There were three mortgages on the farm, which were purchased by Mrs. Winegar for the sum of $4,000. She mortgaged her home to secure the money with which to purchase these mortgages. Subsequently she brought suit to foreclose the mortgages so assigned to her, and the principal and interest at that time amounted to $7,500. A decree of foreclosure was duly entered of record in the chancery court, and at the foreclosure sale Mrs. Winegar became the purchaser of the land. She acquired title to the automobile in this way: Her husband had treated a wealthy oil man and other members of his family as a physician and surgeon. The oil man was so pleased with his services that he purchased the automobile and gave it to Mrs. Winegar in 1919. It was the intention of the two families to take a trip out West in the car. The oil man gave her the car because she could drive one and her husband could not.

Mrs. Winegar gave her testimony by a deposition in September, 1921. According to her testimony, she purchased the office furniture in 1913 and paid something like $1,900 for it. She exhibited the receipted bill for it. She said that her husband ran a small sanitarium in connection with his office as a physician and surgeon in Hot Springs, Ark., and that she purchased this furniture for his use there, and it was understood that she was to be paid by receiving the rent from the rooms which he used as a sanitarium. She acquired the money from her father with which to purchase the furniture.

It was decreed by the chancery court that the plaintiff should have judgment against E. F. Winegar for the amount sued for, and it was further decreed that the complaint as to the defendant, Melissa Winegar, should be dismissed for want of equity. The plaintiff has appealed.

A. J. Murphy, for appellant.

R. G. Davies, for appellee.

HART, J., (after stating the facts). To reverse the decree the plaintiff relies upon the case of *Maloney* v. *Hale,* 153 Ark. 462. In that case the court held that, where a wife permitted her husband to use her money and personal property as an apparent basis of credit, she is estopped from claiming the property as against one who extended credit to her husband on the faith thereof. In that case the husband failed in business, and about a year afterwards he again engaged in business in the name of Hale & Co. The wife claimed the business, and said that she obtained the money with which to start it from her brother-in-law. The business was conducted solely by the husband under the name of Hale & Co. for many years. The wife never gave any attention whatever to the business. The husband obtained credit on the faith of its being his own business. The money of the wife and the business skill and industry of the husband could not be separated. There was no question but that the creditors extended credit to the husband on the faith that it was his own business. He had no other basis of credit. Hence the court held that, the plaintiff having given the husband credit on the faith of his supposed ownership of the business, it would be a fraud on him for the wife to be allowed to claim the business. In cases of this sort, however, it is essential, in order that the plaintiff may invoke this estoppel against the wife, that he should have given credit to the husband upon the faith of, and in the reasonable and justifiable belief in, the fact that the husband was the actual owner of the property in controversy, and without notice of any facts and circumstances that would lead to the belief that the property was claimed by the wife.

In the present case the wife mortgaged her homestead to secure the money with which she purchased the mortgages on the Barry farm. It is true that she did this with the view of selling the farm to the corporation

promoted by her husband for use in erecting a large sanitarium. The motive which prompted her to make the purchase, however, cuts no figure in the case. The fact remains that she did purchase the mortgages with her own money. It is also insisted that she purchased the mortgages for less than their face value. This did not make any difference. That was a matter which solely concerned the mortgagees. The validity of their mortgages is not even questioned by the plaintiff. Mrs. Winegar had a right to foreclose the mortgages after they were assigned to her and to purchase the mortgaged land at the foreclosure sale. It is not shown that the husband had possession of the land or that his wife permitted him to use it as a source of credit.

The evidence also shows that the automobile was given her by a wealthy oil man in token of his appreciation of professional services rendered him and members of his family by Dr. Winegar. It is not shown that the automobile was given as a part payment for these medical services. The evidence shows that it was a gift, pure and simple, to the wife, and we are not concerned with the motive which prompted the gift, in the absence of a showing that it was intended as a payment, in whole or in part, for the medical services performed upon the giver by her husband. It is not shown that the husband used it as a basis of credit.

With regard to the office furniture, the case is not so plain, but we are of the opinion that the finding of the chancellor in favor of Mrs. Winegar on this point is not against the preponderance of the evidence. The evidence is plain that Mrs. Winegar bought the furniture and paid for it. She exhibited the receipted bill which she obtained from the dealer who sold her the furniture. She testified to the amount of money that her father gave her, and the large amount inherited from him after his death. She gave the place where he died, and the records there would have shown the falsity of her testimony as to the amount that she received when her father's estate was administered upon and dis-

tributed to his heirs. No contradiction of her testimony in this respect was made. Hence, if the plaintiff has any standing in this case as to the furniture, it must be upon principles of equitable estoppel on the ground that Mrs. Winegar permitted her husband to take possession of it and acquire credit on the strength of it, and, the plaintiff having given him credit on the faith of his supposed ownership of it, it would be a fraud on her for Mrs. Winegar to now claim that the furniture is hers.

According to the testimony of Mrs. Winegar, she at all times claimed the furniture and collected the rent on it while it was in her husband's possession. The chief source of her husband's income as a physician and surgeon would necessarily arise from his professional services, and his office furniture would be merely an incident to his profession.

It does not even appear that he obtained the loan from the plaintiff on account of having this furniture. He was engaged with an associate, who also had signed the note sued on, in promoting a $10,000,000 enterprise. Both Dr. Winegar and his associate spent large sums of money and much time in promoting this enterprise. The plaintiff thought that it would be a success, and that Dr. Winegar and his associate had considerable means. It does not appear that his office furniture was ever considered in the premises at all.

In the case relied on for a reversal of the decree the wife necessarily knew that the husband was conducting the business solely on his own account, and that credit was being extended to him solely on the faith of his supposed ownership of the business. He was insolvent, and had no other source of income. His ability to earn money was inseparable from the business.

Here the office furniture was but a small incident in the business of Dr. Winegar. He claimed to be a physician and surgeon of note, and obtained credit from the plaintiff on her belief in the success of the enterprise promoted by him and his associates.

The chancellor found that, under the peculiar circumstances of this case, no fraud was practiced upon the plaintiff, and that the doctrine of equitable estoppel did not apply. It cannot be said that his finding is against the preponderance of the evidence, and the decree will therefore be affirmed.

LIGHTER v. STATE.

Opinion delivered February 19, 1923.

1. WITNESS—WIFE TESTIFYING FOR HUSBAND.—Notwithstanding the enfranchising of women, a wife is incompetent to testify for or against her husband in a criminal case, save that she may testify against him in cases where an injury has been done by him against her person or property, as provided by Crawford & Moses' Dig., § 3125.
2. CRIMINAL LAW—INSTRUCTION AS TO DEFENDANT'S CREDIBILITY.—An instruction in a criminal case stating the matters to be considered in determining the degree of credit to be given to defendant's testimony *held* not erroneous.
3. CRIMINAL LAW—GENERAL AND SPECIAL INSTRUCTIONS.—An instruction in correct form presenting defendant's theory of the case was not covered by a general instruction given which does not cover the particular theory of the defendant.
4. CRIMINAL LAW—REQUEST FOR INSTRUCTION.—It was error to refuse a correct request for instruction presenting defendant's theory of the case, which is supported by evidence and is not covered by other instructions given.
5. EMBEZZLEMENT—EVIDENCE.—Evidence, on a prosecution for embezzlement, that money was deposited with defendant to secure defendant's wife for signing a bail bond, and that the money is still held under that agreement, *held* not to sustain conviction of embezzlement.

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

STATEMENT OF FACTS.

J. D. Lighter was indicted under § 2500 of Crawford & Moses' Digest for the crime of embezzling $140 which Nina Seals had placed in his hands as bailee.

According to the evidence for the State, Lured Seals, the husband of Nina Seals, was convicted of a crime in the municipal court of Fort Smith, Ark., and fined $140. He took an appeal to the circuit court. The defendant, J. D. Lighter, was his attorney, and Nina Seals gave the defendant $140 as a deposit for the fine of her husband, and a receipt given by Lighter to her for the money recited that, if Lured Seals appeared at the term of the next circuit court, the money was to be refunded to Nina Seals.

The circuit court dismissed the appeal because it was not perfected in time, and the municipal court threatened to put Lured Seals in jail for the nonpayment of his fine. The defendant procured the release of Lured Seals by promising to pay the fine. He said that his wife had just been operated on, and that she had the $140 which had been deposited with her for the purpose of procuring her to sign the bail bond of Lured Seals.

On cross-examination, Nina Seals admitted that, when she first gave the money to the defendant, it was understood that his wife was to sign the bond, and that the money was given to secure her against loss. She also said that it was understood that the defendant would take care of it. Nina Seals knew that Mrs. Lighter was called to the jail where her husband, Lured Seals, was confined, and that Mrs. Lighter signed the bail bond of Lured Seals and thereby procured his release from jail. The defendant paid $65 of the fine against Lured Seals, and has failed and refused to pay the balance of it.

Subsequently Nina Seals removed from Fort Smith, Ark., to the State of Oklahoma, and in a few months procured a divorce from her husband. She has since remarried, and is now Nina Henson.

J. D. Lighter was a witness for himself. According to his testimony, Nina Seals turned over to him $140 to secure his wife against loss as surety on the bail bond of Lured Seals, who was at that time the husband of Nina Seals. Subsequently the defendant delivered the

$140 to his wife in the presence of Nina Seals and Lured Seals. His wife then signed the bail bond of Lured Seals, and he was released from jail. On the same day that the circuit court dismissed the appeal of Lured Seals, the municipal court issued a commitment for him. Nina Seals informed the defendant of this fact, and asked him to go over and pay the fine. The defendant told her that his wife was in the hospital, and he could not get the money from her at that time. He went with Nina Seals and told the presiding judge that his wife had just been operated on, and that he could not draw upon her account. He told the court that, just as soon as his wife was able, he would have her make a check for the money and pay it into court. The defendant told the court that he would pay the fine of Lured Seals, and in this way secure his release. The next day the defendant collected $65 and paid it on the fine and costs. Subsequently Nina Seals came to the defendant's office, and told him that she had separated from her husband, and notified him not to let his wife pay the money deposited with her on the fine. The defendant's wife still has the money in her possession. The defendant's evidence was in some respects corroborated.

The jury returned a verdict of guilty, and the defendant was sentenced to one year's imprisonment in the State Penitentiary. He has duly prosecuted an appeal to this court.

W. A. Falconer and *Webb Covington,* for appellant.

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

HART, J., (after stating the facts). The first assignment of error is that the court erred in refusing to allow the defendant's wife to testify in his behalf as to the circumstances attending the deposit of the $140 with her. The general rule is that the wife is incompetent to testify for her husband in a criminal case. *Padgett* v. *State,* 125 Ark. 471.

In *Christian & Taylor* v. *Fancher,* 151 Ark. 102, the court held that the act of the Legislature enfranchising

women has not changed the status of a married woman so as to render her competent to testify in her husband's behalf. This rule applies to criminal as well as civil proceedings, except that, under § 3125 of Crawford & Moses' Digest, the wife may testify against the husband in cases in which an injury has been done by him against her person or property. Therefore this assignment of error is not well taken.

It is next insisted that the court erred in giving instruction No. 5, which reads as follows: "5. I charge you further that, under the law, the defendant is a competent witness in his own behalf, and you should take his testimony and consider it in the same manner as you do the testimony of any other witness in this case. You are not blindly to receive a fact as true simply because the defendant says it is true, but you should take his testimony and weigh it in connection with all the other evidence and circumstances in this case, and determine whether his statements are true and made in good faith, or whether they are made for the purpose of avoiding a conviction at your hands. In considering the degree of credit to be given it, you may take into consideration the defendant's appearance on the witness stand while testifying, the reasonableness or unreasonableness of his statements, his candor or lack of candor, and his interest in the result of your verdict."

It is the duty of the court to instruct the jury in the rules of law by which the testimony is weighed and its credibility tested. The jury are the exclusive judges of the weight of such testimony, and the court has no right, directly or indirectly, to express an opinion on the weight to be given to the testimony. While it has been said an instruction on this point may be drawn in more apt language, still it has been held that an instruction in substantially the same language is not erroneous. *Hamilton* v. *State,* 62 Ark. 543, and *Whitener* v. *State,* 120 Ark. 30.

The next assignment of error is that the court erred in refusing to give instruction No. 2 at the request of the defendant. The instruction reads as follows:

"Mr. Covington: I want to ask the court to instruct the jury that, if they find from the evidence in this case that the defendant, Lighter, acting as the agent of Nina Seals, secured the signature of his wife to the appeal bond of the husband of Nina Seals, and Nina Seals deposited with him the sum of one hundred and forty dollars to secure his wife against loss by reason of her having signed the bond, and that the one hundred and forty dollars was turned over to her, and she has it now, it would be their duty to acquit the defendant in this case."

It is first claimed by the State that the matters embraced in this instruction were covered by 1-a given by the court. This instruction reads as follows:

"If you find from the evidence, beyond a reasonable doubt, that the defendant, J. D. Lighter, in the Fort Smith District of Sebastian County, Arkansas, within three years before the finding of the indictment in this case, being then and there over the age of sixteen years, and being then and there the bailee, and having then and there in his hands and possession, as such bailee of the said Nina Seals, one hundred and forty dollars in gold, silver and paper money, of the value of one hundred and forty dollars, the property of Nina Seals as aforesaid, did unlawfully, fraudulently and feloniously make away with, embezzle and convert to his own use the said one hundred and forty dollars, without the consent of the said Nina Seals—if you find these facts from the evidence, beyond a reasonable doubt, it would be your duty to convict the defendant."

A comparison of the two instructions will show that the instruction given by the court is entirely general in its terms, and does not cover the particular theory of the defendant relied upon by him for a reversal of the judgment.

While this court has uniformly held that it is not necessary to repeat instructions where the point involved is already embraced in the instructions given, it is equally well settled that it is the duty of the court to give instructions presenting the defendant's side of the case, if there is evidence to support it and the defendant requests a proper instruction. This rule is elementary, and in the application of it we are of the opinion that the court erred in refusing to give instruction No. 2 asked by the defendant. The instruction was correct in form, and presented the defendant's theory of the case, and should have been given.

If the testimony of the defendant was true, the money was deposited by him with his wife for the purpose of getting her to sign the bail bond of Lured Seals, and Nina Seals knew this was the object to be accomplished when she delivered the money to the defendant. If the money was delivered to the defendant's wife for that purpose, and is still held by her under the original agreement, the defendant is not guilty of embezzlement, and had a right to have his theory of the case submitted by instruction No. 2 as requested by him.

It follows that, for the error in refusing to give instruction No. 2 asked by the defendant, the judgment must be reversed, and the cause will be remanded for a new trial.

STATE v. KNIGHTS OF PYTHIAS OF NORTH AMERICA, ETC.

Opinion delivered February 19, 1923.

1. INSURANCE—BENEFIT SOCIETY SUBJECT TO AUDIT WHEN.—Under Crawford & Moses' Dig., § 6117, as amended by Acts 1921, p. 472, relating to exemption from supervision by the insurance department of certain fraternal orders, including the Knights of Pythias, *held*, that both the white and the colored orders of the Knights of Pythias were intended, but that the insurance departments of

such orders were expressly excluded from the exemption, and are subject to the audit of the Insurance Commissioner.

2. TRIAL—SUFFICIENCY OF GENERAL FINDING.—On an application by the State for the appointment of a receiver of a fraternal benefit society, where a report was made by the plaintiff for separate findings of fact and law, *held* a general finding of fact and refusal to grant the relief prayed for was a sufficient compliance with such report.

3. INSURANCE—IRREGULARITIES.—Evidence of irregularities in the conduct of the insurance department of a fraternal benefit society *held* insufficient to warrant the appointment of a receiver.

4. INSURANCE — BENEFIT SOCIETY — APPOINTMENT OF RECEIVER. — Though the State's right to supervise fraternal and benefit societies when they engage in the insurance business is universally upheld, the remedy of appointing a receiver is a harsh one, and will not be applied until all other remedies fail.

Appeal from Pulaski Circuit Court, Second Division; *W. B. Brooks,* Judge; affirmed.

J. S. Utley, Attorney General, *Elbert Godwin* and *W. T. Hammock,* Assistants, and *F. G. Lindsey,* for appellants.

The court erred in refusing to state in writing its conclusions of fact found separately from the conclusions of law. C. & M. Digest, § 1309.

T. J. Price, J. R. Booker, Scipio A. Jones, and *Coleman, Robinson & House,* for appellee.

The judgment of the lower court was correct. 70 Ark. 507; 73 Ark. 418; 85 Ark. 127; 86 Ark. 140; 85 Ark. 1; 102 Ark. 435. The court was correct in its declaration of law. 105 Pac. 411. The evidence was not sufficient to revoke the corporate privileges and to appoint a receiver. No relief could be accomplished by this procedure. 42 Ohio 579; 26 Atl. 1045; 27 Atl. 712; 41 So. 228, 20 L. R. A. 210. The misconduct of managers or trustees is not ground for dissolution of a corporation and appointment of a receiver. 50 Barb. 157; 16 Cal. 145; 30 Iowa 148; 130 Mass. 194; 19 R. C. L. 1320.

SMITH, J. Upon complaint being made to the Insurance Commissioner concerning the management of the Knights of Pythias of North America, South America,

Europe, Asia, Africa, Australia, and the State of Arkansas, a domestic colored fraternal insurance order, that officer caused an audit of its affairs to be made. Authority for this action is conferred by § 6110, C. & M. Digest; indeed, without complaint being made to the Insurance Department, it is the duty of that department to make an examination of the "affairs, transactions and condition" of such organizations at least once every three years.

The accountants representing the Insurance Department made a report, in which they reported that they had not been accorded the cooperation by the order necessary to make a satisfactory audit of its affairs; and the testimony established the fact that the officers of the company did not apparently realize their duty to aid in this audit, nor did they appear to comprehend the extent of the authority of the auditors. Subordinate lodges made complaint of the management of the officers of the order, and, in addition, the grand chancellor, the chief officer of the order, preferred charges to the Insurance Commissioner which tended to show that the finances of the order were being misappropriated. A supplemental audit by the Insurance Department appeared to confirm the findings in the first report; and the Insurance Commissioner turned these reports over to the Attorney General of the State. Upon an examination of these reports the Attorney General commenced an action in *quo warranto* to liquidate the order, under the authority of § 6111, C. & M. Digest.

While the allegations of the complaint were not sustained by the testimony, and the court below made a general finding against the State and dismissed the complaint, we take occasion to commend the Attorney General for his action in instituting this proceeding. It was highly praiseworthy for him to have sought to protect the interests of the members of the four hundred subordinate lodges of the order in the State. The facts, as they appeared to him at the time he instituted the suit, after giving the notice required by § 6111, C. &

M. Digest, warranted that action; but explanations have been made which should have been made to the auditors of the Insurance Department and to the Attorney General himself.

A demurrer to the complaint was overruled by the court below, and it is now insisted that the demurrer should have been sustained. The ground of the demurrer was that the Attorney General was not authorized by the law to institute the proceeding. Section 6117, C. & M. Digest, as amended by act 493, General Acts 1921, page 472, exempts certain named fraternal orders from the list of those orders whose financial affairs the Insurance Department is required to audit. Section 16 of the Act of 1921 is the section which amends § 6117, C. & M. Digest, and this section, as amended, does grant an exemption from the operation of this insurance act to certain named orders, and the Knights of Pythias is among those thus exempted; but the insurance department of that order is excluded from the exemption, and the effect of this exclusion is to leave the insurance department of the Knights of Pythias subject to the law. There appears to be a white order and a colored order, both known as Knights of Pythias, and while the statute contains but one general designation, "Knights of Pythias," we are of the opinion that both orders are embraced in that designation, and that the insurance departments of both orders are subject to audit by the Insurance Commissioner. The demurrer was therefore properly overruled.

The State asked the court to make a number of findings of fact conforming to the allegations of the complaint, but the court refused to make any of these findings, and this refusal is assigned as error, as constituting a refusal to comply with § 1309, C. & M. Digest, which requires the court, upon trials of questions of fact, to state in writing the conclusions of fact separately from the conclusions of law. We think, however, that the court's general finding of fact and re-

fusal to appoint a receiver as prayed for sufficiently complies with the law.

The first declaration of law asked by the State was to the effect that, if the grand keeper of records and seal, or the committee of the order which audited its books, negligently, carelessly, or fraudulently failed to keep the cashbook, or the duplicate receipt book, and failed to deliver them to the examiner, when called for by the examiner of the Insurance Department, such failure would be transacting business fraudulently within the meaning of the statute. The court refused this declaration, upon the ground that the testimony did not support the finding of fact that the records had been purposely put beyond the reach of the examiner, and we concur in that view. The particular record which was specially desired was the duplicate receipt book. This was a large book, and was not in current use at the time of the audit, and had not been for six months prior thereto, and appears to have been lost during the session of the grand lodge at Hot Springs, where the record had been carried from the general offices in Little Rock. The loss of this record was not accounted for to the auditors of the Insurance Department, and the failure to produce it was one of the irregularities insisted upon by the auditors. It may be said that it now appears that proper records are being kept, and are being properly kept. It may also be said that the funds have all been properly accounted for, and the auditors of the Insurance Department now report the order as 100 per cent. solvent. There appears no reason now to believe that the order has been made insolvent by the misconduct of its officers, or that its funds are being wasted or misappropriated by them.

The auditors of the Insurance Department discovered the fact that the grand keeper of records and seal had mingled his own funds with those of the order. This was, of course, an inexcusable thing to do, and that officer confessed his error and has abandoned his practice. This was done by that officer using money to pay

his private expenses out of money which would be due him on salary. In other words, he was anticipating his salary by using it as it was earned but before it was payable, and it was shown that he never at any time used any more of the order's funds than was due him for salary at the time of such use. This appears to have been the practice of the predecessor of the present incumbent and to have been known to the grand lodge trustees.

Another thing reported to the Insurance Commissioner was that the officers of the order had devoted a portion of the order's charity fund to the defense of certain members of the colored race, not members of the order, who were charged with the commission of a capital offense. It appears that the grand lodge annually appropriated a thousand dollars to be used for general charitable purposes, and there remained $481.65 of this fund, which was appropriated not to the defense of persons accused of crime, but to the members of their families, who were said to be in destitute condition. This cannot be said to have been an improper use of this money, as it was made the duty of the officers of the order to determine who should be the beneficiaries of its charity fund, and it does not appear that they acted fraudulently in the matter.

The most serious charge preferred against the officers of the order was that four of them had conspired with a contractor who had been employed to erect a building belonging to the order in the city of Little Rock, and that the contractor, in consideration of being awarded the contract, had paid each of these officers the sum of $250. This charge was based on the testimony of one of the officers, who said he had been paid that sum of money by the contractor. The other officers emphatically denied any knowledge of this agreement, and the contractor also denied that any such agreement had been made, or that he had paid, or had promised to pay, anything to any one for the award to him of this contract.

In further explanation of this very serious charge it was shown that sharp differences existed between these officials, and each had sought the displacement of the other at the election of officers, and, although much bitterness had been engendered by this contest, no charge of bribery had been made at the grand lodge meeting when the officers were elected, although the alleged bribery preceded the grand lodge meeting. The court below, in refusing to find that the officers of the order had accepted a bribe, evidently discarded the testimony of the officer who gave that testimony. There was no corroboration of his testimony, and much contradiction of it, and we cannot say the court should have found otherwise.

The court was requested to make other findings of fact of less importance, but refused to do so, and, upon the whole case, we do not feel warranted in disturbing the judgment of the court below. There were irregularities which should not have existed, but these appear to have been corrected, and the officers have been taught that the management of the order is not their private business which can be run by them without rendering the account to the Insurance Department which the law requires.

Legislation such as we have is getting to be general among the States, and the right of the State to supervise these fraternal and benefit orders, where they embark in the insurance business, is universally upheld, and, when it is found proper to do so, the right to appoint receivers to take over their affairs will be enforced, and the courts have not hesitated to do so. The courts, however, recognize these statutes as harsh and severe remedies, which will not be applied until all others fail. Note to annotated case of *Supreme Sitting of the Order of Iron Hall* v. *Baker,* 20 L. R. A. 210, 214; *State* v. *Bankers' Union of the World,* 99 N. W. 531; *State ex rel. Attorney General* v. *People's Mutual Benefit Assn.,* 42 Ohio St. 579; *Crombie* v. *Order of Solon,* 27 Atl. 710; *Order of International Fraternal Alliance* v.

State, 26 Atl. 1040; *Stendell* v. *Longshoremen's Protective Union Benev. Assn.*, 41 Sou. 228; *French* v. *Gifford*, 30 Iowa 148; 19 R. C. L. 1320 *et seq.*

This insurance order is shown to have nearly four hundred subordinate lodges and a gross annual income of over a hundred thousand dollars, and there are no doubt members who were eligible for insurance at the time of their applications who are no longer so. If the order is put in the hands of a receiver, its usefulness is largely abridged, if, indeed, its existence is not terminated, as the best risks might seek other insurance, leaving the order liable on benefit certificates to the less desirable risks, and the purpose of the law, which is that of protecting the persons insured, would be defeated by the appointment of a receiver.

The judgment of the court below is therefore affirmed.

LASETER *v.* LASETER.

Opinion delivered February 19, 1923.

1. INSURANCE—BY-LAW OF BENEFIT SOCIETY—STEPMOTHER AS MEMBER OF FAMILY.—Where a stepson had been at home only occasionally during the five years prior to his becoming of age, and afterwards married and lived apart from his father and stepmother, until his death, the stepmother was not a member of his family, so as to entitle her to the proceeds of an insurance policy within the meaning of by-laws of a mutual benefit society limiting beneficiaries to members of the insured's family.
2. INSURANCE—BY-LAWS OF BENEFIT SOCIETY—WIDOW AS BENEFICIARY.—Under by-laws of a fraternal insurance company providing that the beneficiaries should be limited to members of insured's family, and that if a designated beneficiary was ineligible the benefit should go to his widow, *held* that a benefit certificate taken for the benefit of insured's widow and his stepmother was payable to the widow alone where the stepmother was not a member of his family.

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

Buzbee, Pugh & Harrison, for appellant.

The court erred in dismissing the intervention of the administrator. 53 Ark. 255; 102 Ark. 72; 150 Ark. 317. The courts are divided as to what persons would class as "member of family," under the by-laws of the order in force in this case. 64 S. W. 8; 22 S. W. 551; 47 Atl. 460; 88 Am. St. Rep. 449; 16 N. W. 871; 87 S. W. App. 268. Our Legislature in act 462, Acts of 1917, classed a stepmother, with others, as a beneficiary. That act is not controlling here, but it is for the insurance society to challenge the stepmother's eligibility, which was not done. The court erred in dismissing the intervention.

Rogers & Terral and *J. C. Marshall,* for appellee.

The stepmother was not a member of the household of the insured, and was not eligible. 106 N. W. 140; 119 N. E. 426; 126 N. E. 892; Words & Phrases, "Family." By paying the money into court the society simply recognized liability to the rightful claimant thereto. 163 N. W. 292; 27 Cal. App. 607; 150 Pac. 803; 151 Wisc. 155; 138 N. W. 615; 112 Wis. 587; 88 N. W. 606. The exact question involved here, as to the right of the beneficiary under the contract to assert the disqualification of others designated as beneficiaries, has been ruled upon in the following cases: 106 N. W. 140; 92 N. E. 962; 87 N. E. 299; 36 L. R. A. (N. S.) 208. The fact that the member designated his stepmother as his mother is immaterial. 191 S. W. 539; 34 L. R. A. (N. S.) 1192.

SMITH, J. In the year 1909 Modern Woodmen of America issued to William E. Laseter a policy of insurance, or benefit certificate, in the sum of $2,000, payable to William F. Laseter, his father, and Roy Laseter, his brother. On October 6, 1916, he changed the beneficiaries in said certificate, and designated as beneficiaries Mattie Laseter, his stepmother, and Mollie Elizabeth Laseter, his wife. The change of beneficiaries was accomplished in accordance with the rules of the insurance order, by canceling the original certificate and issuing,

in lieu thereof, a certificate in the sum of $2,000, payable to Mattie Laseter and Mollie Elizabeth Laseter, "related to said member as mother and wife."

W. E. Laseter died on the 10th day of July, 1920, and claims were duly presented by Mattie Laseter and Mollie Elizabeth Laseter, the designated beneficiaries. Mattie Laseter's claim was for a thousand dollars. Mollie Elizabeth Laseter made claim for two thousand dollars, setting up that Mattie Laseter was not eligible to take as beneficiary under the by-laws of the insurance order. Modern Woodmen of America promptly paid Mollie Elizabeth Laseter a thousand dollars, but withheld payment of the remainder on account of the conflicting claims of the designated beneficiaries.

Mollie Elizabeth Laseter sued the insurance order, and that defendant filed motion that the administrator of Mattie Laseter (who had died in the meantime) be made a party, and offering to pay the money into court, although the payment was not made.

The benefit certificate provided that, in case the designated beneficiary should be disqualified, and no substituted beneficiary had been named, the money should go in accordance with the by-laws of the order in force at the time of the death of the insured.

It is admitted that, if Mattie Laseter was ineligible, the entire certificate, under the terms of the by-laws of the insurance order, would be payable to the widow; and it is also admitted that the stepmother of the insured was not eligible as a beneficiary, under the by-laws of the order, unless she was a member of the family of the insured, within the meaning of that phrase as used in the by-laws of the insurance order. It is insisted, however, that the stepmother was a member of the insured's family within the meaning of the by-laws of the order; and it is also insisted that, if she was not a member of his family, that question can be raised only by the insurance order, and has not been raised by it.

The court below found in favor of the widow of the insured, and rendered judgment accordingly, and this appeal is from that judgment.

As has been said, the stepmother of the insured was not among the eligible beneficiaries under the by-laws of the order, unless she was a member of the insured's family, or a dependent upon him; and we think, under the recitals of the agreed statement of facts, she was not a member of his family, nor a dependent. The relation of stepmother is a very tender one, and one's stepmother might well be a member of his family; but, as we have said, the agreed statement of facts shows the stepmother was not a member of the insured's family.

It appears, from the agreed statement of facts, that the insured's father married Mattie Laseter in August, 1907, and that she was never dependent upon the insured for support, and never at any time lived in his home. The insured finished school at twenty-one, and for five years prior thereto came back to the home of his father and stepmother for short periods of time. After finishing school insured taught continuously until he married in 1915, from which time he maintained a home of his own, and lived separate and apart from his father and stepmother until the time of his death. Under these circumstances the stepmother was not a member of the insured's family. See the various cases defining the word "family" in Words & Phrases.

Counsel for appellant insist that only the insurance order can question the eligibilty of the stepmother, and cite, in support of that contention, the following cases: *Johnson* v. *Knights of Honor*, 53 Ark. 255; *Longer* v. *Carter*, 102 Ark. 72; and *American Ins. Union* v. *Manes*, 150 Ark. 315. In the case of *Longer* v. *Carter, supra,* the court said: "It seems to be settled by the weight of authority that, where a member of a fraternal benefit society has the right, under the laws of the order, to change the beneficiary, and does make a change in the manner prescribed by the laws of the order, no one but the society

itself can question the eligibility of the person thus designated, and the original beneficiary has no right to complain, even though the new beneficiary does not fall within the class specified by the laws of the order. In other words, that the society itself may waive the ineligibility of the designated beneficiary, and that the original beneficiary, having no vested interest in the benefit, is not in position to complain." In that case the insured changed his beneficiary to one who was not eligible to be a beneficiary, and upon the death of the insured the original beneficiary sought to question the qualification of the subsequent beneficiary. The right of the original beneficiary to question the substitution was denied, upon the ground that the original beneficiary had no vested interest in the benefit certificate, and therefore had no right to question the eligibility of the substituted beneficiary.

The same principle controlled in the case of *Johnson* v. *Knights of Honor, supra.* There the certificate was made payable to the insured's "heirs." Later the insured married, and died without changing his beneficiaries, and the litigation arose between the widow and the insured's brother and sister. The court held that the brother and sister, and not the widow, were the heirs, and therefore the persons named in the certificate, and that their eligibility could not be questioned by the widow, who was not named as beneficiary.

The case of *American Insurance Union* v. *Manes, supra,* was one where it was insisted that the benefit certificate was void as being a wager contract; but the court held that, even though it was not binding on the company which issued it, as being a wager contract, a society which subsequently entered into a contract to perform the original contract of insurance could not question its validity.

We have here a different proposition. An eligible and named beneficiary claims the entire benefit, and she is entitled thereto under the by-laws of the order, unless

the stepmother is entitled to a part thereof. We do not understand that the insurance order is waiving the ineligibility of the stepmother; it merely tenders into court the sum it still owes under the benefit certificate, and asks that it be discharged from liability thereon, and accompanying its motion is a copy of its by-laws, from which it appears that the stepmother is ineligible unless she was a member of the insured's family.

The case of *Logan* v. *Modern Woodmen of America*, 137 Minn. 221, 163 N. W. 292, 2 A. L. R. 1676, is a case in which the propositions here involved were considered, and the opinion of the Supreme Court of Minnesota in that case is of especial value here, because it construes the sections of the by-laws of the insurance order here under consideration, the insurance order in both cases being the Modern Woodmen of America. In that case Oliver Jones procured a benefit certificate payable to Mrs. Austin, his mother-in-law. He later changed the beneficiary and made his certificate payable to Mrs. Logan, his deceased wife's niece, who was designated as "related to said member in the relationship of niece." It was conceded that Mrs. Logan was not a blood relative of the insured, and was never dependent upon him, nor a member of his family. The court said that, as Mrs. Logan was not within any of the classes of persons eligible to be appointed as beneficiary, her designation as such gave her no right to share in the benefit fund of the society. The named beneficiary being ineligible, the court, in construing the effect of the by-laws, said: "If the appointee in the certificate is ineligible, the by-laws step in and appoint another in his stead who is eligible. * * * The appointment of Mrs. Austin as beneficiary was canceled by the assured in the manner prescribed by the by-laws; and the failure to appoint an eligible beneficiary in the new certificate did not revive or reinstate the canceled appointment, but, by force of the by-laws, made the children of the assured

his legal beneficiaries," and the judgment of the court in favor of the children was affirmed.

Here by force of the by-laws the widow is made the legal beneficiary, and she therefore takes the share which would have gone to the stepmother but for the ineligibility of the latter.

In that case, as in this, the insurance order tendered the money into court and asked to be discharged from liability, and on that account it was contended there, as here, that the insurance order had waived the ineligibility of the substituted beneficiary. Answering that contention, the court said: "We are also unable to assent to the proposition that the payment of the money into court operated to waive the by-law. By paying the money into court, the society simply recognized liability to the rightful claimant thereto, not to any particular claimant, and its action amounted to nothing more than a demand that the court protect it against a double liability by determining to whom the money rightfully belonged" (Cases cited).

The case of *Cunat* v. *Supreme Tribe of Ben Hur* (249 Ill. 448, 94 N. E. 925) is annotated in 34 L. R. A. (N. S.) 1192. In the annotator's note it was said that the authorities are unanimous in holding that joining an ineligible person with an eligible one as beneficiary in a mutual beneficiary certificate did not render the certificate void, and that the portion made payable to the ineligible person would, as a general rule of law, be payable to the persons who, under the rules of the insurer, are eligible as beneficiaries. That person here is the wife.

In the case of *Logan* v. *M. W. of A., supra,* the court, in construing § 46 of the by-laws, said: "By virtue of this provision, if the beneficiary named is found to be ineligible, the widow, and, if no widow, the children, become the beneficiaries, and the obligation of the society remains in full force."

We conclude therefore that the judgment was properly rendered in the wife's favor, and it is affirmed.

McKINLEY v. BLACK.

Opinion delivered February 19, 1923.

MORTGAGES—LIMITATION—EFFECT OF UNRECORDED PAYMENTS.—Under Crawford & Moses' Dig., §§ 7382, 7408, providing that payments on a mortgage shall not revive the indebtedness or extend the operation of the statute of limitations, so far as the same affects the rights of third parties, unless, prior to expiration of the period of limitation, a memorandum of such payment be indorsed on the margin of the record, *held* that a purchaser at his own execution sale, not a party to the mortgage, is a "third party," and where payments on the mortgage were not indorsed on the margin of the record until after the debt was apparently barred, and after the execution sale, the payments did not stay the running of the statute as to such purchaser.

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

Duty & Duty, for appellant.

The mortgage was barred, so far as pertains to the rights of this appellant. Crawford & Moses' Digest, §§ 7382, 7408. Appellant was a third party within the meaning of the statute, § 7382, *supra.* 106 Ark. 207; 64 Ark. 317; 68 Ark. 257-9; 91 Ark. 394-8; 99 Ark. 213; 91 Ark. 394; 42 Ark. 140; 41 Ark. 186.

W. O. Young, for appellee.

A purchaser at his own execution sale can acquire no greater rights to the property than the debtor could himself claim. 23 C. J. 746 *et seq.* The purchaser at a valid execution sale takes what title the defendant in execution has, no more, no less. 131 Ark. 492; 215 S. W. 611.

HUMPHREYS, J. Appellant instituted suit in the Benton Chancery Court to quiet title to the SE¼ NW¼ sec. 16, T. 21 N., R. 29 W., in Benton County, Arkansas, against appellee, alleging ownership thereto under purchase at his own execution sale under an execution issued out of the Benton Circuit Court, upon a judgment obtained by him against C. S. and Sarah Mitchell.

Appellee filed an answer and crossbill, asserting and seeking to enforce a mortgage against the property which he obtained from the owners, C. S. and Sarah Mitchell, on the 17th day of February, 1909, to secure a note of even date in the sum of $295, due on the 17th day of February, 1910, on which the following payments had been made: September 13, 1909, $49; June 20, 1914, $10; and June 17, 1919, $10. The mortgagors were made parties defendant in the crossbill, who filed an answer admitting the indebtedness and the execution of the mortgage to secure same.

Appellant filed an answer to the crossbill, alleging that the mortgage indebtedness was barred as to him under §§ 7382 and 7408 of Crawford & Moses' Digest.

The cause was submitted to the court upon the pleadings and the oral and documentary testimony, which resulted in a refusal to sustain the plea of the statute of limitations, and the rendition of a decree in favor of appellee for the mortgage indebtedness, and foreclosure of the mortgage to pay same, and a dismissal of appellant's bill for the want of equity, from which decree an appeal has been duly prosecuted to this court.

The facts are undisputed, and are as follows: On February 17, 1909, C. S. and Sarah Mitchell were indebted to W. L. Black in the sum of $295.62, and to secure the indebtedness executed a mortgage to him on said real estate. The indebtedness was evidencd by note of even date with the mortgage, bearing interest at the rate of 8 per cent. per annum from date until paid, being due and payable on the 17th day of February, 1910. Three payments were made upon the indebtedness and credited on the notes, as follows: September 13, 1909, $49; June 20, 1914, $10; and June 17, 1919, $10. The mortgage was recorded, but the credits were not noted on the margin of the record until April 18, 1918. Appellant obtained a judgment against C. S. Mitchell in a magistrate's court for $226.85, which was filed on the judgment docket of the Benton Circuit Court on November 3, 1917. On the 12th day of April, 1918, the exe-

cution was issued upon the judgment levied on said land, which was sold to satisfy the judgment. Appellant purchased the land at the execution sale, and, after the expiration of the right of redemption, procured the sheriff's deed thereto. On the 18th day of April, 1919, before the sheriff's deed was executed, a notation of the amounts theretofore paid on the notes was made upon the margin of the record. The only question presented by this appeal is whether the mortgage lien was barred as against appellant. This must depend on whether the purchaser at an execution sale is a third party within the meaning of §§ 7382 and 7408 of Crawford & Moses' Digest. Those sections provide that payments upon a mortgage indebtedness shall not operate to revive the indebtedness or to extend the operation of the statute of limitation, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk. In construing these statutes this court has ruled that strangers to the mortgage, with full knowledge of the existence of such mortgage, may avail themselves of an apparent bar of the debt, if payments which would stay the limitation are not indorsed on the margin of the record of the mortgage. *Martin* v. *Ogden,* 41 Ark. 186; *Wright* v. *Graham,* 42 Ark. 140; *Hill* v. *Gregory,* 64 Ark. 317; *Morgan* v. *Kendrick,* 94 Ark. 394. Third parties, as used in the statutes under construction, necessarily mean strangers to the mortgage. This being true, we think an execution purchaser at his own sale, who was not a party to the mortgage, is a third party within the meaning of the statutes. In the instant case the payments which prevented the statutory bar between the mortgagor and mortgagee were not entered upon the margin of the record of the mortgage until long after the debt was apparently barred, and after appellant had purchased the land at

the execution sale. The payments did not therefore stay the limitation as to appellant.

On account of the error indicated the decree is reversed and the cause is remanded, with directions to quiet appellant's title to said real estate as against the mortgage lien of appellee.

SPIER v. STATE.

Opinion delivered February 19, 1923.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a prosecution for murder, evidence *held* to warrant submission of the charge of murder and to support conviction of voluntary manslaughter.
2. HOMICIDE—ORIGIN OF QUARREL.—In a prosecution for murder, evidence of the victim's wife that about two years before the killing defendant had ravished her, was admissible as being the cause of the quarrel between defendant and her husband, which never abated.
3. HOMICIDE—EVIDENCE OF DECEASED'S INSANITY.—Evidence as to an insanity proceeding against the deceased, either not objected to or else elicited by defendant, cannot be ground for complaint on appeal.
4. CRIMINAL LAW—ARGUMENT OF COUNSEL.—In a murder trial, where there was testimony that the killing of defendant's brother grew out of defendant having ravished his wife, statements of the prosecuting attorney that defendant shed more tears in the preceding 24 hours than he had shed for years prior to the trial, that evidence showed that he didn't shed tears at his brother's grave, that when defendant ravished his brother's wife he forfeited the right to live, and that the man who would ravish his brother's wife and then murder him would fabricate a defense like defendant had done, were mere expressions of opinion and proper argument.
5. CRIMINAL LAW—ARGUMENT OF COUNSEL.—In a murder trial, argument of the prosecuting attorney that defendant could have turned aside when he saw he was going to meet deceased, and, having failed to do so, he did not do everything in his power consistent with his safety to avoid difficulty, and therefore was not entitled to invoke the law of self-defense, was not prejudicial in view of the court's instruction that defendant had a right to pursue his intended course without turning aside, and

that a failure to turn aside would not deprive him of the right of self-defense.

6. CRIMINAL LAW—REQUESTED INSTRUCTIONS ALREADY COVERED.—Refusal of instructions fully covered by other instructions given was not error.

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

Gordon & Combs, for appellant.

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

HUMPHREY:, J. Appellant, Charlie Spier, was indicted in the Conway Court for murder in the first degree for killing his brother in Conway County on October 24, 1921, and on the trial of said charge was convicted of voluntary manslaughter and adjudged to serve two years in the State Penitentiary as punishment therefor. From the judgment of conviction an appeal has been duly prosecuted to this court.

Appellant's first assignment of error is that the evidence is not sufficient to support the judgment. It is contended that the undisputed evidence reflects that appellant killed his brother, Arthur Spier, in necessary self-defense. The record of the testimony is quite voluminous, and it would extend this opinion to great length to set out the testimony of each witness. Only a brief statment of the facts therefore will be attempted. The tragedy occurred on the public highway near Morrilton. It was the culmination of a quarrel between the brothers, of two years standing, growing out of a charge that Charlie had ravished Arthur's wife. Arthur had threatened appellant's life on many occasions, and had compelled him to leave home. Charlie had resided with his father and mother only a few hundred yards from Arthur's home. After leaving the country, Charlie returned secretly on several occasions to visit his parents. During one of these visits, the brothers engaged in a shooting affair near a neighborhood store. Neither was injured at that time. The sympathies of the father

and mother were with Charlie, which caused a bitterness between the two families. On one occasion, during the absence of Charlie, a charge of insanity was preferred against Arthur on account of frequent outbursts of anger toward his father and Charlie, in the hope that treatment in the Hospital for Nervous Diseases would restore his former equanimity. Charlie did not participate in the proceedings. On the night before the killing, Charlie spent the night with his brother, Elmer, who lived in the same neighborhood. Early the next morning he went to his father's home, in company with a friend, taking a single-barrel shotgun and two cartridges with him. In going to his father's house he saw Arthur, but avoided meeting him by going through the woods. In a short time after arriving at his father's home, he saw Arthur passing in a wagon on his way to Morrilton. Later in the morning Mr. Spier went to Morrilton in his buggy, and Charlie decided to go with him as far as Ed Bradshaw's, in order to collect some money which Bradshaw owed him. He procured two more cartridges at his father's home, making four in all, and took the gun with him. He testified that his purpose was to collect the money, return home by way of a neighborhood store, buy some more shells and hunt squirrels in the woods on the way back; that Bradshaw was not at home, so he decided to go on to town with his father; that after going about one-half mile he saw Arthur coming; that just before meeting him he observed a pistol in Arthur's hand; that he said, "Arthur, don't you get it," at which time Arthur began to fire, hitting him the first shot in the hip; that when Arthur fired the second shot he reached for his gun and shot him; that Arthur then fired four more shots at him.

R. I. Spier testified that Charlie was watching Arthur when they met him; that he heard Charlie say, "Don't you get it," and Arthur reached over for a pistol; that he became excited, and could not say which one fired first. Other witnesses who heard the shots said

they were close together, but the pistol shot was first. Dr. Arthur, the coroner, testified that appellant told him he took the gun that morning for the purpose of killing a hawk, should he see one.

Appellant's explanation as to why he had the gun, and why he went to town with his father, knowing they would likely meet Arthur, may have been regarded as a ruse by the jury. They may have disbelieved the testimony, and concluded that he took the gun for the purpose of engaging in a shooting fray with his brother. As they were about to meet, he was watching his brother, and quickly warned him not to draw his pistol. The jury may have drawn an inference from his conduct and statement that he was prepared to prevent Arthur from drawing the pistol, or, to put it in common parlance, that appellant had beaten him to it. While appellant stated that Arthur was the aggressor, his father, the only eye witness, stated that he did not know who fired first. The conflict in the evidence, and the reasonable inferences that might be drawn therefrom, warranted the submission of the charge of murder to the jury, and were sufficient to support the verdict and judgment.

Appellant's second assignment of error is that the court permitted the wife of deceased to testify that about two years before the tragedy appellant ravished her. This was the cause of the trouble between the brothers. The quarrel growing out of the affair never abated, but continued until it culminated in the tragedy. Being the origin of the trouble, the testimony was clearly admissible.

Appellant's third assignment of error is that the court admitted proof of the insanity proceeding against Arthur. No objection was made to the testimony of Mrs. Arthur Spier relating to the insanity proceeding, at the time it was introduced. The testimony of the other witnesses concerning the insanity proceeding was elicited by appellant from his own witnesses. We are

unable to see just how the introduction of the testimony prejudiced the rights of appellant, but, even if it did, he is in no position to complain.

Appellant's fourth assignment of error is that counsel for the State, over the objection and exception of appellant, made the following statements in the course of argument:

"1. The defendant could have turned aside to another road when he saw he was going to meet the deceased, and, having failed to do so, he didn't use all the means within his power consistent with his safety to avoid the difficulty. He was therefore not entitled to invoke the law of self-defense.

"2. The defendant shed more tears in the last twenty-four hours than he had shed for years prior to the trial; that he should have gone to the grave of his deceased brother at the time of his funeral and shed some tears; that the evidence showed that he didn't shed any at that time.

"3. When Charlie Spier ravished the wife of deceased, he forfeited the right to live, under the law.

"4. The man who would ravish his brother's wife and later murder him would fabricate a defense just like Charlie Spier had done."

The last three statements were expressions of opinions only, and therefore proper argument.

The first statement did not result in any prejudice to the cause of appellant, because the court instructed the jury "that he (appellant) had a right, under the law, to pursue his regular or intended course without turning aside to some other road, and that his failure to turn aside to some other road would not deprive him of his rights, under the law of self-defense."

Appellant's fifth assignment of error is that the court refused to give four of the instructions requested by him. We have examined the instructions carefully, and, by comparison with other instructions given by the

court, find that the instructions requested were fully covered by other instructions, except that part of appellant's request No. 1, embraced in the first sentence thereof. The court gave that part of appellant's request. The court fully and correctly instructed the jury upon every issue involved in the case.

No error appearing, the judgment is affirmed.

McILROY v. BAIRD.

Opinion delivered February 19, 1923.

1. HIGHWAYS—DISALLOWANCE OF CLAIM AGAINST DISTRICT—LIMITATION OF APPEAL.—A statute limiting to 30 days the time for appealing from the disallowance by highway commissioners of claims against a district which had been abolished by the statute, *held* valid.
2. HIGHWAYS—DISALLOWANCE OF CLAIM—LIMITATION OF APPEAL.—Where all the parties have treated a claim against a defunct road improvement district as if it had been rejected by the commissioners, it is too late to raise the question that it had not been passed on by the commissioners, and that for this reason the statutory limitation for appealing did not apply.
3. HIGHWAYS—REPEAL OF STATUTE CREATING IMPROVEMENT DISTRICT.—It is immaterial that a suit attacking the validity of a special act creating a road improvement district was brought before an act abolishing the district went into effect, where the complaint was amended to set forth such repealing act, and the action thereafter proceeded to final decree, in accordance with the statute.

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

Jas. B. McDonough, for appellant.

W. N. Ivie, John Mayes, and *J. V. Walker*, for appellee.

PER CURIAM. This is an appeal from a decree of the chancery court of Washington County disallowing a portion of appellant's claim against Road Improvement District No. 6 of Washington County, created by special act

of the General Assembly of 1919 (Vol. 2, Road Acts of 1919, p. 2326) and abolished by special act of the General Assembly of 1921. Special Acts 1921, p. 525.

Appellees moved to dismiss the appeal on the ground that it was not perfected within the time prescribed in a section of the repealing act cited above.

The history of the litigation is as follows: Appellees, who were certain owners of real property in the district mentioned, commenced suit in the chancery court of Washington County in June, 1920, attacking the validity of the statute creating the district and the assessment of benefits thereunder. No decree was rendered in that action until after the repealing statute became effective, ninety days after the adjournment of the General Assembly of 1921. After the passage and approval of that statute, but before it went into effect, appellees amended their complaint in the orginal action so as to set forth this statute, and the action proceeded to final decree after the repealing statute went into effect. The court appointed a master to investigate the claims, and specified a time within which the claims might be presented. The master made his report, and appellant filed exceptions to the report, and the court rendered a final decree allowing a portion of appellant's claim but disallowing the remainder. This is the decree from which appellant seeks to prosecute his appeal, but his transcript was not filed within the time specified in the repealing statute for the prosecution of such appeals.

The section of the repealing statute cited above reads as follows: "Section 3. If the commissioners reject any claim, in whole or in part, presented to them, the holder thereof shall be barred, unless he shall, within ninety days after notice of the rejection thereof, proceed to enforce the same by suit. All suits shall be deemed matters of public interest, and shall be advanced and heard at the earliest possible moment; and all appeals therein must be taken and perfected within thirty days."

This court has, in numerous decisions, held to be valid statutes similar to this, limiting appeals in certain cases to a time as short as that mentioned in this statute. *Crandell* v. *Harrison,* 105 Ark. 110; *Miller* v. *White,* 108 Ark. 253; *Norton* v. *Road Imp. Dist. No. 1 of Jefferson County,* 143 Ark. 110; *Ferrell* v. *Massie,* 150 Ark. 156; *Davis* v. *Cook,* 155 Ark. 613.

Appellant insists that this case does not fall within the terms of the statute, for several reasons; first, because his claim was never rejected by the commissioners, but was passed on by the court in the first instance. The commissioners of the district were parties to this suit, and appellant presented his claim to the court, or, rather, to the master, in accordance with the instructions of the court, all parties treating the claims as being in the same attitude before the court for adjudication as if it had been rejected by the commissioners, and it is too late now, after the adjudication has been made by the court, to raise the question that the commissioners had not previously passed upon the claim and rejected it.

The next reason given why the case does not fall within the provisions of the statute is that it was instituted before the repealing statute went into effect. The answer to that contention is that the suit progressed without final decree until after the repealing statute became effective, and the decree was rendered under that statute.

Again, it is urged that the case does not fall within the statute for the reason that there is an attack made upon the constitutionality of the statute, and that the appeal ought to stand as to that part of the decree under the rule announced in *Davis* v. *Cook, supra.* Conceding it to be true that there is involved an attack upon the constitutionality of the statute, the attack arises entirely in the prosecution of the claim which appellant had filed, and therefore it comes squarely within the statute. The fact that there is a challenge to the constitutionality

of the statute does not render it any the less conclusive as to the time for prosecuting the appeal. We have held that that part, at least, of the statute is valid under the rule announced in the cases hereinbefore cited.

It follows from what has been said that the appeal has not been prosecuted within the time specified by the statute, and the appeal must therefore be dismissed. It is so ordered.

ÆTNA CASUALTY & SURETY COMPANY v. NORTH LITTLE ROCK.

Opinion delivered February 26, 1923.

1. MUNICIPAL CORPORATIONS—LIABILITY OF CITY COLLECTOR.—Where funds collected by a city collector belonging to a city and to certain improvement districts were jointly deposited in his name as collector, and it was impossible to show from what source the funds came, further than that they were collected for the benefit of the city and the improvement districts, it was proper to divide the joint fund *pro rata*, in accordance with the amounts due each.
2. MUNICIPAL CORPORATIONS—CITY COLLECTOR—REPEAL OF STATUTE. —Crawford & Moses' Dig., § 5702, providing for the appointment of collectors of improvement districts by the respective boards of improvement except in the cities of Little Rock and Pine Bluff, was not repealed by Crawford & Moses' Dig., § 5669, providing that the city clerk shall deliver to the "city collector" a copy of assessments of benefits and warrants for collection, the reference to the city collector, instead of to the collectors of the various improvement districts, being a clerical error.
3. STATUTES—REPEALS.—Repeals of statutes by implication are not favored.
4. MUNICIPAL CORPORATIONS—LIABILITY ON COLLECTOR'S BOND.—In view of Crawford & Moses' Dig., § 5702, providing for the election of collectors of improvement districts by the respective boards of improvement in all cities except Little Rock and Pine Bluff, the clerk and the city collector of North Little Rock was not the collector of improvement districts in such city, and bond given for faithful performance of his duties did not cover a de-

falcation in regard to funds belonging to improvement districts collected by him.

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

Roscoe R. Lynn, for appellant.

Under the statutes, the city clerk and collector was not, by virtue of his office, the collector also for the improvement districts, and the bond to the city against loss to it did not cover losses to the districts. As to bond required of collectors for improvement districts, see C. & M. Digest, § 5702. The authority for the ordinance under which the city collector gave his bond is § 7517, C. &. M. Digest. In so far as the ordinance requires that the bond be conditioned that the collector account for money taken in as collertor for improvement districts, it is in conflict with § 5702, *supra,* and is void. The act of May 3, 1901, § 7, being C. & M. Digest, § 5669, did not in any way repeal or affect § 5702.

J. F. Wills, for appellee, city of North Little Rock.

If it is found that the improvement districts were not protected by the bond, the city should have judgment for the shortage against the appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellees, improvement districts.

The act of 1897, carried into Crawford & Moses' Digest as § 5702, was repealed by the act of 1921, act No. 143, Acts 1901, p. 264, which intrusts the collection of all municipal local assessments to the city or town collector. The bond covers the indebtedness due the improvement districts as well as that due the city.

McCULLOCH, C. J. R. W. Miller was, in April, 1920, elected to the office of city clerk and city collector of North Little Rock (a city of the first class) and, in accordance with an ordinance, he executed his official bond to the city in the sum of $5,000 with appellant as surety thereon, conditioned that he should "faithfully discharge and perform the duties of his office, and at the expiration of his term of office shall render unto his successor in office a

correct account of all sums of money, books, goods, valuables, and other property, as it comes into his custody, as such clerk and collector of said city of North Little Rock, Arkansas, and shall pay and deliver to his successor in office, or any other person authorized to receive the same, all balances, sums of money, books, goods, valuables and other property which shall be in his hands and due by him."

Miller resigned in April, 1921, and it was found that he was short in his accounts to the city and also to three separate local improvement districts for which he had collected funds. According to the audit of Miller's accounts, which has been found to be correct, he owed the city of North Little Rock $5,531.63, and also owed the three improvement districts, in the aggregate, the sum of $6,734.37, and he had in a bank, to his credit as collector, the sum of $3,843.61.

This action was instituted in the chancery court of Pulaski County by the city of North Little Rock against appellant to recover the amount on the bond. In the complaint the facts were set forth concerning the amount of funds on hand in bank to the credit of the collector, and an accounting was asked as between the city and the improvement district concerning the application of these funds. The improvement districts were joined as defendants in the action, and each filed a cross-complaint asking for recovery on the bond of the respective *pro rata* of the liability to each of the districts.

The chancery court decided that each of the improvement districts was entitled to protection under the bond jointly with the city of North Little Rock and to share in the recovery *pro rata* according to their respective amounts due from Miller, the principal in the bond. The court in its decree credited on Miller's account with the city and each of the improvement districts a *pro rata* part of the fund in bank, and, after thus ascertaining the net amount of Miller's shortage with each party, rendered a decree against appellant for a recovery by the city and

each of the improvement districts of their *pro rata* part of the liability under the bond. Under this decree the recovery against appellant was as follows:

City of North Little Rock	$2,198.33
Street Improvement District No. 15	1,209.77
Sewer Improvement District No. 1	773.83
Street Improvement District No. 16	620.82
Street Improvement District No. 18	197.25
Total	$5,000.00

Appellant prosecuted its appeal to this court, and the city of North Little Rock has cross-appealed.

The first question arising in the case relates to the apportionment of the credits for the funds in bank so as to ascertain the amount of shortage in Miller's account with the city of North Little Rock and the local improvement districts. The amounts due from Miller were proved beyond dispute, as hereinbefore stated, and it was also proved that the funds collected by Miller from the city and districts were jointly deposited in bank in his name as collector. It was impossible to show from what particular source these funds came further than that they were collections for the benefit of the city and the districts. There is no way, from the testimony, to separate the funds, and, it being shown to be a joint fund, it can only be divided *pro rata* in accordance with the amounts due by Miller to each.

In the recent decision of this court in *Miller* v. *State,* 155 Ark. 13, which was a criminal prosecution against R. W. Miller for embezzling funds of the city of North Little Rock, we decided, under the same proof as is involved in this case, that the funds belonged to the city and the improvement districts jointly, to be credited *pro rata* on the balances due the city and the improvement districts. We think that the chancery court was therefore correct in ascertaining the amount of shortage in Miller's accounts with the city and the several improvement districts.

The principal question in the case, however, is whether or not the bond protects the improvement districts as well as the city, so as to permit the improvement districts to share in the recovery.

The ordinances of the city of North Little Rock provide that the city collector shall give bond in the sum of $5,000, conditioned that he will account for and pay all funds coming into his hands which belong to the city or any improvement districts within the city; but the bond in this case was executed to the city alone, and, unless the city collector is, under the statute of this State, constituted as the collector of improvement districts in a city of the first class, the bond does not afford indemnity to the districts for moneys received by the city collector. This phase of the case therefore comes down to the question whether or not the statutes of this State constitute the city collector as the collector of local improvement districts.

Our laws governing the organization of improvement districts and providing for the procedure in their operation began with the statute enacted by the General Assembly in the year 1881. Acts of 1881, p. 161, Mansfield's Digest, § 825 *et seq.*, Sandels & Hill's Digest, § 5321 *et seq.* A section of that statute (Sandels & Hill's Digest, § 5360) provided that the board of improvement of local improvement districts should appoint the collector and treasurer of the district, but that section was amended by the act of April 19, 1895 (Acts of 1895, p. 161), so as to provide that in cities of the first class the city collectors should collect the improvement district assessments. The last mentioned statute was again amended by the act of February 11, 1897 (Acts of 1897, p. 23) reenacting the old statute to the effect that the collector and treasurer of local improvement districts should be appointed by the board of improvement, but providing that the cities of Little Rock and Pine Bluff should have the power, by ordinance, to make the city collector *ex-officio* collector of improvement districts. The

last mentioned statute has been brought forward by subsequent digesters, and it appears in Crawford & Moses' Digest as § 5702.

It is contended on behalf of counsel for the improvement districts that this statute was amended by the act of May 3, 1901 (Acts of 1901, p. 264), so as to provide that in all cities the city collector shall be the collector for the improvement districts. The section of that statute which, it is contended, amends the act of 1897, *supra,* reads as follows:

"Section 7. That § 5337 of said digest (Sandels & Hill's) be amended so as to read as follows:

"That within forty days after the passage of said ordinance, unless the time be extended by the city or town council, the city clerk, or town recorder shall deliver to the city collector a copy of said assessment of benefits containing a description of said blocks, lots and parcels of land in said district, and the amount assessed on each, duly extended against each lot, block or parcel of land, and shall deliver it with his warrant attached thereto the city or town collector, which warrant may be in the following form:

"STATE OF ARKANSAS.

"City (or town) of.....ss.

"To the collector of said city (or town) of.....

"You are hereby commanded to collect from the owners of real property described in the annexed copy of ordinance No....., the assessments on the same and as extended thereon for the current year and to pay to the treasurer of Local Improvement District No..... of said city (or town) within sixty days from this date.

"Witness my hand and seal of office on this.....day of....., 19.....

"And like writs shall be issued annually until said local assessment shall be fully paid."

That section has also been brought forward in Crawford & Moses' Digest as § 5669. There is no direct repeal by this statute (the act of 1901) of the former stat-

ute (1897) authorizing the board of improvement to appoint the collectors. If the repeal or amendment has been accomplished, it must be by implication only, and such repeals are not favored. That principle is elemental and needs no citation of authorities to support it. This court has often announced that rule of construction. There is no reference made in this statute to the act of 1897, but, on the contrary, the section under consideration expressly refers to another statute, *viz.*, § 5337 of Sandels & Hill' Digest, which relates merely to the method of certifying the assessments by the city clerk. At the time of the enactment of § 5337, Sandels & Hill's Digest, the statute provided that assessments for local improvements should be according to valuation as appraised for general taxation purposes, and that section provided that, immediately after the passage of the ordinance authorizing the improvement, the city clerk, should procure, at the expense of the district, a copy of the last assessment made by the county assessor and deliver the same to the collector of the improvement district, with his warrant attached, directing the collection of the assessments. The manifest purpose of the amendment of § 5337 was to give further time for the certification of the list of assessments, giving forty days after the passage of the ordinance, and also providing that there should be certified a list of assessments as appraised by the assessors of the district, instead of a list of valuation made to the county assessor as required under the former statute. That part of the section which prescribes the form of the certificate was a mere formula and nothing more, and it cannot be presumed that the lawmakers intended in this incidental way to repeal or amend an important feature of the former statute. If such had been the intention, the lawmakers would doubtless have adopted more direct language expressing that intention. As an indication that such a change was not in the minds of the framers of the statute in prescribing the formula for certifying the assessments, it was pro-

vided that the warrant should be directed to the collector of the city or town, whereas there is no such office as collector of an unincorporated town. The statute does not provide for any such office, and that office pertains only to cities. If the statute in question is construed to repeal the former statute, then there is no provision at all for a collector for local improvement districts in incorporated towns.

We are constrained therefore to hold that the act of 1901, *supra,* was not intended to repeal any former statute, but that the provision for certifying the assessments merely prescribed a form in which there occurred a clerical error with respect to certifying to the city collector, instead of to the collector of the improvement district.

We hold, in accordance with this view, that the act of 1897 (Crawford & Moses' Digest, § 5702) is still in force, and provides for the election of collectors of improvement districts by the respective boards of improvement in all municipalities except in the city of Little Rock and in the city of Pine Bluff. Miller was therefore not a collector of the improvement districts *de jure,* and the bond did not cover his defalcations as to funds received by him which belonged to the improvement districts. Having received the funds, however, for the benefit of the improvement districts, he became, in fact, a bailee, and was subject to prosecution for embezzlement, as we announced in the former opinion in the criminal case against Miller, but the sureties on his official bond are not liable for the defalcation, for the reason, as before stated, that Miller was not, in law, the authorized collector of the districts.

It follows therefore that the decree was wrong in awarding any sum to the improvement districts, but the bond protects the city of North Little Rock to the extent of Miller's defalcation of said funds. After crediting Miller's defalcation to the city with the *pro rata* of the funds in bank, there was a deficit of $3,703.04, and the city is entitled to a decree against the surety on the bond for that sum.

The decree is therefore reversed and dismissed as to the improvement districts, and a decree will be entered here in favor of the city of North Little Rock for the sum mentioned above, to which it is entitled. This decree will be entered here as of the date of the decree below, so as to bar interest from that date. It is so ordered.

HAWKINS BROTHERS v. LESSER-GOLDMAN COTTON COMPANY.

Opinion delivered February 26, 1923.

1. ACCOUNT STATED—ACTION TO SURCHARGE—JURISDICTION OF EQUITY.—An action to recover an additional amount alleged to be due on an account stated, alleging fraud therein, is an action to surcharge the settlement, rather than an action to recover damages for deceit, and is within the jurisdiction of equity, and is properly transferable to that court.
2. ACCOUNT STATED—ACTION TO SURCHARGE—BURDEN OF PROOF.—In an action to surcharge an account stated and settled and recover an alleged balance, the burden is on the plaintiff to impeach the accounts already furnished and accepted.
3. ACCOUNT STATED—CONCLUSIVENESS.—Where, in settling an account, a price is agreed upon for certain damaged cotton, those accepting such price with full knowledge are bound thereby, and cannot afterwards object to it in an action to surcharge the account stated and settled.

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

Paul Jones, Sr., and *James D. Head*, for appellants.

1. This case comes well within the principles announced by this court in *Sanders* v. *Berry*, 139 Ark. 447, 457, as disclosed by the evidence whereby it is made plain that appellee sought to induce the appellants, and did induce them, to believe that the weights on which the settlement was made were the actual compress weights after conditioning.

The fact that appellants might have learned the true weights by going to Hope is no defense to appellee. 71 Ark. 305.

2. The circuit court erred in transferring the case to equity over the objections of the plaintiffs, and the latter court erred in refusing to remand the same to the law court. 40 Ark. 189; 77 Ark. 261; 73 Ark. 542; 101 Ark. 195, syllabus; 76 Ark. 497, 501; 74 Ark. 46; 70 Ark. 189, 191; 6 Ark. 79; *Id.*, 317.

C. E. Johnson and *A. D. DuLaney,* for appellee.

1. As is admitted by the complaint, this is a suit to surcharge an account which has been fully settled and paid. This can only be done in equity, upon specific charges of fraud, mistake or error. Being an account fully stated, agreed upon and paid, more proof is required to surcharge it than is required to surcharge an account stated. 1 R. C. L., § 16, Accounts and Accounting; *Id.,* § 17; 1 C. J. § 357.

If the circuit court, as is contended by appellant, had concurrent jurisdiction with the chancery court in this case, since it was transferred to the chancery court and there tried, the decision of the latter court will not be reversed unless there was manifest error. 83 Ark. 1.

McCULLOCH, C. J. Appellee, a foreign corporation with its principal place of business at St. Louis, is engaged in the cotton business and has branch offices at various points in Arkansas, including Texarkana, and on December 23, 1918, appellee, through its Texarkana office, purchased from appellants, who were engaged in the mercantile business at the town of Foreman, Little River County, 809 bales of cotton, to be delivered at the compress at Hope, Arkansas. The agreed price for the cotton was 30½ cents per pound, the price to be paid in advance on the basis of what the parties termed "country weights," that is to say the book weights kept by the appellants, and there was to be a final settlement according to the compress weights. The cotton was in damaged condition on account of exposure to weather, and it was

agreed that the cotton was to be "conditioned," that is to say, the bagging and ties were to be removed and the damaged cotton removed, appellants to pay the cost of labor, and that the "pickings," that is to say, the damaged cotton removed, were to be taken by appellee at the highest prices paid at that time for such cotton.

The gross weight of the cotton, as invoiced by appellants, was 427,075 lb., and appellees paid for the cotton in advance on the basis of that weight. The cotton was shipped to Hope, as agreed, and was there "conditioned" and repacked, and on January 30, 1919, appellee furnished to appellants an itemized statement of the amount of cotton, according to the compress weights, aggregating 422,689 lbs. which, at the stipulated price of the cotton, made a debit of $1,337.73 against appellants. Another statement furnished on the same date showed the cost of labor of handling the damaged cotton, the price of the bagging, and also the weights of the pickings at 13,661 lb., and the price, at 4½ cents, aggregating $614.74, which amount was credited to appellants, after charging them with the cost of handling, leaving a credit of $85.69. Appellants immediately repaid the amount due to appellee according to these statements, but later claimed that they had received information that the compress weights of the cotton were falsely understated in the account furnished to appellants, and that the price of the pickings should have been 9 cents a pound, instead of 4½ cents.

After communications between the parties, extending over a period of several months, appellants instituted this action in the circuit court of Little River County to recover, on account of the alleged false representations, the additional amount claimed for the price of the cotton.

It is alleged in the complaint that appellee's agents misrepresented to appellant the amount of the weights, and, instead of there being a shortage of 4,386 lb. in the weights, as shown in the statement furnished to appellants, there was, in fact, a gain of 1,277 lb., and that ap-

pellants were entitled to recover the sum of $1,728.16 on this account, as well as an additional sum on account of the difference in the price of the pickings, making a total of $2,020.95 sought to be recovered.

Appellee answered the complaint, denying all the allegations with respect to the false representations concerning the weights of the cotton, and also denying the allegations with respect to the price to be paid for pickings.

There was a cross-complaint, in which it was alleged that there was even a greater loss than that set forth in the statement, as subsequently ascertained, and there was a prayer for the recovery of the additional amount of $250 from appellants.

Appellee also moved to transfer the cause to the chancery court, which was done over appellant's objections. On final hearing of the cause, the court dismissed the complaint and also the cross-complaint, and appellee accepted the decree and has not cross-appealed.

It is first insisted that the chancery court is without jurisdiction, that the circuit court erred in transferring the cause, and that the chancery court erred in refusing to remand it. The contention is that the action is nothing more nor less than one to recover damages on account of alleged fraud and deceit, and that the remedy at law is adequate.

According to the pleadings in the case, to which we must look for the purpose of determining the jurisdiction of the court and in testing the correctness of the court's ruling in transferring the cause to equity, there was an account stated between the parties and settled, and this is an action to surcharge that settlement on account of fraud and to recover the amount alleged to be actually due. It is not merely a case to recover damages on account of deceit, as, for instance, where a sale of property is induced by fraud. The correction of accounts stated, and settlement thereof for fraud or mistake, is within the original common-law jurisdiction of courts of chancery. It is unnecessary to determine

whether or not the jurisdiction of the chancery court is exclusive, for undoubtedly the jurisdiction is at least concurrent, and, under our statute, it is proper to transfer a cause from the law court to the chancery, where "all of the issues are such as heretofore were cognizable in chancery, though none were exclusively so." Crawford & Moses' Digest, § 1045.

The only issue related to the alleged fraud in the account furnished to appellants by appellee, and, as we have seen that this was at least within the concurrent jurisdiction of the chancery court, the case was properly transferred to that court.

The evidence was to some extent conflicting as to the correct weights of the cotton when reweighed at the compress, but we are of the opinion that the evidence preponderates in favor of the findings of the chancery court. The burden was on appellants to successfully impeach the accounts furnished by appellee and accepted by appellants. They offered no direct testimony as to the correct weights of the cotton, but the testimony they introduced merely tended to show that the weights had not been correctly stated. On the other hand, appellee adduced direct testimony by at least two witnesses that the weights furnished were correct.

As to the issue concerning the price of the pickings, there was also testimony preponderating in favor of the finding of the chancellor. Appellants admitted that at the time a settlement was made for the pickings the price offered by appellee was discussed, and at first objection was made to it, but the price was finally accepted, and settlement was made accordingly. After acceptance of the price, under those circumstances, it is too late for appellants to object that the price was insufficient. They knew then all that they know now concerning the price of the pickings, and the acceptance of the price offered by appellee was binding on the parties.

Our conclusion is that the decree is supported on both branches of the case by sufficient testimony, and it is therefore affirmed.

WESTERN CRAWFORD ROAD IMPROVEMENT DISTRICT v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered February 26, 1923.

1. HIGHWAYS—ABANDONMENT OF IMPROVEMENT DISTRICT—PRELIMINARY EXPENSES.—The method of assessment prescribed by a special statute creating a road improvement district in case the improvement is abandoned, namely, that the preliminary expenses shall be paid by a levy of a tax based on the assessed value for State and county taxation, *held* valid.
2. HIGHWAYS—LEGISLATIVE ASSESSMENT OF BENEFITS.—The legislative determination that the preliminary expenses of an abandoned highway improvement, levied on the basis of the assessed value of the property in the district for State and county taxation, would not exceed the anticipated benefits from the construction of the improvement is conclusive unless shown on its face to be arbitrary and unreasonable.
3. HIGHWAYS—LEGISLATIVE METHOD OF ASSESSING BENEFITS.—A legislative assessment for paying the preliminary expenses of an abandoned road district by pro-rating such expenses according to the assessed valuation of property in the district for State and county taxation is not shown to be arbitrary and unreasonable by proof that an incomplete assessment of benefits on plaintiff's property for the completed improvement was less than the amount they would be required to pay for preliminary expenses under the legislative method of assessment.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

E. L. Matlock, for appellant.

The court erred in levying the preliminary expenses upon a basis of the benefit assessment which had been made in the district and abandoned, instead of upon the basis of the assessed valuation of the property for State and county taxation, as required by the act creating the road improvement district, § 25. 151 Ark. 47; 153 Ark. 5.

Thos. B. Pryor, for appellee, Missouri Pacific Railroad Co.; *Warner, Hardin & Warner,* for appellee, St. Louis-San Francisco Railway Co.

Where the amount of the tax to pay preliminary expenses exceeds the anticipated benefits, such an exaction is not warranted, and where the evidence shows

that the tax exceeds the benefits, and the assessment of benefits has been made under the provisions of the act, the only fair and just basis for a tax to pay the preliminary expenses would be the benefits as made by the assessors under oath. 153 Ark. 5, 239 S. W. 722; 107 Ark. 285.

McCULLOCH, C. J. A road improvement district designated as Western Crawford Road Improvement District was created in Crawford County by special statute (unpublished) at the extraordinary session of the year 1920, and there were proceedings under the statute up to the assessment of benefits by the assessors and the filing of the list of assessments with the clerk of the county court for approval by the board of commissioners. The statute contained the usual provisions with reference to giving notice of the assessments and providing for a hearing upon the correctness of the assessments.

On the day provided for the hearing there were numerous protests made by owners of property to further proceedings toward the construction of the improvement, on the ground that the improvement was too expensive,and that the cost would probably exceed the benefits, and the commissioners, without acting upon the list of assessments filed by the assessors, decided to abandon the whole project as being impracticable. There were no further proceedings towards carrying out the construction of the improvement, but there had been preliminary expenses incurred, and the statute contained the following provision with reference to the payment of such expenses:

"Section 25. In case, for any reason, the improvement contemplated by this district is not made, the preliminary expense shall be a first lien upon all of the lands in the district, and shall be paid by a levy of a tax thereon upon the assessed value for the county and State taxation, which levy shall be made by the chancery court of Crawford County and shall be collected by a receiver to be appointed by said court."

The commissioners of the district, pursuant to the provisions of that part of the statute quoted above, prepared an itemized statement or list of the preliminary expenses, and filed a petition in the chancery court of Crawford County, setting forth in detail all the proceedings in connection with the preliminary expenses incurred, and asked the court to levy a tax upon the property in the district to raise funds for the payment of such expenses. The court disallowed one of the claims, but no appeal has been prosecuted from that part of the decree. The remainder of the claims were approved by the chancery court and ordered paid, but in the final decree rendered the court refused to order payment of assessments in accordance with the directions of the statute quoted above, but ordered that the payments be made in proportion to the anticipated benefits assessed by the board of assessors.

It appeared from the proof that the property of two railroad corporations whose lines of railroad ran through the district would, under the method of assessment prescribed by the statute, amount to more than the whole of the anticipated benefits as assessed by the assessors of the district. It is shown that the assessed benefits of the Missouri Pacific Railroad were $1,960, whereas the levy of the tax on that property, according to the "assessed value for county and State taxation," would amount to $2,396.62. The board of assessors had assessed the property of the St. Louis-San Francisco Railway Company at $2,341.50, and it is shown that the amount to be paid on a levy in accordance with the provisions of the statute would be $2,769.40.

The chancery court based its conclusion on the ground that the assessment made by the board of assessors was conclusive as to the amount of anticipated benefits from the construction of the improvement, and that the owners of property could not be taxed for preliminary expenses in excess of the anticipated benefits.

It will be observed that the statute involved in this inquiry expressly provides that, in case the contemplated improvement is abandoned, "the preliminary expense shall be a first lien upon all of the lands in the district, and shall be paid by a levy of a tax thereon upon the assessed value for county and State taxation." This court has decided heretofore that the method of assessment prescribed in this statute is valid as applied to the payment of a completed improvement (*St. L. S. W. Ry. Co.* v. *Board of Directors,* 81 Ark. 562), or for the method of payment of preliminary expenses. *Board of Directors* v. *Dunbar,* 107 Ark. 285; *Neterer* v. *Dickinson & Watkins,* 153 Ark. 5. The decisions on this question were based on the ground that the statute constituted a legislative determination that benefits would accrue in proportion to value. Special application of this rule was made in the Neterer case, *supra,* where a different method of assessment had been provided under the statute for payment of the cost of the improvement, if completed. In that connection we said:

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

It is true that we reiterated in that case what had already been held in the Dunbar case, *supra,* that assess-

ments for payment of preliminary expenses could not be exacted in excess of anticipated benefits, but in each of those cases we emphasized the principle that a provision for payment of preliminary expenses necessarily implied a legislative determination that the cost of the preliminary expenses would not exceed the anticipated benefits from the construction of the improvement. The legislative determination is conclusive unless shown on its face to be arbitrary and unreasonable. *Desha Road Imp. Dist.* v. *Stroud,* 153 Ark. 587, and cases cited therein.

There is nothing shown in the present case to overcome the legislative determination except the unapproved assessment lists filed by the board of assessors. The assessment was incomplete because it was never approved by the board of commissioners. The point was never reached for the approval, for there was an abandonment of the district before this was done, and we do not certainly know what the assessments against the railroads would have been, had the assessment of benefits proceeded to finality.

Counsel for appellees lay stress upon the statement in the opinion in the Neterer case to the effect that the payment of preliminary expenses must not exceed the anticipated benefits, but this was a mere reiteration of what we have held in other cases in regard to taxation upon property and was a mere statement of the principle, without undertaking to determine how it might be shown that the taxes exceeded those benefits. We have always adhered to the principle that the right to tax for local improvements is limited to the amount of anticipated benefits, but, at the same time, we have consistently held that the legislative determination of the amount of benefits, or the legislative provision for the method of determining benefits, was conclusive unless shown to be arbitrary. So we hold now that this legislative determination is conclusive, and it is not sufficient to overcome this by showing that an incomplete assessment of benefits made by the board of assessors was less than the amount of taxes

that the appellees would be required to pay under the other method prescribed by the statute.

The chancery court erred therefore in refusing to follow the statute, and the decree is reversed, and the cause remanded with directions to enter a decree levying taxes on the property in the district in accordance with the terms of the statute; that is to say, "upon the assessed value for county and State purposes."

WOOD and HART, JJ., dissent.

BACON v. ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered February 26, 1923.

1. HIGHWAYS—DESCRIPTION OF LANDS IN IMPROVEMENT DISTRICT.—Where the Saline River formed the boundary between Howard and Sevier counties, description of lands in the order creating a road improvement district in Howard County and in a curative statute affecting it as lying "on the left bank of the Saline River" is to be construed as referring to that portion of the particular section which lies on the east side of that river which is in Howard County.
2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—Special Acts 1921, No. 594, excluding from a road improvement district half of the lands originally embraced therein after bonds had been issued for the improvement, is unconstitutional both because it imposes upon the remaining lands the total cost of the improvement and because it impairs the obligation of the contract of the district with its creditors.
3. HIGHWAYS—VALIDITY OF ESTABLISHMENT OF IMPROVEMENT DISTRICT.—Where a road improvement district was created under a general statute, the fact that a special statute attempted to dismember it, thereby impairing the obligation of its contracts, affords no ground for nullifying the district.

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

W. C. Rodgers, for appellants.

Since the answer to the cross-complaint traverses only the allegations to the effect that when the district issued its bonds no assessment of benefits had been made,

and that, when act 594, Acts 1921, was passed, the bonds of the district had been sold and contracts for the payment of money borrowed had been entered into by the district, all the other allegations of the cross-complaint must be taken as true. Crawford & Moses' Digest, § 1231; 56 Ark. 73, 79. The road district was not legally formed because the boundaries were not definitely fixed. The boundaries of such districts must be as accurately and definitely specified as is required for a valid deed. 71 Ark. 211; 106 Ark. 83; 143 Ark. 83; 144 Ark. 240, 244; 122 Ark. 491; 139 Ark. 574; 130 Ark. 70. The Legislature by the curative act, vol. 1, Road Acts 1919, p. 201, made no change in the description of the property of the district except to say it was in Howard County; but, if the district as organized by the county court was illegal and void, how could the curative act legalize and validate it? *House* v. *Road District No. 4,* 154 Ark. 218; 122 Ark. 491, 501, 126 Ark. 416, 418, 419. The formation of the district was invalid, because it called for all the property in the district, which necessarily includes personal property, and the curative act offends in the same way, in describing, in addition to the lands, all the property in the town of Dierks and all other towns in the district. 147 Ark. 181, 183. It is not sound to say that, because the bonds of the district had been sold and contracts for the payment of money borrowed had been entered into by the district, the special act No. 594 is therefore unconstitutional and void, since, if the proceedings of the district and its officers were void, and its officers without authority to enter into any contract at all, there is nothing for the Constitution to protect. 147 Ark. 252, 266; 40 Ark. 251; 111 U. S. 400; 142 Ark. 378. The law authorizing the expenditure of money or the levy of a tax for road purposes contemplates not only a legal and regular formation of the district but also a legal and regular assessment of benefits. 119 Ark. 188; 149 Ark. 476; 151 Ark. 398, 404. The decree rendered in June, 1920, in so far as it purported to hold the district regu-

larly formed, was erroneous, because the law which alone could give it life has not been complied with. However, that adjudication is not binding upon persons who were not parties to it; and these interveners, any one of whom has a right to maintain this suit, were not parties to that litigation. 88 Ark. 355; 52 Ark. 541; 54 Ark. 645; 108 Ark. 306; 141 Ark. 288; 33 Ark. 704; 141 Ark. 140; 101 U. S. 160; Dillon, Municipal Corporations, § 919; 55 Wis. 161.

Abe Collins, Epperson & Jackson, and *Buzbee, Pugh & Harrison,* for appellees.

The validity of the district and the assessment of benefits made therein have been determined by judicial decision, and are no longer open to question. The special statutes, Road Acts 1919, vol. 1, p. 201, and act 285, extraordinary session 1920, were before this court in the case of *Payne* v. *Road Improvement District,* 149 Ark. 491, and their validity sustained. See also 152 Ark. 170. There is no merit in the contention that these appellants are not bound by the decree rendered in 1920 sustaining the regularity of the formation of the district, from which no appeal was taken. That suit was brought by thirty-six taxpayers, under the rule that such taxpayers acted for the benefit of the other taxpayers in like situation. The only question open for decision is the validity of the act No. 294, Acts 1921, which undertook to eliminate a large quantity of land from the district. This court, in 152 Ark. 170, declined to pass upon it for reasons there stated. That act was invalid, being an impairment of the obligations of the contract between the district and the purchasers of the bonds, and as placing an undue burden on the lands remaining in the district. 130 Ark. 70; 139 Ark. 574; 145 Ark. 49; Constitution, U. S., art. 1, § 10; 150 Ark. 94.

McCULLOCH, C. J. The road improvement district which is plaintiff in this action was originally created under the general statutes by an order of the county court on October 7, 1918, but there was a special statute enacted by the General Assembly of 1919, curing irregularities in the organization and establishing the district

as a valid road improvement district covering the territory embraced in the original order creating it. The assessments of benefits were completed, a contract was let for the construction of the road, and a great portion of the improvement was constructed—eleven miles of the seventeen-mile length of the proposed road. Bonds in the sum of $130,000 to raise money to pay for the cost of the improvement were also issued and sold subsequent to the enactment of the curative statute referred to above.

The present action was instituted by the board of commissioners against all delinquent owners of land in the district, including appellants, and an appeal has been prosecuted from the decree of the chancery court decreeing payment of the delinquent assessments and declaring a lien on the lands.

Appellants answered, and filed an answer and cross-complaint attacking the validity of the assessments and also the validity of the district itself.

So far as concerns the correctness and validity of the assessments, it is sufficient to say that the attack comes too late, since the assessments have been approved and have become final. There were attacks on the validity of the assessments by owners of property who protested against them in apt time, and the cases were brought to this court from the circuit court, where the questions were adjudicated on appeal from the county court. *Payne* v. *Road Imp. Dist.*, 149 Ark. 491, 152 Ark. 170. On the last appeal of the case we affirmed the judgment of the circuit court approving the assessments.

The validity of the district is assailed on the ground that the description of the lands embraced in the district were in many instances so vague that it is impossible to determine what lands were meant to be described, and that the district, for that reason, is void.

In the order of the county court creating the district, as well as in the special act of the Legislature curing irregularities and establishing the district, the lands were described by sections and subdivisions thereof, and some

of the descriptions specify certain sections "on the left bank of the Saline River"; the lands are described, of course, as being in Howard County. The Saline River forms the boundary between Howard and Sevier counties. These are the descriptions which counsel for appellants insist are insufficient. We are of the opinion, however, that the words of descriptions giving the number of the section and stating that they are on the "left bank of the Saline River" clearly refer to that portion of each section which lies on the east side of the river and is in Howard County. *Bush* v. *Delta Road Imp. Dist.*, 141 Ark. 247.

The General Assembly of 1921 enacted a special statute (act No. 594) excluding from the district about half of the lands originally embraced therein, and the lands thus eliminated from the district had been assessed more than half of the total benefits. It is contended now by counsel for appellants that the effect of this statute was to nullify the district altogether, for the reason that the Legislature had no power to impose the total cost of the improvement on the lands remaining in the district after the exclusion of others.

Counsel is correct in the contention that the Legislature had no right to thus enlarge the burden on the lands remaining in the district. This, however, affords no reasons for nullifying the district, but it does afford grounds for declaring the act void. The act is also void as an impairment of the obligation of a contract between the district and its creditors.

It is shown by stipulation that, subsequent to the enactment of the curative statute, the larger portion of the improvement was constructed and that bonds were issued in the sum of $130,000. In the last case which was before us involving the question of the asessments in this case (152 Ark. 170) our attention was called to the act of 1921, *supra,* but we declined to pass upon its validity for the reason that it was not shown that there had been any indebtedness incurred prior to the passage of the statute.

It needs no citation of authorities to support the view that a statute dismembering a district after obligations are incurred constitutes an attempt to impair the obligation of a contract, and is void; that falls within the inhibition of our Constitution which declares that no law shall ever be passed impairing the obligation of contracts. Constitution of 1874, art. II, sec. 17. The attacks upon the validity of the district are therefore unfounded.

Decree affirmed.

THOMPSON v. SHORT.

Opinion delivered February 26, 1923.

1. CONTRACTS—BREACH—INSTRUCTION.—An instruction, in an action for damages for the breach of a contract wherein defendant counterclaimed asking damages for breach by plaintiff, that, if plaintiff failed to comply with the contract by failing to pay defendant, then defendant had a right to treat the contract as null and void and recover, *held* erroneous, as giving defendant the right to recover regardless of whether he had breached the contract or not.
2. EVIDENCE—WRITTEN CONTRACT—SUBSEQUENT PAROL AGREEMENT.—Proof of a subsequent parol agreement is admissible to change the terms of a written contract.

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

STATEMENT OF FACTS.

W. A. Thompson instituted this action against W. J. Short to recover damages for an alleged breach of contract whereby the defendant agreed to clear 165 acres of land in White County, Arkansas.

The defendant filed an answer and cross-complaint in which he denied having breached the contract on his part, and asked for damages on account of an alleged breach of the contract by the plaintiff.

The contract between the parties is in writing, and provides that W. J. Short should clear 165 acres of land

for W. A. Thompson in White County, Arkansas, and should receive as compensation therefor the sum of $50 for sixty acres of said land, which had already been cleared but had grown up with underbrush, and the sum of $5 per acre for the remainder of the land, together with the timber on it. The contract provides for payment to be made as the clearing progresses in certain stipulated amounts, which need not be set out in detail. The contract also provides that the land should be all cleared by the first of April, 1918.

The time of the performance of the contract was extended on account of the World War, and numerous letters passed between the parties in regard to the extension of the time of the performance of the contract. The correspondence is too long to be set out in this opinion, and indeed it is not necessary in order to discuss the issues in the appeal.

It appears from the plaintiff's own letters that he extended the time of the performance of the contract until January 1, 1920. According to his testimony, the defendant did not clear the land in accordance with the terms of the contract.

According to the testimony of the defendant, he cleared and prepared for cultivation one hundred acres of the land. This included the sixty acres which had formerly been cleared, but which had grown up in bushes to a certain extent, and had some dead timber standing on it. The plaintiff owed him, under the terms of the contract, at least $100, which he refused to pay him. The defendant demanded this amount of the plaintiff orally in June, 1920, and the plaintiff neglected and refused to pay him. In July, 1920, the defendant wrote the plaintiff a letter in which he refused to further perform the contract because the plaintiff had not paid him in accordance with its terms for the clearing that he had already done.

Other facts necessary for a decision of the issues raised by the appeal will be stated or referred to in the opinion.

The jury returned a verdict for the defendant in the sum of $100, and from the judgment rendered the plaintiff has duly prosecuted an appeal to this court.

Brundidge & Neelly, for appellant.

Miller & Yingling, for appellee.

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

"You are instructed that if you find that the plaintiff failed to comply with the contract in that he failed to pay the defendant for work done under the contract as required by the terms of the contract, then the defendant had the right to treat the contract as null and void, and your verdict will be for the defendant."

The instruction is erroneous because it gives the defendant the right to recover if the plaintiff failed to pay him for the land which he had already cleared, regardless of the fact of whether or not the defendant committed a breach of the contract on his part. The contract provides that the clearing of the land should be completed by April 1, 1918, by the defendant. It appears from the letters passed between the parties that the time for the performance of the contract was extended until January, 1920. The undisputed evidence shows that sixty-five acres of the land remains to be cleared, and, according to the testimony of the plaintiff, the defendant did not in all respects comply with the terms of the contract in the land which he did clear.

Then too, according to the plaintiff's testimony, the defendant did not demand payment for the land which he had cleared until some time after the time limit for finishing the clearing had expired. If the defendant committed a breach of the contract on his part by not clearing the land, the plaintiff would be entitled to recover damages on this account, and might offset the amount which was due the defendant for work already done

by the damages which he was entitled to recover from the defendant for the non-performance of the contract by the defendant. In this connection it may be stated that the damages claimed and testified to by the plaintiff for the alleged breach of the contract by the defendant would amount to more than the amount allowed the defendant by the verdict of the jury. Hence the court erred in giving this instruction.

In view of another trial of the case we call attention to the fact that instruction No. 3, given by the court at the request of the plaintiff, is erroneous, although no assignment of error is predicated upon the action of the court in giving this instruction. The instruction reads as follows:

"You are instructed that if you find that the parties made and entered into the written contract sued on in this case, the defendant cannot, under the law, excuse a breach of said contract by setting up a different and verbal contract claimed to have been made by the defendant with the plaintiff at a different time and subsequent to the written contract sued on."

It is well settled in this State that no rule of evidence is violated by allowing proof of a subsequent parol agreement changing the terms of a prior written contract. *Caldwell* v. *Dunn,* 156 Ark. 126.

In view of a new trial of the case and the fact that additional testimony may be introduced by the parties, we do not pass upon the assignment of error that the evidence is not sufficient to support the verdict.

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

BELFORD v. ABSTON-WYNNE & COMPANY.

Opinion delivered February 26, 1923.

1. PLEDGES—NECESSITY OF DELIVERY.—Delivery of pledged property is absolutely necessary, and there can be no privilege under a pledge, in the absence of delivery, as against a third person.
2. PLEDGES—SUFFICIENCY OF DELIVERY.—There was no delivery of possession of a crop which a corporation agreed to pledge to its manager where the manager was already in possession and apparently retained possession for the corporation, and nothing further was done to transfer the property.
3. APPEAL AND ERROR—EVIDENCE NOT APPEARING IN RECORD.—The contention of defendant that a note transferred to him as collateral security was secured by a chattel mortgage on a crop of cotton will not be considered on appeal where the note and mortgage were not introduced in evidence.

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

STATEMENT OF FACTS.

Abston-Wynne & Company brought this suit against Harry Belford and Frank Taylor to enjoin them from interfering with their possession as mortgagees of a certain crop and other personal property in St. Francis County, Ark. Subsequently the plaintiffs amended their complaint and asked for a foreclosure of their mortgage.

The defendants claimed the property under a pledge to secure an existing indebtedness, and filed a cross-complaint against the plaintiffs for damages for an alleged breach of contract to furnish them funds with which to gather the crop in dispute.

It appears from the record that the plaintiffs are partners under the firm name of Wynne & Co., as cotton factors, in Memphis, Tenn. J. C. Hooten & Co., an Arkansas corporation, became indebted to them in the sum of approximately $50,000. J. C. Hooten was the owner of nearly all of the stock in said corporation, and was engaged in farming on a large scale in Poinsett and St. Francis counties in the State of Arkansas. J. C. Hooten had charge of the business in Poinsett County and Harry

Belford and Frank Taylor had charge of the business in St. Francis County. Harry Belford was the manager and bookkeeper. J. C. Hooten & Co. also ran commissaries in connection with its farming operations in both counties. Harry Belford was working for J. C. Hooten at a salary of $150 per month during the year 1920. None of his salary for that year was paid, and he also furnished the corporation $150 of his own money.

According to the plaintiffs, in August, 1920, J. C. Hooten and Harry Belford came to their place of business in Memphis, Tenn., for the purpose of making a contract with them to furnish money with which to gather the crops. On the 12th day of August, 1920, J. C. Hooten & Co. executed a mortgage to Abston-Wynne & Co. to secure $10,000 which was to be furnished in gathering and marketing the crop on the land owned by said corporation in St. Francis County, Ark. The mortgage was duly executed and filed for record on the 6th day of September, 1920. Subsequently, J. C. Hooten & Co. became further indebted to Abston-Wynne & Co. for advances made under the mortgage to be used in gathering the crop.

At the time the contract for the advances to be used in gathering the crop was made, Abston-Wynne & Co. understood from J. C. Hooten and Harry Belford that the latter was the manager and in possession of the crop and personal property on the farm as such manager. No information was given them from which it could be inferred that Harry Belford or Frank Taylor had any claim or interest in the crop. After making certain advances, Abston-Wynne & Co., deeming themselves insecure, sent an agent to see J. C. Hooten about taking possession of the crop and gathering it in order to indemnify themselves from loss under their mortgage. Upon being approached about the matter, J. C. Hooten made some evasive answer and told the representative of Abston-Wynne & Co. that he thought that they had already taken possession of the crop. On the next day he left the county, and has not been heard of since. Harry

Belford and Frank Taylor refused to deliver possession of the crop to Abston-Wynne & Co., and claimed it had been delivered to them in pledge by J. C. Hooten to secure them for their wages. Hence this lawsuit.

According to the testimony of Harry Belford, J. C. Hooten first turned over to him, as collateral security for his unpaid salary, a note for $1,200, which was secured by a mortgage on a pair of mules and a wagon. We quote from his testimony the following:

"Q. What, if any, agreement did he make with you later about the crop and the other property when he couldn't pay you? A. Well, he was over there later, and I asked him for some money, but he said he didn't have any, and said that I could get my money out of the crop, and all the farming tools or whatever was there, but later said he would just turn it all to me—to Frank Taylor and I."

We also quote from his testimony what occurred at the time J. C. Hooten went to Memphis in August to see Abston-Wynne & Co. and make arrangements with them about getting money with which to gather the crop. On this point Belford testified as follows:

"Q. Tell now what agreement you made there in the presence of Mr. Hooten with Abston-Wynne about this cotton crop. A. We went up there, and there wasn't any one there but Mr. Wynne. So Mr. Hooten, Mr. Wynne and I were in Mr. Abston's office . Mr. Abston was gone somewhere, I don't know where, so he told Mr. Wynne it was impossible for him to be over there at the farm, as he had to keep books there at Tyronza, and that whenever he left there things might as well be shut down, because they wouldn't do anything there, and he said he had just turned everything to me over there, and wanted him to deal with me. So Mr. Wynne asked him what kind of an agreement he wanted to make, and he told him he had gone as far as he could with that crop over there without getting some help, so Mr. Wynne asked him how much help he would need. He said he was so

far behind with the payments over there that he didn't know, and we told him, as near as we could, about what we were behind. Q. Were you talking? A. Yes sir. Q. To Mr. Wynne? A. Yes sir."

The chancellor found the issues in favor of the plaintiff and dismissed the cross-complaint of Harry Belford and Frank Taylor for want of equity. It was also decreed that the plaintiffs were entitled to a foreclosure of their mortgage.

Harry Belford alone has appealed.

C. T. Bloodworth, for appellant.

The property was pledged and delivered to Belford to secure his debt and that of his co-worker. He is entitled to have his money first out of the property. 98 Ark. 379; 21 R. C. L. 640, § 7; 31 Ark. 34.

Mann & Mann, for appellee.

Appellant's claim is fictitious and without merit. The court properly dismissed the cross-complaint.

HART, J., (after stating the facts). It is elementary law that the delivery of pledged property is absolutely necessary to the life of the contemplated pledge, and that, without such possession in the pledgee, there can be no privilege thereunder as against a third person. *Lee Wilson & Co.* v. *Crittenden County Bank,* 98 Ark. 379. This is not a case where a pledgee has the pledged property already in his possession, as by a deposit or a loan, so that the very contract would transfer to him possession of the property as a pledge. Here Belford was not in possession of the property for himself, but held possession of it for J. C. Hooten & Company as its manager. His possession then was the possession of the corporation which employed him.

In order to transfer the property to his possession as pledgee something more must have been done than the executory contract which he claims to have made with J. C. Hooten. According to his own testimony, Hooten told him that he could get his money out of the crop and the farming tools, and later said that he would turn them

over to Belford. There is nothing in this testimony to show that the property was actually turned over to Belford. His continued holding as the manager of a corporation would not constitute possession of the property for himself as pledgee. His testimony as to what occurred in August when he went to see Abston-Wynne & Company with J. C. Hooten is contradicted by both Abston and Wynne. They both testified positively that at no time on that occasion did Belford claim any interest whatever in the crop which Hooten proposed to mortgage them to secure advances with which to gather it. Hooten was already largely indebted to them, and, according to the testimony of Belford even, he was hard pressed for money and unable to pay him. It is more reasonable to suppose that the plaintiffs agreed to advance Hooten money with which to gather the crop and took a mortgage from him to secure themselves, than it is to suppose that they dealt with Belford as the pledgee of the crop.

Their testimony in this respect is corroborated by that of their representative whom they sent in the fall to take possession of the crop under their mortgage. He testified that Belford told him that Hooten was indebted to him, but made no claim to the mortgaged property as against Abston-Wynne & Compny. Hence we are of the opinion that the chancellor was right in finding the facts on this point in favor of the plaintiffs and in dismissing the cross-complaint of Belford and Taylor for want of equity.

It is next insisted that the note of Lincoln Johns for $1,200, which was transferred to Harry Belford as collateral security, was secured by a chattel mortgage on the cotton grown on the plantation operated by Hooten & Company in St. Francis County. It does not appear from the record that this note and mortgage was introduced in evidence. Therefore, any argument based on the rights of the parties under this mortgage can not be considered by us.

It follows that the decree will be affirmed.

O. K. TRANSFER & STORAGE COMPANY *v.* CRABTREE.

Opinion delivered February 26, 1923.

1. GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS.—A stockholder selling his stock to the corporation may make a valid agreement with it not to engage in the same business again in the same city.
2. GOOD WILL—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS—CONSIDERATION.—Where a contract for the sale of stock to the corporation which issued it was made, and the stock and notes therefor were delivered, before anything was said to the seller about agreeing not to re-engage in the same business in the same city, such an agreement subsequently entered into without consideration was invalid and unenforceable by the corporation or its assignee.
3. EVIDENCE—PAROL EVIDENCE AS TO SEPARATE AGREEMENTS.—Parol evidence that a contract for the sale of stock to the corporation which issued it and an agreement by the seller not to re-engage in the same business in the same city were separate contracts, and that there was no consideration for the latter contract, was admissible in a suit to enforce the latter contract.

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

STATEMENT OF FACTS.

O. K. Transfer & Storage Company, an Arkansas corporation, brought a suit in equity against J. W. Crabtree to enjoin him from conducting a storage and transfer business in the city of Fort Smith, Ark. Subsequently the codefendants of Crabtree were made parties to the suit by an amendment to the complaint.

In 1912 J. W. Crabtree was engaged in the general transfer business in the city of Fort Smith, Ark., under the name of the Merchants' Transfer Company, and consolidated his business with that of the Fort Smith Transfer Company. The Fort Smith Merchants' Transfer Company was duly organized to take charge of the business of the two concerns. One hundred and ninety shares of stock in the new corporation were issued to Crabtree in payment for his business. He was elected president of the new company and assumed the management of its af-

fairs. R. G. Moore was elected first vice-president and Ollie C. Moore was elected second vice-president.

On the 23rd day of June, 1914, J. W. Crabtree sold his stock and good will to the corporation for $9,000. He resigned as president, and R. G. Moore was selected to succeed him. The minutes of the Fort Smith Merchants' Transfer Company show that the directors met at 8:30 p. m. on June 23, 1914, in Fort Smith, Ark. J. W. Crabtree resigned as president, and then sold 190 shares of capital stock in said corporation and his good will to the corporation for the sum of $9,000, to be evidenced by notes of $200 each. Crabtree's stock was held as collateral by the Fort Smith Bank & Trust Company at the time the sale ws made, and the same was not delivered until the morning of June 24, 1914. On that morning R. G. Moore and J. W. Crabtree met at the bank. The stock was delivered to Moore and the notes executed by the corporation for the stock were delivered to the bank. This was in accordance with the terms of the agreement made on the previous evening. On the morning of the 24th day of June, 1914, J. W. Crabtree entered into written agreement with the Fort Smith Merchants' Transfer Company that he would not at any time thereafter directly or indirectly engage in conducting a transfer business in the city of Fort Smith, Ark.

This agreement also provided that Crabtree would at all times do everything in his power to promote the good will and prosperity of the business sold.

According to the testimony of J. W. Crabtree, this written agreement was presented to him after the contract for the sale of his stock in the corporation had been completed. The question of his not again entering into the transfer business in the city of Fort Smith was not mentioned until after said contract for the sale of his stock had been executed. Moore presented the contract to Crabtree at the bank, and, after some insistence, Crabtree signed the contract, but received no consideration for so doing. The contract was not spoken of until after

the sale of the stock by Crabtree had been completed. Crabtree's testimony is corroborated by that of Ollie C. Moore.

The agreement which Crabtree made with the Fort Smith Merchants' Transfer Company not to again engage in the transfer business in the city of Fort Smith was assigned by that company to the O. K. Transfer & Storage Company at the time the former corporation sold its property and assets to the latter corporation.

In September, 1921, J. W. Crabtree again engaged in the transfer business in the city of Fort Smith. After the Fort Smith Merchants' Transfer Company sold out to the O. K. Transfer & Storage Company, it surrendered its charter and the corporation was dissolved. On this account the plaintiff made all the stockholders in said corporation codefendants with J. W. Crabtree in the present suit.

The chancellor found the issues in favor of the defendants, and it was decreed that the complaint of the plaintiff should be dismissed for want of equity.

W. L. Curtis and *Cravens & Cravens,* for appellant.

The contract is assignable at the common law, and, the assignor being a necessary party, the company having gone out of business, it was proper to make the stockholders thereof parties. 97 Ark. 513; 47 Ark. 541; 80 Ark. 167; 120 Ark. 221. We find no decisions of this court on the question whether or not such a contract as is involved here is assignable, but the weight of authority holds that it is assignable. 118 N. W. 166; 16 Am. & Eng. Ann. Cas. 259 and note; 47 Iowa 137; 67 Am. Dec. 511; 106 N. Y. 487; 13 N. E. 419; 95 N. Y. Supp. 1060; 57 Atl. 1025; 32 Md. 561; 3 Am. Rep. 164; 71 N. W. 654; 26 S. E. 71; 72 N. W. 757; 68 Am. St. Rep. 480; 62 So. 514; 66 S. E. 665.

Warner, Hardin & Warner, for appellees.

1. There was no consideration for the contract relied upon by the appellant, and it is therefore void and unenforceable. 112 Ark. 126; 76 Ark. 140; 13 C. J. 359;

39 N. W. 255. Because Crabtree sold his stock and good will for a consideration, the law will not imply a promise on his part not to reengage in the same business. 148 Ark. 222.

2. The contract was strictly personal and not assignable. 64 Ark. 339; 67 Am. St. Rep. 357; 5 Corpus Juris 882, 883; 128 U. S. 246; 81 Atl. 163.

3. Assuming that the contract was valid, not intended to be strictly personal, and that it was, in fact, assigned to the plaintiff, was it, being in partial restraint of trade, assignable? See 67 Am. St. Rep. 357; 18 Am. Rep. 281. While this court, commencing with *Webster* v. *Williams,* 62 Ark. 101, upholding the validity of such contracts, if reasonable and founded upon a legal consideration, down to *Patterson* v. *Rogers,* 148 Ark. 22, has not passed directly on this question, yet it has throughout hedged these contracts about with limitations and restrictions not applicable to other contracts. And it has held that such contracts are valid only when they afford fair protection to the interests of the party in whose interests they are given and do not interfere with the interests of the public. 95 Ark. 449; 112 Ark. 126. See also 13 Corpus Juris 478.

HART, J., (after stating the facts). This court has sustained as valid agreements by the vendor of a business, with or without limitations as to time, not to carry on the business within the limits of a certain city. *Bloom* v. *Home Insurance Agency,* 91 Ark. 367; *Hampton* v. *Caldwell,* 95 Ark. 387; *Kimbro* v. *Wells,* 112 Ark. 126; and *Kimbro* v. *Wells,* 121 Ark. 45.

Under this rule Crabtree might make a valid agreement with the purchaser of his stock not to engage in the same business again in the same city as the corporation which purchased his stock. Assuming (without deciding the question) that a contract in partial and reasonable restraint of trade, such as a covenant not to engage in a particular business within a designated territory, is as-

signable, still we do not think that the contract in question is valid under the particular facts and circumstances in this case as shown by the record.

According to the testimony of Crabtree, which is corroborated by that of Moore, he made and executed the contract for the sale of his stock to the corporation which issued it before he made or assigned the contract not to engage again in the transfer business in the city of Fort Smith. His sale of the stock was completed on the evening of June 23, 1914. This is shown by the minutes of the board of directors of the corporation held on that evening, and nothing is shown by any agreement on Crabtree's part not to again engage in the same business.

It is true that the stock was not delivered to the corporation or the notes of the corporation delivered to Crabtree until the next morning. This occurred, however, because the stock of Crabtree had been deposited in bank as collateral security. The stock was delivered to the corporation by Crabtree, and the notes of the corporation were delivered to Crabtree for the stock before anything was said to Crabtree about making an agreement not to engage again in the business. Crabtree at first declined to sign the agreement, but, upon the representative of the corporation insisting on it, he did sign it, but received no consideration for so doing. His testimony in this respect is corroborated by that of O. C. Moore.

Hence the chancellor was warranted in finding that the contract for the sale of the stock by Crabtree to the corporation and the contract by him with the corporation not to engage again in the transfer business in the city of Fort Smith were separate and distinct contracts, with no consideration for the latter.

It was competent to show by parol evidence that the two instruments were wholly independent and separate agreements, and that there was no consideration between the parties to support the agreement of Crabtree not to

again engage in the transfer business in the city of Fort Smith. *Kimbro* v. *Wells,* 112 Ark. 126, and *Kimbro* v. *Wells,* 121 Ark. 45.

The chancellor found the issues in this respect in favor of the defendant, Crabtree, and it cannot be said that his finding of fact is against the preponderance of the evidence.

It follows that the decree will be affirmed.

WEBB v. SPANN.

Opinion delivered February 26, 1923.

1. APPEAL AND ERROR—FINDINGS OF TRIAL COURT.—Findings of the trial court sitting as a jury must be accepted on appeal if the testimony is legally sufficient to support them.
2. LIMITATION OF ACTIONS—EFFECT OF PENDENCY OF ANOTHER SUIT.—Where a suit to recover land and quiet title was begun within seven years after defendants took possession of plaintiff's land, its pendency would prevent the running of the statute of limitations as against it, but would not prevent the statute from running against an action of ejectment where there was no connection between the two suits, and no nonsuit had been filed in the first suit.
3. LIMITATION OF ACTIONS—AGREEMENT TOLLING LIMITATIONS.—Where, after a suit to quiet title was begun, the parties agreed to let the ownership abide the decision of the Department of the Interior, the agreement operated to prevent the running of the statute of limitations till the decision of the Interior Department was made, and plaintiff's action brought within time thereafter was not barred.
4. EJECTMENT—PLAINTIFF'S POSSESSION UNDER COLOR OF TITLE.—Plaintiff, having possession of land under color of title, can maintain ejectment against mere trespassers.

Appeal from Mississippi Circuit Court, Osceola District; *W. W. Bandy,* Judge; affirmed.

T. J. Crowder, for appellants.

J. T. Coston, for appellee.

1. Prior possession, with or without color of title, is sufficient to sustain a judgment against a mere trespasser. 199 S. W. 119; 62 Ark. 56.

2. Appellants are in no position to plead the statute of limitations (1) because of the pendency of the suit against them in chancery, and (2) because they agreed to vacate the premises in case the Department of the Interior decided adversely to them. However, appellee really owned the land in controversy, as was demonstrated to the lower court from a map which has not been brought into the record here. It must be presumed that the trial court was correct in its finding. 30 Pac. 1089; 8 Ark. 436; 1 Peters, 23; 28 N. E. 747; 20 S. W. 539; 38 Ark. 481; 58 Ark. 135; 34 Ark. 313.

SMITH, J. Appellee brought separate suits in ejectment against appellants, to recover certain parcels of land situated in section 22, township 14 north, range 12 east. The cases are identical, and were tried together and disposed of as a single case. The court made findings of fact, on all the issues raised, in appellee's favor, and the recital of these findings will explain and state the case. They were as follows:

"1. That the defendants are living upon and occupying land in the W½ of section 24, township 14, range 12 east, and have been occupying and claiming the same since the year 1911, without color of title thereto.

"2. That the lands occupied by them are situated within the meander line of what is known as Hudgens Lake.

"3. That the plaintiff had color of title to and was claiming, clearing up and had actual possession of the lands occupied by the defendants at the time of and prior to the occupancy of the defendants.

"4. That after the defendants took possession of said lands, and within seven years, the plaintiff commenced an action in the chancery court of the Osceola District of Mississippi County, Arkansas, against them to recover said land from them and quiet his title thereto, which action is still pending and undetermined.

"5. That after said action was commenced by the plaintiff in the chancery court, and within seven years

after defendant took possession of said lands, the plaintiff and defendants entered into an agreement, whereby plaintiff and defendants agreed to let the ownership of the land abide the decision of the Department of the Interior, the defendants agreeing, in case the Department of the Interior decided in favor of the riparian owners, to vacate said lands immediately.

"6. That the Department of the Interior decided, in the year 1920, that there was no error in the original survey of Hudgens Lake and, including the lands claimed and occupied by the defendants, belonged to and were owned by the riparian owners, including the plaintiff."

Inasmuch as the case was heard by the court sitting as a jury, these findings must be accepted if the testimony is legally sufficient to support them, when given its highest probative value in appellee's favor, and we think it is sufficient for that purpose.

It is undisputed that appellants were squatters, who entered upon and occupied the land on the theory that it was government land and did not belong to the riparian owners. At the time of their entry it was insisted by them that the government survey was in error in showing the land which they entered upon to be a lake; and the Government Land Office was induced to verify this survey. A finding was made by the Department that no error had been made in the original survey. The Department of the Interior reviewed this finding, and affirmed it. The effect of that action was, of course, to conclusively determine the fact that at the time of the government survey the land in litigation was a lake, and was therefore owned by the riparian proprietors.

It is insisted by appellee that if the lake bed was apportioned among the riparian proprietors in accordance with the rules for such apportionment, the land in litigation would fall within the boundaries of appellee's land; but the court made no finding to that effect—the finding being merely that the lands covered by Hudgens Lake were owned by the riparian owners, including ap-

pellee—and we do not feel called upon to attempt to determine whether the land would fall to appellee in this apportionment. Indeed, the determination of that question would involve the validity of appellee's title as a riparian owner—a question which we do not decide, as the case must be affirmed upon other grounds.

Appellee had color of title to the land in litigation; and we think the testimony shows he had actual possession thereof at the time appellants entered; in fact, he had cleared about one hundred acres of land in the south half of the section, and had it about ready for the plow when appellants entered upon it.

It is undisputed that, after appellants took possession of the land, and within seven years, appellee commenced an action in the chancery court to recover the land from them and to quiet appellee's title thereto; and this action is pending and undetermined. This was the court's fourth finding of fact, and it is insisted that it is conclusive of the case.

We think, however, this fact is not of controlling importance, and would not operate to prevent the running of the statute of limitations against this suit, considered by itself; and, while the pendency of that suit would prevent the running of the statute of limitations against it, its pendency would not prevent the running of the statute of limitations against this one, as there was no connection between the two cases, and no nonsuit had been filed in the first one. Such is the effect of the holding of this court in the case of *Hill* v. *Pipkin,* 72 Ark. 549, and *Wallace* v. *Swepston,* 74 Ark. 520.

In 25 Cyc. p. 1290, it is said: "The defense of the bar of the statute of limitations applies strictly to the particular action to which it is pleaded, and hence if that suit be not brought within the statutory period, the bar of the statute cannot be avoided by showing that another action had been brought by plaintiff against defendant on the same cause of action within the period limited by the statute." Numerous cases are cited in support of the

text quoted, including the two cases from this court mentioned above. See also 2 Wood on Limitations (4th ed.) p. 1197; 8 C. J., sec. 166.

The fifth finding of fact is, however, decisive of the question of limitation; and we think there was testimony legally sufficient to support that finding. Appellee testified that, after the suit in chancery had been brought, he discussed the suit with appellants, who insisted that they made no claim to the land except that it was government land and was subject to entry for homestead purposes, and appellee stated to them that, if the land was government land, he had no claim to it, and was willing for appellants to perfect their homestead claims, and with this understanding, and because of it, he did not press the suit until the character of the land had been finally determined by the Federal Government. This finding of the Department of the Interior was made on December 18, 1920; but appellants refused to vacate, and thereafter these suits were brought in the spring of 1921.

We think this agreement—which the court found the parties had made—operated to prevent the running of the statute of limitations until the character of the land had been determined by the Department of the Interior; and, with the period of time covered by this agreement excluded, the statute of limitations could not have run against this suit. *Shirey* v. *Whitlow,* 80 Ark. 444; *Hudson* v. *Stilwell,* 80 Ark. 575.

Appellee had possession under color of title. He was therefore entitled, as against appellants (who, under the facts of this record, were mere trespassers), to maintain this suit. *Cotton* v. *White,* 131 Ark. 273. The judgment of the court below is therefore affirmed.

NATIONAL FIRE INSURANCE COMPANY v. PETTIT-GALLOWAY COMPANY.

Opinion delivered February 26, 1923.

1. ASSIGNMENTS—ASSIGNOR AS NECESSARY PARTY.—Where a fire insurance policy provided that if insurer claimed that a fire loss was caused by act or neglect of a third person, the insurer, on pyament of the loss, shall be subrogated, to the extent of such payment, to the insured's right of recovery, in an action by the insurer against a person whose negligence is alleged to have caused a fire loss which the insurer paid, the insured was a necessary party, as the cause of action was not assignable at law.
2. PARTIES—REFUSAL TO PERMIT NEW PARTY TO BE BROUGHT IN.—Refusal of the court to permit a new party to be brought in was not error where the cause of action as to him was barred.

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

Coleman, Robinson & House, for appellant.

1. Under the facts in this case, the right of the insurer to maintain this action in their own name is not open to question. Crawford & Moses' Digest, § 1089; 41 Fed. 643; 26 C. J. 465; Ann. Cases, 1917-A, 1302; 99 Ark. 460.

2. We think the insured was not a necessary party; but, if so, appellant, in view of the fact that appellee did not raise the question until after the testimony was all in, should have been permitted to make him a party.

J. H. Carmichael, for appellee.

1. The insured was a necessary party. Causes of action of this kind are not assignable under our statute, and must be brought in the name of the assignor. Crawford & Moses' Digest § 475; 26 C. J. 467; 60 Ark. 325; 80 Ark. 167; 127 Ark. 590; 151 Ark. 207.

2. Action against the insured, at the time the request was made to make him a party, was barred by the statute, and the court properly refused to permit it. C. & M. Dig., § 6950. Moreover, the request came too late. The case was ready to submit to the jury. 93 Ark. 609.

SMITH, J. J. F. Jones held policies of insurance in the appellant fire insurance companies on his dwelling for $1,500, and another policy on his household furniture for $600. On December 13, 1917, during the life of the policies, the dwelling and household furniture were damaged by fire, and in the settlement of the loss the insurance company paid Jones $1,826.90.

Each of the policies contained the following provision: "If this company shall claim that fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on the payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

The companies took an assignment of the claim from Jones, and on August 10, 1918, brought this suit against Pettit-Galloway Company, engaged in business as plumbers, alleging that the fire and loss was caused by the negligence of that company in thawing some frozen pipes in the house, and at the trial testimony was offered from which the jury might have found that the fire was caused by the negligence of an employee of the plumbing company. At the trial, however, the court directed a verdict in favor of the defendant on the ground that the insurance company could not maintain the action without making Jones a party. When the court indicated the action it was about to take, the plaintiff asked to be allowed to make Jones a party, but the court refused to permit this to be done, and judgment was rendered for the defendant.

For the reversal of the judgment it is insisted, first, that Jones was not a necessary party; and, second, that, if Jones was a necessary party, the court should have permitted the plaintiff to make him a party under the facts of the case. These facts were that the defendant had filed a motion to make the complaint more specific, and a motion to require the plaintiff to give bond for

costs, but did not raise the question of a defect of parties until shortly before the trial.

Jones was a necessary party. This is true because the cause of action here sued on is one not assignable at law. The case of *Chicago, R. I. & P. R. Co.* v. *Cobbs,* 151 Ark. 207, is similar to, and is decisive of, this case. Property belonging to Cobb was destroyed by fire by the railway company. Insurance thereon covering only a part of the loss was paid by the insurance company, which took an assignment of Cobbs' cause of action against the railway company to the extent of the amount paid by it, and suit was brought by the insurance company for the sum paid by it, and by Cobbs for the value of the property in excess of the insurance. There was a motion to remove the cause to the Federal court on the ground of diversity of citizenship. The motion to remove was overruled by the trial court, and in affirming that action this court said: "It is not shown in the petition or in the complaint that these are separable causes of action, nor is it contended that the causes of action asserted by the different plaintiffs are separable, and it is clear that they are not separable. The insurance companies, by virtue of the assignment to them of a portion of the right of actions, are possessed of an interest in the subject-matter in controversy, and are therefore necessary parties. Cobbs, the other plaintiff, was a necessary party, not only from the fact that he was the owner of an interest in the subject-matter of this controversy, but also for the reason that he was assignor of that part of the cause of action which was assigned to the insurance companies, and since it is a right of action not assignable under our statute (Crawford & Moses' Digest, § 475), the assignor was a necessary party to a suit to recover. *St. Louis, I. M. & S. R. Co.* v. *Camden Bank,* 47 Ark. 541. Under the statute cited above, only agreements or contracts in writing are assignable, and the cause of action in the present instance was not based on an agreement in writing. The insurance companies succeeded, by the assignment, to the right

of action by Cobbs for the recovery of unliquidated damages on account of the wrongful act of the railway company."

We think, under the circumstances, the court should have permitted Jones to be made a party plaintiff, imposing terms as to costs if thought proper so to do, but for the fact that at the time of the trial the cause of action in Jones' favor was barred by the statute of limitations, and making him a party at the time that request was made would have been unavailing.

The judgment is therefore affirmed.

HENRY QUELLMALZ LUMBER & MANUFACTURING COMPANY v. BRINEY.

Opinion delivered February 26, 1923.

1. SALES—EVIDENCE AS TO BREACH OF CONTRACT.—A finding that plaintiff had not broken his contract to manufacture and deliver lumber on board cars at specified prices *held* not contrary to a clear preponderance of the evidence.
2. LOGS AND LOGGING—ESTOPPEL TO CLAIM FORFEITURE.—Where vendors conveyed timber rights to a vendee with reservation of a vendors' lien and stipulation that, upon default, all rights should cease, and the vendee conveyed same to defandant, who contracted with plaintiff to manufacture the timber into lumber and deliver same to plaintiff, *held*, in a suit by plaintiff to recover a balance due by defendant under such contract, the vendors were estopped to assert by cross bill their right to enforce a forfeiture as against defendant where they permitted him to purchase and manufacture the logs after default in payment of the purchase money, and also made continuous efforts to collect the purchase money.
3. EQUITY—DISMISSAL OF CROSS BILL.—It was not error to dismiss a cross bill against a party not shown to have any interest in the litigation and who in his answer disclaimed any interest therein.
4. EQUITY—CROSS BILL.—A cross bill to make vendor in a quitclaim deed a party to a suit was properly dismissed, although the deed provided that the vendor would defend all suits brought by the representative of the original owner for the purpose of

defeating title to the timber conveyed; the expense of defending the suit not being an issue in the case.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley,* Chancellor; affirmed.

C. T. Bloodworth, for appellant.

F. G. Taylor and *Fuhr & Futrell,* for appellees.

HUMPHREYS, J. This suit was commenced in the Western District of the Clay Circuit Court by appellee, J. R. Briney, against appellant to recover an alleged balance of $2,410.29 upon a written contract entered into on the 23rd day of July, 1919, by and between appellant and appellee, J. R. Briney, for the manufacture and delivery of different kinds of lumber on board cars at Tipperary, Arkansas, at prices specified in the contract.

Appellant filed an answer admitting the execution of the contract, but alleging breaches thereof by said appellee, in failing to manufacture grades contracted for, and in failing to deliver same as per contract. By way of further defense, appellant pleaded that it was compelled to purchase a superior title to that of appellee to said lumber from George A. Burr and W. O. Poole, who had a lien thereon for the purchase money of the timber out of which the lumber was manufactured, and asked to be subrogated to the rights of Burr and Poole. It also alleged that Burr and Poole warranted the title thereto and agreed to hold it harmless. It also alleged that George Booser was the real party in interest, instead of J. R. Briney, and asked that Booser, Burr, and Poole be made parties defendant in its cross bill against them and Briney, in which it was alleged that said appellant sustained $5,000 damages on account of a failure to deliver the lumber to it.

George A. Booser filed an answer denying any interest in the litigation.

George A. Burr and W. O. Poole filed an answer denying that they guaranteed a title to the lumber when they sold same to appellant, but asserted a right to sell same under a vendor's lien, retained by them in their

timber deed of date September 19, 1918, to F. C. Mullinix as trustee in bankruptcy of George A. Booser, bankrupt, from whom said appellee, J. R. Briney, purchased the logs out of which the lumber in question was manufactured. They asked and obtained a transfer of the cause to the chancery court of the Western District of said county for the purpose of enforcing their alleged lien rights against the timber and lumber.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a dismissal of appellant's cross bill and a judgment against appellant in favor of appellee, J. R. Briney, in the sum of $839.43 with interest, from which is this appeal.

The record reveals that on the 19th day of September, 1918, George A. Burr, W. O. Poole, and his wife, Dora C. Poole, conveyed the timber on 1,566.42 acres of land in the said county to F. C. Mullinix, trustee in bankruptcy of George A. Booser, bankrupt, for $20,000, $1,000 cash, and the balance in deferred payments, evidenced by said trustee's certificates. The deed contains the usual granting, habendum and warranty clauses appearing in deeds of real estate. It also contains the following clauses:

"If default be made for a period of thirty days in the payment of principal and interest, the entire remaining purchase money and interest to become immediately due and payable, and at such time all cutting, removing and manufacturing of the timber herein sold shall immediately cease. "And in consideration of the foregoing grant the said F. C. Mullinix, as trustee in bankruptcy, agrees that he will pay every sixty days for all timber removed by him from any lands, at the rate of two dollars per thousand feet for all soft wood, and five dollars per thousand feet for all hard wood, the amount of such payments to be credited on the notes first falling due after payments. Said W. O. Poole and George A. Burr retain a lien on all timber herein conveyed, except as herein provided, until said notes and interest be fully paid."

The timber deed was placed on record immediately after execution and delivery. F. C. Mullinix cut and removed a large amount of timber, and cut quite a little which he did not remove. The down timber was principally in section 24. Mullinix sold the down timber in that section to J. R. Briney, who manufactured about 362,000 feet of it into lumber. Briney produced his returned check for $886.06, payable to F. C. Mullinix, evidencing that he had paid the contract stumpage price for the timber. George A. Booser testified that he kept the books for F. C. Mullinix, trustee, showing the amount of all timber cut and all money paid by Mullinix to Burr and Poole under the timber deed. According to his testimony, which was undisputed, Mullinix cut 1,365,157 feet of soft wood, and 352,546 feet of hard wood, paying therefor the stumpage price of $2 per thousand for soft wood and $5 per thousand for hard wood, or a total of $4,358.02, in addition to $1,000 cash paid by him when the contract was entered into. Prior to the time Burr & Poole declared a forfeiture for the nonpayment of the purchase money due by F. C. Mullinix, trustee, J. R. Briney purchased the down logs in said section 24. During the period of default on the part of Mullinix, and before the forfeiture was declared, J. R. Briney entered into a written contract with appellant which is made the basis of this suit, and manufactured 275,589 or more feet of lumber which was stacked on the mill yard and marked by appellant's agent, upon which appellant advanced $544.39, and afterwards expended $1,237.36 in hauling and placing same on board cars at Tipperary. This contract provided, in substance, for the cutting of not less than 200,000 and not more than 1,000,000 feet of lumber of different kinds by Briney for appellant, at fixed prices; that the lumber should be log run No. 2, common and better; that the lumber should average not more than 20 per cent. No. 2; that said lumber should be first stacked and dried at a sawmill on the land, and, after inspection, hauled to Tipperary and

placed on board cars by Briney at his expense, when directed to do so by appellant; that advances should be made to Briney every two weeks, as the lumber was being manufactured, at the rate of $14 or $15 per thousand, balance to be paid when loaded on cars; that appellant should be allowed 2 per cent. discount on cash advanced.

Long after the lumber had been manufactured and stacked, to-wit: in the month of March, 1920, Burr & Poole declared a forfeiture because Mullinix defaulted in the payment of the purchase money certificates, and served notice on all parties that they claimed a lien on all the timber, including the lumber stacked on the mill yard. Thereupon appellants purchased the timber and lumber from Burr & Poole, and obtained a quitclaim deed thereto from them. Immediately after obtaining the deed, appellant took charge of the lumber, inspected, sold, and shipped same to its customers.

The testimony adduced by appellant tended to show that it gave appellee every opportunity to haul and place the lumber on board cars at Tipperary, and that he refused to do so, and abandoned his contract. The testimony adduced by said appellee tended to show that he requested appellant to permit him to haul and place the lumber on board cars, and that appellant refused to let him do so. We deem it unnecessary to set out the testimony upon this issue. Suffice it to say that, after a careful reading thereof, we cannot say that the finding of the chancery court, to the effect that Briney did not breach the contract is contrary to a clear preponderance of the evidence.

Appellant contends that the chancery court erred in holding that it obtained title to the lumber in question from Burr & Poole through Mullinix and Briney. It is argued that because Mullinix made default in the payment of the purchase money he automatically forfeited all right to cut the standing timber and to sell or remove the down timber. In support of this argument appellant relies upon the following clause in the timber deed of date September 19, 1918:

"If default be made for a period of thirty days in the payment of principal and interest, the entire remaining purchase money and interest to become immediately due and payable, and at such time all cutting, removing and manufacturing of the timber herein sold shall immediately cease."

Appellee Briney made the contention that the clause quoted had no application to down timber which had been paid for according to the stumpage prices fixed in the deed. In support of this contention appellee relies upon the following clause in said timber deed:

"And in consideration of the foregoing grant the said F. C. Mullinix, as trustee in bankruptcy, agrees that he will pay every sixty days for all timber removed by him from any lands, at the rate of two dollars per thousand feet for all soft wood, and five dollars per thousand feet for all hard wood, the amount of such payments to be credited on the notes first falling due after payments."

Our interpretation of the evidence makes it unnecessary to determine, under the terms of the contract, whether down timber which had been paid for according to the fixed stumpage prices had been released from the vendor's lien retained in the deed. At the time Briney purchased the logs from Mullinix and during the time he manufactured the lumber, no forfeiture was declared by Burr & Poole. On the contrary, after default in the payment of the purchase money, they made continuous efforts to collect same. They permitted Briney to manufacture the down logs, which he had purchased from Mullinix, into lumber for appellant. We think Burr & Poole clearly estopped, by this contract, from asserting a lien upon the down logs for which it had been paid according to stumpage prices. Appellant acquired the right to the possession of the lumber, upon which it had made advances, from Briney. It was therefore unnecessary for appellant to purchase the pretended claim from Burr & Poole to the lumber in order to get possession thereof.

Appellant also contends that the court erred in stating the account between it and Briney. The alleged error consists in the fact, first, that the court made no allowance to appellant on account of there being more than 20 per cent. of No. 2 common, in the lot of lumber. The record fails to show that appellant sustained any damage on this account; second, that the court charged appellant $15 per thousand for No. 3 lumber. The contract did not specify any price for No. 3 lumber. Testimony adduced was conflicting as to the value of that grade of lumber, and the court's finding that it was worth $15 per thousand is not contrary to the clear preponderance of the evidence.

Appellant's last contention is that the court erred in dismissing his crossbill against George A. Booser, George A. Burr and W. O. Poole. The record does not show that Booser had any interest in the litigation, and he disclaimed any. The timber deed procured by appellant from Burr & Poole to the lumber in question was a quitclaim deed. It is true, it contained an agreement to defend all suits which might be brought by Mullinix, or his assignees, for the purpose of defeating title to the timber conveyed. The expense of defending the suit was not made an issue in the case. The crossbill against all three of the parties was properly dissmissed.

No error appearing, the decree is affirmed.

CONTINENTAL CASUALTY COMPANY v. HAWKINS.

Opinion delivered February 26, 1923.

INSURANCE—CHANGE OF OCCUPATION—REDUCTION OF AMOUNT OF INSURANCE.—In an action on a policy of life insurance a provision in the policy that where insured changed his occupation to one classified by the company as more hazardous than his former occupation, the amount payable should be only the amount of insurance the premium would have bought for him in the more hazardous occupation, is valid.

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

Roscoe R. Lynn, for appellant.

1. There can be no recovery at all, for the reason that appellee breached his warranty in his application, in describing his duties as "Ice checker in factory, not handling," whereas he admits that he did handle ice and was really a laborer. 65 Ark. 298.

2. He cannot recover the amount sued for because he had actually changed his occupation. He is entitled to recover only the amount the premium paid would buy in the more hazardous occupation. 64 So. 732.

G. Denison Cherry, for appellee.

1. The term "occupation," as used in an application for accident insurance, is a comprehensive one, and comprehends the incidental as well as the main requirements of one's vocation, etc. 218 Fed. 582, 585; 121 S. W. 785, 786; 55 Hun. 111, 8 N. Y. S. 202.

2. Forfeitures, especially in the case of insurance policies, are not favored in law. 113 Ark. 174, 181; 132 Ark. 546, 549.

3. The materiality and truth of the statements in the application is usually for the jury to determine, as is also the question whether a statement was made with intent to defraud. 1 C. J. 509, § 338; 150 Fed. 92, 80 C. C. A. 46; 133 Ark. 220. Statements should be construed with reference to the time made, unless they expressly or impliedly refer to the future. 90 Ark. 264; 106 Ark. 91. Where the applicant makes a true and full statement of his occupation to the insurer's agent, the company is bound, after loss, by the classification given him by the agent. 92 S. E. 88, 89.

4. The burden of proof was on the insurer. 1 C. J. 496, § 286; 131 Pac. 1084, 1086.

5. Appellant did not plead a forfeiture based on breach of warranty in the application, but in fact relied on the provisions of the pro-rate clause. It cannot main-

tain any such defense here. 95 Ark. 593; 83 Ark. 575, 582; 151 Ark. 554, 557.

6. The application of the pro-rate provision of the policy was properly refused. 1 C. J. 436, § 83, 3a; 121 N. E. 296, 298; 190 N. W. 97; 96 Wis. 304, 71 N. W. 601; 58 Fed. 342, 7 C. C. A. 264; 1 C. J. 437, § 85c; 121 S. W. 785.

7. The injury was received while the appellee was at his home after he had been discharged, and while he was out of employment altogether. His last employment should not be considered as having continued to date of injury. 180 Pac. 200, 202; 172 Pac. 106; 11 Tex. Civ. App. 273; 33 S. W. 133; 37 Pa. Super. 299; 82 Iowa 107; 47 N. W. 783; 31 A. S. R. 466; 11 L. R. A. 299.

HUMPHREYS, J. Appellee instituted suit against appellant in the Third Division of the Pulaski Circuit Court, upon a personal accident policy, to recover $500 for the accidental loss of an eye. The issue joined by the pleadings was whether appellee was entitled to $500 or $150. This was dependent on whether appellee's change in occupation from an "ice checker, not handling" to that of a "laborer in foundry, not handling hot metal," changed his classification from "C" to "XD" within the meaning of the standard *pro rata* clause contained in the policy, which clause is as follows:

"This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the company's classification of risks and premium rates in the event that the insured is injured or contracts sickness after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing an act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreations, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the

limits so fixed by the company for such more hazardous occupation."

The cause proceeded to a hearing upon the pleadings and evidence, at the conclusion of which appellant requested the court to instruct the jury to return a verdict for $150 which it had tendered into court. The court refused to give the instruction over the objection and exception of appellant, and, over the objection and exception of appellant, sent the case to the jury to ascertain whether employment at the foundry was more hazardous than at the ice company, and, if not, to return a verdict for appellee. The court, over the objection and exception of appellant, had, during the course of the trial, admitted evidence tending to show that the employment at the foundry was less dangerous than that at the ice company.

The jury returned a verdict in favor of appellee for $500, and a judgment was rendered in accordance therewith, from which is this appeal.

Appellant's insistence for reversal is that the court erred in not construing the contract, under the undisputed evidence, to mean that the classification of appellee had been changed from "C" to "XD" by changing his occupation to one classified by the insurer as more hazardous than the one stated in the policy. The undisputed facts show that appellee stated in his application, which was copied into and made a part of the policy, that he was employed by the ice company in the capacity of "ice checker, not handling;" also that the rate and classification manual, which became a part of the policy by express terms therein, shows that a laborer in a foundry, not handling hot metal, was rated and classified as class "XD;" also that appellee changed his occupation from that specified and classified in the policy as class "C" to that of a laborer in a foundry, not handling hot metal; also that appellant classified the occupation to which appellee changed as more hazardous than his occupation with the ice company.

The contract entered into between appellee and appellant provided that appellant might determine the relative danger between occupations. This being true, and appellee having changed his occupation from one specified and classified in the policy to one classified by appellant as more hazardous than the one stated in the policy, the pro-rate clause in the policy is applicable, and appellee was only entitled to recover the benefits which would have been provided in his policy if he had paid the same amount of premium and had been engaged in the occupation of laborer in foundry, not handling hot metal. Under the undisputed facts and terms of the policy appellee's claim must be pro-rated from class "C" to class "XD," entitling him to a recovery of $150. The trial court should have instructed a verdict for that amount.

On account of the error indicated the judgment is reversed, and judgment is directed to be entered here in accordance with the tender heretofore made.

DISTRICT GRAND LODGE No. 11 *v.* STEVENS.

Opinion delivered March 5, 1923.

1. INSURANCE—PAYMENT OF DUES TO LOCAL SECRETARY.—Where the by-laws of a fraternal society provided that all endowment dues must be paid to the endowment secretary, the fact that the members of a branch lodge paid their dues to a local secretary, who in turn forwarded the dues to the endowment secretary, did not establish a general custom or course of conduct on the part of the endowment department so as to abrogate the by-law requiring payment by the member and to confer authority on the local secretary as agent to collect.
2. INSURANCE—CUSTOM AS TO PAYMENT OF DUES—JURY QUESTION.—Whether there was a general course of conduct for the secretary of a local lodge to act for the fraternal society within the knowledge of the superior body as to show authority of the local secretary to collect dues *held* for the jury.

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

J. F. Jones and *Mann & McCulloch,* for appellant.

There was a disputed question of fact as to whether or not the assessment and dues had been paid by the insured prior to his death, and within the terms of the policy. It was error therefore to direct the verdict for the plaintiff. The constitution and laws of a mutual benefit society constitute a part of the contract of insurance. 142 Ark. 132. The facts in this case are not such as to constitute the local secretary the agent of the insurer. 2 C. J. 432.

Albert P. Smith and *Frank P. Fitzsimmons,* for appellee.

McCULLOCH, C. J. Appellant is a fraternal society organized under the laws of the State of Arkansas and bearing allegiance to a national organization known as the "Grand United Order of Odd Fellows in America." There is a department of appellant organization designated in the constitution and by-laws as the district grand lodge endowment department, which furnishes insurance to members in good standing of the local lodges upon the payment of a small admission fee and the payment of quarterly dues. The policy is issued in the sum of three hundred dollars, and the present action is one to recover on a policy issued to Pittman Stevens, a member of one of the local lodges of the organization.

The by-laws provide that the endowment department shall be under the control of the endowment board, consisting of the district grand master, the endowment secretary, and the endowment treasurer. A section of the by-laws reads as follows:

"Sec. 6. The endowment secretary, on receipt of the said first payment, shall issue to the member of the lodge a policy stipulating such payment. All endowment dues must be paid to the Endowment Secretary within thirty days after the beginning of the quarter."

Another by-law provides for automatic forfeiture in the event of nonpayment of dues within the time prescribed. These provisions are indorsed upon the policy itself.

The provisions indorsed on the policy with reference to forfeiture in case of nonpayment of dues reads as follows: "The failure of a member to pay quarterly dues to the endowment secretary within thirty days after the beginning of each quarter will forfeit this policy without notice."

It was the custom in the lodge to which Pittman Stevens belonged for the members to pay their quarterly dues to the secretary of that lodge, who remitted the same to the endowment secretary with a list showing the names of the members who had paid and the amounts. In July, 1921, three of the members of this local lodge, including Stevens, were unable to pay their dues, which were payable not later than July 31, and the lodge decided to make each of them a loan of sufficient amount to pay their dues, and the secretary of the lodge was instructed to send in the amount to the endowment secretary with the payments made by other members. This was done, but, in making out the list of those who had paid, the lodge secretary erroneously omitted the name of Stevens, and instead thereof put in the name of a member named Martin, who had not paid. The endowment secretary, on receipt of the list, credited the amounts to the respective members who were named on the list. This payment was made to the endowment secretary on the last day for payment, and the mistake was not discovered until after the death of Stevens, which occurred on August 27, 1921, and the proofs of loss were subsequently sent in.

Liability was denied on the ground that Stevens forfeited his policy by failure to pay the July dues within the time required by the laws of the association.

At the conclusion of the trial the court gave a peremptory instruction in favor of appellee and judgment

against appellant was accordingly entered for the full amount of the policy.

The ruling of the court in taking the case from the jury is defended under authority of the case of *Sovereign Camp* v. *Newsom,* 142 Ark. 132, 14 L. R. 903, when the court held that where the clerk or secretary of a local branch of a mutual benefit society is charged with the duty of collecting and forwarding monthly assessments and is subject to suspension or removal for failure to discharge his duties, he is, in fact, the agent of the superior organization in the collection of such dues, "notwithstanding a rule or by-law of the order recites that such officer in collecting or forwarding assessments shall be the agent of the members of the subordinate lodge." The facts in the present case are quite different, however, from those recited in the opinion in the case referred to above. In that case the by-laws of the organization provided that it should be the duty of the clerk or secretary of the local organization to collect and forward the dues, and that for failure to discharge his duties the superior body might remove him. In the present case there is no authority conferred by the by-laws upon the secretary of the local lodge to collect the dues. On the contrary, the by-laws distinctly provide that payments shall be made by the members to the endowment secretary within the time prescribed. The by-laws confer no authority whatever on the part of the endowment department or any of the officers thereof to control the local secretary, and there is proof tending to show that there was no attempt to exercise any control over him. The most that is shown in the proof is that it is a custom in this particular lodge for the members to pay the local secretary and for the latter to forward the amount to the endowment secretary. The case is therefore not controlled by the former decision referred to. In that case, as in many other cases, we have decided that the by-laws constituted a part of the contract between the members and the society.

The mere fact that the members of this particular lodge paid their dues to the local secretary, who, in turn, forwarded the sum to the endowment secretary, does not establish a general custom or course of conduct on the part of the endowment department or its governing officers so as to constitute an abrogation of those provisions of the by-laws which require the payment to be made by the member and to confer authority upon the local secreaary as the agent of the endowment department to collect the dues. *Sovereign Camp W. O. W.* v. *Barnes,* 154 Ark. 486.

The testimony in the case at most only made it an issue for the jury to determine whether or not there had, in fact, been established such a general course of conduct within the knowledge of the governing officers as to show authority to the local secretary to collect the dues for the superior body.

The fact that a mistake was made in omitting Stevens' name from the list of members who had paid and inserting in lieu thereof another member who had not paid is not a material factor as to the question of liability under the policy, for the case turns upon the question whether or not the local secretary was the agent of the superior body in collecting and forwarding the dues. If he was only the agent of the local lodge or of the local members, and not of the superior body, the latter was not responsible for the mistake, and the forwarding of the money for the payment of Martin's assessment did not constitute a payment of Stevens' assessment, notwithstanding the mistake.

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

HART, J., dissents.

BLAKELY v. NEWTON.

Opinion delivered March 5, 1923.

1. APPEAL AND ERROR—FINAL DECREE—TIME FOR APPEALING.—Where a final decree was rendered in a case, and it was not appealed from within six months, the appeal will be dismissed.
2. APPEAL AND ERROR—MOOT CASE.—An appeal involving the right of appellee to an office in a fraternal society will be dismissed where the term of appellee's office has expired.

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; appeal dismissed.

Scipio A. Jones, R. S. Bowers, L. J. Brown and *Thomas J. Price,* for appellants.

When an order such as this has a complete system of procedure for redress of grievances, and the courts of that order have in good faith passed upon and decided a case presented, such decision is conclusive. 225 S. W. (Ark.) 335; 2 Daly (N. Y.) Com. 329, 357, 359; Ves. & B. 154; 144 Mass. 175; 129 Mass. 70; 137 Mass. 368; 52 Ill. 128. The laws of such an order are binding on the members, and to them the members must look for redress of grievances rather than to the courts. 110 N. W. 358, 100 Minn. 87; 116 La. 270, 40 A. S. R. 700; 92 S. E. 730, L. R. A., 1917-E, 995; 111 Mass. 185; 8 Mo. App. 148. The courts will not interfere with the decisions of a tribunal within an order in admitting, disciplining, suspending or expelling members, further than to ascertain whether or not the proceeding was in accordance with the rules and laws of the society, was in good faith, and not in violation of the laws of the land. 19 R. C. L. 1235; 75 Cal. 308, 17 Pac. 217; 58 Conn. 552, 20 Atl. 671; 2 Whart. (Pa.) 309, 52 Pa. St. 125. See also notes: 30 Am. Dec. 265; 59 A. S. R. 208; 25 L. R. A. 149; 49 L. R. A. 355.

J. F. Jones, W. Leon Smith, and *Rowell & Alexander,* for appellees.

1. The appeal should be dismissed. The decree of May 18, 1921, was final, and no appeal therefrom was taken within six months. C. & M. Digest, § 2140; 152

Ark. 581; 145 Ark. 303; 122 Ark. 255; 134 Ark. 386; 108 Ark. 523.

2. So far as pertains to the decree of January 25, 1922, the case should be affirmed. There was oral evidence heard on the part of the plaintiffs below, which is not set out in the transcript. 129 Ark. 193.

McCULLOCH, C. J. The Grand United Order of Odd Fellows in America is a fraternal society composed of negroes, and the branch of the organization in Arkansas is incorporated under the laws of this State under the name of "District Grand Lodge No. 11 of the Grand United Order of Odd Fellows in America." The Arkansas branch of the order bears allegiance to the national organization, and is subject to its constitution and by-laws.

The district grand lodge meets biennially, and at the meeting at Hot Springs in August, 1919, T. L. Newton, one of the appellees, was reelected district grand master, and the other appellees were elected to other offices in the district grand lodge. The next meeting was held in the city of Pine Bluff in August, 1921, and Newton was reelected, but, according to a special plea filed since the present case came here on appeal, Newton, since his election, ceased to be grand master and another, one Taylor, has been elected, or appointed, in his stead.

Shortly after the Hot Springs meeting at which Newton was elected district grand master, charges were preferred against him by two members of one of the local lodges for alleged personal and official misconduct, and Newton was put upon trial before the executive board of the district grand lodge on these charges, and was acquitted. The individuals who preferred the charges took an appeal to what is termed the "subcommittee of management," which seems to be, under the by-laws of the national organization, a governing board of the national organization. The subcommittee of management entered an order finding Newton guilty of the charges and removed him from office. Another order

made by the subcommittee of management appointed J. I. Blakely, one of the appellants, as district grand master in the place of Newton. The order contained a specification that Blakely's tenure should extend no longer than to the next meeting of the Grand Lodge of Arkansas, which, under the by-laws, was to convene in August, 1921.

Appellees instituted this action in the chancery court of Jefferson County on January 16, 1920, against Blakely and the other appellants who were associated with him in the controversy which had arisen between the Newton party and the Blakely party. In the complaint it was alleged that Newton had been regularly reelected grand master at the Hot Springs meeting for the ensuing term of two years; that a resolution was adopted at that meeting, in accordance with the by-laws of the order, fixing the next biennial meeting to be held at Pine Bluff in August, 1921; that Newton had been tried and acquitted of the charges against him, and that the order of the subcommittee of management was void for the reason that the by-laws did not provide for an appeal to that body by the prosecutors of charges, and that the appellants were wrongfully interfering with Newton and the other grand lodge officers in the discharge of their official duties, particularly with reference to the holding of the next biennial meeting at Pine Bluff. The prayer of the complaint was that appellants be restrained from the aforesaid interference with Newton and the other officers of the grand lodge, and the chancellor granted a temporary injunction in accordance with the prayer of the complaint.

The appellants, or some of them, had instituted an action against appellees in the chancery court of Garland County to enjoin the latter from attempting to exercise the functions of office in the grand lodge, but the prosecution of that case was restrained by an order made by the Jefferson Chancery Court.

Appellants appeared in the Jefferson Chancery Court and filed an answer and cross-complaint asking for the same relief which they had asked for in the Garland Chancery Court. The feature of the case which related to the adoption of the resolution of the grand lodge at Hot Springs calling the next meeting to be held at Pine Bluff was separately heard by the Jefferson Chancery Court on May 18, 1921, on oral testimony, and a decree was rendered finding that the next ensuing meeting to be held at Pine Bluff in August, 1921, had been fixed by resolution adopted by the grand lodge at Hot Springs in accordance with the laws of the association, and dismissing the cross-complaint of appellants for want of equity, and restraining them from "further interfering with Thomas L. Newton as grand master in the discharge of his duties as such, and calling the grand lodge to convene in Pine Bluff, Arkansas, in 1921."

There was no separate appeal from that decree, but another decree was rendered by the court on January 25, 1922, restraining appellants from interfering with Newton and the other officers in the discharge of their official duties.

A transcript of the whole record in the case was filed here on July 24, 1922, and the clerk granted an appeal.

The decision of the case upon the merits of the controversy turns primarily upon the right of the prosecutors of the charges against Newton to appeal to the subcommittee of management and the authority of that body to hear the cause on appeal, but appellees have filed a motion to dismiss the appeal on the ground that the decree of May 18, 1921, was final, and that the appeal was not prosecuted within six months, and also that since Newton was reelected as grand master at the Pine Bluff meeting and has since retired from that office, the question of the legality of his incumbency of the office for the term beginning with the Hot Springs meeting and

ending with the Pine Bluff meeting has become a moot one.

We are of the opinion that the contention of appellees is correct, and that the appeal should be dismissed. The decree of May 18, 1921, was final, in form as well as in substance, as to all the matters adjudicated. It was not merely an interlocutory order granting or continuing an injunction, but it finally adjudicated the question of the legality of the meeting to be held at Pine Bluff.

In the recent case of *Road Improvement District No. 1* v. *Cooper,* 150 Ark. 505, we said that "an order or decree extending an injunction for a fixed time, or until the happening of a certain event, may be final, but it appears clearly from the recitals in the decree that the court meant to continue control over the injunction granted in this case and over the subject-matter of the litigation." The court did not retain control over that feature of the case, but finally adjudicated it, and the adjudication related to a matter which was to occur at a fixed time. It was necessarily final in its nature, for it completely covered the subject-matter of that part of the litigation.

Now, since we find that that part of the decree was final, and no appeal was prosecuted from it, it follows that the question of interference as adjudicated in the last decree has become moot. The litigation between the parties only related to the validity of the order of the sub-committee of management in deposing Newton from office and appointing appellant Blakely for the remainder of that term. That term expired, and an election was held for the next term at a meeting the legality of which was adjudicated by the decree, from which no appeal was prosecuted. We are of the opinion that this phase of the case is controlled by the decision of this court in *Kays* v. *Boyd,* 145 Ark. 303.

The appeal is therefore dismissed.

McKINNEY v. BEATTIE.

Opinion delivered March 5, 1923.

1. TENANCY IN COMMON—ADVERSE POSSESSION.—Where the land of intestate ascended to his father for life as a new acquisition, with remainder to his brother and sister, and the father died, devising it to the brother, who occupied it as his own, adversely to the sister, for more than seven years, his adverse possession constituted such disseizin as set the statute of limitation in motion.
2. LIMITATION OF ACTIONS—EFFECT OF MISTAKE OF LAW.—Mere ignorance on the part of a cotenant concerning her right to land adversely occupied by another tenant, or even a joint mistake of law on the part of both cotenants as to their respective rights to the land, does not affect the running of the statute of limitations, under which title by adverse possession is claimed, the mistake not being caused by fraudulent concealment or misrepresentation.

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

Berry & Wheeler, for appellant.

This was a new acquisition. Appellant and George A. C. Beattie became the owners in fee simple of the lands at the death of their brother, their possession being postponed until the death of their father. 15 Ark. 555; 34 Ark. 590; 75 Ark. 19. They became tenants in common at the death of the brother, in 1881, the mere right of possession being postponed. If, however, their title was postponed until the death of the father, appellant is still entitled to judgment. Actual notice of adverse holding was never brought home to her, and the will of Madison Beattie did not amount to constructive notice of ouster. 69 Ark. 95; 76 Ark. 525; 99 Ark. 446; 103 Ark. 425. This will did not convey color of title. It states: "I give to my son * * * the farm * * * which was owned by my son William * * *", thereby limiting the quantity and extent of the estate devised. A life tenant has no interest in land that he can devise by will. 25 R. I. 332, 55 Atl. 889; 50 N. W. 143; 104 Ark. 439; *Id.* 600. The source of title goes back to William. This is in effect an attempt

to assert title under the will against an older title derived by descent, which cannot be done. 8 Ohio 87, 31 Am. Dec. 432; 49 Am. Dec. 379; 23 N. E. 225; 49 Ark. 242; 150 Ark. 347. All the parties were residents of Virginia. Their ignorance of the Arkansas statutes pertaining to descents and distributions, or their mistaken idea as to the descent, was a mistake of fact and not of law. As to mistakes of law, and when the courts will grant relief, see 13 Ark. 129; 10 Am. Dec. 323, note; 51 Me. 140, 81 Am. Dec. 564; 1 Storey, Eq. § 122-130; I Head 77. If George A. C. Beattie was not mistaken as to the law, and knew that appellant was entitled to a half-interest in the lands, his withholding this knowledge from his sister was an active fraud against her, and neither he nor his heirs could claim or reap the benefits of such fraud. 2 Pomeroy, § 894, note 2, 3d edition; *Id.* § 901. The doctrine of constructive notice from possession is applied only to protect him who has equitable rights, and not for the benefits of one who is without equity. 48 Ark. 409. The burden of proof is on him who asserts title by adverse possession, and he must show every element necessary to constitute title under the statute. 65 Ark. 422; 76 Ark. 426; 82 Ark. 51; 94 Ark. 118; 99 Ark. 446.

C. W. Norton, for appellee.

Ignorance of the right of action does not avoid the statute of limitations. 25 Cyc. 1212; 17 R. C. L. 831; 85 Ark. 584; 116 Ark. 198, 172 S. W. 1006; 61 Ark. 527, 33 S. W. 953. Non-residence does not avoid it. 96 Ark. 448. Mistake does not avoid it. 66 Ark. 452, 51 S. W. 321; 25 Cyc. 1112.

McCULLOCH, C. J. Appellant instituted an action in the circuit court of Crittenden County to recover possession of an undivided half interest in a tract of land in that county, title to which appellant claims as tenant in common of appellees. The statute of limitation was pleaded as one of the defenses, and the cause was transferred to the chancery court on motion of appellees, ap-

parently without objection on the part of appellant; at least there is no objection urged here.

The facts are undisputed with respect to the origin of the title asserted by the respective parties. The land in controversy was originally owned and actually occupied as a farm by William F. Beattie, who died intestate and without issue in the year 1881, leaving surviving his father, Madison Beattie, and sister and brother, Mary B. McKinney and George A. C. Beattie, respectively. The land was a new acquisition, and under the statutes of this State (Crawford & Moses' Digest, § 3480) ascended to his father, Madison Beattie, for life, and then descended in remainder to the collateral kindred of the intestate.

Immediately after the death of William F. Beattie, his father, Madison Beattie, took possession of the land and occupied it until he died on July 31, 1885, leaving a last will and testament, by which he undertook to devise the whole of the land to his son, George A. C. Beattie. The will of Madison Beattie was probated in Virginia, where he resided, and also in Crittenden County, Arkansas, and his son, George A. C. Beattie, immediately took possession of the land and occupied it until his death in the year 1919. The appellees are the children and only heirs at law of George A. C. Beattie.

According to the undisputed evidence, George A. C. Beattie was the sole occupant of the land from the time he took possession immediately after the death of his father, and he occupied it as his own and did not share the rents and profits with his sister, the appellant. She testified that she made no claim to the land for the reason that she believed, until after the death of her brother, George A. C. Beattie, that her father, Madison Beattie, had inherited the land in fee simple from William F., and that the title passed to George A. C. Beattie under the will of her father.

We think that the evidence justified the finding by the chancery court that the possession of the land by the father of appellees was adverse for more than the statutory period, and that such possession constituted an investiture of title. The evidence shows that the possession of George A. C. Beattie was, from the start, adverse and not in recognition, either expressly or impliedly, of the rights of any one else. It is true that, according to the testimony of appellant, both she and her brother were resting under the belief that the latter had acquired title under the will of their father, Madison Beattie, but this does not alter the fact that the possession was in fact adverse to the rights of the cotenant, and constituted in law an ouster, which put the statute of limitation in motion. We say this in full recognition of the rule that possession of one of the cotenants is possession of both, but in this case the adverse occupancy was brought home to appellant as one of the cotenants, and constituted such disseizin as put the statute of limitation in motion.

The facts in the case were sufficient, we think, to completely satisfy the rule stated by this court in *Singer* v. *Naron,* 99 Ark. 446, as follows: "In order therefore for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed."

Mere ignorance on the part of appellant concerning her inheritance, or even the joint mistake of law on the part of appellant and her brother as to their respective rights to the land, did not affect the operation of the statute. Ignorance of the law, or even of facts, afford no immunity from the operation of the statute unless the mistake is caused by fraudulent concealment or misrepresentation. *McKneely* v. *Terry,* 61 Ark. 527; *Hibben* v. *Malone,* 85 Ark. 584; *Conditt* v. *Holden,* 92 Ark. 618, 135 Am. St. 206.

Finding that the court was correct in its decree in favor of appellees on the ground of the bar of the statute of limitation, it is unnecessary to discuss the other grounds upon which the decree is sought to be upheld.

Affirmed.

WELLS v. McKAY.

Opinion delivered March 5, 1923.

PRINCIPAL AND AGENT—POWER OF AGENT TO RENT LAND.—A power of attorney which authorized an agent to collect rent, sell crops, make settlements concerning the property or "do any other thing that may seem to him best in the premises," *held* not to authorize the agent to lease the premises, the general language quoted referring to the particular facts specifically mentioned.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy,* Judge; affirmed.

Davis, Costen & Harrison, for appellant:

1. Under the uncontroverted evidence in this case, there is the plain inference that Mrs. Stacy knew of Allee's contract with the appellant, and that he acted as her agent in the transactions with him. Such being the case, it was her duty to repudiate his agency in the matter of the rental contract. 21 R. C. L. 919, § 99; 80 Ark. 302; 96 Ark. 505; 124 Ark. 360; 96 U. S. 648.

2. The power of attorney of itself gave Allee authority to rent the land; but, if there is any doubt as to the import of the language used, it should be construed most strongly against the grantor of the power, where the interests of third parties intervene. 79 A. S. R. 127; 98 *Id.* 553.

R. A. Nelson, for appellees.

Allee was authorized to *collect* rents, but he was not authorized by the power of attorney to enter into rent or lease contracts. 4 Elliott on Contracts, § 2868.

Appellant having been advised by Allee himself that he was the agent of Mrs. Stacy, it was appellant's duty,

at his own peril, to ascertain the scope of the agent's authority. 62 Ark. 3; 105 Ark. 111; 119 Ark. 53. See also 66 Ark. 256; 31 Cyc. 1049; *Id.* 1053; *Id.* 1073; *Id.* 1075.

WOOD, J. This action was instituted by the appellees against the appellant to recover the possession of a certain tract of land in Mississippi County. The appellees alleged that appellant rented the land for the year 1919, and took possession thereof and cultivated the same for that year, and that his rent contract expired January 1, 1920, but that appellant refused to surrender possession, although duly notified in writing so to do. The appellant answered denying that he unlawfully retained the premises, but set up that he was holding the same under a written contract with the owner executed by her attorney in fact, which contract he set out and made an exhibit to his answer, the material part of which is as follows: "I hereby authorize the said Sam Wells to gather and market the third of the corn and the fourth of the cotton if he should deem it best to do so. I have also agreed that he shall have the place for 1920 on the same terms he now holds it, or, if we later agree to a money rent, he shall have the place for $8 per acre."

The undisputed testimony shows that the appellant on September 17, 1919, entered into a written contract for the rent of the land in controversy for the year 1920 with F. M. Allee, who signed the same as "attorney in fact for Mrs. Abigail Stacy." The authority of Allee is contained in a power of attorney signed by Mrs. Stacy, which constitutes Allee her attorney in fact and prescribed his authority as follows: "* * * for the purpose of collecting my rent, and selling any or all crops of any description or making disposition of the same, and that any act or acts done by my said attorney I hereby ratify and confirm the same by these presents. * * * And he, my said attorney, is lawfully authorized and employed to make any and all settlements concerning the same property, or any interest therein, in my name, or do

any and all things that I could do, pay the taxes, or bring any suit to protect the title to the same, or do any other thing that may seem to him best in the premises. To sell or contract for the sale of the growing timber on said farm [describing same] * * * Said attorney to have full power to do anything whatsoever requisite and necessary to be done in the premises as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that F. M. Allee, or his substitute, said attorney, shall do or cause to be done by virtue hereof."

Soon after the rent contract was entered into, the appellees purchased from Mrs. Abigail Stacy, as evidenced by her warranty deed of October 19, 1919, the land in controversy. The negotiations for the purchase of the land were conducted with Mrs. Stacy by correspondence. The deed was brought to the appellee by F. M. Allee, and the appellees paid to him the consideration for the land. The appellees knew that the appellant was in possession at the time they purchased the land, and made it a condition of the sale that Mrs. Stacy deliver possession to them.

The testimony of Mrs. Stacy was to the effect that she did not authorize Allee or any one else to rent the land to the appellant for the year 1920, and that he had no contract with her to rent the land that year. The testimony on the part of the appellant showed that Allee collected the rents from the lands and directed the improvements that were made on the lands by the appellant while he was occupying the same. Upon the above facts the court directed a verdict in favor of the appellees. Judgment was entered in accordance with the verdict, from which is this appeal.

The only question on this appeal is whether or not Allee had authority, under the power of attorney in evidence, to rent the land for the year 1920. The court correctly construed the power of attorney as not giving Allee any such authority. The authority conferred upon

Allee is clearly expressed in the instrument, and nowhere in it do we find that he is given the authority to rent the land. His authority is to collect rent, sell crops and growing timber, make all settlements concerning the property, pay the taxes, bring suit to protect the title, or "do any other thing that may seem to him best in the premises."

The words, "do any other thing that may seem to him best in the premises" do not confer a general authority upon Allee to do anything not connected with the particular acts of authority previously designated. These words refer to the doing of anything that may be necessary to effectuate the particular acts of authority previously expressed. The objects of the power conferred upon Allee having been definitely expressed, the instrument cannot be construed to include other powers and objects not connected with these specifically mentioned. See *Welch* v. *McKenzie,* 66 Ark. 256-58. As we construe the instrument, it does not confer authority upon Allee to act generally in all matters concerning the land in controversy, but only the authority to act in the particulars mentioned, which, as we have said, nowhere mentions authority to rent. See 4 Elliott on Contracts, § 2868. Therefore Allee exceeded his authority in renting the land to the appellant for the year 1920. The facts do not warrant the inference that Mrs. Stacy was estopped from challenging the authority of her agent to rent the land. Appellant therefore in renting the land for the year 1920 dealt with Allee at his peril. See *U. S. Bedding Co.* v. *Andre,* 105 Ark. 111; *Bank of Hoxie* v. *Hadley Milling Co.,* 119 Ark. 53.

The court was correct in its interpretation of the power of attorney, and did not err in directing a verdict for the appellees. Therefore let the judgment be affirmed.

PENDERGRASS v. STATE.

Opinion delivered March 5, 1923.

1. CRIMINAL LAW—DEMONSTRATION BY SPECTATORS.—Applause by some of the spectators at the close of an argument by one of the State's attorneys, and even participation therein by a deputy sheriff, which was not general on the part of the spectators, was not so prejudicial to the rights of the accused as to be beyond the power of the court to cure, and its injurious effect was cured where the demonstration was promptly suppressed by the court, who instructed the sheriff to arrest any one whom he saw applauding and admonished the jury not to allow the applause of the audience to influence them in any way.
2. CRIMINAL LAW—MANIFESTATION IN COURT OF POPULAR SENTIMENT.—A manifestation of popular sentiment in court for the purpose of influencing the decision of a criminal case in a manner calculated to create an abiding bias or prejudice entitles the accused to a new trial.
3. CRIMINAL LAW—DEMONSTRATION IN COURT—DISCRETION OF COURT.—Where the trial court refuses to grant a new trial because of the misconduct of the public at the trial, the Supreme Court will be slow to control his discretion, and will not do so unless it has been abused, resulting in a miscarriage of justice.
4. CRIMINAL LAW—ARGUMENT OF COUNSEL.—A reference by one of the State's attorneys to a demonstration in the court room as being a spontaneous outburst of the honest hearts of the people was improper, but was not so flagrant that its prejudicial effect could not have been removed by appropriate directions to the jury, and does not call for a reversal where accused did not object to the remark nor ask for an instruction to the jury not to consider it.
5. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE—COLLATERAL MATTER.—In a prosecution for murder, where ill feeling between the parties grew out of the deceased's belief that defendant had seduced his daughter, newly discovered evidence relating to intimacy and familiarity in conduct between the daughter and another man, and to statements of the daughter alleged to show a blackmailing scheme, was collateral and irrelevant to the issue on trial as to whether the accused killed deceased in self-defense, and does not require the granting of a new trial.
6. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE.—Newly discovered evidence which goes only to impeach the credibility of a witness is not ground for a new trial.

7. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE.—Newly discovered evidence which was merely cumulative of other evidence adduced at the trial does not call for a new trial.

8. CRIMINAL LAW—NEWLY DISCOVERED EVIDENCE—DISCRETION.—Motions for a new trial on the ground of newly discovered evidence are addressed to the legal discretion of the trial judge; and, unless it appears that there has been an abuse of that discretion, the refusal of a new trial will not be reversed.

9. CRIMINAL LAW—DISCRETION OF COURT—DISQUALIFICATION OF JUROR.—Where accused filed the affidavits of two nonresidents that they had heard a certain juror state that accused ought to be hanged, such juror on his *voir dire* having stated that he had not expressed any opinion, and the juror made affidavit that he had no recollection of having made such a statement, the court's discretion in refusing a new trial will not be reversed.

10. HOMICIDE—INSTRUCTIONS—PREJUDICE.—In a murder trial, where evidence on behalf of the State showed a premeditated killing while that on behalf of the defense showed self-defense, and there was no evidence tending to reduce the offense to manslaughter, any errors in giving instructions on manslaughter or any refusal to instruct thereon were harmless.

11. CRIMINAL LAW—MULTIPLICATION OF INSTRUCTIONS.—Though a requested instruction that, if deceased at the time of the killing was in the act of making a murderous assault upon defendant and attempting to take his life, defendant would not be required to retreat before he was authorized to kill deceased, if need be, to prevent him from killing or doing great harm to defendant, was a correct statement of the law, refusal to give it was not error where the court instructed the jury fully and correctly upon the law of self-defense.

Appeal from Logan Circuit Court, Northern District; *James Cochran*, Judge; affirmed.

Robt. J. White, John H. White, W. B. Rhyne, G. C. Carter, John P. Roberts, and *Evans & Evans,* for appellant.

1. The court erred in refusing to grant the appellant a new trial on account of the demonstration in the court room by the spectators and the deputy sheriff who selected and summoned the talesmen on the jury, and on account of the argument of the State's attorney in urging the jury to convict the appellant because of the demonstration. 108 S. E. 290; 166 Calif. 357, Ann. Cases,

1915-B, 881, and case note at p. 894; Ann. Cas. 1913-E, p. 806, case note; 112 Mo. 277, 20 S. W. 461; 16 Texas Ct. App. 473, 49 Am. Rep. 826.

2. The court erred in refusing to grant a new trial on account of newly discovered evidence. 34 Ark. 632.

3. It was error to refuse a new trial on account of the misconduct and disqualification of the juror Girard. 20 R. C. L. 242-3, § 27; 41 Fed. 676; 12 Am. Dec. 157; 46 Ore. 342, 80 Pac. 660, 114 A. S. R. 873; 69 W. Va. 244, 71 S. E. 609, 50 L. R. A. (N. S.) 958, case note; 19 Ark. 156; 72 Ark. 158; 131 Ark. 404; 150 Ark. 555.

4. The court erred in its instruction on the subject of manslaughter, and in refusing to give the instructions on that subject requested by the appellant. 50 Ark. 545; 74 Ark. 460; 52 Ark. 345; *Id.* 45; 116 Ark. 588; 69 Ark. 134; 82 Ark. 503; 87 Ark. 281.

5. It likewise erred in failing and refusing to correctly instruct the jury on the duty of the defendant to retreat. 62 Ark. 306; 50 Ark. 545.

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

1. The prompt and vigorous reprimand of the audience by the court, his directions to the sheriff and his admonition to the jury, removed any prejudice that might have resulted from the applause. 104 Ark. 162. No objections were made to the argument of the attorney based on the applause, and appellant cannot now complain. 79 Ark. 25; 84 Ark. 128; 120 Ark. 562; 125 Ark. 339; 109 Ark. 159; 120 Ark. 530; 126 Ark. 354. See also 65 Ark. 475; 95 Ark. 321; 94 Ark. 548; 100 Ark. 232.

2. There was no error in refusing to grant a new trial on account of newly discovered evidence. Such evidence, where it goes only to impeach the credibility of a witness, is not a ground for new trial. 72 Ark. 404; 90 Ark. 435; 91 Ark. 492; 96 Ark. 400; 114 Ark. 472; 99 Ark. 407. Motions for new trial on the ground of surprise or newly discovered evidence are addressed to the sound

legal discretion of the trial court, and that discretion, in the absence of abuse, will not be controlled. 41 Ark. 229; 54 Ark. 364; 116 Ark. 558.

3. There was no error in refusing a new trial on account of the conduct of the juror Girard. 19 Ark. 156; 72 Ark. 158; 143 Ark. 178; 133 Ark. 16.

4. Under the testimony the defendant was guilty of murder in the first degree, or the killing was in self-defense, and therefore justifiable. Having been convicted of murder in the second degree, he cannot complain of instructions on the subject of manslaughter. 59 Ark. 431; 91 Ark. 224; 37 Ark. 238; 77 Ark. 247; 105 Ark. 367; 91 Ark. 589; 80 Ark. 495; 104 Ark. 606.

5. The court's instruction covered the subject of the duty to retreat, and it was not required to multiply instructions. 116 Ark. 588.

WOOD, J. On Friday, January 13, 1922, appellant shot and killed Clay McIlroy on the northeast corner of the public square in the town of Ozark, Franklin County, Arkansas. McIlroy at the time was armed with a twelve gauge choke-bore shotgun loaded with B B shot. The appellant used a small automatic pistol. On the northeast corner of the square is situated the People's Bank building. It is a two-story building, the lower story being devoted to the banking business and the upper story containing offices. The appellant, with another lawyer, had an office on the second floor. The stairway leading to the second story was immediately west of the bank building. The appellant fired the shot that killed McIlroy from this stairway. Appellant at the time was some eight or ten steps up the stairway.

A nineteen-year-old unmarried daughter of McIlroy had become pregnant and given birth to a baby on January 23, 1922, in Oklahoma City. She claimed that the appellant was the father of the child, and that she went to Oklahoma City at his suggestion and upon his promise that he would defray the expenses of the trip. Miss McIlroy was staying at her home in Ozark at the

time she had sexual intercourse with the appellant. After she became pregnant she notified him of her condition, but did not tell her father. Her father ascertained her condition after she reached Oklahoma City. She did not tell her father that the appellant was the author of her ruin.

It was the contention of the State that the appellant, without provocation, waylaid McIlroy and killed him at a time when the appellant was in no danger of death or great bodily harm from McIlroy. There was testimony to warrant such contention on the part of the State. On the other hand, it was the contention of appellant that McIlroy knew that his daughter had accused the appellant of being the father of her child, and that because of this McIlroy had threatended the life of the appellant and had taken his gun to the People's Bank, where he transacted his business, and had left the same there to be used by him when the opportunity presented for shooting the appellant; that the appellant had been informed of these threats of McIlroy; that on the day of the killing McIlroy saw appellant standing unarmed, as he believed, near appellant's car in front of the People's Bank; that McIlroy thereupon went and got his gun, and came out of the bank with the gun in a shooting position, and was seeking appellant to take his life; that when the appellant saw McIlroy come out of the door with the gun he left the man with whom he was talking at the edge of the sidewalk and ran up the stairway in an effort to get away from McIlroy; that he lost his footing after he had ascended eight or ten steps, and fell or sank down; that McIlroy pursued along the sidewalk in a trot or run until he came in front of the stairway with his gun in a shooting position, and just as he was in the act of bringing his gun toward the appellant to shoot, the appellant fired the fatal shot in order to save his own life. There was testimony to support this contention of the appellant, and we deem it unnecessary to set forth in detail the testimony in support of the respective contentions.

The appellant was indicted by the grand jury of Franklin County of murder in the first degree for the killing of McIlroy. The venue was changed to the Northern District of Logan County, where the trial was had, resulting in a verdict of guilty of murder in the second degree, and a judgment sentencing the appellant to imprisonment in the State Penitentiary for seven years, from which judgment is this appeal.

We will dispose of the alleged errors in the rulings of the trial court in the order in which they are presented in the brief of learned counsel for appellant.

1. The appellant contends first that the court erred in refusing a new trial on account of a demonstration in the court room by the spectators and the deputy sheriff who selected and summoned the talesmen on the jury, and on account of the argument of Hon. Steel Hays in urging the jury to convict the defendant because of the demonstration. To sustain the above assignment of error, which was made one of the grounds of the motion for a new trial, the appellant attached several affidavits. One of the affidavits stated, in substance, that he heard the argument made by Mr. Wolf, one of the attorneys for the State, and that at the close of his argument a great many persons in the audience engaged in a noisy demonstration by clapping their hands, stamping their feet, and hollering in loud voices; that he saw Guy Lipe, who was sitting on a bench near to, and in plain view, of the jury. He had his hands raised above his head, and was clapping them, and stamping his feet, and in that manner assisting and engaging in the demonstration. Lipe is the chief deputy sheriff of B. B. Foster, sheriff of Logan County. Other affiants corroborated the above statement as to the character of the demonstration in the court room.

Two of the appellant's attorneys stated, in an affidavit in support of the above ground for a new trial, that they were present and heard the argument of Steel Hays, one of the counsel for the prosecution, who stated

in his argument with reference to the demonstration by the audience the following: "It was the spontaneous outburst of the honest heart of the people of this county —of your friends and neighbors."

The court put into the record the following statement: "At the conclusion of the speech of Otha Wolf, an attorney representing the State, there was a sudden outburst of applause by a small portion of the audience located near the east front door and extended to other portions of the audience, but by no means a general applause. Immediately the court rapped vigorously for order, and order was almost immediately restored. The court rebuked the crowd severely for the outburst, directed the sheriff to arrest any one whom he saw applauding and bring them before the court, and directed the sheriff, if another applause occurred, to clear the room of spectators, and admonished the jury that they must not allow the applause of the audience in any way to influence them in their verdict, and said to them that, should they do so, they would be unworthy as jurors, and ought not to be allowed to sit in any case. If the Honorable Steel Hays made the statement in his address to the jury that it was the spontaneous outburst of the honest hearts of the people of this county, of your friends and neighbors, the statement was not called to the attention of the court, and no exceptions were saved to such statement."

The statements of the presiding judge with reference to the character of the demonstration in the court room following the argument of the attorney, Wolf, must be accepted as the facts concerning such demonstration and the rulings of the court concerning the same. The statements show that the outburst of applause was by no means general, and that the trial judge immediately took vigorous action, by way of reprimand to the audience and instructions to the sheriff and admonitions to the jury, to correct any prejudicial effect in the minds of the jury that might have been caused by such demonstration. The demonstration that was made by the audience was exceedingly reprehensible, and if the court had

not promptly, and on its own motion, taken the steps indicated to counteract the prejudice which such demonstrations were calculated to produce in the minds of the jury, we would not hesitate to reverse because of the probable prejudice which might have resulted from such improper exhibition of public sentiment in favor of the prosecution. But the demonstration, as evidenced by the statement of the court, was not of so flagrant a character that any prejudice occasioned by it in the minds of the jury could not be completely removed by the efforts which the trial judge made to eliminate the same. The conduct of the deputy sheriff in charge of the jury was, to be sure, the most culpable of all, because he was a sworn officer of the law, whose duty it was to preserve the utmost impartiality in his conduct before the jury. However, we are convinced that the instructions of the presiding judge to the jury not to allow the applause in any way to influence them in their verdict, and telling them that, if they did so, it would show them unworthy to sit as jurors in any case, were adequate to eliminate from the mind of any sensible and honest juror whatever prejudice might, for the moment, have been lodged in his mind. The manifestation of popular sentiment in a court of justice for the purpose of influencing the decision of a cause is always to be deprecated, and, where such sentiment is voiced in a manner calculated to create an abiding bias or prejudice which enters into the determination of a cause, then the only possible method of obviating the failure in the administration of justice caused by such undue influence is to award a new trial. To anticipate and to prevent such occurrences presents a serious problem, and one ofttimes most difficult, and even impossible, to solve. It would not do to invalidate trials because of some sudden outburst of popular feeling which it is impossible for the presiding judge to control. Much must be left to his judgment and discretion in such cases, and, where he fails to grant a new trial because of such misconduct on the part

of the public, this court will be slow to control his discretion, and will not do so unless it is manifest that same has been abused resulting in a miscarriage of justice. The facts of this record as evidenced by the statements of the trial judge do not warrant us in coming to that conclusion.

Concerning the remarks of counsel for the State in regard to the demonstration, such remarks were, of course, calculated to accentuate in the minds of the jury any prejudice which the demonstration might have produced, but these remarks also were not so flagrant that their prejudicial effect could not have been removed by appropriate directions to the jury. The statement of the trial judge shows that his attention was not directed to these remarks, and counsel for the appellant at the time saved no exceptions to them and did not ask the court to instruct the jury not to consider them. Such being the case, appellant cannot now take advantage of a failure of the trial judge to exclude such remarks, or to reprimand counsel for having made the same. *Smith* v. *State,* 79 Ark. 25; *Bell* v. *State,* 84 Ark. 128; *Wilson* v. *State,* 126 Ark. 354.

2. The appellant next contends that the court erred in refusing to grant a new trial on account of alleged newly discovered evidence. He brings forward to sustain this ground of his motion for a new trial the affidavits of William Bearden, John McCormick, and Mrs. Godwin Lewis. The affidavit of William Bearden shows that he on one occasion observed an intimacy and familiarity in conduct between L. M. Guthrie and Edna Jane McIlroy, which counsel for appellant contends would tend to show that appellant was the victim of a blackmailing scheme on the part of Edna Jane McIlroy, to which Guthrie was a party. The affidavit of Mrs. Lewis shows that she would testify to facts which would tend to prove that Edna Jane McIlroy told her that she had never had intercourse with any man except the appellant, and that appellant forced her to such intercourse

at the point of a gun, and that Miss McIlroy wrote to the appellant demanding money, and that Miss McIlroy's father saw the letter. Such testimony as the above was wholly collateral and irrelevant to the issue as to whether or not the appellant killed McIlroy in self-defense. Moreover, the testimony of these witnesses, even if relevant, was only for the purpose of impeachment. Newly discovered evidence which goes only to impeach the credibility of a witness is not ground for a new trial. *Dewein* v. *State,* 114 Ark. 472.

The affidavit of McCormick shows that he would testify that he witnessed the killing; that "he saw McIlroy come out of the door of the People's Bank with a shotgun in his hand and heard McIlroy say as he came out, 'I am going to kill the son-of-a-bitch!' That appellant ran from where he was talking with a party across the sidewalk into the stairway; that McIlroy changed the gun from his right hand to his left, put the gun to his left shoulder and ran along the sidewalk with the gun to his shoulder, and as he got in front of the stairway he was bringing the muzzle of the gun around into the stairway when he was shot and fell."

The above testimony was but cumulative of the testimony of several witnesses adduced at the trial which tended to show the circumstances of the rencounter to be substantially as disclosed by the alleged newly discovered evidence of McCormick. Under numerous decisions of this court a new trial will not be granted on the ground of newly discovered testimony which is but cumulative in character. *Hays* v. *State,* 142 Ark. 587; *Huckaby* v. *Holland,* 150 Ark. 85, and many cases cited in 4 Crawford's Arkansas Digest at page 3819.

Motions for a new trial on the ground of newly discovered evidence are addressed to the legal discretion of the trial judge, and, unless it appears from the record that there has been an abuse of that discretion, the ruling of the trial court refusing a new trial for such ground will be sustained. *Anderson* v. *State,* 41 Ark. 229; *Arm-*

strong v. *State,* 54 Ark. 364. The court did not abuse its discretion in overruling the motion for a new trial on the ground of newly discovered evidence.

3. Appellant contends that the court erred in refusing a new trial on account of the misconduct and disqualification of juror Joe Girard. The record shows that Girard was selected on the jury that tried the appellant. He was a member of the regular panel, and on his *voir dire* he qualified himself to sit on the jury by stating that he did not know anything about the facts of the case, and had not formed or expressed an opinion as to the guilt or innocence of the appellant, and that, if selected, he would try the case fairly and impartially according to the law and the testimony, and that he was not prejudiced against the appellant. The affidavit of one of the attorneys for the appellant shows that appellant and his counsel did not know at the time Girard was accepted by them as a juror that he had expressed the opinion that the appellant ought to be hung. To sustain this ground of his motion for a new trial, appellant also brought forward the affidavits of two parties to the effect that during the August term of the court, 1922, at which the trial of the appellant was had, and before the trial began, they heard Joe Girard say that he knew Pendergrass and McIlroy, and knew enough about the case to know that Pendergrass ought to be hung for killing McIlroy. To rebut the statements made by the two affiants as to what Girard said, the State adduced the affidavit of Girard in part as follows: "I have read the affidavit of Walter Leach of the county of Wagoner, State of Oklahoma, as the same is copied in the application for a new trial in the case of State of Arkansas v. Willard Pendergrass, and I have no recollection of making such statement to any one." It appears that the affidavits tending to show the prejudice of juror Joe Girard were made by parties who lived in Oklahoma. These affidavits do not state the occupation of the affiants, and no facts are set up that would

tend to advise the court as to the identity of the affiants and the credibility that should be given their affidavits. It is not shown that appellant asked that they be brought before the court for observation and personal examination.

As we have already stated, it was shown by the affidavit of one of appellant's counsel that the juror Girard qualified himself under oath as a juror by answering that he had not expressed any opinion as to the guilt of appellant, and the affidavit of Girard states that he had no recollection of making *such statement to any one* as was attributed to him in the affidavit of Walter Leach. The affidavit of Walter Leach as to what he heard the juror Girard say was in substance and effect the same as the affidavit of Walter Smith, so the denial by Girard that he made *such statement to any one* was tantamount to a denial of both affidavits. The answers to the questions propounded to him on his *voir dire* were in effect a denial that he had made such statements prior to the trial as were attributed to him in the affidavits of Leach and Smith. The court had personal observation of the juror Girard while he was making his answers with reference to his qualification to sit as a juror.

In the early case of *Meyer* v. *State,* 19 Ark. 156, we had under consideration the incompetency of a juror on account of prejudice alleged to have been discovered after the trial and conviction, and among other things we said: "If, in this case, the juror Beard had really and seriously expressed the determination, before the trial, to convict the prisoner at all events, he was guilty of a fraud upon the law, and upon the prisoner's rights, in hypocritically taking upon himself the solemn oath of a juror, and falsely assuming to act as an impartial arbiter of the life or liberty of the prisoner. But it would not be safe to hold that the prisoner, after conviction, could take the *ex parte* affidavits of persons out of doors, to establish the prejudice of the juror, and,

bringing them into court, claim a new trial, absolutely, and as a matter of right, upon such affidavits, as insisted by the counsel of the prisoner in this case. Such a practice might open the door for corruption and perjury."

The above case is the leading case in our reports on the subject now under review, and contains a learned and thorough discussion of the same. In that case the court held that where the competency of a juror is challenged on the ground of prejudice which was not discovered until after the trial, the trial court might consider the affidavits of parties tending to show such prejudice, and might have the affiants and juror brought before the court for examination concerning the alleged prejudice, and that, after ascertaining all the facts, the court would necessarily have to exercise a sound legal discretion in disposing of the motion. In that case there was nothing in the record to discredit the affidavits tending to show prejudice on the part of the juror. The juror himself whose conduct was impeached was not examined, nor his afidavit taken in rebuttal of the alleged fraud and misconduct practiced upon the court in the concealment of his prejudice.

Such being the state of that record, this court held that the competency of the juror had been impeached, and that a new trial should be had on that account. Chief Justice ENGLISH concluded by saying: "In this case, nothing appears of record to discredit the affidavits of Addy and Tune, and the court below, perhaps, overruled the motion for a new trial, under the impression that, under our statute, the competency of jurors could, in no case, be impeached after the trial." But in the case at bar the juror whose conduct was questioned made an affidavit in rebuttal or contradiction of the charges made against him. It occurs to us that the statement contained in his affidavit was an absolute contradiction of the alleged misconduct set forth in the two affidavits that were filed by the appellant in support of his motion.

The court considered these affidavits in connection with the affidavit of the juror Girard, and held that the competency of the juror had not been impeached. We are convinced that the trial court did not abuse its discretion in holding that the integrity of the trial was not impaired by any alleged concealment or prevarication on the part of Girard in imposing himself upon the panel. See *Vowell* v. *State,* 72 Ark. 158. "On motion for a new trial on the ground that a juror was disqualified by reason of having formed and expressed an opinion that the accused was guilty, a finding of the court, on conflicting evidence, that the juror was not disqualified, is conclusive." *Sneed* v. *State,* 143 Ark. 178. *Wright* v. *State,* 133 Ark. 16; *Van Houser* v. *Butler,* 131 Ark. 404.

4. The appellant next urges that the court erred in its instructions given on the subject of manslaughter, and erred in refusing to grant prayers by the appellant in regard to manslaughter. It is a sufficient answer to this contention to say that the appellant cannot complain of error, if any, in the rulings of the trial court in giving or refusing prayers for instructions on the subject of manslaughter, for, as we view the record in the case, there was no testimony to justify instructions on the subject of manslaughter. Counsel for the appellant, in their statement of the case, correctly say that their contention at the trial was that the appellant "was running to the stairway and up the stairway in an effort to avoid the deceased and to prevent the deceased from shooting and killing him, and that the deceased followed, or went along the sidewalk in front of the bank, in a trot or run, with his gun in a shooting position, until he came in front of the stairway up which the appellant was trying to escape, and just as deceased was in the act of bringing his gun in the stairway toward the appellant to shoot, the appellant fired a shot which resulted in the death of the deceased, and that he fired the shot for

the sole and only purpose of saving his own life from being taken by the deceased."

As we have already stated, there was testimony to sustain this contention, but there was no testimony whatever to warrant a finding that the appellant voluntarily shot and killed McIlroy in a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible. Nor is there any testimony on behalf of appellant, if believed by the jury, that would warrant the inference that appellant was careless in reaching the conclusion that it was necessary to take the life of McIlroy and acted too hastily in doing so. Appellant either shot and killed McIlroy in his necessary self-defense under the circumstances as detailed by himself and witnesses in his behalf, or else he killed McIlroy, as the State contended, and as the testimony tended to prove, without any provocation whatever, and with malice aforethought, and after deliberation and premeditation. The verdict of the jury has settled the issue thus made by the facts against the appellant by finding him guilty of murder in the second degree, showing that, under the evidence, they believed him guilty of that grade of homicide. If they had not so believed, they should, and doubtless would, have acquitted him, for, if the evidence tending to prove the contention of appellant were believed by the jury, they could not have convicted him of any offense. In this state of the proof the appellant is in no attitude to complain because the court submitted instructions on the subject of manslaughter, which, even if erroneous, would have permitted the jury to find him guilty of a lower grade of homicide than that of which he was guilty under the evidence, if he was guilty at all. The instructions on manslaughter were therefore more favorable to the appellant than he was entitled to under the evidence, which tended to prove that, if guilty at all, he was guilty of murder and nothing less. *Beatty* v. *State,* 77 Ark. 247; *Cook* v. *State,* 80 Ark. 495; *Sexton* v. *State,* 91 Ark. 589;

Hamer v. *State,* 104 Ark. 606; *Wilkerson* v. *State,* 105 Ark. 367.

5. Appellant urges, as a ground for reversal of the judgment, that the court erred in failing and refusing to correctly instruct the jury on the subject of the duty of the defendant to retreat. The appellant prayed for instructions which, in effect, declared that if McIlroy, at the time of the killing, was in the act of making a murderous assault upon the appellant and attempting to take his life, under such circumstances appellant would not be required to retreat before he was authorized to shoot and kill McIlroy, but that he had the right to stand his ground, and, if need be, kill McIlroy to prevent him from killing, or doing great bodily harm to the appellant. In this connection the court gave the following instruction:

"15. No one in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, is justified in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. The danger must apparently be imminent and actual, and he must exhaust all means within his power, consistent with his safety, to protect himself, and the killing must be necessary to avoid the danger. If, however, the assault is so fierce as to make it apparently as dangerous for him to retreat as to stand, it is not his duty to retreat, but he may stand his ground, and, if necessary to save his own life, or to prevent a bodily injury, slay his assailant."

The appellant offered only a general objection to the above instruction, and the appellant's prayers raised only the objection that the instruction given by the court did not correctly declare the law applicable to the testi-

mony adduced by the appellant, which tended to prove that McIlroy, at the time appellant shot and killed him, was making a murderous assault upon the appellant. Appellant's prayers for instructions in this connection were correct declarations of the law, but we are convinced that the law embodied in these prayers was fully and correctly declared in the instructions which the court gave.

The concluding portion of instruction No. 15, given by the court as above set forth, correctly stated the proposition of law which the appellant contends the court should have stated, for it tells the jury in substance that, if the assault upon appellant was so fierce as to make it apparently as dangerous for him to retreat as to stand, it was not his duty to retreat, but that he could stand his ground, and, if necessary to save his own life or to prevent great bodily harm, slay his assailant, McIlroy. This certainly accurately declared the law safeguarding all the rights of the appellant, if the jury should find that a murderous assault was made upon appellant by McIlroy, and thus fully covered the evidence tending to sustain his theory that the killing was done in his necessary self-defense. After the court had fairly and fully declared the law applicable to the facts which the testimony adduced by the appellant tended to prove, then it was not error to refuse to multiply instructions covering the same subject. *Stevens* v. *State,* 117 Ark. 64-70; *Dickerson* v. *State,* 121 Ark. 564-70.

The record presents no reversible error in the rulings of the trial court, and its judgment is therefore affirmed.

ROBERTS v. STATE.

Opinion delivered March 5, 1923.

1. CRIMINAL LAW—INSTRUCTION AS TO CREDIBILITY OF WITNESS.—The credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly for the jury, and it is an invasion of their province to tell them that they may disregard a witness' entire testimony when they believe he has testified falsely as to a material fact.
2. CRIMINAL LAW—INSTRUCTION AS TO CREDIBILITY OF WITNESS.—An instruction on the credibility of witnesses that, if the jury find that any witness has wilfully sworn falsely to any material facts, "you may disregard their whole testimony if you believe it to be false, or believe that part which you think true, and disbelieve that part which you regard to be false," is not erroneous as telling the jury that if they find that any witness has wilfully sworn falsely to any material fact they may disregard all the testimony of such witness.

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

Cravens & Cravens, for appellant.

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

HART, J. Jack Roberts prosecutes this appeal to reverse a judgment of conviction against him for the crime of selling intoxicating liquors in the Fort Smith District of Sebastian County, Ark., on the 15th day of July, 1922.

His only assignment of error is that the court erred in giving instruction No. 2, which is as follows:

"You are the sole judges of the credibility of the witnesses and the wieght that should be given to their testimony. It is your duty to reconcile the statements of these different witnesses, so as to believe as much of this testimony as you can, but if you cannot do so on account of contradictions, then you have the right to believe the witnesses whom you think the most worthy of credit, and disbelieve the witnesses who you believe from the evidence to be the least worthy of credit. And if you find any witnesses have wilfully sworn falsely to any material facts in this case, you may disregard their whole testi-

mony if you believe it to be false, or believe that part which you think true, and disbelieve that part which you regard to be false. And in weighing a witness' testimony you may take into consideration his candor or lack of candor, his knowledge about the thing he testifies, the reasonableness or unreasonableness of his testimony, and his interest, if any be shown, in the result of your verdict."

Counsel for the defendant claim that the instruction is open to the objection that it tells the jury that, if it finds that any witness has wilfully sworn falsely to any material fact in issue, it may disregard all the evidence of such witness, if it sees fit to do so, and rely upon the decision of *Mangrum* v. *State,* 156 Ark. 306, and cases cited for a reversal of the judgment.

We do not think that the instruction is of similar import to any of the instructions referred to in those cases. While we do not approve the form of the instruction, we do hold that it is free from the criticism of the instructions in the cases cited.

The object of all testimony is to establish the truth, and the jury is the judge of the credit to be given to the witnesses. The true rule is that the credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly a matter for the jury. It may believe or disbelieve his testimony as to other facts according as it deems such testimony worthy or unworthy of belief. Hence it is an invasion of the province of the jury to tell it that it may disregard the entire testimony of a witness whom it may believe to have testified falsely as to a material fact.

The present instruction is not open to that criticism because it tells the jury that, if it believes any witness has testified falsely to a material fact, it may disregard his whole testimony if it believes it to be false, or it may believe that part which it thinks true and disbelieve that part which it regards false. By this the court meant to tell the jury that, if it found a witness to have wil-

fully testified falsely on a material point, it might disregard his whole testimony if it believed the whole of it to be false.

Therefore the instruction was technically correct, and an instruction in substantially the same language has been recently approved in the case of *Bryant* v. *State,* 156 Ark. 580.

It follows that the judgment will be affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* PUGH.

Opinion delivered March 5, 1923.

CARRIERS—JEWELRY AS BAGGAGE.—Jewelry suitable to the condition in life of the passenger and intended for personal use on the journey is "baggage," and an interstate carrier cannot limit the meaning of that term by rules and regulations filed with the Interstate Commerce Commission so as to exclude articles included in the generally accepted meaning of that term.

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

STATEMENT OF FACTS.

This was an action by Dorothy Pugh against the Missouri Pacific Railroad Company to recover the value of her baggage lost by the said railroad company.

According to the allegations of her complaint, on December 30, 1920, the plaintiff purchased from the defendant at Hamburg, Ark., a railroad ticket from that place to Asheville, N. C. The railroad company also checked her trunk as baggage on the ticket. When the plaintiff delivered the trunk to the defendant as baggage, among other articles of wearing apparel it contained a gold pin set with precious stones worth $50 and two lavallieres each set with a small diamond worth $75 each.

It is alleged that these articles were carried by the plaintiff for her own use on her journey. The trunk

having been lost upon the journey, the plaintiff brought this action to recover damages for the value of the trunk and its contents.

The railroad company defended on the ground that it had complied with the tariff rates and rules and regulations affecting baggage promulgated by the Interstate Commerce Commission.

It also claimed that under the rules of the Interstate Commerce Commission jewelry is not baggage. The rule on this point is as follows:

"Money, jewelry, negotiable papers and like valuables should not be inclosed in baggage to be checked. The carriers issuing and concurring in this tariff will not be responsible for such articles in baggage."

The plaintiff filed a demurrer to the answer of the defendant.

The circuit court sustained the demurrer to the answer, except to that part setting up the $100 limitation of value.

The defendant elected to stand upon its answer, and refused to plead further. Whereupon the court rendered judgment in favor of the plaintiff against the railroad company for the sum of $100.

The defendant has duly prosecuted an appeal to this court.

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

1. The tariff regulation prohibiting the carriage of jewelry as baggage is reasonable and lawful, and should be enforced. 74 I. C. C. Rep. 238; 132 Ark. 582; 233 U. S. 97; 100 U. S. 24; 3 Wall. 107.

2. In the absence of a showing that complaint of the unreasonableness of the regulation had been heard and determined by the Interstate Commerce Commission, the court was without jurisdiction to abrogate or hold it unreasonable. 4 Fed. Stat. Ann. 337 *et seq.;* Supp. of 1920, Fed. Stat. Ann., 93 *et seq.;* 4 Fed. Stat. Ann. 2d ed., 406, § 6; 36 Stat. 539-546; U. S. Comp. Stat., Supp. 1911, chap. 309, p. 1288; 4 Fed. Stat. Ann. (2d ed.) p.

359, Supp. 1920, p. 95; sub-paragraph 7 of § 6 of the act, p. 421; Supp. 1920, p. 104; § 10 of act, p. 439; Supp. 1920, p. 105; § 13 act, p. 453; Supp. p. 106; § 14 act, p. 457; Supp. p. 107; § 15, act, p. 458 and sub-paragraph 7, p. 468; Supp. p. 107; § 16, act, p. 475 and sub-paragraphs, Supp. 1920, p. 116; 204 U. S. 426; 51 L. ed. 553; 222 U. S. 506; 56 L. ed., 288; 234 U. S. 138; 58 L. ed. 1255; 230 U. S. 247; 57 L. ed. 1472; 240 U. S. 43; 60 L. ed. 517; 231 Fed. 405.

HART, J., (after stating the facts). In the case of *Bush* v. *Beauchamp,* 132 Ark. 582, the court held that, inasmuch as the term "baggage" has a generally recognized meaning, the carrier cannot, by rules and regulations, limit its meaning so as to exclude articles which are usually included in the generally accepted meaning of the term.

In that case, following its earlier decisions, this court also held that jewelry suitable to the condition in life of the passenger and intended for personal use on the journey is baggage.

We are now asked to overrule that decision upon the authority of a ruling of the Interstate Commerce Commission. This we decline to do.

It follows that the judgment will be affirmed.

WILSON v. OVERTURF.

Opinion delivered March 5, 1923.

1. GARNISHMENT—JUDGMENT AGAINST GARNISHEE.—Under Crawford & Moses' Dig., § 4916, final judgment may be rendered against a garnishee upon default made by him, or when, on trial, the court finds that he is indebted to the defendant in the original judgment.
2. GARNISHMENT—PLEADING.—No special form of pleading is required in garnishment proceedings.
3. JUDGMENT—DEFAULT JUDGMENT.—A default decree in a garnishment proceeding upon a complaint alleging that plaintiffs are informed and believe that the garnishee is indebted to defendants in a certain sum, and that he has money, property and

effects belonging to defendants, is not based upon a complaint which states a good cause of action under Crawford & Moses' Dig., § 1187, and is therefore erroneous.

4. PLEADING—DEFAULT JUDGMENT ON INSUFFICIENT PLEADING.—A default judgment after service of summons admits only the allegations of the complaint, and, if they are insufficient to support the judgment, it will be reversed.

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

STATEMENT OF FACTS.

This is an appeal by a garnishee from a decree by default against him. H. C. Overturf, trustee, for the use and benefit of Aaron McMullin, brought suit in equity against Mrs. Charles Eddins Owen and Mrs. I. I. Biles to foreclose a deed of trust on certain lands in Crittenden County, Ark., given by Mrs. I. I. Biles to secure an indebtedness of $7,000 owed by her to Aaron McMullin. The complaint alleges that Mrs. I. I. Biles sold the mortgaged land to Mrs. Charles Eddins Owen, and that the latter is now in possession of it; that she is allowing the land to grow up in noxious weeds and undergrowth, and that there has been a failure to pay the mortgage indebtedness or any part thereof. The complaint also contains allegations as follows:

"Plaintiffs are informed and believe that B. W. McCulloch is indebted to the defendant Mrs. I. I. Biles and Mrs. Charles Eddins Owen in the sum of $11,775; that he has money, property, or effects belonging to the defendant Mrs. I. I. Biles of the value of $11,775, and plaintiffs propound to the said B. W. McCulloch the following interrogatories, to-wit:

"1st. Are you indebted to Mrs. I. I. Biles of Memphis, Tennessee, and Mrs. Charles Eddins Owen, and, of so, state the amount of such indebtedness, the nature thereof, whether evidenced by a promissory note, and, if so, whether said notes are secured by mortgage or deeds of trust? State fully.

"2nd. Have you in your possession or under your control any moneys, goods, chattels or effects of Mrs. I. I. Biles of Memphis, Tennessee, and Mrs. Charles Eddins Owen, and, if so, state the nature of the same and the value thereof."

The complaint prays for a foreclosure of the mortgage, and also for a writ of garnishment against B. W. McCulloch. A writ of garnishment was duly issued, and personal service was duly had upon B. W. McCulloch. On final hearing of the case, there was a decree of foreclosure in behalf of the plaintiff against Mrs. I. I. Biles and Mrs. Charles Eddins Owen, and a personal judgment was rendered against them for the amount of the mortgage indebtedness.

A decree by default against B. W. McCulloch as garnishee was also entered in the sum of $8,014.30, being the amount for which judgment was rendered against Mrs. I. I. Biles and Mrs. Charles Eddins Owen.

Subsequent to the rendition of the decree, B. W. McCulloch died intestate, and an appeal to this court has been duly prosecuted by the administrator of his estate.

Berry & Wheeler, for appellant.

The allegations of the complaint are not sufficient to warrant or support a judgment against the garnishee. 94 Ark. 572; 41 Ark. 42; 44 Ark. 56; 58 Ark. 39; 68 Ark. 263; 107 S. W. 179; 82 Ark. 455; *Knapp* v. *Gray,* 153 Ark. 160.

J. F. Gautney, for appellee.

The service on the garnishee was by personal service of summons, and he failed to answer. Judgment by default was authorized under the garnishment act of 1889 as amended, Acts of 1905. 70 Ark. 128; 96 Ark. 1. Allegations and interrogatories are not necessary prerequisites to the validity of judgments against garnishees. 133 Ark. 579, 582.

HART, J., (after stating the facts). Sec. 4916 of Crawford & Moses' Digest in effect provides that if any garnishee upon whom personal service has been had

shall neglect or refuse to answer the interrogatories exhibited against him, the court before whom the matter is pending shall enter judgment against such garnishee for the full amount specified in the plaintiff's judgment against the original defendant, together with costs. Under this act final judgment may be rendered against a garnishee upon default made by him, or when, on trial, the court finds that he is indebted to the defendant in the original judgment. *Norman* v. *Poole,* 70 Ark. 128; and *Tiger* v. *Rogers Cotton Cleaner & Gin Co.,* 96 Ark. 1.

In the instant case, judgment by default was rendered against the garnishee. The only question raised by the appeal is whether the allegations of the complaint are sufficient to support the decree entered upon the default of the garnishee. *Koons* v. *Markle,* 94 Ark. 572, and cases cited.

It is claimed by counsel for the garnishee that the complaint is defective in that it did not charge as a fact that McCulloch was indebted to the defendants.

It will be noted from our statement of facts that the complaint only alleges that plaintiff is informed and believes that B. W. McCulloch is indebted to the defendants in the sum of $11,775. We think the defect is fatal unless this form of pleading is allowed by our Code. There is no special form of pleading required in garnishment proceedings, and we must therefore look to our general Code provisions on the question.

Under § 1187 of Crawford & Moses' Digest the complaint must contain a statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action. This provision requires that the facts relied upon should be directly and positively alleged and not stated by way of argument, inference, or belief. The statute requires the facts to be alleged so that an issue may be made thereon. The statement in the pleadings should be made in direct and positive terms, so that, if it be necessary for the other

party to respond to them, he may be able to do so in terms equally direct and positive. The issue tendered by the complaint is not as to the existence of the fact of whether or not the garnishee was indebted to the defendant, but as to the plaintiff's information and belief on this matter.

Therefore the decree was not based upon a complaint which showed a good cause of action, and was erroneous.

A default after due service of summons admits only the allegation of the complaint, and, if they are insufficient to support the judgment, it will be reversed. *Chaffin* v. *McFadden,* 41 Ark. 42; *Benton* v. *Holliday,* 44 Ark. 56, and *American Freehold Land Mortgage Co.* v. *McManus,* 68 Ark. 263.

As supporting the views herein expressed see also *Nichols & Sheppard Co.* v. *Hubert,* 51 S. W. 1031, where the Supreme Court of Missouri held that a petition in a creditor's suit, which avers that plaintiff is informed and believes certain facts, thereafter recited, which are essential to plaintiff's case, is demurrable, as it does not allege the existence of the facts.

It follows that the decree must be reversed, and the cause remanded for further proceedings in accordance with the principles of equity and not inconsistent with this opinion.

COX v. THANE.

Opinion delivered March 5, 1923.

PUBLIC LANDS—EFFECT OF HOLDING CERTIFICATE TO SWAMP LANDS.—Where, in an action to quiet title to swamp land, defendant claimed through a holding certificate issued in 1852, and plaintiff through a patent issued in 1920 on the assumption that the holding certificate had been surrendered and a refunding certificate issued therefor, which was evidenced by a pencil notation in the column headed "Remarks," a finding that defendant's title was valid will be upheld.

Appeal from Chicot Chancery Court; *E. G. Hammock,* Chancellor; affirmed.

Joe H. Thompson and *J. S. Utley,* for appellant.

1. The burden of proof was on appellee to overcome the presumption in favor of appellant raised by the issuance of the swamp land patent. 55 Ark. 286; 75 Ark. 419; 94 Ark. 221. The effect of the pencil notation on the original records showing that Ferguson surrendered his holding certificate, and accepted in lieu thereof a refunding certificate, cannot be ignored. Crawford & Moses' Digest, §§ 6610, 6613-14, 6766-69, 6774-75, and 9858.

2. The State will not be estopped by the unauthorized acts of her officers in listing the lands for taxes, etc. 93 Ark. 490; 54 Ark. 251; 48 Ark. 426; 42 Ark. 118; 40 Ark. 251; 39 Ark. 580.

Streett, Burnside & Streett, for appellees.

1. The pencil notation can have no effect as a record, and, in the light of the evidence in this case, it can have no probative force. 135 Ark. 238.

2. This court has consistently held to the doctrine of presumption of grant from the sovereign, where there was a legal commencement of possession by the claimants, and that possession together with payment of taxes has been long continued and uninterrupted. 114 Ark. 62; 135 Ark. 232; *Id.* 353; 149 Ark. 189.

SMITH, J. Appellant filed a bill in the chancery court of Chicot County, alleging that he was the owner of two quarter sections of land there described situated in that county. He claimed title under the swamp land grant to the State from the United States, approved September 28, 1850, and a swamp land patent to him from the State dated April 16, 1920. There was an allegation that the lands were wild and unimproved, and that Henry Thane, the defendant, claimed some interest in the land, to the plaintiff unknown, and there was a prayer that the plaintiff's title to the land be quieted and confirmed.

Thane filed an answer disclaiming any interest in the land; but the Desha Bank & Trust Company filed an intervention and cross-complaint, in which title thereto was asserted. The intervener claimed title as follows: That a patent issued from the United States to the State of Arkansas on January 3, 1880. That on February 21, 1852, William T. Ferguson purchased said land from the State of Arkansas, and paid the purchase price in full and received a certificate of purchase therefor designated as a holding certificate. That immediately after this sale to Ferguson, the State caused the lands to be listed for taxation upon the taxbooks of Chicot County, and the State has since continuously assessed and attempted to collect the taxes thereon. That the lands were included in the overdue tax suit on account of the nonpayment of certain taxes, and were sold under the provisions of that decree to D. H. Reynolds. This sale was duly confirmed, and Reynolds received the commissioner's deed, which was also confirmed, and, by mesne conveyances, the Desha Bank & Trust Company has acquired the Reynolds title. There was a prayer that the plaintiff's title be canceled, and that relief was awarded, and this appeal is from that decree.

The records of the State Land Office were carefully examined by the witnesses, and from the depositions and stipulations the following facts appear from those records. A holding certificate was issued February 21, 1852, to Williams T. Ferguson for the lands in question. That certificate evidenced the fact that Ferguson had paid the purchase price demanded for the lands and was entitled to a patent from the State as soon as the State itself obtained a patent from the United States. *Coleman* v. *Hill,* 44 Ark. 452. But, as has been said, the State itself had not at that time obtained a patent from the United States.

The record showing the issuance of a holding certificate to Ferguson is the "Record of Certificates of Purchase," and was made in ink. In the column headed

"Remarks," after the entry showing issuance of a holding certificate to each of the tracts of land in litigation, there appears a pencil notation to the following effect: "Refunding certificate July 6, 1863."

The law permitted one to surrender a holding certificate and to take, in lieu thereof, a refunding certificate, which certificate entitled the holder thereof to enter a corresponding amount of swamp land; and when one took a refunding certificate for a holding certificate, that action operated to cancel the holding certificate.

The State Land Department acted upon the assumption that the pencil notation evidenced the fact that Ferguson had surrendered his holding certificate, thereby canceling his entry of the land, and leaving it vacant and subject to sale; and, upon this assumption, issued to Cox the patent upon which he bases this suit. Was this assumption warranted under the facts of this record?

These are as follows: The tax records of Chicot County from 1853 to 1869 are missing from the office where they should be kept; but the certificate of the county clerk shows that the lands have been continuously listed for taxation since 1869. The lands were included in the overdue tax decree, and were sold under its provisions.

Although, as we have said, the law provided for the surrender of a holding certificate and the acceptance of a refunding certificate in lieu thereof, there is no showing as to the authority by which the notation was made that a refunding certificate had issued except its appearance under the head of "Remarks." There was a record then in use, and still in use, in the State Land Office in which the issuance was noted of all refunding certificates; and if a refunding certificate was in fact issued to Ferguson, an entry thereof should have been made in this record, but none appears. Refund-

ing certificates were numbered as issued, and the pencil notation makes no reference to any number.

There was testimony to the effect that in 1915 a deputy land commissioner and a clerk in that office prepared an abstract of all the records of the State Land Office concerning swamp and overflow lands in Chicot County for an abstracter residing in that county. An official certificate was then made attesting the correctness of this copy of the records. The deputy who made this copy and certificate was asked if his copy showed this pencil notation, and he stated that it did not. When asked why he did not show it on his copy of the records, he answered that there might have been two reasons. One was that, if the notation was on the record at the time the copy was made, it was disregarded as not being a permanent record on account of its being made in pencil. The other reason was that the notation might not then have appeared on the record. He had no independent recollection whether that was true or not. He also testified that, if the holding certificate had been surrendered, and the refunding certificate issued in lieu thereof, a notation should properly have been made in ink, giving the date of the certificate and its number, so that it could be referred to by number. And, as we have said, there was also a permanent record in which entries were made showing the issuance of such certificates; but this record contains no entry indicating that a refunding certificate issued in lieu of the holding certificate.

Ferguson died March 19, 1863, which was, of course, prior to the date on which the notation shows the refunding certificate issued. It is true these certificates were assignable, and Ferguson's assignee might have surrendered the holding certificate and have obtained the refunding certificate; or his legal representatives might have done so; but the fact that the assignee of the entryman, or his legal representatives, rather than the entryman himself, surrendered the certificate, would ap-

pear to make it more probable that some record would have been made of that fact, if this had been done.

There was testimony tending to show that the land was in actual cultivation many years ago, before the location of the levee was changed leaving the land on the outside of the levee and unprotected from the overflows of the Mississippi River. And it was also shown that, with the exception of a few omissions, the taxes had been paid since 1869, and since 1885 have not been delinquent, and since 1894 have been paid without a break by appellee and its predecessors in title.

The court found from these facts that the probative value of this pencil notation was not sufficient to overcome the authentic records of the Land Office showing that Ferguson had entered the lands, and had obtained a holding certificate therefor, and that the State's title now stood as it did when the holding certificate issued, and that appellee, as the owner of the Ferguson title, was entitled to a patent; and, upon this finding, canceled the patent to appellant as a cloud upon appellee's title.

We cannot say this finding is clearly against the preponderance of the evidence. In the case of *State* v. *Taylor*, 135 Ark. 232, we had occasion to consider the effect to be given a pencil notation similar to the one under consideration here. In that case, as in this, there was no showing when or by whom the notations were made, nor any statute providing that such notations should be evidence of the matters contained in them. We held that, although the notation had no force as a record, still the entry was not without probative force. So here the pencil notation does have probative value, but that value is overcome by the other evidence in the case, and the decree of the court below is affirmed.

WYNNE, LOVE & COMPANY v. BUNCH.

Opinion delivered March 5, 1923.

1. FACTORS—GUARANTY AS TO PRICE.—A guaranty by a factor that cotton shipped to him would be sold for a sum not less than the advances made by him on the cotton, made as a consideration for the shipment, is enforceable.
2. EVIDENCE—INFERENCE FROM COLLATERAL WRITING.—Where a letter put in evidence is not a part of the contract, but is merely offered for the purpose of showing an extrinsic fact, it is for the jury to say what inference of fact is to be drawn from it.
3. FACTORS—LIABILITY ON PRICE GUARANTY.—Where cotton was delivered to a factor on consideration that he would guaranty that it would be sold for a sum equaling the advance then made as a consideration for the shipment, the seller could not hold the factor on such guaranty unless the factor had authority to sell in good faith at the best price obtainable.
4. FACTORS—DUTY TOWARD PRINCIPAL.—A factor has the right and it is his duty to exercise good faith, due diligence, and ordinary discretion in selling the goods consigned for sale.
5. GUARANTY—MATERIAL ALTERATIONS.—A material alteration in the obligation of a guarantor, made without his consent, releases him.

Appeal from Mississippi Circuit Court, Chickasawba District; *W. W. Bandy*, Judge; reversed.

V. G. Holland, for appellant.

1. The defense of negligence on the part of appellants is refuted by uncontradicted proof that the opportunity to sell the cotton in May was the first demand for cotton after they received appellee's lot, and they handled his cotton the very best they could, and got the most out of it that they could for appellee. The market value of cotton at that time in appellee's locality was no evidence of the market in Memphis, Tennessee. 78 Ark. 402.

2. The evidence of the guaranty is too indefinite. 23 Ark. 63; 6 R. C. L. 657, § 61; 9 Cyc. 248.

If there was any guaranty to sell for as much as was advanced, the agreement was rescinded by appellee. If appellant guaranteed to sell for a certain price,

and saw that cotton was declining, it not only had the legal right to sell, but it was its duty to do so. 11 R. C. L. 767, § 19; 19 Cyc. 129, § C.

By the sale of May 18, 1920, appellant performed its part of the contract, and if appellee refused same he rescinded the contract, and the parties were left in the situation of consignor and factor with instruction to sell for enough to pay out. 22 Ark. 258; 41 Ark. 532; 88 Ark. 422; 80 Ark. 469; 114 Ark. 312; 1 Cyc. 367.

R. A. Nelson, for appellee.

1. The guaranty contract is not so indefinite but that it may be enforced. 9 Cyc. 250, 251; 70 Ark. 568. There was substantial proof that appellant guaranteed to get the amount advanced out of the cotton. Appellee was entitled to have that evidence presented to the jury. 87 Ark. 245; 98 Ark. 609; 134 Ark. 36.

2. Appellant, as is shown by its own proof, failed to exercise due care for the protection of appellee. 134 Ark. 580. The issue as to whether appellant exercised the care and diligence required of a factor was a jury question. *Id.*

3. The letter of May 24, 1920, did not constitute an account stated. 74 Ark. 277; 150 Ark. 197.

SMITH, J. Appellant is a corporation doing business as a cotton factor in Memphis, Tennessee, and appellee is a farmer residing in Mississippi County, Arkansas. During the season of 1920-1921 appellee shipped to appellant fourteen bales of cotton to be sold for appellee's account. There were three consignments of this cotton. There were nine bales in the first shipment, two in the second, and three in the third. Appellee and one Martin shipped a few bales of cotton later for their joint account, but that cotton is not involved in this litigation.

Appellee testified that at the time of the first shipment he visited the office of appellant, and talked with Mr. Wynne, its president, and explained to him that he had taken the cotton over in settlement with his share-

croppers, with whom he must settle for their interest, and that he explained to Wynne that, while he wanted the largest advance that could be made on the consignment, he did not want an advance which would exceed the price the cotton would bring. In other words, after settling with his share-croppers, he did not want to be put in position where he would have to call on the share-croppers to return money he had paid them for their interest in the cotton.

Appellee testified that Wynne told him that advances of $125 per bale were being made on cotton at that time, and would be made on the nine bales appellee had ready for shipment, and that Wynne also stated he would guarantee to sell the cotton for a sum not less than the amount advanced, and that there would be money coming to appellee after the cotton was sold. He further testified that, in reliance upon this guaranty, the nine bales were shipped, and an advance of $125 was made on each bale. When the next two bales were shipped an advance of $100 per bale was made; and when the last three were shipped an advance amounting to $250 was made, and appellee testified that he was told by Wynne that the same guaranty would apply to the remaining shipments. Appellee is substantially corroborated by the testimony of one Kinmann, who accompained him to appellant's office before the first shipment was made.

The cotton was finally sold by appellant, and lacked $1,104.87 of bringing the amount of the advances, and appellee was sued for this difference.

Two defenses were set up: the first that the cotton had been shipped under the guaranty stated; and the second that appellant had negligently failed to sell the cotton when it could have been advantageously sold, and the loss incurred was a result of this negligence.

Both of these defenses were submitted to the jury in a single instruction, and there was a verdict for appellee—the defendant. It does not appear upon which de-

fense the jury found for the defendant; but it does not appear to us that either defense was established, for the reasons hereinafter stated.

Upon the defense of the guaranty, that appellant could, and would, sell the cotton for a sum not less than the advances made thereon, it may be said that if, in fact, the cotton was shipped under the guaranty that it could, and would, be sold for a sum equaling the advance then to be made, as a consideration for the shipment, we know of no reason why that agreement should not be enforced. *Pugh* v. *Porter Bros. Co.,* 118 Cal. 628. But appellee's own testimony shows that he did not rely on this guaranty contract, and that he abrogated it.

Appellant insists, however, that the testimony, in its entirety, shows that no such agreement was made, and that the cotton was shipped to it, to be sold by it as a cotton factor, in the usual and ordinary course of business; and it may be said that the correspondence between the parties strongly supports that view.

It is insisted that a particular letter from appellee is an admission of the indebtedness sued on, and constitutes an account stated. Appellant had sold, on May 18, 1920, six bales of the cotton for sixteen cents a pound, and five bales for twenty cents. Appellee was notified of this sale in the usual manner, and declined to accept that price for his cotton. Appellant canceled the sale except as to one bale, which had brought twenty cents and had been prematurely delivered to the purchaser through error. After appellee repudiated the sale, appellant wrote to appellee advising that it could not continue to carry this advance, and if the sale was not to be confirmed a deposit of $500 would be required to cover the decline in price, and an anticipated future decline. In reply, appellee wrote appellant the following letter dated May 27, 1920: "I received your letter of 24th. I am not able to send you any money. I am expecting my cotton to pay itself out of debt. I saw in paper the Memphis market where blue stained cotton was all the

way from eighteen to thirty-five cents, and you sold mine for sixteen and twenty cents, and it is not satisfactory at all, so hold my cotton for better price. Now, I would love to send you check to cover all I owe you but I am not able, and I am expecting the cotton to pay itself out of debt."

Appellee explained this letter by saying that what he meant was that he would have been glad to have returned the advance and have taken possession of his cotton, but he was not able to return the advance, and he was not therefore in position to demand that appellant surrender the cotton to be sold by some other cotton factor. The letter admits the amount advanced; but this was not in dispute.

The letter was not, however, a part of the contract; but was merely evidentiary of it, and its interpretation was therefore for the jury in connection with appellee's explanation of it. The rule in such cases is stated by Mr. Thompson as follows: "Where a writing thus put in evidence is not a dispositive instrument, but is merely offered for the purpose of showing an extrinsic fact, it will be for the jury to say what inference of fact is to be drawn from it." Thompson on Trials, § 1098, and cases cited; *Barker* v. *Lewis Pub. Co.* (Mo. App.), 131 S. W. 929.

It appears, however, that, even though the testimony is legally sufficient to support a finding that there was a guaranty on appellant's part as to the price for which the cotton would be sold, appellee could not hold appellant liable as a guarantor unless appellant had authority to sell in good faith at the best price obtainable. The rights and duties of a factor in regard to the sale of cotton consigned for that purpose are fully discussed by Judge BATTLE in the case of *Wynne* v. *Schnabaum*, 78 Ark. 402, the appellant there being the appellant here. And when we speak of the rights and duties of a factor we mean as there defined, and they need not be restated here.

It is obvious that appellee seeks to hold appellant liable as occupying the dual relation towards him of factor and guarantor, and, this being true, appellee would have had no right to speculate at appellant's expense by holding the cotton for a higher price than the sum advanced if appellant believed the price would not go higher, and that the best price obtainable had been offered. If appellant, acting with due diligence, in good faith, and with the ordinary discretion required of a factor, believed, at the time the first sale was made, that the best obtainable price had been offered, then it had the right to accept that price and account to appellee for the difference between that price and the guaranteed price.

The factor has the right, and it is his duty, as stated in *Wynne* v. *Schnabaum, supra*, to exercise good faith, due diligence, and ordinary discretion in selling the goods consigned for sale; and, if appellant did this in making the first sale, appellee should have acquiesced therein, holding appellant accountable for the difference between the sale price and the guaranteed price, and if, under the circumstances stated, appellee failed to do so, he released appellant from the obligation of the guaranty.

This is true because it is a well settled principle of the law of guaranty that a material alteration in the obligation assumed, made without the assent of the guarantor, discharges him, and it would have been an alteration of the contract to deprive appellant of the right to sell the cotton. See § 35 of the article on Guaranty in 12 R. C. L. p. 1083, and the numerous cases cited in the text; *J. R. Watkins Medical Co.* v. *Montgomery,* 140 Ark. 487; *Snodgrass* v. *Shader,* 113 Ark. 429, and numerous cases therein cited.

We think there was no testimony to warrant the submission of the question of negligence on the part of appellant in selling the cotton. It appears from the undisputed testimony now before us that, upon the receipt

of the cotton in Memphis, it was stored in the warehouse of the Memphis Terminal Company. This is a large cotton warehouse designed for the storage of cotton, used by appellant and a number of other cotton factors for that purpose. Upon placing the cotton in the warehouse, a sample of each bale was obtained and rolled in a piece of paper, upon which the marks and number of the bale from which it was taken were written. The warehouse number was also placed thereon to enable the warehouse company to identify it, and under that number the shipper's mark and number were also placed. After that the sample thus wrapped was placed on the sample table, in the salesroom, and each bale was sold on its merits by those samples. Buyers were shown these samples, and sale were made from them when possible.

Wynne testified—and there is no contradiction of his testimony—that there was but little demand for cotton from and after the time of the receipt of appellee's cotton, and the prevailing quotations could not be obtained because of the lack of demand. This lack of demand was accentuated by the constant decline in price, and the first sale made, on May 18, was the most advantageous one that could have been made under all the circumstances. The cotton was finally sold on January 30, thereafter, or at still later dates, for the following prices: Two bales for 16 cents; four bales for 11 cents; two bales for 10 cents; one bale for 15 cents; one bale for 16 cents; two bales for 11 cents; one bale for 12 cents.

The fact that there was a guaranty did not alone deprive the appellant of the right to sell below the guaranteed price, and appellee had no right to impose an arbitrary price and thereby deprive appellant of the right to make an advantageous sale. Appellee was afforded the opportunity to repay the advances and retake the cotton, and declined to do so. Refusing to do this, he had no right to arbitrarily fix the price he would accept for

the cotton and continue to hold appellant liable under the guaranty. 2 Mechem on Agency (2d ed.) § 2527.

Wynne was asked if he had made any special effort to sell this cotton, and he answered that the same effort was made to sell all the cotton consigned to his company. Appellee insists that this was negligence, as special effort should have been made to sell the cotton in view of the declining market. We do not think so. As a factor, appellant owed the same duty to all consignors, and had no right to make any concession at the expense of some other consignor in order to sell appellee's cotton, and the testimony shows that equal and customary attention was given to the sale of all the cotton.

We conclude therefore that, if appellee desired to rely on appellant's guaranty, he should have done so. He had the right to do so. He could have accepted the proceeds of the first sale and have required appellant to account to him for the difference between these proceeds and the guaranteed price, thereby extinguishing his debt for the advances. But he had no right to enlarge the guaranty by depriving appellant of its right to sell if that right was exercised by appellant in good faith, and we find no testimony to the contrary. The undisputed proof shows that the best price was received which could have been obtained, and it is not shown that the second sale was not made at the best price then obtainable. The loss resulted from a collapse in the price of cotton, for which the appellant was not responsible, and the judgment of the court below must therefore be reversed and judgment rendered here for the sum sued for.

ATKINSON IMPROVEMENT COMPANY v. NAKDIMEN.

Opinion delivered March 5, 1923.

1. APPEAL AND ERROR—FORMER OPINION AS LAW OF THE CASE.—An opinion on a former appeal in a case is binding on all the parties on a new trial and in the Supreme Court on a subsequent appeal.
2. APPEAL AND ERROR—CONSTRUCTION OF OPINION ON FORMER APPEAL.—The opinion of this court on a former appeal should be construed in the light of the facts there stated and the directions therein contained.
3. CONTRACTS—VALUE OF ELEVATOR SERVICE.—Under an agreement for the joint use of the elevator, stairway and lobby of a building in connection with an adjacent building about to be erected and for the joint use of the elevator of the new building, which agreement provided for a stipulated monthly rent for a term of 10 years, and for a renewal and for an arbitration as to the rental payable for the next 10 years, on the owners of the new building refusing to arbitrate, *held* that the court should determine the rental payable for such period, taking into consideration the whole premises, including the elevator, and in doing so should give weight to the value fixed by the parties originally, though such valuation is not controlling.

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

Hill & Fitzhugh, for appellant.

Warner, Hardin & Warner, and *James B. McDonough,* for appellees.

SMITH, J. This is the second appeal in this cause, and reference is made to the opinion on the former appeal for a full statement of the facts and issues. *Nakdimen* v. *Atkinson Improvement Co.,* 149 Ark. 448.

The litigation arose out of the interpretation of a lease which the parties hereto had entered into, and that contract, which was in writing, is set out in full in the former opinion. The facts essential to an understanding of the issues presented on this appeal may be briefly summarized as follows. The Atkinson Improvement Company, hereinafter referred to, for brevity, as the company, owned a building in the city of Fort Smith, and Nakdimen owned a lot adjacent thereto, and, desir-

ing to erect a building on his lot, he entered into the contract referred to above, whereby the Nakdimen building should be so constructed that the tenants of the two buildings might make common use of the lobby, stairway and hallways of the company's building, and of the elevator in that building, and also of the elevator which was to be installed in the Nakdimen building. Nakdimen sold an interest in the building to certain associates, who were made parties to the former case, and we use his name to include his associates.

Under the contract as construed in the former opinion, the original lease covered a period of ten years, with the reciprocal privilege of a renewal for another ten-year period. Nakdimen construed the contract as being a lease for a ten-year period only, and at the expiration of that time declared the contract at an end and refused to operate the elevator in his building. The company took the position that the contract was one in perpetuity, and sought to obtain a decree compelling its specific performance by Nakdimen. We held that the contract was not one which the court would compel the parties to specifically perform, but we also held that, as the contract had not expired damages would be awarded for its breach, and the court would fix the rental value, as the parties had failed to do so, under a provision of the contract quoted later.

The lease contract provided that Nakdimen should pay the company $25 per month during the entire ten year period as rent for the privilege and concession there granted. It also provided "that at the expiration of said period of ten years, the rental to be paid by the party of the first part to the party of the second part for the concession and privilege herein granted, as herein granted, as herein set out, shall be fixed by a board of arbitrators, three in number, one to be named by each of the parties hereto, and the third to be selected by the two so named by the parties hereto, and that the award of any two of said arbitrators shall be final and conclusive upon the parties hereto."

The company alleged in its complaint that Nakdimen had refused to name an arbitrator as required by the section of the contract quoted, and was refusing to operate the elevator in his building, and there was a prayer that the court fix the rental value of the premises and damages for failure to operate the elevator.

The case presented to us, as we viewed it, was that the parties were making joint use of the premises as the contract contemplated they should do, but the provision of the contract determining the rent to be paid by Nakdimen had expired by the limitation of the contract, and Nakdimen had failed to comply with the stipulation in regard to the appointment of arbitrators, to determine that question, and, in addition, he was also refusing to operate the elevator in his building as the contract required him to do.

At the time of the rendition of our opinion on the former appeal, it appears that Nakdimen, after having suspended the operation of his elevator from September, 1920, to April, 1921, had resumed its operation under an agreement that he should not be prejudiced thereby in the assertion of what he regarded as his rights and obligations under the contract. We were not advised that the elevator was being operated, and, as it was held that the court would not decree specific performance of the requirement that Nakdimen operate his elevator, we directed the court to find damages for this breach of the contract. The court made a finding assessing the damages for failing to operate the elevator during the time its operation was suspended, and neither party complains of this finding.

The court below interpreted our opinion on the former appeal as directing him to find the rental value of the stairway and lobby of the company building, and in determining the rental value the court took into account nothing else. Much testimony was offered of the rental value of the hallways and elevator in the company building, but the court refused to take any of this testimony into account, for the reason, as stated, that

the court was of the opinion that the rent was to be fixed only on the stairway and lobby.

The opinion on the former appeal, in which the contract was construed, is the law of the case, and is binding on all parties, and ourselves as well. We need not, therefore, inquire what the contract meant, as the decision of the questions presented on this appeal depends upon the interpretation of the former opinion, in which we construed the contract and gave directions to the trial court as to the rights of the parties thereunder.

The opinion is, of course, to be construed in the light of the facts there stated and of the directions there contained. After holding that the court below had erred in granting specific performance of the contract requiring the Nakdimen elevator to be operated, we said that upon the remand of the cause it would be the duty of the court to settle the damages which resulted to the company from the breach of the contract by Nakdimen. We also said that, in fixing the damages to be allowed the company for the breach of the contract by Nakdimen, it would be necessary for the court to consider and fix the rental value of the "premises." The court below had fixed the rental value at $25 per month; but we directed a new finding to be made on that question and gave both parties permission to take additional testimony, and this privilege was very freely used, as we have an additional record as large as the original record.

The former opinion contained this direction to the court below: "It will be the duty of the court upon the remand of the present case to fix the amount of damages suffered by appellee (the company) by the breach of the contract upon the part of appellants (Nakdimen), and, inasmuch as it will be necessary for the court to know the rental value of the premises for the renewal period of ten years in fixing the damages, it will be necessary for the court to fix the rental value for the elevator service, for the reason that appellants refused to proceed under the arbitration clause looking to that end, as above stated."

An elaborate opinion was prepared by the chancellor, and, after making it perfectly plain that he had taken into account only the rental value of the stairway and lobby of the company building, he fixed the rental value thereof at $25 per month. It appears from the opinion of the court below that he reached this conclusion because, as he interpreted the contract, rent was to be paid only on the stairway and lobby, and he was evidently controlled, in a large measure, in fixing the rental value, by the fact that the parties, when contracting in regard to the rental for a period of ten years, fixed $25 per month as the rental to be paid.

We think the court below did not correctly interpret the opinion. Our direction was not to fix the rental value of the stairway and lobby only but "to consider and fix the rental value of the premises." It is true that we gave no specific direction to take into account the elevator service rendered by the company building in fixing the rent. One reason for this omission is that the elevator was a part of the "premises," and was included in that designation. The second reason was the fact, as it then appeared to us, that Nakdimen was not operating his elevator, and we had refused to compel him to do so. This refusal imposed upon the company elevator the service which the parties contemplated the two elevators should perform. Nakdimen had breached his contract, as we found, and this breach was to be compensated by way of damages. The other privileges conferred by the contract, such as the use of the stairway, lobby and hallways, were being jointly used by the parties as the contract contemplated, and the value of these privileges was to be considered in determining the rental value.

The Nakdimen elevator is now being operated, and the parties are getting what they mutually contracted for originally. It appears the parties then contemplated there would be a difference of opinion as to the rental value after the ten year period, for they provided for an arbitration of that question without requiring the parties to first consider it.

The reciprocal privileges for the ten-year period were identical with those for the first ten-year period, and "the rental to be paid by the party of the first part to the party of the second part for the concession and privilege herein granted, as herein set out," was the matter which the contract provided the arbitrators should determine, but, as Nakdimen failed and refused to name an arbitrator, as there provided, it became the duty of the court to make the finding which the arbitrators should have made, and the direction given to the court below was to make this finding after compensating the company for Nakdimen's refusal to operate his elevator.

As we have said, the court below was largely controlled, in fixing the rent at $25 per month, by the fact that the parties had themselves fixed it at that amount, and it is insisted that we, too, should reach the same conclusion, for the reason that conditions have not substantially changed since the execution of the contract, and the parties were the best judges of the reciprocal value of the contract to each other.

The fact mentioned is, of course, very significant, but it is not controlling. It now appears that the company elevator carries ninety-seven per cent. of the traffic, with the consequent cost of its operation, which the owners of that building must pay. This results chiefly from the more convenient location of the company elevator, and from the fact that it is more modern. In other words, it now appears that the company is largely furnishing the elevator service which the contract contemplated should be jointly furnished.

The testimony developed this and other facts which the numerous witnesses mentioned in testifying as to the rental value of the contract to Nakdimen. This testimony is voluminous and in many respects conflicting. This might well be expected, as the basis of most of it is the opinion of the witnesses as to rental value. No useful purpose would be served by setting this testimony

out. We have had much difficulty in determining what the fair rental value is as shown by the testimony, and after carefully considering this testimony and reconciling our own views in regard to it, we have concluded that the rental value should be fixed at $33.33 per month, and the decree of the court below will be modified to accord with that view.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. COMER.

Opinion delivered March 5, 1923.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—In determining whether the verdict in a personal injury case was excessive, the testimony must be viewed in the light most favorable to the plaintiffs.
2. CARRIERS—PERSONAL INJURY TO PASSENGER—EVIDENCE.—In an action for personal injury to a passenger, evidence *held* to sustain a verdict in favor of the passenger.
3. DAMAGES—EXCESSIVENESS.—In an action for personal injuries, in which plaintiff suffered an injury to her side resulting in a miscarriage, and was confined to her bed for seven days, and was rendered very nervous, a verdict for $2,000 was not excessive.
4. DAMAGES—RECOVERY BY INJURED PASSENGER'S HUSBAND.—Where, on account of an injury to a wife, she was unable to perform household duties for nine days, and the husband spent $60 for medical services and hired the family washing done for two weeks, but there was no permanent impairment of her ability to assist her husband after the injury, a verdict of $500 will be reduced to $100.

Appeal from Jackson Circuit Court; *Dene H. Coleman,* Judge; modified in part.

T. S. Buzbee and *H. T. Harrison,* for appellant.

A verdict in favor of Lois Comer of $2,000 where there was no proof of permanent injury, she having been confined to her bed for only seven days and within less than four weeks able to do arduous work, was grossly

excessive; likewise a verdict of $500 in favor of B. F. Comer, where the only damage suffered by him was the payment of doctors' bills of $10 to one doctor, and $50 to another, was manifestly excessive. 82 Ark. 61; 87 Ark. 109; 89 Ark. 9; 98 Ark. 425; 36 So. 676.

Boyce & Mack, for appellees.

As to Lois Comer, the verdict was not excessive. The single case of injury resulting in miscarriage cited by appellant as an excessive verdict, and in which a remittitur from $2,500 down to $1,000 was required, was an exception to the general rule. The courts generally sustain verdict in such cases, even for larger amounts than returned here. L. R. A. 1917-A, 394; 17 L. R. A. (N. S.) 598; 128 N. E. 513; 35 L. R. A. 252; 6 Thompson on Negligence, §§ 7348, 7352; 8 Am. & Eng. Enc. of Law, 2d ed., 629. The B. F. Comer verdict was not excessive. 6 Thompson on Negligence, § 7341; 13 R. C. L. 1411; *Id.* 1422; 7 L. R. A. (N. S.) 545.

SMITH, J. B. F. Comer and Lois, his wife, instituted separate suits against the Chicago, Rock Island & Pacific Railway Company, to recover damages on account of alleged injuries to Lois Comer on August 7, 1921, while she was preparing to board one of the defendant's trains. The cases were consolidated by consent and tried together.

The complaint alleged that, as Mrs. Comer, with two small children, was boarding a passenger train, the company negligently caused the train to start, and she was suddenly and violently thrown and jerked against the end of the coach and against the railing of the platform to the entrance of the coach, and as a result thereof she suffered a nervous shock, was injured and bruised in her right side, her right arm and back were bruised, and by reason thereof she was caused to suffer a miscarriage on the 11th day of August, 1921.

Mr. Comer alleged that he had been caused to expend large sums of money on account of his wife's

injuries, and had been deprived of her services and society, and he prayed damages on that account.

There was a denial of liability and of injury; but the jury found for the plaintiff in each case, and assessed Mrs. Comer's damages at $2,000 and her husband's at $500, and judgments were rendered against the railroad company for those amounts.

The railroad company has appealed, and the only assignment of error argued for the reversal of the judgments is that they are excessive.

We must, of course, view the testimony in the light most favorable to the plaintiffs; otherwise the judgments would have to be reversed as being excessive, as the clear preponderance of the testimony is that Mrs. Comer was not seriously injured. On the day following the injury Dr. Bradford was called to attend Mrs. Comer on account of the injury to her wrist. She made no complaint of any other injury, and the doctor regarded the wound which he treated as of small consequence.

Mrs. Comer testified that she was injured in the manner alleged in her complaint; that she was pregnant at the time of her injury, and had been since June; that prior to her injury she had been in excellent health. That she was thrown violently against the railing of the platform, and bounced back, and was injured between her ribs and side. That soon after her injury her arm felt numb, and her side became sore. She was injured on Monday, and the pain continued and increased, and she went to bed on Wednesday, and suffered a miscarriage the next day. She saw a doctor on Monday and Tuesday, and he treated her arm, but gave her no treatment for her side. Wednesday night the pains in her side became more severe, and she was very nervous, and the doctor was called, and she was given relief. Later she again became very nervous, and suffered a miscarriage, and was thereafter in bed for seven days, and did not resume her household duties until the ninth day.

Mrs. Pierce, Mrs. Baker and Mrs. Comer, a sister-in-law of the plaintiff, gave testimony affording sub-

stantial corroboration of the plaintiff's testimony in regard to her illness and its consequences.

A doctor who attended plaintiff described her nervous condition, and stated that the patient told him, as a part of the history of her case, that she had suffered a miscarriage, and she pointed out a sheet on the bed with blood spots on it. The sheet was folded, and he did not know to what extent it was saturated with blood. He "could not say there was anything about her condition to indicate she had suffered a miscarriage"; that while he would not say definitely that she had miscarried, it is clear that in his opinion the case was one of delayed menstruation.

Doctor Bradford, who made a digital examination of Mrs. Comer on August 27th, testified that the appearance he then found indicated that there had been no miscarriage.

Still another doctor, who also examined the plaintiff on October 6th, testified that, if there was a miscarriage, it was caused by the plaintiff's injury and fright. He testified that at the time of his examination he found a retroversion of the womb, with a slight enlargement and a tendency for a slight prolapse, and that her temperature and reflexes were exaggerated. He also testified that her nervousness had improved, and she had about recovered from her injury and the miscarriage.

We think the testimony legally sufficient to support a finding that Mrs. Comer had suffered a miscarriage, and she testified that she suffered acutely during the nine days she was confined in bed, and had suffered less severely for some time thereafter. Under these circumstances we do not feel disposed to say that the evidence does not support the judgment recovered by her.

The verdict in Mr. Comer's favor we think is clearly excessive. He expended $60 for medical services. Mrs. Comer was unable to perform her household duties for a period of only nine days. When she was able, she

did the family washing, but during her illness her husband hired this done for two weeks. She testified that she had also worked with her husband in the field, but since her injury she had done less of this work. We think, however, the testimony does not show any impairment of Mrs. Comer's capacity to assist her husband as she did before her injury, and we have concluded that a judgment for a hundred dollars would fully compensate any damage sustained by him on account of his wife's injury, and the judgment in his favor will be reduced to that amount. The judgment in Mrs. Comer's favor will be affirmed.

GURLEY v. STATE.

Opinion delivered March 5, 1923.

1. EMBEZZLEMENT—INDICTMENT—VARIANCE.—Where the indictment charged embezzlement of $800 gold, silver and paper money of the value of $800, property of the prosecuting witness, and the proof showed that the company which accused owned and managed had collected $800 in the form of a check for the prosecuting witness, received credit therefor at the bank, and expended same for its private uses, there was no variance between the indictment and proof.
2. CRIMINAL LAW—JUDICIAL NOTICE.—It is common knowledge that banks deal in money only in giving credit to depositors.
3. EMBEZZLEMENT—CRIMINAL INTENT.—Where there has been a wrongful conversion of a fund, criminal intent to embezzle may be inferred from the act itself, and proof of concealment on defendant's part is unnecessary.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; affirmed.

Lewis Rhoton and *X. O. Pindall,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried, and convicted of the crime of embezzlement in the First Division of the Pulaski Circuit Court, and as punishment

therefor was adjudged to serve one year in the State Penitentiary, from which judgment an appeal has been duly prosecuted to this court.

The indictment, omitting formal parts, is as follows: "The said J. A. Gurley on the 1st day of May, 1922, in the county and State aforesaid, then and there being over the age of sixteen years, and being the agent of E. T. Foster, and having then and there in his custody and possession, as such agent as aforesaid, eight hundred dollars ($800), gold, silver and paper money of a value of eight hundred dollars ($800), the property of the said E. T. Foster, did unlawfully, fraudulently and feloniously make away with and embezzle and convert to his own use the said sum of eight hundred dollars ($800) as aforesaid, without the consent of the said E. T. Foster, against the peace and dignity of the State of Arkansas."

The facts pertinent to the questions presented by this appeal for determination are as follows: E. T. Foster, at the instance of appellant, loaned Mrs. Anna Grantham $800, taking her note due January 1, 1921, to which bank stock was attached as collateral security. On December 8, 1920, appellant, as vice-president of J. A. Gurley Company, a corporation, advised E. T. Foster, who was then residing in Oklahoma City, Oklahoma, that Mrs. Grantham wanted to know where she could pay the note, offering to handle the collection according to Foster's wishes. The note and attached collateral were in a lock box in a Memphis bank. E. T. Foster directed a friend to forward the note and collateral to appellant by registered letter, and wrote appellant to have Mrs. Grantham purchase and mail him a cashier's check for the amount due, and, when she did so, to deliver the note and collateral to her. Instead of doing this, appellant procured a check for the amount from Mrs. Grantham, payable to the J. A. Gurley Company, which he owned and managed, and upon receipt of said check delivered the note and bank stock to her. The check was deposited to the credit of J. A. Gurley Company, and checked out for company purposes, and not for a cashier's check, payable

to E. T. Foster. J. A. Gurley, as vice-president of J. A. Gurley Company, notified E. T. Foster of the collection by letter, stating therein, "as soon as we get a return on her check, will forward cashier's check to you." After the expiration of a month, failing to receive a remittance, E. T. Foster made written request of appellant to forward cashier's check, to which he received the following reply:

"J. A. GURLEY COMPANY
"Investment Bankers
"Little Rock, Ark., 3-1-21.

"Mr. E. T. Foster,
"Dear sir:

"I have your letter of February 17th and have carefully noted contents of same. I am going to tell it to you just as it is. I received bank stock just as they were sent from Memphis by registered mail, delivered same and bank check for collection. Now in the meantime my company issued stock, and it was up to me to take the majority of the stock or lose control of my company, and in doing so I drew my bank balance below the $800 mark, and it was continued below. I have about $5,000 in collections that are past due and have been expecting to get at least a sufficient amount of this to remit to you, but have so far failed. I am responsible for the rule not to allow any officer of our company to borrow any money from the company, consequently I have not asked them to advance it to me.

"Now, Mr. Foster, I am attaching a 10 per cent. note to $3,000 worth of my stock and am leaving the time open. I would like to have you make it six months, if entirely satisfactory to you. If you will give me the time you prefer, I will mail you a check for the interest. It has not and is not my intention to misuse you in this matter, and if the above arrangement is not entirely satisfactory I want you to notify me at once, and will make a sacrifice somewhere and raise the money for you.

"With best personal regards, I remain,

"Yours truly,
"J. A. GURLEY."

Foster returned the 10 per cent. note and stock immediately, stating that he could not use them, and again requested appellant to forward cashier's check for $800. Foster was unable to get any further response or to collect the account from appellant. The company subsequently went into the hands of a receiver.

At the conclusion of the testimony, appellant requested the court to direct a verdict of not guilty, and now insists that the court committed reversible error in not doing so, for two alleged reasons. First, because there is a variance between the indictment and the proof. Second, because there is no evidence in the record showing any criminal intent on the part of appellant in his transaction with reference to the money referred to in the indictment.

(1) The indictment charged appellant with embezzling $800, gold, silver and paper money, of the value of $800, the property of E. T. Foster. The proof shows that the company which he owned and managed collected $800, in the form a check for E. T. Foster from Mrs. Anna Grantham, received credit therefor in the bank with which the company did business, and expended same, contrary to instructions, for the private use and benefit of said company. The transaction, in substance, amounted to the same thing as if appellant had drawn the money out on the check and deposited it in the bank to his company's credit, thereby converting it to the use of his company, contrary to instructions. It is common knowledge that banks deal in money only when giving credit to their depositors. "The giving of credit is practically and legally the same as paying the money to the depositor and then receiving the money again on deposit. The intent of the parties must govern, and presenting a check on the bank with a pass book in which the receiving teller notes the amount of the check is sufficient indication of intent to deposit and to receive as cash." Morse on Banks and Banking, § 569. The rule quoted from Morse was adopted by this court in the case of *Skarda* v. *State,* 118 Ark. 176. In that case Joe

Skarda, cashier of The Bluff City Bank, was indicted for receiving on deposit from Joe Janet fifty-five dollars, gold, silver, and paper money, knowing at the time that the bank was insolvent. The proof showed that Joe Janet presented a check to the bank for $70, receiving a credit for $55 and the balance in cash. The court treated the credit as cash money, and held that there was no variance between the indictment and the proof. The rule thus announced is not in conflict with the rule in *Wilborn* v. *State,* 60 Ark. 14, and the reiteration thereof in *Starchman* v. *State,* 62 Ark. 538; *Marshall* v. *State,* 71 Ark. 418; and *Silvie* v. *State,* 117 Ark. 108, but is in harmony with them. The cases last cited enunciate the doctrine that the State must prove the character of money alleged to avoid a variance between the indictment and the proof, and the Skarda case, the doctrine that the State must prove what amounts in fact to a transaction in money of the character alleged.

(2) According to appellant's interpretation of the testimony, there is nothing to show a felonious intent on his part because he made no concealment of the amount in his hands belonging to E. T. Foster. We are unable to adopt appellant's construction of the testimony, but, if his construction is correct, it is not the law that some degree of concealment must be shown in order to establish a felonious intent, where the property has been wrongfully converted or appropriated. The case of *Fleener* v. *State,* 58 Ark. 98, cited by appellant in support of his contention, that the concealment of the fund was necessary to establish a felonious intent on his part, is not in point. In that case there had been no misappropriation of the property. Upon this point the instant case is ruled by *Russell* v. *State,* 112 Ark. 282, in which it was said that "one guilty of embezzlement cannot claim immunity because he did not attempt to conceal the evidence of his crime." Where there has been a wrongful conversion of a fund charged, a jury may infer a criminal intent from the act itself, and proof of the concealment of the fund is unnecessary.

No error appearing, the judgment is affirmed.

WILSON v. CHISHOLM.

Opinion delivered March 5, 1923.

1. TAXATION—RIGHT TO REDEEM FROM TAX SALE.—One going into possession of, and claiming title to, land in good faith under a donation certificate may redeem it from a tax foreclosure sale under the overdue tax act of March 12, 1881, as against anyone other than the true owner.
2. TAXATION—PRESUMPTION OF REDEMPTION FROM TAX SALE.—Where one who went into possession in good faith under a void donation certificate in 1882 made the necessary improvements and procured a deed two years later, and he and his successors in title have paid the taxes up to the present time and have held actual, peaceful and uninterrupted possession, it will be presumed that such donee or his successors in title redeemed the land from the overdue tax sale made in 1883.

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

Joe Joiner, for appellants.

This case comes clearly within the law announced heretofore by this court. 66 Ark. 48. The court also in *Wallace* v. *Hill,* 135 Ark. 353, recognized the principle that a purchaser of State lands during the period of redemption acquires nothing. See also C. & M. Dig., § 6695. This has become a rule of property in this State, 95 Ark. 23.

Marsh & Marlin, for appellee.

It will be presumed that one remaining in possession and paying taxes after an overdue tax forfeiture had redeemed within the time allowed by law for redemption from the overdue tax sale. 135 Ark. 353; 147 Ark. 247. The same principle will protect one who entered, as Owen did in this case, under a donation certificate. Either the persons whose titles were forfeited under the collector's sale or the donee under the tax deed could have redeemed from the overdue tax sale. Sections 11 and 13 of the "overdue tax act, provided for redemption by the "owner." The word "owner" in tax redemption statutes is uniformly given a highly remedial and liberal

construction. 39 Ark. 580; 42 Ark. 215; 59 Ark. 147; 74 Ark. 572; 74 Ark. 343. The right to redeem is remedial, and statutes conferring that right must be liberally construed as to the class of persons to whom the right is extended. 66 Ark. 141; 52 Ark. 132; 96 N. W. 902; 64 W. Va. 673; 3 Words & Phrases, 2d Series, 845, defining "owner". See also 49 Ore. 419. Payment of taxes under a void donation deed gives one a right to redeem. 74 Ark. 572; 75 Ark. 308; 76 Ark. 551.

Joe Joiner, for appellants, in reply.

The facts are entirely different from the facts in *Wallace* v. *Hill*, 135 Ark. 353. There can be no presumption of redemption here. There can be no such presumption in favor of any one, except the real owner, and in this case there is nothing to show who the real owner was. 139 Ark. 333. One who redeems land from a tax sale, when he has no interest, right or title, acquires no title. 87 Ark. 360. See also 80 Ark. 43; 99 Ark. 324.

HUMPHREYS, J. Appellee, J. Chisholm, instituted suit in the Union Chancery Court against appellant to cancel a State deed to T. E. Wilson for the following described real estate in said county: N. W. ¼, sec. 33, tp. 19 S. R. 18 W., and to quiet and confirm the title to said real estate in him as against said appellants. In the bill filed appellee deraigned his title to said land through mesne conveyances from the State of Arkansas, the origin of his alleged title being a certificate of donation of date August 19, 1882, and deed issued thereon of date March 21, 1884, which were based upon an alleged forfeiture of said land to the State of Arkansas, for failing to pay the taxes, due and assessed for the years 1869 and 1870. It was also alleged that appellee, and those through whom he claimed, had been in the actual possession of said land, making improvements thereon continuously since August 19, 1882, and had paid the taxes each and every year from and including the year 1885, the year following the date of the donation deed. Appellants interposed the defense in an an-

swer and cross-petition that the land in question was included in an overdue tax proceeding instituted on July 15, 1882, in the chancery court of Union County; that in said suit the alleged forfeiture was declared by the court to be void and of no effect, and that said land be sold for taxes, due and unpaid, for the years 1869 and 1870; that, pursuant to said order of sale, the land was sold on the 15th day of June, 1883, and that thereafter the sale was duly confirmed by the court; that the donation certificate relied upon by appellee was issued by the State after the institution of said suit, and that the donation deed executed in pursuance thereto was delivered prior to the expiration of the period of redemption allowed in the overdue tax act of March 12, 1881, under which the overdue tax suit aforesaid was instituted; that the lands were sold and certified to the State in the overdue tax suit, and on December 20, 1919, the State issued a patent to appellant, T. E. Wilson, for said land, based upon the overdue tax proceeding; that on December 22, 1921, said patent was recorded; that subsequent thereto T. E. Wilson conveyed said land to appellant, A. J. Marsh. Appellants prayed for a dismissal of appellee's bill and possession of the land.

A demurrer was filed to the answer and cross-petition, which was sustained by the court, and, upon failure of appellants to plead further, the decree was rendered canceling the State deed to T. E. Wilson and quieting and confirming the title in appellee as against appellants. From that decree an appeal has been duly prosecuted to this court.

The facts as gleaned from the pleadings are as follows: The land in question was certified to the State under a void forfeiture of 1869 and 1870. On July 15, 1882, a suit was filed in the chancery court of Union County under the overdue tax act of 1881, in which this land was included. On August 19, 1882, the State issued a certificate of donation for said land to James M. Owen. James M. Owen took immediate possession thereof, and

made the necessary improvements to procure the donation deed which he obtained on March 21, 1884. During the time of his occupancy it was adjudged in the overdue tax suit that the tax forfeiture to the State upon which the donation deed was based was void and of no effect. The land was thereupon ordered sold for the taxes of 1869 and 1870, and on June 15, 1883, was sold under the overdue tax decree to the State, which sale was confirmed by the court. In 1885 after the issuance of the donation deed to James M. Owen the land was assessed to James M. Owen, and he and his successors in title paid the taxes each and every year on said land after and including the taxes for the year 1885, and held the actual, peaceful, and uninterrupted possession thereof down to the present time. On December 20, 1919, the State issued patent for said land to T. E. Wilson, based upon the overdue tax proceeding. The record fails to show that James M. Owen or his successors in title ever redeemed the land from the overdue tax foreclosure.

The only question presented by this appeal is whether the presumption will be indulged that the land was redeemed from the overdue tax foreclosure for the taxes of 1869 and 1870 by James M. Owen or his successors in title. Appellants take the position that James M. Owen and his successors in title had no right to redeem the land because they acquired no interest therein under the donation certificate and the donation deed made pursuant thereto. The case of *St. Louis Refrigerator & Wooden Gutter Co.* v. *Langley,* 66 Ark. 48, is cited in support of their contention that they acquired no interest whatever in said land under said certificate and deed. That case does hold that the State by purchase at such sale acquired no title which the State Land Commissioner had power to convey until after the redemption period expired; and that during the pendency of the overdue tax suit the Commissioner of State Lands had no authority to issue a donation certificate and deed based upon a forfeiture of land for the nonpayment of

taxes; and also that after acquired titles had no application to conveyances made by the State. It is true that James M. Owen and his successors in title acquired no interest in the land as against the true owner under the donation certificate, but it served the purpose of showing that he went into possession of the land in good faith, and not as a squatter or mere trespasser. His possession and claim of title in good faith constituted such an interest in the land as gave him a right to redeem the land from the sale in the overdue tax foreclosure against any one other than the true owner. It was held in the cases of *Woodward* v. *Campbell,* 39 Ark. 580, and *Sanders* v. *Hill,* 42 Ark. 215, and reaffirmed in the case of *Hodges* v. *Harkleroad,* 74 Ark. 343, "that almost any right either in law or equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on land, amounts to such an ownership as will entitle the party holding it to redeem." The facts in this case bring it well within the rule of a presumptive redemption from an overdue tax forfeiture announced in the cases of *Wallace* v. *Hill,* 135 Ark. 353, and *Lloyd* v. *Thornton,* 147 Ark. 247. Appellants insist that the rule in those cases relates to real owners only, and that a redemption will not be presumed in favor of any other than absolute owners. We cannot agree with them in this contention. Those cases had in mind redemption laws when they used the word "owner," and used it as a generic term, embracing even a possessory right. The trial court was correct in indulging a presumption that James M. Owen or his successors in title redeemed the land from the overdue tax foreclosure before appellant, T. E. Wilson, procured a patent to said land from the State.

The decree is therefore affirmed.

CHASTAIN v. ARKANSAS BANK & TRUST COMPANY.

Opinion delivered February 12, 1923.

1. HOMESTEAD—RIGHT TO ACQUIRE.—There can be no such thing as a fraudulent acquisition of a homestead, for the law permits it regardless of the rights of creditors.
2. HOMESTEAD—ACTUAL OCCUPANCY.—Actual occupancy in good faith is essential to the impressment of the homestead character; a mere intent to occupy as a homestead in the future is not sufficient.
3. HOMESTEAD—GOOD FAITH OF OCCUPANCY.—Good faith of occupancy may be inquired into to determine whether the occupancy was for the purpose of establishing a home.
4. HOMESTEAD—OCCUPANCY—BURDEN OF PROOF.—The burden of proof is on one claiming a homestead to show such occupancy as is sufficient to establish a homestead.
5. HOMESTEAD—USE FOR OTHER PURPOSES.—The fact that the property is being partly used for other than residence purposes is insufficient to destroy the homestead right.
6. HOMESTEAD—GOOD FAITH OF OCCUPANCY.—Where partners in business, who owned a store building having numerous rooms on second floor but not adapted for a residence, being heavily in debt, made division of it, one taking the north half and the other the south, and each claimed to have established a residence in the upstairs rooms, but the circumstances showed that their occupancy was temporary for the purpose of evading process of creditors and not in good faith to establish homesteads, it was not error to deny them exemption.
7. APPEAL AND ERROR—OBJECTION TO JURISDICTION NOT RAISED BELOW.—Where the only thing done below to raise the question of jurisdiction of the chancery court was a motion to dissolve an attachment, the question of jurisdiction cannot be first urged on appeal.

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

M. E. Vinson, for appellants.

1. The chancery court has no jurisdiction. Allegations as to debts owing by the defendants to plaintiffs did not confer jurisdiction, nor allegations showing their marriage and claim of the property as a homestead. Partition of the property by the defendants so that it might be claimed as a homestead was not a sufficient allegation

showing fraud and that the partition deeds were fraudulent conveyances. As to homesteads there are no creditors, and a creditor cannot complain of a voluntary conveyance thereof by a debtor. 96 Ark. 579; 103 Ark. 145. Conveyance of a homestead is never fraudulent as to creditors. 75 Ark. 205; *Id.* 591; 109 Ark. 493; 33 Ark. 762; *Id.* 454; 44 Ark. 180; 43 Ark. 429; 52 Ark. 101; 99 Ark. 45. The lack of jurisdiction was raised in the lower court by the motion to discharge the attachments, by the several controverting affidavits filed by the defendant, and the motions to stay the proceedings; but, aside from that, the objection to jurisdiction may be raised on appeal for the first time. 98 Ark. 595.

2. Even if the court had jurisdiction, the attachment would not lie in this case. C. & M. Digest, § 554.

3. There is no conclusive proof that the property involved was ever partnership property. 37 L. R. A. 895, and cases cited.

Mere use by a partnership of real estate raises no presumption that it is partnership property. 81 Ark. 68.

4. Almost any kind of an estate will support the homestead claim. Lands held by tenants in common may be partitioned, and homestead set aside out of it. 63 Ark. 289, 299; 70 Ark. 129; 42 Ark. 504, 514; 35 Ark. 49; 39 Ark. 301-4-5; 54 Ark. 9; 99 Ark. 45 *et seq.;* 111 Ark. 15. Tenancy by curtesy will support the claim. 66 Ark. 382. Homestead may be claimed in lands owned jointly or as tenants by entirety. 83 Ark. 196. See also 70 Ark. 317; 123 Ark. 607; 56 Ark. 589; 74 Ark. 593 *et seq.;* 134 Ark. 521, 525, and cases cited; 146 Ark. 51.

5. If partnership property, the partners had the right to partition it and establish homesteads thereon. The purchase by a partner of partnership property is not *per se* fraudulent. 60 Ark. 18. See also 103 Ark. 105; 54 Ark. 449 *et seq.;* 91 Ark. 324, 327; 114 Ark. 14; *Id.* 384.

Stayton & Stayton and *Boyce & Mack,* for appellees.

1. The pleadings in which a debtor asserts a homestead right must set forth facts establishing the right,

and not a mere general allegation that the right exists. And evidence must be introduced to establish the allegations or the claim will fail. 21 Cyc. 635; 34 Ark. 55; 78 Ark. 479; 76 Ark. 575; 69 Ark. 596; 57 Ark. 179.

2. It is not material in whose name the title to partnership property stands, whether in the name of one of the partners or all of them, or whether, on the face of the deed, they appear as tenants in common or whether it was conveyed to them expressly as partners. It is the fact that property was bought with partnership money, and that it is used in the partnership business, that impresses on the property the character of partnership real estate. 20 R. C. L. 857; 80 Am. Dec. 450, 451; 56 Ark. 167; 93 Ark. 61; 28 Ark. 259; 67 Am. Dec. 527, 538; 37 L. R. A. (N. S.) 889, at pp. 909, 910; 27 L. R. A. 449, note beginning at p. 550.

3. Partnership realty is not subject to partition until after the payment of partnership debts. 20 R. C. L. 755; *Id.* 870; 118 A. S. R. 568-572; 68 Am. Dec. 604, and note, p. 606; 22 Am. & Eng. Encyc. of Law, 99. Transfers of partnership assets by an insolvent firm which operate to hinder and delay creditors in the collection of their claims are held invalid in most courts. 30 Cyc. 543. And agreements between partners converting firm property into separate property, etc., are, in effect, conveyances of such property, and subject to the rule pertaining to fraudulent conveyances. 22 Am. & Eng. Encyc. of Law, 2d. ed., p. 109. Sales, interchanges and adjustments of partnership property between the partners are clearly alienations within the statute against fraudulent conveyances. Bigelow on Fraudulent Conveyances, 136. See also 48 Am. St. Rep. 596; 63 *Id.* 524; 1 *Id.* 589; 17 *Id.* 865; 20 Am. Rep. 762; 60 Am. St. Rep. 677.

4. Partnership property is not subject to homestead or other exemptions, nor is a widow entitled to dower therein. 65 Ark. 550; 46 Ark. 43; 39 Am. St. Rep.

58; 28 L. R. A. 89, and note on p. 105; 76 Ill. 109; 21 Cyc. 506; 48 Ark. 557; 66 Ark. 251; 19 C. J. 473.

5. The chancery court had jurisdiction. C. & M. Digest, § 494; 33 Ark. 550; 38 Ark. 397; 20 R. C. L. 1043; 2 Rowley on Partnership, par. 820; 6 C. J. 205; Pomeroy's Eq. Jur., 4th ed., §§ 112, 171; *Id.* vol. 2, § 968; 67 Ark. 330, 332; 81 Ark. 78; C. & M. Digest, § 4880; 140 Ark. 558.

6. The property involved here is not of a nature or of such character as could be impressed with the homestead right, so as to place it beyond the reach of creditors. 31 Ark. 468; 134 Ark. 525; 14 Fed. Cas. 1048, 1049; 13 R. C. L. 594.

McCULLOCH, C. J. Appellants, T. B. Chastain and C. H. Chastain, were copartners in the operation of a retail merchandise business at Newport, Arkansas, and in the year 1914 they purchased a lot with a two-story brick building thereon for occupancy in the operation of their business. The lot in question is 50 x 150 feet in size, and the building is 50 x 90 feet, covering the full width of the lot. There is only one room on the ground floor, and the second floor is divided into numerous rooms. After the purchase of the building, appellants continued to occupy it as a place of business.

Appellants were both single men, and roomed elsewhere than in the building, but about two years before the present litigation began the proof shows that they established a dining-room in one of the upstairs rooms of this building.

Appellants increased their business to a considerable extent, and extended it to farming operations, and in the year 1920 became largely in debt, and finally became insolvent.

In May, 1921, appellants made a division of the property in question by one taking the north half of the building and the other taking the south half, and they executed conveyances to each other to carry out this division. Each of them had married a short time

before this division, and it is claimed that each of them established his residence in the upstairs of this building. Within a few weeks thereafter the appellees instituted separate actions in the chancery court of Jackson County against appellants, charging that the property was purchased with partnership funds and for partnership purposes, and that the partition conveyances executed between them was for fraudulent purposes to prevent creditors from collecting their debts. Each of the appellees sued out a writ of attachment, which was levied on the property in question.

Appellants filed answers, denying the charges of fraud, and claiming the respective parts of the property which had been allotted to each in the division as a homestead.

The proof of the marriage of appellants shortly before the commencement of these actions and their occupancy of the property in controversy as a homestead is very meagre, but the case was tried by all the parties upon the theory that appellants had become married men, and that there had been, to some extent, occupancy of the rooms in the second floor.

We fail to discover any direct proof as to the present value of the building, but it appears from the proof that the price paid for it by appellants in the year 1914 was $16,000, and that it has been carried in the list of assets at the value of $25,000.

The chancery court refused to allow the claims of homestead, and rendered decrees in favor of appellees, sustaining the attachments and declaring liens on the building.

The cases instituted by each of the plaintiffs were tried on the same testimony, and have been consolidated here for convenience, as they involve the same issue and the same proof.

It is undoubtedly true, as shown by the evidence, that the property in controversy was purchased with

partnership funds and was used, until divided, for partnership purposes.

Pretermitting the discussion of other questions and conceding that, after division of the real estate purchased by copartners for partnership purposes and before the acquisition of specific liens by creditors, the property may, by the individual partners, be impressed with the character of a homestead so that it may be lawfully claimed as such (*Richardson* v. *Adler,* 46 Ark. 43), we go to the question whether or not there is evidence sufficient to show that this property was actually occupied in good faith as a home so as to impress it with the character of a homestead.

There can be no such thing as the fraudulent acquisition of a homestead, for the law permits it, regardless of the rights of creditors. *Ferguson* v. *Little Rock Trust Co.,* 99 Ark. 45. It is quite another thing, however, to say that a given tract or lot of real estate must be occupied in good faith as a home before it becomes impressed with the character of a homestead under the law. This court has steadily adhered to the rule that actual occupancy in good faith is essential to the impressment of the homestead character. A mere intention to occupy as a homestead in the future is not sufficient. *Williams* v. *Dorris,* 31 Ark. 466; *Patrick* v. *Baxter,* 42 Ark. 175; *Tillar* v. *Bass,* 57 Ark. 179; *Gill* v. *Gill,* 69 Ark. 596; *Gibbs* v. *Adams,* 76 Ark. 575; *Gebhart* v. *Merchant,* 84 Ark. 359.

The good faith of the occupancy may be inquired into for the purpose, not of determining whether the occupant is entitled to impress the property as a homestead, but of determining whether the occupancy was to actually establish a home. *Gibbs* v. *Adams, supra; Kulbeth* v. *Drew County Timber Co.,* 125 Ark. 291.

The facts of the case must therefore be examined in the light of these decisions for the purpose of determining whether they are sufficient to show that the property in controversy was actually occupied in good faith as a home by appellants for the purpose of impress-

ing it with the homestead character. The burden of proof is on them to show that there was such occupancy as was sufficient to establish the homestead. *Pace* v. *Robbins,* 67 Ark. 252; *Gibbs* v. *Adams, supra.*

The controlling factor in the case is that the property is essentially unadapted for residence purposes. It is true that this court has held that the fact of property being partly used for other than residence purposes is not sufficient to destroy the homestead right (*Berry* v. *Meir,* 70 Ark. 129; *Earl* v. *Earl,* 145 Ark. 559), but in each of those cases it was clear that the property was used as a homestead. In the present case we must consider the character of the property for the purpose of determining whether it was, in fact, occupied in good faith as a homestead, or whether the occupancy was merely colorable and not for the purpose of actually acquiring a homestead, but for the purpose of preventing the creditors from seizing it at that time. *Gibbs* v. *Adams, supra.*

The building was, as before stated, a two-story one, adapted solely for business purposes and not as a residence. It was, moreover, a single building, and in its present condition is not susceptible of being divided. Of course, the lot could be divided in ownership, but the building itself was not susceptible of division for purposes of occupation as a place of residence. The facts and circumstances tend to show unmistakably that the occupancy by appellants of their respective halves of the building was merely temporary for the purpose of evading processes of creditors for the collection of their debts, and not in good faith for the purpose of establishing homesteads. The court was correct therefore in denying the exemptions claimed by appellants.

It is also insisted that the chancery court was without jurisdiction of the causes of action set forth in the complaints of appellees, but there was no objection made below to the jurisdiction of the court, and no motion to transfer to the law court, which should have been done if it was determined that there was an adequate remedy

at law. The only thing done below which had any appearance of raising the question of jurisdiction was a motion to dissolve the attachment, and this was insufficient to raise the question of jurisdiction of the court to hear and determine the rights of the parties under the allegations of the complaints. It is too late to raise the question now for the first time.

The decree in each case is therefore affirmed.

HOLLINGSWORTH v. LEACHVILLE SPECIAL SCHOOL DISTRICT.

Opinion delivered February 26, 1923.

1. CONTRACTS—TERM "ARCHITECT" DEFINED.—Where, in a building contract, the term "architect" was expressly defined as referring to a designated architect with his partner as associate, and the contract makes "the architect" the final arbiter between the contractor and the school district which was having the building erected, either partner was authorized to pass on the work, and the contractor could not dispute the authority of either partner to act.
2. CONTRACTS—SUBSTANTIAL PERFORMANCE—DAMAGES.—In a building contract, a substantial compliance by the contractor is all that is required, he being charged, where there is such compliance, with the difference in value between the work as done and as contracted to be done, or the replacement of defective work where this can be done without great expense or material injury to the structure as a whole.
3. CONTRACTS—EVIDENCE.—Evidence *held* to show necessity of tearing down and removing defective work in a school building and rebuilding in accordance with original plans.
4. CONTRACTS—BUILDING CONTRACT—LIQUIDATED DAMAGES.—Where a certain sum per day was named in a building contract as liquidated damages for delay in completing the building after a named date, and the contractor threw up the job, and it was completed by another contractor, and on a cost plus basis, the original contractor was not liable for such liquidated damages during the period the other contractor was engaged in completing the work.
5. CONTRACTS—BREACH OF BUILDING CONTRACT—DAMAGES.—Where a contractor failed to complete his contract, and it was neces-

sary to employ another contractor to tear down part of the building and rebuild it, a fee paid to the architect in supervising such work as a necessary expense was properly chargeable to the original contractor.

6. CONTRACTS—BREACH OF BUILDING CONTRACT—DAMAGES.—Where a contractor failed to complete his contract, and it was necessary to employ another contractor to tear down part of the building and rebuild it, the expense of employing a watchman while such work was being done, not being provided for in the original contract, could not be charged against the defaulting contractor.

7. CONTRACTS—BUILDING CONTRACT—LIQUIDATED DAMAGES.—Where a certain sum per day was named in a building contract as liquidated damages for delay in completing the building after a named date, and the contractor threw up the job, and it was subsequently let to another contractor on a different basis, the defaulting contractor was liable for such liquidated damages from the time the contractor unlawfully refused to complete the work until the district took over the work.

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

L. C. Going, for appellant Hollingsworth.

The school district contracted with Mitchell Selligman as architect alone, not with Selligman & Edelsvard. See contract of March 20, 1919. Article 2 thereof recites: "It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect (meaning Selligman), and that his decision as to the construction and meaning of the drawings and specifications shall be final." That bound both parties. 88 Ark. 213; 112 Ark. 83. There has been a substantial compliance with the contract, and that entitled Hollingsworth to his pay. 97 Ark. 278; 64 Ark. 34; 105 Ark. 353; 122 Ark. 308; 131 Ark. 481.

Edward B. Klewer, for appellant Maryland Casualty Company; *Ashley Cockrill,* of counsel.

1. There was a substantial compliance with the contract. 97 Ark. 278, 133 S. W. 1032. The architect, Selligman, was of the opinion that there had been a sub-

stantial performance of the contract. His decision cannot be questioned, except for fraud, or gross mistake, necessarily implying bad faith or failure to exercise an honest judgment. 48 Ark. 522, 3 S. W. 639.

2. There was no certificate by the architect of such refusal, neglect or failure on the part of the contractor as to justify the owner in terminating the employment of the contractor, and taking over and completing the building, Mitchell Selligman being the architect authorized by the contract to make such certificate. Such certificates are conditions precedent to the right of the contractor to furnish labor and material, or the right to terminate the employment of the contractor; and such a provision in a building contract is in the nature of a forfeiture which should be strictly construed, it being incumbent on the owner to show a strict compliance with the contract, or a valid excuse for noncompliance. 77 Ark. 305, 90 S. W. 1000; 142 Ark. 539, 219 S. W. 328; 100 Ark. 565, 568; 87 Conn. 41, 86 Atl. 755; 127 Fed. 671, 62 C. C. A. 397; 80 Conn. 134, 67 Atl. 369, 13 L. R. A. (N. S.) 448; 56 Minn. 410, 57 N. W. 943. Even if Edelsvard was an "architect" within the meaning of the contract, a joint certificate by both was necessary before the owner would be justified in terminating the contractor's employment. 30 Ind. App. 342, 65 N. E. 1061; 173 Ill. 179, 50 N. E. 716; 165 Cal. 497, 133 Pac. 280, Ann. Cases, 1916-C, 44; 193 Mo. App. 132, 182 S. W. 143. See also 144 N. Y. 691, 39 N. E. 394; 157 N. Y. Supp. 782; 21 Ga. App. 758, 95 S. E. 113.

3. If Edelsvard, associate architect, was authorized by the contract to give such certificate, the purported certificate given by him was insufficient in law to comply with the contract, article 5. 157 N. Y. Supp. 782; 70 N. J. L. 4, 56 Atl. 304; 68 N. J. L. 627, 54 Atl. 815; 104 Fed. 930; 144 N. Y. 691, 39 N. E. 394; 193 Mo. App. 132, 182 S. W. 143; 95 S. E. 113; 105 Atl. 467.

4. The three days' notice prescribed by article 5 of the contract to be given to the contractor by the owner

after the making of such certificate by the architect was not given to the contractor. 193 Mo. App. 150; 213 S. W. 151; 165 Cal. 497; 213 S. W. 151.

5. The decision of the architect as to compliance was final, and could be impeached only by clear and convincing proof of fraud, or mistake so gross as to imply bad faith or the exercise of dishonest judgment, and the evidence does not justify such finding. 70 Ill. App. 273; 84 Ill. 225; 158 Ill. 432; 90 N. Y. Supp. 115, 44 Misc., 555; 165 Pa. St. 394, 30 Atl. 988; 37 Ark. 145; 38 Ark. 419; 92 Ark. 509, 122 S. W. 649; 112 Ark. 83, 164 S. W. 1137; 88 Ark. 213, 114 S. W. 242; 83 Ark. 136, 103 S. W. 620; 79 Ark. 506, 96 S. W. 70; 68 Ark. 185, 56 S. W. 1068; 48 Ark. 522, 3 S. W. 639.

6. As to liquidated damages for delay in completion, there was no notice of default, and the surety was therefore relieved of its obligation to pay such damages.

7. The school district waived strict compliance with the terms of the contract requiring completion within five months of its execution. 99 Ark. 340, 138 S. W. 467; 104 Ark. 9; 103 Ark. 484, 145 S. W. 234; Wait, Engineering & Architectural Jurisprudence, § 325; 9 N. Y. Supp. 538; 121 Ill. 571; 120 N. Y. 236; 1 N. Y. Supp. 500; 81 N. J. Eq. 286, 86 Atl. 958; 20 L. R. A. (N. S.) 350, notes; 2 L. R. A. 1916-E, 1180, notes.

8. The burden was on cross-complainant to legally prove its damages, and there is no legal proof of any damage sustained by it. 44 Ark. 439; 153 Ill. App. 43; 10 Ore. 440.

9. The provision of the contract with respect to the certificate of the architect, that he has audited the cost of completion, should be strictly construed.

R. A. Nelson, for appellee.

1. It being a question of fact as to whether or not there was a substantial performance of the contract by the contractor, the trial court's finding that there was not a substantial performance will not be reversed, if

supported by the evidence, 148 Ark. 296; 129 Ark. 583; 130 Ark. 178; 6 Cyc. 54, 57, 58. 97 Ark. 282; 79 Ark. 115; 102 Ark. 53.

2. Propositions 2, 3 and 4 urged by the casualty company go only to the sufficiency of the notice to comply served upon the contractor, and of the architect's certificates, to warrant the owner in taking over the building, under article 3 of the construction contract, upon default of the contractor. These alleged defenses were not pleaded in the trial court and cannot be raised here. 37 Ark. 542; 91 Ark. 30; 129 Ark. 280.

If these matters were conditions precedent, and therefore defenses to the appellee's action against the contractor and his surety, they were material defenses, and should have been pleaded in the lower court. C. & M. Digest, § 1231; 85 Ark. 567; 128 Ark. 240.

3. As to proposition 5, it is not correctly stated in the form submitted to the trial court; but court's finding that Selligman's conduct was such as to amount to bad faith was in accordance with the proof.

4. As to liquidated damages and appellant's argument thereon, reference is had to the surety company's bond, viz: "Provided, that any alterations which may be made in the terms of the contract or in the work to be done under it, or the giving by the owner of any extension of time for the completion of the contract, or any forbearance on the part of the owner, shall not in any way release the principal and surety, or either of them, * * * from liability herein assumed, *notice to the surety of any such alterations, extensions or forbearances being hereby waived.*" 4 R. C. L., 3547; 29 Cyc. 1117; 32 Cyc. 106, 107; 92 Ark. 519.

5. The above waiver carries with it appellant's proposition 7. Moreover there is no plea or proof that the school district ever received any consideration for the so-called waiver of completion on time. 4 R. C. L. 3719; 9 C. J. 794.

6. The method adopted in the audit or certificate of the architect was that agreed upon by the parties under

article 5 of the contract, and the amount of the certificate was never questioned for fraud or mistake in the trial court, and all parties are bound by it. 6 Cyc. 40, 42; 48 Ark. 522; 68 Ark. 187; 79 Ark. 513; 83 Ark. 402; 88 Ark. 224; 91 Ark. 421.

SMITH, J. On March 11, 1920, J. E. Hollingsworth, a building contractor doing business as J. E. Hollingsworth & Co., sued the Leachville Special School District, alleging that on or about May 20, 1919, he and the said district entered into a written contract, whereby he agreed to erect and complete a certain brick school building in the town of Leachville, according to the plans and specifications made a part of the complaint, for the sum of $34,000. That he began the construction of the building under his contract, and had expended thereon the sum of $20,178.80, and that he had been paid by the school district, on the certificate of the architect, the sum of $12,800, leaving a balance due him of $7,378.80. That on or about December 10, 1919, the school district forcibly took possession of said partly constructed building, and refused and declined to permit him to complete same, and that such action on the part of the school district was unlawful and wrongful, in that he was constructing the building in accordance with the plans and specifications.

On March 27, 1920, the school district filed its answer and cross-complaint. It admitted the execution of the contract sued on, but denied that the building was constructed according to the plans and specifications, and denied that it had, without right, forbidden plaintiff to continue the work, and averred that its reason for not permitting plaintiff to continue was that he had refused to construct and complete the building in accordance with the plans and specifications.

In its cross-complaint the school district set up the contract, and alleged the execution of a bond for its faithful performance by the Maryland Casualty Company as surety. The plaintiff, the surety and Mitchell Sellig-

man, the architect, were made parties to the suit. It was alleged that the architect had conspired with the plaintiff to obtain the contract for the plaintiff, and that the architect had fraudulently permitted the plaintiff to make substitutions of defective material, and had fraudulently approved defective work by the contractor.

Answers were filed by the cross-defendants, denying all the allegations of the cross-complaint, and alleging that the work of the contractor was in accordance with the plans and specifications, and had been accepted and approved by the architect, whose decision, according to the terms of the building contract, was final with respect to the work, and averred failure to give notice of default.

The final decree dismissed the complaint, and also the cross-complaint in so far as the architect was concerned, but gave the district a judgment against Hollingsworth and his surety, and this appeal is from that decree.

The record is very voluminous, consisting of over a thousand pages, and the briefs, which are correspondingly large, discuss at length the conflicting testimony of the numerous witnesses. We shall not undertake to review all this testimony, although we have considered it, and have reached the conclusion that the findings of fact upon which the decree of the court below was based were not clearly against the preponderance of the testimony except as to two items, which we think were improperly charged against the contractor.

For the reversal of the judgment it is insisted:

1. That there was a substantial performance of the contract on the part of the contractor up to the time of his discharge; and this is the principal question in the case.

2. That there was no certificate by the architect of a failure on the part of the contractor to comply with the contract, it being insisted that Selligman was the architect authorized by the contract to make that certificate.

3. That, if the associate architect, who made the certificate upon which the directors acted in discharging

the contractor, was authorized to so certify, he should have done so in connection with Selligman, and not individually as he did do.

4. That proper notice, as prescribed by the contract, was not given by the district to the contractor of his discharge.

5. That the decision of the architect as to compliance with the contract was final, and could be impeached only by proof of fraud or mistake so gross as to imply bad faith and the exercise of dishonest judgment, and the evidence does not justify that finding.

6. That there was no notice of default, and the surety was, on that account, relieved of its obligation to pay liquidated damages for delay.

7. That the district waived strict compliance with the terms of the contract requiring the completion of the building within five months.

8 and 9. That the district did not properly prove the damages allowed it.

The propositions stated are substantially questions of fact, as the principles of law which control their decision are well settled and are not in dispute between the parties, and we will not undertake a separate discussion of each of these propositions.

There are provisions in the building contract which make the architect the final arbiter between the contractor and the district, and it becomes important, therefore, to determine who the architect was, as Hollingsworth took the position, when the first disagreement arose, that Edelsvard was not the architect, and Hollingsworth demanded that Selligman approve the findings and directions of Edelsvard before he would assent thereto. On that question we quote from the contract as follows: "This agreement, made this 20th day of March, 1919, by and between the Leachville Special School District, party of the first part, hereinafter called the owner, and Mitchell Selligman, party of the second part, hereinafter called the architect, with G. A. Edels-

vard, associate, witnesseth:" The same instrument defines the terms, "owner," "architect," and "contractor," the definition of "architect" being "the term 'architect' refers to Mitchell Selligman or associate."

Selligman and Edelsvard were partners, as Selligman & Edelsvard, at the time the district contracted with them as architects, although the negotiations leading to their employment were conducted by Selligman, and that member of the firm acted for the firm in the award of the contract to Hollingsworth, the plaintiff in this suit. However, the plans and specifications were prepared by Edelsvard.

The court below was of the opinion that Edelsvard, as well as Selligman, was the "architect," as that term was used in the contract, and we concur in that finding.

The contract specified what supervision the architect should give the building and what his duties should be in that connection, and we think it was contemplated by the parties that either Selligman or Edelsvard might perform those duties. The contractor was therefore in error in disputing Edelsvard's authority as architect.

Four bids were received by the district for the construction of the building as originally advertised. The lowest bid was $34,737, and was made by H. E. Monk; the next lowest bid was $34,887, and this bid was made by the plaintiff Hollingsworth. The district had only $34,000 to spend for the building, and did not accept any of these bids. Selligman undertook to revise these plans by reducing the cost of the building by $887, and after doing so Hollingsworth's bid was accepted.

The alterations thus made were indicated on the plans as "Addenda A," and much stress is laid on these alterations by the district as tending to show collusion between Selligman and Hollingsworth. Monk testified that the alterations made by Selligman did not reduce the building cost only $887, but that the amount of the reduction was $2,134, and he testified that, if he had been given an opportunity to revise his bid after the

alterations had been made, he could, and would, have reduced his own bid by that amount, whereas Hollingsworth reduced his bid only to the extent of $887.

There was testimony on the part of the district that Selligman refused to give Monk an opportunity to revise his bid on the ground that Monk probably could not make the required bond, the intimation being, of course, that Monk was not a responsible bidder. The insistence of the district, in this connection, is that Selligman and Monk were unfriendly, and that the relations between Selligman and Hollingsworth were unduly friendly. Selligman denied that this was true, and he denied that the alterations in the plans which he made warranted a difference of more than the $887 reduction necessary to bring Hollingsworth's bid within the money the district could pay, and he testified that he was not asked by the directors of the district to figure with any other bidder on any reduction of the amount bid.

The first issue between Selligman and Edelsvard came over the allowance of an estimate which Hollingsworth asked the district to pay. Edelsvard testified that he told Selligman the sum demanded was in excess of the amount then payable under the contract, and Selligman admitted this was true, but insisted that the estimate be approved notwithstanding that fact, but Edelsvard refuse to do so. Selligman denied this. An issue also arose between Selligman and Edelsvard over the approval of the work covered by this estimate. Edelsvard went to Leachville and condemned a lot of the work, and, among other things, ordered brick walls torn down. Hollingsworth declined to obey Edelsvard's direction, and insisted that his work was not defective, and had been approved by Selligman. In this connection there were introduced certain telegrams and correspondence, which, it is strongly insisted, show Selligman's entire good faith. Edelsvard wired Selligman that Hollingsworth had disputed his authority and claimed to have his (Selligman's) approval of the work. Selligman an-

swered by wire affirming Edelsvard's authority, and denying that he had given a blanket approval of Hollingsworth's work. The issue between Edelsvard and Hollingsworth remained unsettled, and Selligman himself went to Leachville. Upon Selligman's return home he wrote a letter to the school directors, in which he expressed the opinion that Hollingsworth was correct in his contention. In the same letter Selligman insisted, first, that the alleged defective work was not so defective that it could not be remedied, and, in his testimony, explained the remedy he would have applied. He also stated in the letter that such defects as did exist resulted from defects in the plans, and not from faulty materials or work. Edelsvard insisted to the contrary, and the directors accepted his view as correct. There was a meeting at which all parties in interest were present or were represented, and the directors announced their approval of Edelsvard's position, and called upon the representative of the surety company to comply with Edelsvard's directions and complete the building after Hollingsworth had declined to do so.

It was insisted at that meeting, as Hollingsworth had all along insisted, that the trouble was with the plans, and there is much testimony in the record which supports that contention. In fact, if the case was disposed of on the testimony of the witnesses who qualified as experts, and testified as such, it must be confessed that the clear preponderance of the testimony shows that the plans were defective, and the troubles complained of by Edelsvard were attributable to the defect in the plans.

The testimony of these experts appears to be overcome, however, by the undisputed fact that the defective work was torn away and the building was completed according to the plans which the experts had testified were defective, and there is no disagreement that the district has a satisfactory building.

The principal defect complained of in the plans was that the weight of the building had not been properly

distributed over the foundation, and the explanation is offered that it became possible to erect a good building under the plans used only because the foundation had properly settled. Of this we shall have more to say.

It is conceded that there were numerous departures from the plans. It is said, however, that most of these were unimportant and immaterial, and resulted chiefly from the inability of Hollingsworth to obtain the articles called for in the specifications, resulting from the congestion of railroad traffic existing at the time, and the inability to have builder's orders promptly filled. It is also insisted that such variations as might be deemed material did not impair the value of the building, and were authorized by Selligman in good faith.

It is undisputed that many defects existed at the time Selligman and Edelsvard disagreed, and, as has been said, the chief issue of fact was the cause of these defects—whether defective plans, or defective work—and it is undisputed that one of the brick walls fell, and the remaining walls were torn down. One of the orders which Edelsvard had given, and which Hollingsworth refused to obey, was to tear down these walls. Hollingsworth accounts for the falling of the wall by saying that the building had been left unoccupied from October 20, 1919, to January 5 thereafter; but the court did not accept this explanation, and neither do we. The walls were shown to have been out of plumb, some of the witnesses placing the variation in this respect as high as four inches; and the testimony shows an insufficient quantity of cement was used, and that the mortar was not properly mixed. A number of witnesses testified that brick could be, and were, pulled out of the walls like pulling books out of a book-case. The other defect in the walls was that the walls had cracked. There was no dispute about that fact, although there was the sharpest conflict as to the extent and cause and probable effect of these cracks.

It was insisted by Selligman that these cracks were not as serious as Edelsvard claimed, and could have been

closed by certain excavations of the foundation; and the witnesses who testified in Hollingsworth's behalf as experts expressed the same opinion. One of these witnesses, in response to a hypothetical question which assumed as existing the conditions which Edelsvard and the other witnesses for the district had testified did exist, admitted that, under the facts assumed, the building should have been torn down, and nothing else could have been done to make the building safe.

We do not concur in the view that there was any trouble with the foundation. The building was located on "confined" sand, and the testimony is all to the effect that only solid rock makes a better foundation—the coarser the sand the better the foundation.

Building operations entirely ceased on October 20, 1919, this being the date when the contractor and the representative of the surety company definitely refused to take down and reconstruct the building; and building operations were not resumed until January 5, thereafter. During this time there may have been, and probably was, some additional settling of the concrete foundation on which the walls were erected; but we do not think this settling made it possible to build a good building, whereas before it had been impossible to do, and such was not the theory of the experts, their chief objection to the plans being that the weight of the building had not been properly distributed over the foundation.

Upon the first submission of the cause the court prepared a written opinion in which he announced certain conclusions which he had reached. Among other findings of the court was one to the effect that Hollingsworth and his surety did not have the right to rely on the decisions of Selligman, for two reasons. The first was that Selligman had given up the work before the time for the more important decisions; and the second reason was that his inattention to the work amounted to bad faith, though there was no satisfactory proof of fraud. Selligman's contract with the district provided for personal attention on the job at least once every two weeks, but, despite re-

peated calls when the board of directors were complaining of defective work, he made only three visits in five months.

The court found as a matter of law that "a substantial compliance by the contractor is all that is required under the law, he being charged (where there is a substantial compliance) with the difference in value between the work as done and as contracted to be done, or the replacement of defective work where this can be done, or the replacement of defective work where this can be done without great expense or material injury to the structure as a whole."

We approve both the finding of fact stated and this declaration of law.

The court, after making certain general findings of fact, propounded the following question: "The question for decision therefore is: Could the defective masonry have been replaced with reasonable expense without tearing down the whole structure? If it could, then the district is entitled to charge only what such cost would have been, together with difference in value of brick, steel, lugs, caps, bases, etc., furnished and those contracted for. On the other hand, if the inferior masonry was all over the building so that the structure was unsafe (and the maximum of safety is required for school buildings where hundreds of little children are housed) and it was necessary to rebuild in order to be certain of durability, then the district was justified in dismantling the house as a whole and in the rebuilding to use materials conforming strictly to the contract."

The court then directed that additional testimony be taken for the purpose of enabling him to determine the questions stated, and what damages should be awarded the district if it was found the structure had to be torn down; and the additional testimony was taken, and the court thereafter rendered a final decree assessing as damages the cost of tearing down and removing defective work and rebuilding in accordance with the original plans.

We will not set this testimony out in detail. There is much conflict in it, and much of it cannot be reconciled. As we have said, the preponderance of the expert testimony supports the contention of Hollingsworth, but the decided preponderance of the practical testimony—that of the men who tore down the old work and replaced it—supports the finding of the court below. We are largely controlled by the fact that a satisfactory building has been erected according to the plans and specifications which the expert witnesses condemned.

After Hollingsworth was discharged, Monk was employed to complete the building, and was paid for this service on the basis of cost plus ten per cent. He testified that in tearing down and removing the condemned parts of the building he discovered that much material of a cheaper kind than that called for by the specifications had gone into the building, and he estimated this difference amounted to $2,336. Complaint is made of the commission paid Monk; but it does not appear that the work could have been contracted on more advantageous terms at that time. Monk testified that a wall fell before he took the job, and he did not know what conditions he would find.

Edelsvard furnished the district a certificate that the total cost to the district for the construction of the building was $64,400.59, and that there were credits against this amount of $34,722.63, leaving a balance above the original contract price of $28,677.96, and that the building remained uncompleted for 400 days after October 20, 1919, the date of the expiration of the five months' limit allowed for the construction of the building, and that the liquidated damages for that period at $25 per day, the sum specified in the contract, amounted to $10,000.

The original contract gave the architect the right to make such a certificate against the contractor; but we think no binding effect can be given to the certificate of Edelsvard for the reason that Monk's work was not done

under the contract. Edelsvard's certificate and his testimony in regard thereto are competent as evidence of the facts recited, but they are not conclusive, and we do not approve the figures made by him in their entirety for the reasons hereinafter stated.

Objection is made to the fee paid Edelsvard. This fee was not paid Edelsvard under the old contract, but was his compensation for services in connection with the tearing down and rebuilding of the schoolhouse, and the testimony showed the sum paid him was a necessary expense under the circumstances.

It is said certain errors in addition appear in Edelsvard's figures amounting to $363.30, and no explanation of what appears to be an erroneous addition is made, and this error must, of course, be corrected.

It is insisted that Monk used a more expensive brick than Hollingsworth was required to use, and an additional cost of $572 was incurred on that account. The testimony does not appear, however, to support the charge that a more expensive brick was used than the original contract called for. Certain other disputed items may be disposed of similarly.

The court allowed an item of $525 covering the expense of a watchman during the reconstruction of the building. Such an expense does not appear to have been provided for in the original contract, and we think no authority was shown for making this charge against the contractor and his surety.

The court refused to allow the liquidated damages certified by Edelsvard, but did allow liquidated damages from the time Hollingsworth refused to proceed until the directors commenced work on the building. In other words, the court took no account of the period of time in excess of the five months amounting to 400 days, but did charge Hollingsworth for the time covered by his refusal to proceed before the district took over the work. We think this was not unfair to Hollingsworth, and the surety company was advised of the issue between the par-

ties and refused to complete the building, as it had the right to do, and it is chargeable therefore with liability for the liquidated damages assessed as a part of its obligation as a surety.

The decree will be modified by reducing it to the extent of the error in addition, and the charge for the services of the watchman, and, as thus modified, will be affirmed.

BOAS v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered March 5, 1923.

1. LIMITATION OF ACTIONS—INJUNCTION AGAINST OBSTRUCTING CREEK.—A suit to enjoin a railroad from obstructing and diverting the natural flow of a creek by filling in a trestle spanning it and digging a ditch too small to accommodate the flow during heavy rains, thus causing water to back up over plaintiff's lands, is barred after three years from completion of the embankment, the nuisance as well as the injuries being original and permanent.
2. LIMITATION OF ACTIONS—INJUNCTION AGAINST DISCHARGE OF WATER.—A suit to enjoin a railroad company from discharging water from day to day from its boilers and roundhouse into an insufficient ditch dug by it, resulting in the water being backed upon plaintiff's land and becoming stagnant, is not barred within three years from completion of the ditch, the injury being caused by a continuing nuisance.

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

W. A. Cunningham, for appellants.

The right of action is not barred. Where the obstruction is not *necessarily* an injury, or where the party damaged cannot tell the extent of the injury, or where the obstruction may be remedied, the injury is successive, and not original. 57 Ark. 398; 52 Ark. 243; 95 Ark. 302.

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

The action is barred. The trestle was filled in in 1902, at which time the ditch was cut draining the creek

down the west side of the railroad. The injury was permanent, and the statute ran from that date. 107 Ark. 169; 62 Ark. 360; 86 Ark. 406; 92 Ark. 465; 93 Ark. 46; 35 Ark. 662; 39 Ark. 463; 56 Ark. 613; Wood on Limitations, 3d ed., § 180.

HUMPHREYS, J. Appellants, twenty-eight in number, commenced this suit in the Eastern District of the Lawrence Chancery Court, to enjoin appellee from obstructing the natural flow of Turkey Creek until it provides complete drainage to carry off the water, and from discharging water from their boilers and roundhouse into the ditch cut on the west side of its tracks to turn Turkey Creek, which water backs up to and on the lands of appellant in such way as to stand and become stagnant.

Appellee filed an answer admitting that it obstructed the natural flow of Turkey Creek by damming the channel or filling in the draw where the creek crossed the roadbed east of the lands of appellants, and turning the water into a ditch on the west side of its track, but alleging that the right of action, if any, was barred by the three years statute of limitation; and denying that it is discharging water from its boilers and roundhouse into the ditch which backs up to and on the lands of appellants so as to stand and become stagnant. Other defenses were introduced, but the proof was largely directed to the defenses set out above, so we deem it unnecessary to set out the others.

The court found that the cause of action was barred by the three years' statute of limitation, and dismissed the bill of appellants for want of equity.

From the decree dismissing the bill an appeal has been prosecuted to this court.

Appellants were owners of certain lands in the town of Hoxie immediately west and across appellee's railroad track from its terminal and switch yard. Originally Turkey Creek flowed down from the north part of said property and passed under the main line of the railroad and thence in a southerly direction along the east side of

the roadbed for a considerable distance before crossing back to the west side thereof. In 1902 appellee filled in the gap of its roadbed where the creek first crossed it, so as to obstruct the flow of water, and, in order to carry it off, dug a ditch in a southerly direction along the west side of the roadbed to connect with Turkey Creek where it crossed the roadbed a second time. According to the weight of the evidence, the ditch was not large enough to carry off the water, and during the heavy rains the lands of appellants were inundated and greatly damaged with back-water.

The nuisance complained of consisted in filling in the trestle which theretofore spanned Turkey Creek, so as to divert the water from the channel of the creek, and by digging a ditch too small to accommodate the flow of water during heavy rains. The decided weight of the testimony shows that, before the trestle was filled and the ditch constructed, the water had not backed up over any of appellants' lands, but immediately thereafter and since that time has backed up and seriously affected said lands. The nuisance as well as the injuries were original and permanent, and the rights of action to enjoin the nuisance or sue for damages on account of permanent injuries accrued when the construction was completed in 1902, and suits should have been instituted within three years after that time. This court said in the case of *Turner* v. *Overton*, 86 Ark. 406: "When the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original and may be at once fully compensated, and the statute of limitations begins to run upon the construction of the nuisance." The facts in that case are quite similar to the facts in the instant case, and the rule announced therein is applicable and controlling here. Appellants are clearly barred from maintaining this suit to abate the original and permanent nuisance. The case, however, is different with reference to water being continually emptied into the ditch from the boilers and roundhouse. The weight of the testimony is to the ef-

fect that the water discharged from the roundhouse either passed through a sump into the ditch, or directly into it, to such an extent that it backs up two blocks in dry weather and stands in a stagnant pool near or on said lands. The act of appellee in discharging this water into the ditch from day to day is distinctively a continuing nuisance and injury. It is in no sense a part of the original nuisance and injuries. The action to abate it was not barred when this suit was instituted. The court erred in dismissing this, the second cause of appellants' action.

The decree is affirmed as to the first cause of action, but reversed and remanded as to the second, with directions to enjoin appellee from emptying water out of its boilers and roundhouse, directly or indirectly, into the ditch or the bed of Turkey Creek north of the ditch, without preparing facilities for carrying the water off.

WISCONSIN & ARKANSAS LUMBER COMPANY v. BRADY.

Opinion delivered March 5, 1923.

1. TRIAL—ASSUMPTION OF UNDISPUTED FACT.—An instruction which assumed a fact about which there was no dispute was not erroneous.
2. RAILROADS—NEGLIGENCE—JURY QUESTION.—In actions for personal injuries and for damages to an automobile struck by cars backed over a highway without warning, plaintiff's view being obstructed, *held* that defendant's negligence was for the jury.
3. RAILROADS—DISCOVERED PERIL.—Where defendant's brakeman on a car being backed over a public crossing testified that he discovered plaintiffs when they were about 40 or 50 feet from the crossing and the front end of the flat-car nearest the crossing was 30 feeet from it, and the engineer testified that it was possible to stop the train within a distance of 10 or 12 feet at the rate it was moving, the issue of discovered peril was for the jury.
4. RAILROADS—DUTY OF TRAVELERS AT CROSSING.—While it is necessary for a traveler to look and listen for trains as he approaches a public crossing, he is not required to stop for that purpose,

unless necessary to do so in the exercise of ordinary care for his safety.

5. RAILROADS—CONTRIBUTORY NEGLIGENCE.—Where plaintiffs were approaching a crossing slowly when injured, and there was a dispute as to whether a fence and hedge-row entirely obscured the train, which was backing over the crossing, the question of contributory negligence was for the jury.

6. NEGLIGENCE OF WIFE IMPUTABLE TO HUSBAND.—Where a husband was driving in his automobile driven by his wife under his control, her negligence in driving the car when it was struck by a train, if any, was imputable to him, and should have been considered in determining the liability for damage to the car.

Appeal from Hot Spring Circuit Court; *W. H. Evans,* Judge; reversed in part.

Henry Berger and *Mehaffy, Donham & Mehaffy,* for appellants.

D. D. Glover, for appellees.

HUMPHREYS, J. Appellee, Mrs. Hosea Brady, as mother and next of kin to Louis Lindel Brady, recovered damages in Hot Springs Circuit Court against appellants, in the sum of $500, for injuries received by her child; and appellee, Hosea Brady, recovered damages against said appellants in the sum of $50 for injuries to his automobile, on account of alleged negligence of appellants through their servants. The particular acts of alleged negligence was the backing of a train of flat-cars across a public road, upon which appellees were traveling in an automobile, without warning them of its approach, and which train was obstructed from their view by an office, other buildings, a fence and hedgerow, until within ten or twelve feet of the track, which train collided with the automobile and caused the injuries complained of.

Appellants filed an answer denying the allegation of negligence, and pleading, by way of further defense, that the injuries were the direct result of negligence of appellees in driving the automobile onto and against the flat-cars, without taking any care or precaution to look or listen, or, if necessary in the exercise of ordinary care, to stop for that purpose.

An appeal from the judgments has been duly prosecuted to this court, and the correctness of the judgments is assailed by appellants because the court gave certain instructions alleged to be erroneous, and refused to give others alleged to be correct, and erroneously modified others before giving them. The facts as reflected by the record are in substance as follows: two railroad tracks of appellant, thirty feet apart, running north and south, crossed the public road at right angles where the alleged injuries occurred. Buildings between these tracks were on both sides of the public road. The office, fence and hedgerow were on the south side, and the mill and lumber yard were on the north side. Appellees were going toward the east in the direction of Malvern, in a Ford car owned by Hosea Brady. Mrs. Hosea Brady was driving, and her husband was sitting beside her holding the baby, then twenty-two months old. According to their evidence, they were driving at the rate of six or eight miles an hour, and, on account of the obstructions on the south side of the road, did not see or hear the train until within ten or twelve feet of the track, at which time the train rapidly approached the crossing and collided with their car before they could stop it; that, as soon as they discovered the train, Mrs. Brady put on the brake and turned off the gas, and Mr. Brady turned off the engine; that the train was running much faster then than they had been traveling, and when they cut all the power off the automobile it reduced the speed enough to allow the front end of the flat-car to get by them some six feet before the collision occurred; that Mrs. Brady was accustomed to driving the car, and that she was looking to the front, as usual, when approaching the crossing.

According to the testimony of appellants, the flat-car was being backed across the road into the mill yard to place it for loading; that the train was moving about four to six miles an hour; that appellees were discovered forty or fifty feet from the crossing as they approached it; that the front end of the flat-car was then about thirty feet from the crossing; that immediately upon discover-

ing them the engineer shut the throttle, plugged the air valve and threw back the reverse lever; that, considering the speed of the train and other conditions, it could have been stopped within a distance of ten or twelve feet; that the reason the train reached the crossing first was because it was nearer than the automobile to the crossing; that the tracks did not cross a public highway, but a road that was traveled by the people a good deal.

The undisputed testimony showed that the train was backed across the road crossing, which had been generally traveled by the people for many years, without giving any warning whatever of its approach, and without having any one on the front end of the flat-car to watch and give signals.

At the request of appellants, the jury was permitted to go to the scene and approach the crossing in automobiles as an engine was backing a flat-car up the track toward the road crossing, so that it might observe conditions at first hand.

Appellants contend the instructions were erroneous because they did not take into account that the place where the injury occurred was private property and not a public road, thereby requiring appellants to exercise the same care to keep from injuring trespassers that they would have to exercise to keep from injuring travelers at a public road crossing. It is true, in instructing the jury, the court assumed that the place where the injury occurred was a public road crossing. All the witnesses testified it was such a crossing, unless it can be said that John A. Millen testified to the contrary. He did say the road was not a public highway, but at the time must have had in mind some technical conception of a public highway, for he admitted that the road had been generally traveled by the public for many years. We think the court's assumption warranted, for there was no real dispute in the testimony upon the point.

Appellants also contend that the court erred in submitting the issue of negligence on their part. It is

argued that there is no evidence upon which to base the issue. We think the evidence warranted the submission of that issue to the jury. The testimony tended to show that appellants backed two freight cars rapidly toward a public crossing without warning of any kind to travelers who might be approaching. The error, if any, was against appellees, for, according to the undisputed testimony, the bell was not rung or the whistle blown in the manner required by the statute. Aside from the fact that the whistle was not blown or the bell rung, the evidence tended to show that, as the train approached the public road crossing, it was obscured from the view of travelers until they were within ten or twelve feet of the crossing, and, notwithstanding such facts, that no one was stationed at the crossing or on the front end of the flat-car to notify the public or to signal the engineer or fireman. An inference might well have been drawn by the jury from these facts that appellants' train was operated negligently on that occasion. Appellants go further and assert the court assumed in several instructions that they were negligent in the operation of their train. After a careful reading of the instructions referred to, we do not think them susceptible of that construction.

Appellants also contend that the court erred in giving instruction No. 9, based upon the doctrine of discovered peril, for the alleged reason that there was no evidence to support the instruction. John A. Millen, acting brakeman, testified that the train was moving at the rate of four miles an hour; that he discovered appellees when they were forty or fifty feet from the road crossing, and immediately notified the engineer of their approach; that the front end of the flat-car nearest the road crossing was then thirty feet from it. C. J. Page, the engineer, testified that it was possible to stop the train within a distance of ten or twelve feet, at the rate it was moving. The jury would have been justified from these statements in drawing an inference that the appellants discovered the peril to appellees in time to have stopped the train

and avoided the injury. It was proper therefore to submit that issue to the jury.

Appellants also contend that the court erred in refusing to direct a verdict in their favor as to both appellees, upon the theory that the undisputed testimony showed that the negligence of Mr. and Mrs. Brady was the sole and proximate cause of the injuries. It is insisted that Mr. and Mrs. Brady should have stopped to look and listen as they approached the crossing. While it is necessary for a traveler to look and listen for trains as he approaches a public crossing, he is not required to stop for that purpose unless necessary to do so in the exercise of ordinary care for his safety. We cannot say, as a matter of law, under the facts in this case, that it was the duty of appellees to have stopped their car in order to look and listen. The testimony is in dispute as to whether the fence and hedgerow entirely obscured the train in the direction from which it came. There is nothing in the testimony tending to show that they could not have heard the whistle, if blown, or the bell, if rung, while riding along at a low rate of speed. The record does not reflect that the train was passing on schedule time. According to the testimony, appellees were approaching the crossing slowly and looking to the front. We think it was a question for the jury, under the facts, to say whether the injuries resulted wholly from the negligence of Mr. and Mrs. Brady, or wholly from the negligence of appellants, or from the concurring negligence of both.

Appellants also contend that the court erred in giving appellees' requested instruction No. 1, which is as follows:

"You are instructed that if you find from the evidence in this case that the defendant company, in the operation of one of their trains, negligently damaged plaintiff's car, without fault or negligence on his part, as alleged in his complaint, it will be your duty and you are instructed to find for the plaintiff, Hosea Brady, in what-

ever sum you find from the evidence that his car was damaged."

This instruction was erroneous because it ignored the negligence of the wife as a defense to the action of Hosea Brady for the injury to the automobile. Hosea Brady owned the automobile, and was in no sense a guest of his wife, so he had control, along with his wife, over the movements of the car. The negligence of Mrs. Brady, if any, therefore was imputable to Hosea Brady, and should have been taken into account just as his own negligence, if any, in determining whether there was liability on the part of appellants, for damage to the car. The defect in instruction No. 1 was not cured by other instructions given by the court. The only one tending to cure the defect was in conflict with the one given.

The judgment in favor of Mrs. Hosea Brady, as mother and next of kin of Louis Lindel Brady, is affirmed; and, on account of the error indicated, the judgment in favor of Hosea Brady is reversed, and his cause of action is remanded for a new trial.

DAVIS v. CITY FUEL COMPANY.

Opinion delivered March 12, 1923.

1. CARRIERS—LIABILITY FOR FREIGHT CHARGES.—Where materials were shipped by the sellers consigned to a government quartermaster under a contract between the sellers and the buyer whereby deliveries were to be made f. o. b. at point of shipment and consigned to the quartermaster, to whom the buyer had resold, and from whom the carrier failed to collect the charges, the buyer was not liable, either upon the theory that sellers were acting as his agent in making delivery or upon the theory that the buyer was the consignee.
2. CARRIERS—LIABILITY OF CONSIGNEE FOR FREIGHT CHARGES.—Where goods are delivered by the carrier to the consignee upon condition that the latter will pay the freight charges, the law implies a promise upon his part from his acceptance of the goods.

3. CARRIERS.—DIVERSION OF CONSIGNMENT—LIABILITY FOR FREIGHT CHARGES.—Where carloads of material were resold by the original consignee to a government quartermaster, and, with the carrier's consent, the cars were diverted to a subsequent buyer at another destination, who failed to pay the freight charges, the original consignee was not liable for the charges, the consignment being a single one from point of origin to the last named destination, the charges for which could not be split.

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

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

The consignor is liable for the freight charges; and this is true notwithstanding the provision in the shipping contract that "the owner or consignee shall pay the freight." 10 Corpus Juris, 445; 21 N. J. L. 292; 47 Am. Dec. 162. The owner of goods for whose benefit and under whose direction they are shipped is liable for the freight. 6 Cyc. 500; 97 Ark. 353; 10 Corpus Juris 447. See also 73 Pa. Superior Ct. 588; 93 S. W. 1080; 161 S. W. 954; 105 S. E. 623.

McMillen & Scott, for appellee.

The facts are on all-fours with the facts in *Railroad Company* v. *Freed,* 38 Ark. 614. Under the ruling in that case the camp quartermaster was the owner of the goods at all times they were in possession of the appellant, which ownership the appellant recognized by delivering the goods to him. On delivery to the carrier, title passes to the consignee. 112 Ark. 110; 106 Ark. 478. See also 255 Fed. 949; 166 S. W. 40; 10 C. J. 447; 2 Hutchinson on Carriers, 3d ed., § 808.

McCULLOCH, C. J. The Director General of Railroads instituted against City Fuel Company, in the circuit court of Pulaski County, two suits, which were consolidated and tried together, to recover freight charges on twenty-one carloads of material shipped during the year 1918 from various points in and outside of this State to Camp Pike. The material was purchased by the fuel company from vendors at the several points of shipment, the terms of the purchases being f. o. b. at those

points, and the fuel company resold the same to the quartermaster at Camp Pike. All of the carloads, save three, were shipped by the original vendors consigned to the quartermaster, to whom delivery was made by the carrier without collecting the freight charges. The bill of lading in each instance named the original vendor as consignor and the quartermaster as consignee. The three cars mentioned were consigned by the original vendors to the fuel company at Little Rock; the latter resold them while in transit, and the consignments were diverted to the quartermaster at Camp Pike.

The trial of the consolidated cases in the circuit court resulted in judgments against the fuel company, but the court granted new trials, and this is an appeal from the order, a stipulation being filed, in accordance with the statute, that "if the order be affirmed, judgment absolute shall be rendered against the appellant." Crawford & Moses' Digest, § 2129.

The contention of the plaintiff is that "although the City Fuel Company was not named on the billing, either as consignor or consignee, it had sold the goods to the consignee named, and, being the owner of the goods, had caused them to be transported to Camp Pike, consigned to the quartermaster * * * for the purpose of making delivery of its goods to the consignee, it became liable for the transportation charges."

The law on this subject, which is, in a large measure, controlling in the present case, was stated in *St. Louis S. W. Ry. Co.* v. *Gramling*, 97 Ark. 353, as follows:

"The owner of goods under whose direction they are shipped is liable for the freight. The consignee who actually receives the goods becomes responsible for the carriage charges on the ground that the goods are delivered to him upon the condition that he will pay such charges; and, from his acceptance of the goods, the law implies a promise upon his part to pay such charges. But where the consignee is only the agent of the owner, and this fact is known to the carrier, such

contract to pay the freight by the consignee will not be implied. * * * The carrier has the right to look to the consignor or owner of the goods for the payment of the freight, and he may waive his lien upon the goods by delivering them to the consignee and still hold the consignor liable upon the contract of shipment."

In this statement of the law the court manifestly used the words "consignor or owner" interchangeably as meaning the same, unless the consignor is a different person from the owner and made the contract of shipment as agent for the owner, in which case the owner would be liable as an undisclosed principal.

The determination of this case turns, then, on the question whether, under the facts, the original vendors, as the consignors under the recitals of the bills of lading, acted for themselves or as agent of the fuel company. Under the contracts between the vendors and the fuel company the deliveries were to be made f. o. b. at point of shipment, consigned to the quartermaster at Camp Pike. The consignment was a part of the duty of the vendors in making delivery, and they were acting for themselves, not as agents for the fuel company. This is true, notwithstanding the fact that, under the contract of sale, the freight charges were to be paid by the purchaser at destination. The fuel company was not the undisclosed consignor, for it did not make the consignment, either in its own name or through an agent. Nor was the fuel company the consignee, either in name or undisclosed. There is evidence to show that the quartermaster was to receive the goods and pay the freight, not as agent for the fuel company, but on his own behalf as purchaser and consignee.

All that has been said thus far relates to the charges on the carloads other than the three which were consigned to the fuel company at Little Rock and resold and diverted in transit. The question of liability or nonliability for the charges on those three carloads rests on other grounds. It falls squarely within the principles announced in *St. Louis S. W. Ry. Co.* v. *Gramling, supra.*

The fuel company was originally the consignee, and by acceptance of the goods at destination would, by implied contract, have become liable for the freight charges. But there was, with consent of the carrier, a diversion to another consignee at another destination, and the consignment thereby became, in effect, one from the original point of origin to the last-named destination. It was a single consignment, and liability for the entire charges could not be split. The fuel company, or the last named consignee, is liable for all or none. The fuel company was consignee only during a part of the period of transit, ceasing to be such before the transportation service was complete. This does not make the fuel company liable for the charges for service.

The decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Wallingford* v. *Bush,* 255 Fed. 949, is directly in point and supports our conclusion in the instant case. The only difference between the two cases is that the consignment in the Wallingford case was under contract of sale to shipper's own order with bill of lading attached to draft, and the purchaser paid the draft and received the bill of lading during transit and then resold the goods and assigned the bills of lading to his purchaser. The court decided that the first purchasers did not, by becoming the owners during a brief period during transit, render themselves liable for the freight charges. There is no difference in principle between the question of liability in that case and in the present case. Our conclusion also finds direct support in the decision of a Texas Court of Appeals in the case of *St. Louis S. W. Ry. Co.* v. *Browne Grain Co.,* 166 S. W. 40.

The question of liability for freight charges, as between the quartermaster and the fuel company under this contract of sale, is not involved further than is necessary to determine whether or not the former received the consignment as agent of the latter, and, as before

stated, there was sufficient evidence to show that there was no agency.

The judgment is therefore affirmed, and judgment absolute will be rendered here against the plaintiff's right to recover.

SMITH, J., dissents.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. DAWSON.

Opinion delivered March 12, 1923.

1. CARRIERS—DELAY IN SHIPMENT OF LIVESTOCK—EVIDENCE.—Evidence *held* sufficient to establish that a shipper made demand for diversion of a shipment of cattle, delayed by reason of a strike, to another route, and that, if the request had been granted, there would have been no further delay and no injury would have resulted.
2. CARRIERS—DUTY TO FIND OPEN ROUTE FOR DELAYED SHIPMENT.—It is the duty of a carrier to use reasonable diligence to prevent injury to delayed shipments by finding an open route, and it may not unreasonably delay doing so, though its contract exempts it from liability.
3. CARRIERS—CONNECTING ROADS—LIABILITY OF INITIAL CARRIER.—Under the Carmack Amendment (U. S. Comp. Stat. §§ 8604a-8604aa) an initial carrier is liable for failure of the connecting carrier to use reasonable diligence in forwarding a shipment of livestock over another route if its own is not open.

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

Thos. S. Buzbee, H. T. Harrison and *C. L. Johnson,* for appellant.

On the question of the recovery of damages on account of delay, appellant pleads in bar to the action section 7 of the live stock contract, viz: "That the first party shall be exempt from all liability for loss or dam- this contract, caused by mobs, strikes or violence from any source." While the violent acts of a mob may not exonerate the carrier where the goods are destroyed,

60 Ark. 381, still such acts may exonerate the carrier from liability for loss resulting from delay, even though the mob is composed of employees of the company who have engaged in a strike, if the acts of the strikers are of such character as to prevent the operation of the road, and if the company has exercised care and diligence to move its trains. 13 S. W. 191; 7 N. E. 828; 235 S. W. 913; 4 R. C. L. 744, par. 212.

J. B. Reed, Thos. C. Trimble and *Thos. C. Trimble, Jr.*, for appellee.

1. The burden was on the appellant to show that the loss arose from an act of God, or of the public enemy, or public authority, etc. 174 S. W. 1187; 177 S. W. 401. There is no evidence in the record to show that it was impossible for appellant to comply with the terms of its contract.

2. Demand was made to divert the shipment to a line that could have delivered it promptly. Appellant did not exercise due diligence.

McCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages alleged to have accrued on account of delay in the transportation of eleven carloads of cattle which appellant undertook, as the initial carrier, to transport from Hazen, Carlisle and Lonoke stations to Fort Worth, Texas. Damages were alleged arising from the killing and crippling of a certain number of the cattle of the value of $434.07, and damages in the sum of $650 for overcharge for feed during the period of unnecessary delay, and the sum of $1,900 for shrinkage in weight and depreciation in the grade of the cattle, and the further sum of $900 on account of loss by reason of the decline in the market during the period of the delay.

Liability for the sum claimed on account of killing and crippling the cattle is conceded, but liability for the other items is disputed.

On the trial of the cause the court excluded from the jury the question of liability on account of decline in the

market, but submitted the issues to the jury as to liability for damages from other causes mentioned. There was a verdict in favor of appellee in the sum of $2,339.50, and an appeal has been duly prosecuted from the judgment.

Appellant accepted the carloads of cattle at its stations at Hazen, Carlisle and Lonoke, and gave through bills of lading over its own line to North Little Rock, thence over the line of the Missouri Pacific Railroad Company to Texarkana, and thence over the line of the Texas & Pacific Railway Company to Fort Worth. The bill of lading contained a stipulation that the carrier should "be exempt from all liability for loss or damage to person or persons or live stock covered by this contract caused by mobs, strikes, or violence from any source."

The sole defense made below was that the delay in the shipments was caused by a switchmen's strike on the Texas & Pacific Railway Company, which caused an embargo to be laid on all shipments over that road for the period during which the delay in these shipments occurred.

The cattle were received and the movement thereof started on the morning of April 10, 1920, and reached North Little Rock about 7 o'clock on the evening of that day, and were delivered to the Missouri Pacific Railroad Company. Shortly after the cattle were received at North Little Rock, the Missouri Pacific received notice of an embargo being placed by the Texas & Pacific Railway Company on account of a switchmen's strike, and the cattle were unloaded and placed in stock pens in North Little Rock, and remained there until the evening of April 16, when the embargo was raised and the cattle were reloaded and went forward, reaching destination on April 19, 1920.

It is not contended on behalf of appellee that the exemption clause in the bill of lading on account of delay caused by strikes is invalid, but liability is sought to be

imposed on the carrier on the ground that the shipment could have been diverted at Little Rock to the St. Louis Southwestern Railway Company (Cotton Belt Route) and forwarded through to destination without delay, it being claimed that there was no strike on that line.

Appellee testified that on April 12, 1920, he received a telegram from his broker at Fort Worth informing him that the Cotton Belt Route was open, and that he at once presented this telegram to the proper agents of the Missouri Pacific Railroad Company at North Little Rock and requested diversion of the shipment over the Cotton Belt. Appellee testified that he repeatedly made demand on these agents that such diversion be made over that route. There was other proof adduced tending to show that there was no strike on the Cotton Belt Route and that the shipment could have been forwarded without delay if there had been a diversion in accordance the request of appellee.

We think there was proof sufficient to show that appellee made demand for a diversion of the shipment on April 12, and that if his request had been granted the shipment would have gone through without any further delay and the injury would thereby have been averted.

The case was submitted to the jury upon the issue whether or not there could have been a diversion of the shipment over another route so as to avoid the strike and the consequent delay therefrom.

Without questioning the validity of the contract concerning the exemption from liability on account of the strike, yet it was the duty of the carrier to exercise reasonable diligence to prevent injury by finding another route over which safe and undelayed transportation might be had. The carrier had no right, even though exempt from liability, to withhold the shipment indefinitely when other means of transportation of the same character could be found.

The negligence in failing to divert the shipment was that of the Missouri Pacific Railroad Company and con-

necting carrier, but appellant is responsible, under the Federal statute, for the negligence of the connecting carrier. 34 stat. 584, chap. 3591.

The Carmack Amendment, *supra,* declares the liability of the initial carrier for "any loss, damage or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass," and we perceive no reason why there should not be liability under this statute on the part of the initial carrier for negligence of the connecting carrier in failing to adopt available means for forwarding the shipment over another route.

It is contended further that the proof fails to establish injury and the extent thereof on account of the delay, but we are of the opinion that there is enough evidence to warrant the jury in finding that the delay caused damages by reason of shrinkage in weight of the cattle and the additional cost of feed during the period of delay up to the amount of the award of the jury.

Finding no error in the record, the judgment is affirmed.

FIRST NATIONAL BANK v. DALSHEIMER.

Opinion delivered March 12, 1923.

1. JUDGMENT—RECITALS OF NOTICE—PRESUMPTION.—On a direct attack recitals in a judgment that defendants, though served with summons as provided by law, failed to appear, etc., were *prima facie* evidence of the facts stated, and must be taken as true unless there is testimony to contradict them or tending to show to the contrary, under Crawford & Moses' Dig., § 6290, subd. 4.
2. JUDGMENT—PROCEEDING TO ASIDE DEFAULT.—In a proceeding to set aside a judgment by default for want of service of process or other notice, it is not sufficient to show that there is no record evidence of service of process, but it must also be shown that the judgment defendants had no actual notice of the proceedings against them.

3. PLEADINGS—EVIDENCE.—Where a verified complaint is denied, its allegations are not testimony, and cannot be accepted as facts proved.

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

Bogle & Sharp, for appellant.

1. There is no positive evidence of want of service. There is at best only circumstantial evidence from which the court is asked to infer that no service was ever had. In the absence of direct proof to the contrary, the natural inference would be that appellees were served. There is no justification appearing in the record for vacating a judgment. 49 Ark. 397; 136 Ark. 546.

2. The allegations of the complaint were denied by the answer, and appellees introduced no evidence to support their allegation of meritorious defense. The court was not justified therefore in finding that appellees had a meritorious defense. 123 Ark. 447; 104 Ark. 449.

John I. Moore and *Daggett & Daggett,* for appellees.

A recital in a judgment that notice has been given is merely *prima facie* evidence of the fact stated. This is nothing more than a statutory presumption which may be overcome by proof of contrary facts or circumstances. Crawford & Moses' Digest, § 6329; 63 Ark. 513; 72 Ark. 265. In this case the fact of want of service is sufficiently shown in the proof.

WOOD, J. The appellant obtained judgment in the circuit court of Lee County against the appellees, which recites as follows: "Now on this the 11th day of April, 1921, the same being a regular day of the April, 1921, term of said court, this cause coming on to be heard, the plaintiff appeared by its attorneys, Bogle & Sharp, and the defendants, although having been duly served with summons, in manner and form as provided by law, failed to appear, plead, answer or demur, but wholly made default, whereupon the cause is submitted to the court upon

the complaint and the original note sued upon, and, after being well and sufficiently advised in the premises, doth find that plaintiff is entitled to recover on said notes the sum of $2,498.23 from said defendants." Then follows the formal entry of the judgment in favor of the appellant against the appellees.

The present action was instituted by the appellees against the appellant to set aside the above judgment. The appellees in their complaint set out the judgment, and alleged that the same was obtained against them by the appellant through fraud, in that appellant represented to the court in which the judgment was rendered "that due and legal summons had been served, giving these plaintiffs, defendants in said suit, notice of the pendency of such action, when, as a matter of fact, neither of said defendants in said action, plaintiffs here, were ever at any time served with proper summons or any notice whatever giving them notice of the pendency of such suit against them on the part of the First National Bank of Manchester, Iowa, defendant herein, but these plaintiffs now further aver and allege that at no time was the notice of the pendency of such suit given them in the manner provided by law, or in any other manner." Then follow allegations which it is unnecessary to set forth at length, but which set out that the defendants had a meritorious defense to the action in which the judgment was rendered against them.

The appellant, in its answer, admitted that it obtained the judgment for the sum alleged. It denied that plaintiffs had no notice of the pendency of the action, and that no legal service was had on them, and denied the other allegations of the complaint, and set up that it was an innocent purchaser of the notes upon which the judgment in its favor was rendered. The appellees introduced the original docket entries, which show the following: "Complaint filed and process issued 16th day of November, 1920, service had.....day of..... ....., 19.....". The sheriff of Lee County, Arthur

Cotter, at the time the original action of the appellant against the appellees was instituted, and whose duty it was to serve the summons, kept a record in his office in which he entered the process for service received by him from the clerk of the circuit court for the period beginning Nov. 15, 1920, and ending Jan. 2, 1921. This record did not show any receipt of summons in the original action by the appellant against the appellees in which the judgment here sought to be set aside was rendered.

The appellees also introduced one Galloway, who testified that he was the then sheriff of Lee County. He assumed the duties of the office January 17, 1921. He did not, until the April term, 1921, serve a summons on the appellees in the original action by the appellant against them. He did not find the original summons in that case in his office, but a copy thereof, and there was no return service on the copy. He did not know whether the sheriff who preceded him served the summons or not.

The appellant introduced one of its attorneys in the original action, who testified that on the day the judgment was taken the court was in session, and he asked the court for judgment by default against the defendants in the original action, and the court rendered a judgment in accordance with his request, and he prepared the precedent of the judgment, as disclosed by the record.

Upon the above facts the court found that the defendants in the original action were not served with process and did not have notice of the pendency of that action. The court further found that the plaintiffs (appellees in the present action) had a meritorious defense. Thereupon the court entered a judgment setting aside the judgment of April 11, 1921, in favor of the appellant against the appellees rendered in the original action. The appellant duly prosecutes this appeal.

This is a direct attack by the appellees upon the judgment of the circuit court rendered in favor of the

appellant against the appellees on April 11, 1921, under § 6290 of Crawford & Moses' Digest, subdiv. 4th. But the recitals in the judgment that the defendants, "although having been duly served with summons in manner and form as provided by law, failed to appear," etc., were *prima facie* evidence of the facts stated and must be taken as true, unless there is testimony to contradict them, or tending to show to the contrary. Sec. 6239, C. & M. Digest; *White* v. *Smith,* 63 Ark. 513; *Love* v. *Coffman,* 72 Ark. 265.

The original docket entry in the case made by the clerk shows that the complaint was filed and that process was issued on the 16th day of November, 1920. Sec. 1280 of Crawford & Moses' Digest provides that "the entry on the law docket shall also show whether or not the summons has been fully served in due time for trial. and whether or not the issue has been formed." There is no entry by the clerk showing that the summons had been served in time for trial. The absence of such entry by the clerk on the law docket which he is required to keep, to be sure, is evidence to be considered in determining the issue as to whether or not the summons was served on the appellees in the original action in which judgment was rendered against them. Likewise the fact that no original summons was found with the return of the sheriff showing service, nor any return on the copies that were in evidence, are to be considered in determining the issue as to whether or not the defendants in the original action were served with summons. Conceding, without deciding, that these facts, with the presumptions attending them that the officers had performed their statutory duty, might be sufficient, if there were nothing else in the record to sustain the finding of the trial court that the appellees were not served with process in the original suit, nevertheless appellees have failed to sustain their cause of action because they have utterly failed to show that they did not know of the proceedings in the original action

in which judgment was rendered against them in time to make a defense. This was essential. In *State* v. *Hill,* 50 Ark. 458, Judge COCKRILL, speaking for the court, said: "One who is aggrieved by a judgment rendered in his absence must show not only that he was not summoned, but also that he did not know of the proceeding in time to make a defense." This language was also quoted by us in the case of *Moore* v. *Price,* 101 Ark. 142-145.

The appellees alleged in their complaint that "neither of said defendants in said action were ever at any time served with proper summons, or any notice whatever giving them notice of the pendency of such suit against them," and further, "that at no time was notice of the pendency of such suit given them in the manner provided by law, or in any other manner." The appellant specifically "denies that the plaintiff had no notice of the pendency of the action and that no legal service was had on them." It will be observed that the appellees did not allege in their complaint that they did not know of the pendency of the action in which judgment was rendered against them in time to make a defense thereto, and there is no testimony in the record to show that the appellees did not know of the pendency of the action and the proceedings that were had therein in time to make defense. It is a very significant fact in this record that none of the appellees testified that they did not know that the action was pending and of the proceedings had therein. Their verified complaint was denied, and therefore its allegations are not testimony and cannot be accepted as facts proved, even if it had been therein stated that the appellees did not know of the pendency of the action.

The findings and judgment of the circuit court are therefore erroneous. The judgment is reversed, and the cause is remanded for a new trial.

BROWN & HACKNEY, INC., v. STEPHENSON.

Opinion delivered March 12, 1923.

1. CERTIORARI—REMEDY BY APPEAL—WANT OF JURISDICTION.—Certiorari cannot be used in any case where there has been a right of appeal unless the opportunity of appealing has been lost without fault of the petitioner, or unless the court in the proceedings sought to be reviewed acted without, or in excess of, jurisdiction.
2. CERTIORARI—SPECIAL APPEARANCE—REMEDY BY APPEAL.—Where defendant entered a special appearance and moved to quash the service of summons on it, the trial court had jurisdiction to determine that issue, and appeal afforded a complete remedy if the court erred.

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

Hughes & Hughes, for appellant.

1. Certiorari was the proper remedy in this case. The rule that where an appeal is or has been available to an aggrieved party, the right thereto not having been unavoidably lost without fault on his part, he cannot have the proceeding reviewed on certiorari, does not apply to instances where the trial court has acted without, or in excess of, its jurisdiction. 68 Ark. 205; 103 Ark. 571; 116 Ark. 310; 139 Ark. 400; 114 Ark. 304; 94 Ark. 54.

2. The trial court was without jurisdiction. The cause of action, if any, grew out of a contract which was both made and performed in the State of Louisiana. A foreign corporation doing business in this State, after compliance with the statutes prescribing the terms of its admission, is subject to be sued in the courts of the State only upon causes of action arising within this State. Acts of 1917, p. 744; 56 Ark. 539; 84 Tenn. (16 Lea) 275; 46 Vt. 697, 706; 76 Ala. 388; 83 Ala. 498; 122 Ala. 149; 145 Ala. 317; 204 U. S. 8; 236 U. S. 115; 226 Fed. 893; 42 Sup. Ct. Rep. 84; *Id.* 210.

Streett, Burnside & Streett, for appellee.

For the constitutional provisions and the statutes applicable to the issues involved, see art. 12, § 11, Const.;

Crawford & Moses' Digest, §§ 1826, 1827, 1829. It affirmatively appears that appellant has qualified itself, under our statutes, to do business in this State. It thereby voluntarily submitted itself to the jurisdiction of the State courts. 222 Fed. 148; 18 How. 404; 70 L. R. A. 513, note 1; 106 U. S. 350 (Law ed.); 147 U. S. 591; 37 L. ed. 292; L. R. A. 1916-F., 407; 243 U. S. 93; 61 L. ed. 610; 163 Ill. App. 621; 132 Mass. 432; 143 S. W. 483; 31 So. 172.

WOOD, J. The petitioner, Brown & Hackney, Inc., was sued by the respondent, John C. Stephenson, in the circuit court of Chicot County, upon the following complaint:

"Comes the plaintiff, John C. Stephenson, and for cause of action against the defendant, Brown & Hackney, Incorporated, states: "That the defendant, Brown & Hackney, Incorporated, is and was on the 7th day of March, 1921, a foreign corporation and incorporated under the laws of the State of Tennessee and authorized to do business in the State of Arkansas, and is and was on said date engaged in the business of buying logs and manufacturing same into lumber, and has a designated agent in said State upon whom service of process may be had. That on said 7th day of March, 1921, at Kilbourne Louisiana, the defendant purchased of and from the plaintiff two hundred and sixty-six logs, amounting to 61,525 feet, at an agreed price of $1,540.62; that said logs were bought by defendant f. o. b. cars Kilbourne, in said State, and, pursuant to said contract, the plaintiff immediately delivered said logs to the defendant at said place; that said logs were accepted by said defendant; that same were loaded on cars and consigned to defendant at Little Rock, Arkansas, where they were refused. That defendant refused and still refuses to pay plaintiff therefor. Wherefore, plaintiff prays judgment against the defendant, Brown & Hackney, Incorporated, for the sum of $1,540.62, interest, costs, and all other proper relief."

Summons was issued in said cause for the defendant therein, the petitioner here, and on the 16th day of January, 1922, was served on R. B. Hackney, the agent for service designated by said Brown & Hackney, Inc., in the State of Arkansas.

At the March, 1922, term of said court, the defendant appeared especially for the purpose of questioning the jurisdiction of the court, and for that purpose filed its motion to quash the service, as follows:

"Comes the defendant, Brown & Hackney, Incorporated, and, not entering its appearance, but for the purpose of quashing the service in this case alone, says: That plaintiff is a citizen and resident of the State of Louisiana; that defendant is a corporation organized under the laws of the State of Tennessee, and domiciled in Memphis, Tennessee; that the plaintiff claims that the alleged contract, upon which this action was founded, was entered into in the State of Louisiana; that the defendant is not incorporated in the State of Arkansas, but is doing business in the State of Arkansas as a foreign corporation only; that the defendant is not subject to answer to such an action as this in the courts of the State of Arkansas; that to require it to answer, to submit to a trial and a personal judgment in such an action as this in this court, will deny to the defendant the equal protection of the laws and due process of law afforded to the defendant by the Constitution of the United States. Wherefore, defendant asks that this cause of action be dismissed as to it, and that it be no longer threatened or imperiled with such unlawful process."

On the hearing of the motion the same was overruled, and the defendant, declining to further plead, judgment was on March 15, 1922, rendered by said court in favor of the plaintiff in said cause against the said defendant for the sum of sixteen hundred thirty-four and 85/100 ($1,634.85) dollars."

On July 18, 1922, Brown & Hackney, Incorporated, filed in this court the petition now before the court for

a writ of certiorari to bring before this court the record of the proceedings had in the cause between the parties in the circuit court of Chicot County for review and for the purpose of determining whether the judgment of that court was rendered without jurisdiction.

The petition sets out the facts disclosed by the foregoing complaint and motion to quash, and alleges that the circuit court of Chicot County was without jurisdiction of the person of the defendant therein or of the cause of action upon which the judgment was there rendered; that the enforcement of said judgment would deprive this petitioner of its property without due process of law, in contravention of the 14th Amendment to the Federal Constitution.

It further avers that the petitioner here is without remedy to obtain a review of the proceedings of said circuit court other than by writ of certiorari.

We are met at the threshold with the issue as to whether or not certiorari will lie to correct the ruling of the circuit court in refusing to quash the service had in that case upon Brown & Hackney, Incorporated (hereafter called petitioner). The petitioner contends that the circuit court was without jurisdiction of the person of the petitioner, and also had no jurisdiction of the cause of action upon which the judgment of the circuit court was rendered.

An examination of the allegations of the complaint filed by Stephenson (hereafter called respondent) against the petitioner in the circuit court will discover that the complaint states a cause of action which is transitory in character. The circuit court of Chicot County therefore had jurisdiction of the subject-matter of the action, and the only issue here is whether or not it had jurisdiction of the petitioner. The circuit court did not exceed its jurisdiction in determining the issue as to whether or not service of summons could be had upon the petitioner in Arkansas upon the cause of action stated in the complaint. It was peculiarly within the jurisdic-

tion of the circuit court to determine whether the service could be had upon the petition in this State, and the decision on that issue raised by the motion to quash the service, if erroneous, could and should have been corrected by appeal. The doctrine is well established by numerous decisions of this court "that a writ of certiorari cannot be used in any case where there has been a right of appeal, unless the opportunity of appealing has been lost without the fault of the petitioner; or unless the court, in the proceedings which the petitioner seeks to have reviewed and quashed by certiorari, has acted without, or in excess of, its jurisdiction." *Lamb & Rhodes* v. *Howton,* 131 Ark. 211; *Hilger* v. *J. R. Watkins Medical Co.,* 139 Ark. 400, and other cases cited in Cumulative Sup. Crawford's Ark. Dig., title Certiorari, §§ 4, 12; *Stroud* v. *Conine,* 114 Ark. 304-09; *Caroline* v. *Caroline,* 47 Ark. 511; *Gregg* v. *Hatcher,* 94 Ark. 54; *Griffin* v. *Boswell,* 124 Ark. 234; and numerous cases cited in 1 Crawford's Digest, p. 908 (Certiorari).

After the petitioner entered its special appearance and moved to quash service, it was certainly within the jurisdiction of the trial court to determine whether the petitioner had been duly served with process, and, if the court erroneously decided that issue, the petitioner had a complete and adequate remedy to correct the error by appeal. But, while the petitioner concedes that it would have had a remedy by appeal, it nevertheless contends that such remedy is not as efficient as the remedy by certiorari, and hence petitioner is entitled to the latter remedy, the trial court having exceeded its jurisdiction. Petitioner unquestionably would be correct in this contention if, as petitioner assumes, the trial court had exceeded its jurisdiction in deciding that petitioner had been served with summons. See *Stroud* v. *Conine,* and *Gregg* v. *Hatcher, supra.* But the issue here is not whether certiorari would afford a more or less effectual remedy than appeal. The question is whether the trial court had jurisdiction to decide that petitioner had been

served with summons in the action against it by respondent. Having concluded that the circuit court had jurisdiction to determine that issue, we do not reach the interesting question, so ably argued in briefs of counsel, of whether an action can be maintained in this State by a nonresident against a foreign corporation doing business in this State, upon a cause of action of a transitory nature arising in a foreign State. Petitioner rested on its motion to quash the service, and allowed judgment final to be entered against it. It follows from what we have said that such judgment must be affirmed. It is so ordered.

BOLTON v. MISSOURI PACIFIC RAILROAD COMPANY.

Opinion delivered March 12, 1923.

1. RAILROADS—FEDERAL CONTROL.—Under the Federal Control Act (U. S. Comp. Stat. Ann. Supp. 1919, §§ 3115¾a-3115¾p.) suits might be brought and prosecuted against a railroad company for a cause of action which had become vested before the Director General of Railroads took charge.
2. RAILROADS—LIABILITY OF PURCHASER OF RAILROAD.—One who has not recovered judgment against a railroad company or the receiver thereof operating the railroad at the time the injury complained of was received, cannot recover from a railroad which subsequently obtained possession by purchase under decree of a chancery court.

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

STATEMENT OF FACTS.

On the 20th of June, 1919, Clifton Bolton, a minor, by his next friend, sued Walker D. Hines, Director General of Railroads, for damages for personal injuries received by him on the 6th day of July, 1916.

His complaint alleges that he was injured while returning from work, by the negligence of one of the brakemen of the railroad company shoving him off of one of its trains while it was running at a high rate of speed.

This court held that the Federal Control Act gave the exclusive management of railroads to the Director General, but that it never contemplated that the government would be liable for causes of action against railroads which had become vested before the Director General took charge of them. Hence it held that the plaintiff could not maintain his action against the Director General for the negligence of the railroad company which occurred before the Director General took charge of the railroads under the act of Congress. *Bolton* v. *Hines,* 143 Ark. 601.

On May 17, 1920, the plaintiff sued the Missouri Pacific Railroad Company for damages for the same injury. The former suit against the Director General of Railroads was pleaded by the railroad company as a bar to the action. The plea was sustained, and upon appeal it was sought to affirm the judgment on the ground that on the date of the alleged injury the railroad was being operated by the St. Louis, Iron Mountain & Southern Railway Company, and that subsequently the railroad was sold under the decree of the Federal court, and the Missouri Pacific Railroad Company became the purchaser at the sale. It was insisted that this court would take judicial notice of these proceedings. This court held that it could not take notice of the records of other courts, and held further that an adjudication in favor of the Director General of Railroads was not an adjudication of the right of the plaintiff to sue the railroad itself for an injury which occurred before the government assumed control of the railroad. *Bolton* v. *Mo. Pac. Rd. Co.,* 148 Ark. 319.

Upon a remand of the case the Missouri Pacific Railroad Company filed a motion to require the plaintiff to make his complaint more definite and certain. He was asked to state in his complaint who was operating the railroad at the time his alleged injury was received. The plaintiff filed an amended complaint in which he alleged that the St. Louis, Iron Mountain &

Southern Railway Company was operating the railroad at the time his injury was received, and that later B. F. Bush, receiver, operated the railroad at the time it was purchased by the Missouri Pacific Railroad Company. The defendant, Missouri Pacific Railroad Company, demurred to the complaint on the ground that the plaintiff could not maintain a cause of action against it for injuries received while the railroad was being operated by the St. Louis, Iron Mountain & Southern Railway Company, or by B. F. Bush as receiver of said company.

The court sustained a demurrer to the amended complaint, and the plaintiff elected to stand upon his amended complaint.

From a judgment in favor of the defendant the plaintiff has duly prosecuted an appeal to this court.

Oscar H. Winn, for appellant.

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

No cause of action against the appellant was stated. The case should be governed by this court's decision in *Williams* v. *Railroad Company,* 134 Ark. 366. See also 136 Ark. 193; 18 Am. St. Rep. 460; 69 *Id.* 206; 22 *Id.* 56; 74 Ark. 368; 1 Elliott on Railroads, § 526; 33 Cyc. 338.

HART, J., (after stating the facts). Under the Federal Control Act the rights and remedies against common carriers enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies interfered with Federal operation, were preserved to the general public. Under the act suits might be brought and prosecuted against the railroad company for a cause of action which had become vested before the Director of Railroads took charge of the common carriers under the act of Congress. *Mo. Pac. R. Co.* v. *Ault,* 256 U. S. 554.

According to the allegations of the complaint, the Missouri Pacific Railroad Company purchased the railroad which was the alleged cause of the injury to the plaintiff, some time after the injury occurred. Hence

the plaintiff's cause of action had become vested before the purchase was made of the railroad by the Missouri Pacific Railroad Company.

The complaint does not contain any allegation that the plaintiff had recovered judgment against the company operating the road at the time he received his injury, and that on this account a judgment against the operating railroad company would bind its property in the hands of another company purchasing it. In the absence of an allegation in the complaint that the plaintiff had recovered judgment against the company, or the receiver thereof operating the railroad, at the time the plaintiff received his injury, the Missouri Pacific Railroad Company, which subsequently obtained possession of the road by purchase under a decree of a chancery court, is not liable, and no lien can be fixed against its property. *Williams* v. *Mo. Pac. Rd. Co.,* 134 Ark. 366, and *C. R. I. & P. Ry. Co.* v. *McBride,* 136 Ark. 193.

The complaint does not allege that any suit was filed against the St. Louis, Iron Mountain & Southern Railway Company or against the receiver of such railway company and judgment obtained thereunder. The complaint does show that the injury was received by the plaintiff while the St. Louis, Iron Mountain & Southern Railroad Company or its receiver was operating the road.

Therefore the court properly sustained a demurrer to the amended complaint, and the judgment must be affirmed.

BANK OF GILLETT *v.* BOTTS.

Opinion delivered March 12, 1923.

1. LANDLORD AND TENANT—LIEN FOR SUPPLIES.—Under Crawford & Moses' Dig., §§ 6889, 6890, a landlord who signed a note for his tenant to procure bags to preserve the rice crop, being primarily liable on such note, though signing as surety, upon paying such note was entitled to a lien for supplies furnished.

2. LANDLORD AND TENANT—CONVERSION OF CROP.—Where an action was begun in time to enforce a landlord's lien, and a receiver was appointed to take charge of the crop, and thereafter a mortgagee of the crop seized and sold it, more than six months thereafter, and made a party to the original action, as against such mortgagee's claim that the lien of the landlord was lost by not bringing suit within six months after the rent was due, *held* that the mortgagee's act in selling the crop was a conversion, and the six-months' statute was inapplicable.

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

STATEMENT OF FACTS.

On the 20th of December, 1920, G. W. Botts brought this suit in equity against L. K. Menard to enjoin him from selling rice grown by said Menard and his codefendants on the land of the plaintiff, without paying the rent. The codefendants of Menard had previously filed suits in the justice court claiming a laborers' lien on said rice.

A temporary injunction was granted as prayed for in the complaint, and Menard was appointed receiver to take charge of the rice, and was directed to allow it to remain in the Gillett warehouse until the further orders of the court. Subsequently the Bank of Gillett took charge of said rice, without any order of the court, and sold it at private sale for the purpose of satisfying a mortgage which it held on the rice crop grown by Menard.

L. K. Menard was a witness for the plaintiff. According to his testimony, he grew a crop of rice on the land of the plaintiff in the Southern District of Arkansas County, Ark., during the year 1920. The landlord was to receive one-third of the rice for his rent. After the rice was threshed it was stored in the Gillett Warehouse Company. The Bank of Gillett had a mortgage on Menard's share of the crop. The plaintiff did not waive his landlord's lien on the crop. The witness never gave the bank any authority to take charge of the rice and sell it. The plaintiff never gave Menard permission to

authorize the bank to take charge of the rice and sell it. The rice had not been divided at the time the bank took charge of it and sold it.

G. W. Botts, the plaintiff, was a witness for himself. According to his testimony, he was to receive one-third of the rice grown by L. K. Menard as rent. The rice was grown on the farm of the plaintiff by Menard and delivered by the latter to the Gillett Warehouse Company to be kept in storage. The plaintiff never gave the Bank of Gillett authority to take charge of the rice and sell it, nor did he authorize Menard to do so. The plaintiff thought that the rice was being held in the warehouse by Menard as receiver in the suit filed by the plaintiff against Menard and others in the chancery court. Soon after the plaintiff found that the bank had disposed of the rice crop, he made it a party defendant to the present action.

The plaintiff signed the note of Menard to the Home Bank of DeWitt for $250. The signature is "G. W. Botts, surety." But the plaintiff signed this note to procure some sacks in which to put the rice after it was thrashed. It was necessary to put the rice in sacks to preserve it. The plaintiff in reality furnished these sacks to Menard as supplies to be used in gathering and preserving the rice crop. The plaintiff paid the note on June 1, 1921. The plaintiff's testimony in this respect is corroborated by that of Menard. Menard did not pay the plaintiff any of the rent or any part of the amount of the note given to procure money with which to purchase the rice bags.

According to the testimony of the Bank of Gillett, it had a valid mortgage on Menard's share of the rice, and no part of the mortgage indebtedness had been paid. Menard gave the bank authority to take the rice, sell it at private sale and apply the proceeds towards the satisfaction of the mortgage. The sale of the rice was made by the bank more than six months after the 20th day of December, 1920.

The chancellor found the issues in favor of the plaintiff, and a decree was accordingly entered in his favor for the amount of the rent and supplies due him.

T. J. Moher, for appellant.

1. Where the landlord furnishes necessary supplies to his tenant, or causes such supplies to be furnished the tenant, binding himself primarily therefor, he has his lien; but if he signs an obligation therefor only as surety, he has no lien. 83 Ark. 118; 80 Ark. 243.

2. Appellee is barred by the statute of limitations. C. & M. Digest, § 6889; 67 Ark. 455, 463.

Botts & O'Daniel, for appellee.

1. Appellee filed his suit to foreclose his landord's lien within six months after the crop was harvested. Moreover appellant, a wrongdoer, is in no attitude to invoke the statute of limitations pertaining to landlords' liens. It was not a purchaser. Appellee would have three years to bring suit against it.

2. There is no dispute that appellee signed the note, that the rice bags were necessary for harvesting the crop, and that appellee paid off the note in full. He has his lien as landlord, and prior to the lien of the mortgagee. 62 Ark. 435; 143 Ark. 320, 327; 96 Ark. 268, 271.

HART, J., (after stating the facts). Sec. 6889 of Crawford & Moses' Digest gives the landlord a lien upon the crop grown upon the demised premises in any year for rent. Sec. 6890 gives the landlord a lien for any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles advanced to the tenant with which to make and gather the crop. The section further provides that the lien shall have preference over any mortgage of the crop made by the tenant.

The bank insists, however, that it is only liable to the plaintiff for the amount of the rent due him, and is not liable for the note signed by the plaintiff, because the plaintiff signed the same as surety for the tenant. Hence they claim that the case falls within the doctrine

of *Kaufman* v. *Underwood,* 83 Ark. 118, where it was held that the landlord may not claim a lien as for supplies furnished to his tenant where the tenant purchased a horse for whose purchase price the landlord went security.

On the other hand, the plaintiff relies upon the case of *Walker* v. *Rose,* 153 Ark. 599. In that case it was held that where a landlord directed a merchant to furnish supplies to the tenant for which the landlord agreed to pay, and subsequently paid, the landlord, in effect, furnished the supplies to the tenant, and was entitled to a preference lien therefor. In that case, as here, a bank had a valid mortgage on the crop of the tenant, but knew that the tenant was raising the crop on the land of the plaintiff. The landlord had also become responsible to a mercantile company in the amount of certain advances made by it of money and supplies which were used by the tenant in the cultivation of his crops. The court held that the facts justified a finding that the money and supplies furnished through the mercantile company were in reality furnished by the appellee. Hence it was held that it was not a case of a landlord becoming a mere surety for his tenant, but that the facts warranted the conclusion that the landlord himself was primarily responsible to the mercantile company.

In the instant case, according to the testimony of the plaintiff, he in reality furnished the money to the tenant with which to buy the rice bags for the purpose of preserving the rice. It was absolutely necessary to put the rice in bags after it was thrashed in order to preserve it. Although the note shows that Botts, the plaintiff, signed it as surety, yet, under the attending circumstances, the chancellor was warranted in finding that Botts was primarily liable for the money, which was used in purchasing the rice bags to preserve the crop. The landlord paid the note at the bank, and the purchase of the rice bags inured to the benefit not only of the landlord but his tenant, and to the bank, which was the ten-

ant's mortgagee. The bank knew that the rice was grown on the land of the plaintiff, and therefore it is liable to plaintiff for its value to the extent of the landlord's lien for rent and the supplies furnished by him, which was established by the proof.

It is next insisted that the judgment should be reversed because the suit was not brought within six months after the rent was due and payable. The bank was not made a party to the suit until the 2nd day of September, 1921, and it is insisted that the rent was at least due at the end of the year 1920.

It will be remembered, however, that this suit was commenced by the landlord against the tenant and some laborers who were attempting to assert laborers' liens on the rice crop. The object of the suit was to establish the landlord's lien as superior to that of the laborers for the rent, and also the money advanced by him for supplies. Menard, the tenant, was appointed receiver by the chancery court to take charge of the rice and hold it in a designated warehouse until the further orders of the court.

It is true that the bank testified that it took the rice from the warehouse and sold it under authority given by the tenant. The court was warranted, however, in finding from the evidence of the plaintiff and the tenant that no authority was given to the bank to take charge of the rice and sell it under its mortgage. The action of the bank therefore amounted to a conversion of the rice which was in the hands of the court. Hence the limitation of six months provided by the statute for the continuance of a landlord's lien after the rent shall become due has no application.

It follows that the decree will be affirmed.

JONESBORO, LAKE CITY & EASTERN RAILROAD COMPANY v. MADDY.

Opinion delivered March 12, 1923.

1. CARRIERS—NOTICE OF CLAIM OF INJURY TO LIVESTOCK.—A provision in a contract of shipment of live stock that, as a condition precedent to a claim for loss or injury during transportation, notice thereof should be given by the shipper or agent in charge thereof before removal of the livestock has no application where a shipment of hogs was not in charge of the shipper or his agent, and it was not delivered to the consignees, and was never carried to the destination.
2. CARRIERS—NEGLIGENCE.—In general, a carrier is liable for the negligence of its servants during the course of their employment, and if they go on a strike, abandoning the performance of their duty and causing delay, the carrier is liable.
3. COMMERCE—INTERSTATE SHIPMENTS.—Interstate shipments are governed by the acts of Congress and the decisions of the United States Supreme Court construing same.
4. CARRIERS—LIABILITY FOR LOSSES.—At common law carriers were liable for any loss or damage which resulted from human agency, or from any cause not the act of God or the public enemy; but a carrier may by fair and reasonable agreement restrict its liability to losses which are the proximate result of strikes on its own road, or that of connecting carriers, where the loss is not occasioned by its negligence or where it could not by reasonable diligence have prevented the loss.
5. CARRIER—EXEMPTION AGAINST NEGLIGENCE.—A carrier cannot exempt itself from liability on account of its own negligence.
6. CARRIERS—EXEMPTION FROM LIABILITY—INSTRUCTION.—In an action against an initial carrier for loss to an interstate shipment of hogs never delivered to consignee but turned over by an intermediate carrier to another, it was error to limit defendant's contract right to exemption from liability by reason of strikes to a finding that delay was occasioned solely by a strike of employees of a terminal carrier, as a strike on any of the connecting carriers would, under the contract, release the initial carrier from liability except in cases of negligence with regard to averting the loss on its part or on the part of any of its connecting carriers.

Appeal from Craighead Circuit Court, Lake City District; *W. W. Bandy,* Judge; reversed.

STATEMENT OF FACTS.

C. P. Maddy sued the Jonesboro, Lake City & Eastern Railroad Company to recover damages on account of the negligent delay and misdelivery of a carload of hogs shipped over the defendant's line of railroad to East St. Louis, Ill.

C. P. Maddy, the plaintiff, was a witness for himself. According to his testimony, in 1920 he lived at Lake City, Ark., and was engaged in buying and shipping live stock. On the 6th day of April, 1920, he shipped a carload of hogs over the Jonesboro, Lake City & Eastern Railroad Company from Lake City, Ark., to Davis & Daley, at East St. Louis, Ill. There were 114 hogs in the car, and they were in good condition. The plaintiff loaded the hogs in the car carefully, and they should have reached their destination two days after they left Lake City. The hogs never reached their destination. The Swift Packing Company took charge of them on the 21st of April, 1920, and sold them on the 22d inst. The plaintiff was charged $142.50 for the feed of the hogs in transit, and if they had gone to destination without delay a proper feed bill would have been only $5. One of the hogs died in transit, and the others fell off in weight on account of the delay in their shipment. The plaintiff went on a passenger train to St. Louis, Mo., and learned that the hogs were at Dupo, Ill. Nine or ten days after they were shipped, the railroad company wanted to deliver the hogs to the consignees at Dupo and have them bring them to their destination in trucks. The consignees declined to receive them at Dupo, and the railroad company then took the hogs to Valmeyer, about twenty miles below Dupo.

J. E. Davis and Mike Daley, the consignees, were also witnesses for the plaintiff. Their testimony was substantially the same. According to their testimony, a representative of the Missouri Pacific Railroad Company asked them if they could accept the hogs at Dupo and carry them to their destination in trucks. They told the

railroad company that they could not do this and could not accept the hogs at Dupo. Dupo is a station about ten or twelve miles out from the National Stock Yards in East St. Louis, and Valmeyer is a station on the Missouri Pacific Railroad. The hogs were never delivered to consignees, but were finally delivered by the railroad company to Swift & Company in East St. Louis, Ill. The railroad company said that the delay in shipment and the misdelivery of the hogs was due to a strike of the switchmen on the Terminal Railroad Company and some other railroads which connected with it. The Terminal Railroad Company makes 90 per cent. of all the deliveries to the National Stock Yards in East St. Louis, and would have made the delivery of the hogs in question had they been delivered to the consignees according to the terms of the bill of lading. The amount of the shrinkage of the hogs and the value due to their delay in carriage was established by the plaintiff.

According to the testimony of the defendant, the Missouri Pacific Railroad Company carried the hogs to Dupo, which is the connecting point between its road and the Terminal Railroad Association. The delay in the shipment and the misdelivery of the hogs was due to a strike of the switchmen of the Terminal Railroad Association and on the Missouri Pacific Railroad Company. The railroad company made every effort to deliver the hogs to the consignees. The Terminal Railroad Association was the carrier which would have delivered the hogs to the consignees had the strike not prevented it. The delivery was prevented because the Terminal Railroad Association could not get sufficient switchmen.

The particular provisions in the contract of shipment involved in this appeal are paragraphs 6 and 8, which are as follows:

"Paragraph six. The shipper hereby assumes and releases the company from risk of injury or loss which may be sustained by reason of any delay in such transportation of said stock, or injury thereto, caused by any

mob, strike, threatened or actual violence to real or personal property, or by the refusal of the company's employees to work or otherwise, or the failure of machinery, engines or cars, or by injury to tracks or yards, storms, washouts, escape or robbery of any of said stock, overloading cars, fright to animals, or crowding one upon another, or from any and all other causes whatever, the liability of the carrier or any fact essential thereto in any instance or case shall not be presumed, but the burden of establishing such liability is assumed by the shipper in the event of a suit."

"Paragraph eight. In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the facts and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that, as a condition precedent to his right to recover any damages for any loss or injury to said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or if moved from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stockyards until the expiration of three hours after the giving of such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. The written notice heretofore provided for cannot and shall not be waived by any person except a general officer of the company, and he only in writing. Nor shall any such damage be recoverable unless written claim therefor shall be presented to the company within ninety-one days after the same may have occurred."

The plaintiff did not give the notice to the railroad company contemplated by paragraph 8 of the shipping contract.

The jury returned a verdict for the plaintiff in the sum of $508.50, upon which judgment was rendered.

The defendant railway company has duly prosecuted an appeal to this court.

Eugene Sloan, for appellant.

Giving notice of damage to live stock before removal from destination is condition precedent to recovery. *St. L. & S. F. Rd. Co.* v. *Pierce,* 82 Ark. 353; *K. & A. V. Rd. Co.* v. *Ayers,* 63 Ark. 331; *St. L. & S. F. Ry. Co.* v. *Hurst,* 67 Ark. 407; *Hofer* v. *St. L. S. Ry. Co.,* 101 Ark. 310; *M. & N. A. Rd. Co.* v. *Ward,* 111 Ark. 102. Court should have directed verdict under paragraph 6 of contract, a reasonable requirement and evidence being undisputed. *So. Express Co.* v. *Caldwell,* 21 Wad. 264; 22 U. S., L. ed. 556; *G. C. & S. F. R. Co.* v. *Levi,* 76 Tex. 337; 8 L. R. A. 323; *Pittsburgh etc. R. Co.* v. *Hazen,* 84 Ill. 36; 25 Amer. Rep. 422; 4 R. C. L., pp. 743, 212; 10 C. J. pp. 293, 415. Instructions 2 and 3 for defendant should have been given. Others argued incorrectly given, especially No. 3, releasing carrier from liability if injury caused from strike on one road but liable if from combined strike on two.

J. F. Johnson and *Basil Baker,* for appellee.

Shipping contract no more than receipt for shipment under facts of case and terms and conditions fixed by law. *Railway* v. *Cravens* (1892), 57 Ark. 112; *St. Louis-S. F. Ry. Co.* v. *Wells* (1907), 87 Ark. 469; *St. L. & S. W. Ry. Co.* v. *Haynie* (1915), 120 Ark. 26. No notice required of claim for damages, shipment never having been delivered at destination nor to consignee at all. Cases cited by appellant distinguished. Interstate shipment controlled by Federal law. Barnes' Federal Code, § 7976, 1921 supp. Carrier is not allowed to contract against liability for its negligence.

HART, J., (after stating the facts). It is first insisted by counsel for the defendant that the court should have directed a verdict in favor of the railway company because the notice required by paragraph 8 of the live stock contract of shipment was not given by the plaintiff.

The live stock contract in question involves an interstate shipment of hogs. The Supreme Court of the United States has held that a stipulation in a contract which is governed by the Carmack Amendment for the interstate transportation of live stock releases the carrier from all loss or damage unless a written claim therefor is made on the carrier's freight claim agent within ten days after unloading the live stock. *St. L. I. M. & S. R. Co.* v. *Starbird,* 243 U. S. 592; *Erie Railroad Co.* v. *Stone,* 244 U. S. 332, and *Southern Pacific Company* v. *Stewart,* 248 U. S. 446.

We do not think, however, the facts and circumstances as they appear from the record bring this case within the principles of law decided in the cases just cited. In the present case the hogs were not in charge of the shipper or his agent, and they were never delivered to the consignees. The undisputed evidence shows that the railroad company delivered the hogs to another company than the consignees, and that they were never carried to their destination. Hence the provisions of paragraph 8 of the contract of shipment do not apply, under the facts presented by the record.

It is next contended that the court erred in giving instruction No. 3, which is as follows:

"You are instructed that, if you find from the evidence that the delay in the delivery at St. Louis was occasioned solely by a strike on the part of the employees of the Terminal Railroad Company in St. Louis, then your verdict should be for the defendant. But, on the contrary, if you find the delay was the result of the combined strike of the employees of the Terminal Railroad Company and the employees of the Missouri Pacific Railroad Company, then that would be no defense in this ac-

tion on the part of the railroad, and your verdict should be for the plaintiff."

The contention of counsel for the defendant that the court erred in giving this instruction is based upon paragraph 6 of the contract of shipment, which is copied in the statement of facts.

There is no evidence in the record tending to show that the negligence of the railroad company in failing to deliver the hogs was due to any violence on the part of the strikers on the terminal carrier or any connecting carrier. Hence it is not necessary to decide whether or not violence on the part of the strikers would excuse the railroad company. It is sufficient to say that the general rule is that the carrier is liable for the negligence of its servants during the course of their employment, and therefore if its employees go on a strike, abandoning the performance of their duty and causing the delay in the transportation of goods, the carrier is liable. 10 C. J., par. 414, p. 293, and *Railway Co.* v. *Nevill,* 60 Ark. 375.

But, as we have already seen, the shipment was an interstate one, and is governed by the provisions of the act of Congress and the decisions of the United States Supreme Court construing the same. In addition to the authorities above cited, see *Chicago & E. I. R. Co.* v. *Collins Produce Co.,* 249 U. S. 186.

In the case of *Adams Express Co.* v. *Croninger,* 226 U. S. 491, the court said: "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co.* v. *Illinois Central Railroad,* 3 Wall. 107; *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Hart* v. *Pennsylvania Railroad,* 112 U. S. 331, 338. The rule of common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss and damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might

be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

It follows that the carrier may, by fair and reasonable agreement, restrict its liability to losses which are the proximate result of strikes on its own road, or that of its connecting carrier, where the loss is not occasioned by the negligence of the carrier in the premises, or the carrier could not, by reasonable diligence, have prevented the loss. Paragraph 6 of the contract of shipment is the clause which releases the company from liability by reason of delay in the transportation of live stock caused by strikes on its line or on the line of any of its connecting carriers. But, as we have already seen, the railroad company could not exempt itself from liability on account of its own negligence, and the court should have submitted to the jury that question.

It also follows that the court erred in limiting the right of the defendant to exemption from liability to a finding that the delay was occasioned solely by a strike of the employees of the Terminal Railroad Company. The Interstate Commerce Act extends to all terminal facilities and instrumentalities. *Chicago Junction Railway Company* v. *United States,* 226 U. S. 286. That case also holds that the duties of a common carrier in the transportation of live stock begin with their delivery to be loaded and end only after unloading and delivery, or offer of delivery, to the consignee. It follows that a strike on any of the connecting carriers, singly or together, would, under the terms of the contract, release the initial carrier from liability, except in case of negligence with regard to averting the loss by reason of the

strike on its own part or on the part of any of its connecting carriers.

Therefore the court erred in giving instruction No. 3 as set forth above, and for that error the judgment must be reversed, and the cause remanded for a new trial.

GILLETTE & ENGLISH v. CARROLL & HOGAN.

Opinion delivered March 12, 1923.

1. BROKERS—RIGHT TO COMMISSION.—Where there was testimony tending to prove that defendants promised to pay a broker's commission to plaintiffs if the latter's subagent was instrumental in procuring an exchange of lands, such a contract would be binding though the subagent represented the other party to the exchange; but in such case defendants were entitled to know who their agent was and who was the procuring cause of the exchange; and if there was a divided allegiance, they were entitled to know which principal the agent professed to represent.
2. BROKERS.—AGENT REPRESENTING BOTH PARTIES—COMPENSATION.—An agent who represents an adversary principal also can recover compensation only when there has been a full disclosure to each of all the facts.
3. BROKERS—COMMISSION—INSTRUCTION.—In an action for a broker's commission, an instruction that plaintiffs were not entitled to a commission if defendants made the sale unless plaintiffs, by finding and introducing a purchaser to whom the sale was made, were the procuring cause of the sale, was properly refused where it left out of account the contention of plaintiffs that a commission was to be paid, not merely if plaintiffs found and introduced a purchaser to whom a sale was made, but also if one of the subagents found a purchaser with whom defendants traded.

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

McGill & McGill, for appellant.

Owner had right to make sale of property unless made to purchaser procured by brokers. *Harris & White* v. *Stone*, 137 Ark. 23; *McCombs* v. *Moss*, 121 Ark. 533; *Hardwick* v. *Marsh*, 96 Ark. 23; *Nerakorick* v. *Union*

Trust Co., 89 Ark. 412; *Hill* v. *Jebb,* 55 Ark. 574; *English* v. *Wm. George Co.* (Texas) 117 S. W. 996. Instruction No. 2, only one presenting appellant's theory of case, should have been given. Broker entitled to commission if "procuring cause", but not where agent of purchaser effected sale. *Scott* v. *Patterson,* 53 Ark. 49; *Hinton* v. *Marshall,* 76 Ark. 375; *Pinkerton* v. *Hudson,* 87 Ark. 506; *Branche* v. *Morse,* 85 Ark. 462; *Stilwell* v. *Lally,* 89 Ark. 195; *Mow* v. *Irwin,* 89 Ark. 289; *Porter* v. *Hall,* 97 Ark. 23; *Hodges* v. *Boyley,* 102 Ark. 200; *Simpson* v. *Blewitt,* 110 Ark. 87; *Meyer* v. *Holland,* 116 Ark. 271; *Horton* v. *Beall,* 116 Ark. 273; *Brannon* v. *Poole,* 142 Ark. 48. A broker cannot act for both parties without disclosing fact to principals. *Murphy* v. *Willis,* 143 Ark. 1; *Featherstone* v. *Stone,* 82 Ark. 381; *Taylor* v. *Godbold,* 76 Ark. 395. Utmost good faith required. *Taylor* v. *Godbold,* 76 Ark. 395; *Dallas* v. *Moseley,* 150 Ark. 210; *Wright* v. *Burnett,* 150 Ark. 154. Right to commission for sale effected by another broker or third person. *Nance* v. *Smyth* (Tenn.), 99 S. W. 698. *Hurxthal* v. *Dalby* (Mo.), 153 S. W. 1066, 9 C. J. 914; *Rich* v. *Robertson* (Conn.), 7 A. L. R. 81.

Lee Seamster, for appellee.

Appellant cannot complain of court's failure to instruct on point not having requested a correct instruction. *Brewitt* v. *State,* 150 Ark. 279; *Wharton* v. *Jackson,* 87 Ark. 528; *Holmes* v. *Bluff City Lbr. Co.,* 97 Ark. 180; *Hayes* v. *State,* 129 Ark. 325; *Gunter* v. *Williams,* 137 Ark. 530. Question of lack of good faith not raised here first time. *Matlock* v. *Stone,* 77 Ark. 95. Exceptions not argued abandoned. *Harris* v. *Smith,* 133 Ark. 250; *Holland* v. *Doke,* 135 Ark. 372; *Taylor* v. *Walker,* 149 Ark. 134.

SMITH, J. Gillette and English owned a ranch in the State of Oklahoma, with certain personal property thereon, which they decided to sell or exchange, and with that purpose in view they prepared a circular letter descriptive of their property, which they mailed to a large

number of real estate agents. One of these letters was received by Carroll and Hogan, partners as Carroll & Hogan, residing at Bentonville, in this State, and engaged there in the real estate business.

Gillette represented himself and English in the transaction out of which this litigation arose, and Carroll represented himself and Hogan.

Carroll testified that he and Gillette met and discussed the letter, and Gillette listed the ranch with him to be sold or exchanged, and he told Gillette that he would list the ranch with a number of subagents who were cooperating with him in selling and in exchanging lands, and that if he, or any of those subagents, negotiated a sale or an exchange of the ranch, he would expect a commission of two and one-half per cent., and Gillette assented and agreed to pay the commission.

Among the other real estate brokers notified by Carroll of this arrangement was R. C. Leeper, of Springdale, Arkansas, who agreed to find a purchaser or some one with whom an exchange could be made, and Carroll accompanied Gillette to Springdale and introduced him to Leeper as a man who would negotiate a sale or exchange, and some time thereafter, and pursuant to this understanding, Leeper found one McClinton, with whom Gillette made an exchange for the property of McClinton, and a commission is claimed, on the theory that, by virtue of the introduction of Gillette to Leeper, Carroll & Hogan thereby became the procuring cause of any sale or exchange of the ranch to any customer Leeper might find and himself represent in making a purchase or exchange for the ranch, although Carroll & Hogan might have nothing else to do towards bringing about the sale or exchange. The theory of the case was that Leeper could be, and was to be, the agent of Carroll & Hogan to procure a purchaser for Gillette, and also to be the agent of such purchaser in making an exchange with Gillette.

Shortly before the consummation of the exchange with McClinton, Carroll wrote to Gillette that if he (Gillette) traded with McClinton, a commission would be expected on the theory stated above. The deal with McClinton was closed, and Gillette refused to pay a commission, and this suit was brought to recover it, and there was a judgment as prayed, from which is this appeal.

Carroll did not claim to have an exclusive agency, or any agency for any given time, and the right of Gillette to make the sale was not questioned. The insistence is that Gillette promised to pay a commission if Carroll & Hogan themselves, or if they, through one of their subagents, negotiated a sale or an exchange; and this latter thing they did through Leeper.

The court submitted the case to the jury under instructions to find for the plaintiffs if the facts were found to be as contended by Carroll, and we think no error was committed in so doing, as one may agree to pay commissions for services of almost any character. At least, there is no legal objection to his doing so. It is insisted, however, that the instructions did not properly present the theory of Gillette's defense, and we think that contention is well taken.

The testimony shows that Carroll accompanied Gillette to Springdale and introduced Leeper and Gillette, and Carroll endeavored to exchange the ranch for a hotel owned by a customer of Leeper, but this deal failed, and thereafter Carroll admittedly did nothing further towards selling or exchanging the ranch, except in so far as Leeper represented the firm of which Carroll was a member.

Leeper testified on behalf of the plaintiffs, and it is quite obvious from a reading of his testimony that he was highly friendly to the plaintiffs. He testified that he told Gillette that Carroll would expect a commission if the McClinton deal was consummated, yet he admitted that in all his negotiations with Gillette he was representing McClinton, and that Gillette was without representa-

ion. He further testified that the McClinton deal hung fire for a period of several months, and finally McClinton himself took charge of the negotiations, and thereafter no one acted for either Gillette or McClinton, but when the exchange between them was closed McClinton paid him the agent's commission agreed upon.

Gillette testified that Carroll was never at any time his agent, and had no more right to claim a commission than any one of the other hundred or more real estate brokers to whom he sent his circular letter, which was nothing more than an inquiry whether any of the persons to whom the circular was sent had a customer who might become interested in purchasing or trading for the ranch. He testified that, for a period of several months, negotiations proceeded between himself and Leeper, and, so far from ever being advised that Leeper was his agent and was attempting to procure him a purchaser, he at all times regarded Leeper as his adversary, with whom he was trading at arm's length. He denied that Leeper told him that Carroll was expecting a commission if the McClinton deal went through. He admitted receiving the letter from Carroll & Hogan in which they stated they would expect a commission if the McClinton deal was made, but he dismissed it from consideration on the ground that there was no agreement to support the claim.

An instruction numbered 2 was asked by the defendants, which, in our opinion, should have been given, but which the court refused. It reads as follows:

"If you find from the evidence that defendants mailed a description of their property to plaintiffs for sale or exchange, and that the plaintiffs thereupon made out copies of such description and mailed them to other real estate agents in Benton County and other counties, and, among others, R. C. Leeper, a real estate agent at Springdale, Arkansas, for the purpose of finding other agent who might have property of others for sale or exchange and to enable them in that way to exchange defendant's property through a deal with such other real

estate agents for property which they might have for exchange, in which case each agent would collect the commission from his own client, and that plaintiffs explained this arrangement to the defendants, and thereafter said Leeper notified plaintiffs that he had certain property of one Hart in Springdale for exchange, and that plaintiffs thereupon took defendant, Gillette, to Springdale for the purpose of endeavoring to make such exchange, and introduced him to Leeper, and that plaintiffs, then representing the defendants, endeavored to make an exchange of their property, but that the sale was never consummated, and that Leeper then told Gillette he would endeavor to get other property for exchange for his ranch, and afterwards notified Gillette that he had the property of one McClinton for exchange for other property, and to come down to Springdale, and that Gillette went down to Sprindale, and Leeper introduced him to McClinton and entered into negotiations with him as McClinton's agent for the exchange of McClinton's property for the ranch of defendants, and that Leeper and McClinton finally carried through a deal with Gillette for the ranch of defendants; that neither Leeper nor plaintiffs notified defendants that plaintiffs were having anything to do with the negotiations for said deal, and that plaintiffs did not, in fact, do or offer to do anything whatever toward bringing about or procuring the exchange for McClinton's property, but only kept informed through Leeper of the progress of the deal, of which fact defendants were not notified, then I charge you that plaintiffs could not be considered in law as the procuring cause of the exchange which was finally consummated by Gillette himself with Leeper and McClinton, and plaintiffs would not be entitled to a commission, and you will find for the defendants."

This instruction is open to the objection that it is rather long, but it is not at all obscure, and is a concrete statement of the defendants' contention, and we think should have been given.

It is true Leeper's testimony connects with that of Carroll and corroborates Carroll's contention that a commission was promised and would be expected if he (Leeper) was instrumental in closing the McClinton deal; and we know of no legal reason why a property owner should not be held bound by an agreement of that character, if he made it.

But this instruction declares the law to be that Gillette was entitled to know who was assuming to act for him, or who his agents were, and that he would not be bound unless he was so advised.

Here, according to plaintiffs' contention, Leeper was acting in a dual capacity. He was McClinton's agent, without question, and, according to Leeper's own testimony, was assuming to act for no one else. As such, Leeper no doubt talked up McClinton's property, and talked down that of Gillette. Certainly loyalty to McClinton required him to endeavor to induce Gillette to make the concessions necessary to get the parties together on a trade. As we have said, Gillette had the legal right to contract to pay a commission for the services of having an adversary in a trade produced with whom he might make a trade, and under the case of *Meyer* v. *Holland*, 116 Ark. 271, a person is liable who does so contract when a purchaser is produced.

But, we say again, one is entitled to know who his agent is, and who is the procuring cause in a sale or an exchange of property, and, if there is a divided allegiance, he is also entitled to know which principal the agent is professing to serve.

The law does not look with favor upon contracts of agency where one agent assumed to represent the adversary principal in a contract of any kind, and only permits an agent who has done so to recover his compensation for such services when there has been a full disclosure to each principal of all the facts. *Murphy* v. *Willis,* 143 Ark. 1; *Featherston* v. *Trone,* 82 Ark. 381; *Taylor* v. *Godbold,* 76 Ark. 395.

We conclude therefore that the instruction set out above should have been given.

An instruction numbered 1 was requested by the defendants, which reads as follows:

"If you find from the evidence that defendants listed their ranch with plaintiffs for sale or exchange, this would not preclude the defendants from making a sale or exchange of the property themselves, and they would not be liable to plaintiffs for a commission if they made such sale, unless plaintiffs, by finding and introducing a purchaser to whom the sale was made, were the procuring cause of the sale."

This instruction would be a correct declaration of the law except for the fact that it leaves out of account the contention of the plaintiffs that a commission was to be paid, not merely if plaintiffs found and introduced a purchaser to whom a sale was made, but a commission was also to be paid if one of plaintiffs' subagents found a purchaser with whom defendants traded, and for that reason it was properly refused.

For the error in refusing to give instruction No. 2, set out above, the judgment is reversed and the cause remanded.

JEFFERSON STANDARD LIFE INSURANCE COMPANY v. SMITH.

Opinion delivered March 12, 1923.

1. INSURANCE—SUIT TO CANCEL POLICY AFTER INSURED'S DEATH.—A suit brought after insured's death to cancel the policy for fraudulent representations in the application should have been dismissed, though brought within the contestable period named in the policy, instead of being transferred to a court of law for consolidation with a subsequent action on the policy begun after the expiration of such period, as the death of insured fixed the rights and liabilities of the parties.

2. INSURANCE—INCONTESTABLE CLAUSE.—Where insured died within a year after issuance of a policy containing a one-year incontestable clause, the latter clause did not apply, and it was

error to direct a verdict upon the ground that the action on the policy was brought after the year had expired.

Appeal from Greene Circuit Court, First Division; *W. W. Bandy,* Judge; reversed.

Fuhr & Futrall, for appellant.

When courts have concurrent jurisdiction the first to take acquires exclusive jurisdiction. If circuit court had jurisdiction, it erred in not submitting issues of fact stated in complaint in equity to jury. *Dunbar* v. *Bourland,* 88 Ark. 153. Chancery court first acquired jurisdiction, which became exclusive. 1 Pomeroy Equity Jurisprudence, §§ 138, 177; *Manilla Supply Co.* v. *Tiger Bros.,* 126 Ark. 105; *Dunbar* v. *Bourland,* 88 Ark. 153; *Kastor* v. *Elliott,* 77 Ark. 148; *Devers* v. *State,* 34 Ark. 188; *Bently* v. *Dillard,* 6 Ark. 79; *Conway* v. *Ellison,* 14 Ark. 360, and cases in Crawford's Ark. Digest, § 16, p. 1865, 1920 Supp., pp. 231-2. Jurisdiction is right to hear and determine, and must be tested by allegations of complaint. *Rose* v. *Christinet,* 77 Ark. 582, Const. 1874, Chancery Courts; *Bellows* v. *Cheek,* 20 Ark. 424; *Ry.* v. *Perry,* 37 Ark. 164; *Estes* v. *Martin,* 34 Ark. 410. Court erred in consolidating cases and directing verdict. Case not properly transferred to law court under § 6156, C. & M. Dig.; *Hester* v. *Bourland,* 80 Ark. 145; 95 Ark. 621. Some cases hold remedy by cancellation available, but chancery should not take jurisdiction when remedy at law adequate. *Rankin* v. *Amazon Ins. Co.,* 23 A. S. R. 462; *Metropolitan Life Ins. Co.* v. *Freedman,* 32 L. R. A. (N. S.) 298; 12 L. R. A. (N. S.) 881 and case note; 48 L. R. A. (N. S.) 265. Allegations of complaint warranted cancellation of policy. Incontestable clause bars all defenses to policy in suit brought one year after date. *Metropolitan Life Ins. Co.* v. *Peeler,* 6 A. L. R. 441, case note p. 448. *National Annuity Association* v. *Carter,* 96 Ark. 495. Also 14 R. C. L. 1199. Chancery court erred in transferring case, and circuit court in consolidating. C. & M. Dig., § 1076.

Jeff Bratton, for appellee.

No exceptions saved to order consolidating causes. 90 Ark. 482. Suit on policy within jurisdiction of law not chancery court. C. & M. Digest, § 6156. Question of misrepresentation, false answers, for jury. 137 Ark. 374; *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288. No cancellation of policy for fraud in procurement after loss occurs. 9 C. J. 1173; *Cable* v. *U. S. Life Ins. Co.,* 191 U. S. 288; *Shandhon* v. *Illinois Life Ins. Co.,* 100 Ill. A281; *Biermann* v. *Guaranty Mut. Life Ins. Co.,* (Iowa) 120 N. W. 963; *Globe Mut. Life Ins. Co.* v. *Reals,* 79 N. W. 202; *Des Moines L. Ins. Co.* v. *Seifer,* 112 Ill. A. 277; *Riggs* v. *Union Life Ins. Co.,* 129 Fed. 207. Policy construed most strongly against insurer. 84 Ark. 431; 90 Ark. 88; 90 Ark. 256; 97 Ark. 522; 105 Ark. 519. Law providing trial by jury part of policy, § 6156, C. & M. Dig.; 13 C. J. 560; 25 Ark. 625; 25 Ark. 261; 21 Ark. 85; 58 S. 994, 113 Ill. A. 140; 84 Neb. 422; 180 Ind. 335. False statement not alleged part of contract of insurance. *Flake* v. *Hill,* 130 Ark. 257; *Hubbert* v. *M. P. Ry. Co.,* 136 Ark. 188. Agent taking application was fully informed of insured's previous ailments, and company bound by his knowledge. 108 Ark. 511; *Walker* v. *Ill. Bankers' Life,* 140 Ark. 197.

SMITH, J. On April 15, 1920, the appellant insurance company issued and delivered to appellee Smith, as beneficiary, a policy of insurance for one thousand dollars on the life of Smith's wife. The application for the policy of insurance contained certain answers to questions which, by the recitals of the application, were declared to be material by the company in determining whether or not a policy would issue, and, among others, that the applicant had never suffered from any ailment or disease of the skin. The policy, when issued, contained an incontestable one-year clause reading as follows: "After this policy shall be in force for one full year from the date hereof, it shall be incontestable for any cause except for nonpayment of premiums."

The insured died on March 5, 1921, and on April 13, 1921, the company brought suit in the chancery court to cancel the policy on the ground that its issuance had been procured by the fraud of the insured, in that she had suffered from a disease of the skin, to-wit, pellagra, but had falsely and fraudulently denied that fact in her application.

It will be observed that the suit to cancel was brought two days before the expiration of the year after the issuance of the policy, but slightly more than a month after the death of the insured, as the suit on the policy was commenced June 30, 1921.

The chancery court transferred the suit to cancel to the circuit court, over the company's objection, and it was there consolidated with the suit on the policy, to which action the company also objected and excepted.

At the trial of the cause conflicting testimony was offered as to whether Mrs. Smith had pellagra, and as to her answers made to the examining physician in regard thereto, but at the conclusion of all the testimony the court directed the jury to return a verdict for the beneficiary, on the ground that a year had expired before the suit thereon was brought. Judgment was rendered accordingly, and the company has appealed.

Instead of transferring the suit to cancel the policy to the circuit court, that suit should have been dismissed, for the reason that the death of the insured fixed the rights and liabilities of both the insurer and the insured. Joyce on Insurance, § 1650b; *American Employers' Liability Ins. Co.* v. *Fordyce*, 62 Ark. 562; *Porter* v. *Mutual Life Ins. Co. of N. Y.*, 41 Atl. 970.

But, inasmuch as the insured died before the year had expired, the incontestable clause did not apply, and the fact that the suit was not brought until after the first anniversary of the policy is unimportant, for, as we have said, the rights and liabilities of the parties under the insurance contract had been fixed by the death of the insured.

The court should not therefore have directed a verdict, but should have submitted the question of the alleged breach of the warranty, the law of which question has been announced in many cases.

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

WOOD v. STATE.

Opinion delivered March 12, 1923.

1. INDICTMENT AND INFORMATION—DUPLICITY—ELECTION BETWEEN COUNTS.—While one may in separate counts be charged with a crime and with being accessory before the fact thereto, in which case no election by the State is necessary, the rule is different where separate counts charge one with committing a crime and with being an accessory after the fact, in which case the State should be required to make an election between them.
2. CRIMINAL LAW—ELECTION BETWEEN COUNTS.—Where no testimony was offered in support of a count charging defendant with being an accessory after the fact, and the jury were instructed to consider only the question of his guilt of the crime charged in another count, no prejudice resulted from the court's refusal to compel the State to elect between the counts, and a motion in arrest of judgment was properly overruled.
3. CRIMINAL LAW—EVIDENCE OF SIMILAR OFFENSE.—In a prosecution for robbery, a police officer's testimony as to defendant's arrest on a charge of robbery occurring 5 months previously, also as to a conversation with defendant while under arrest, and as to a search of his room and automobile, in which a mask, pistol and sandbag belonging to him were found, was incompetent, though the court instructed the jury not to consider such testimony unless they found that such articles were possessed by defendant for the purpose of robbery and had something to do with the robbery about which the witness testified.
4. CRIMINAL LAW—INDORSEMENT OF WITNESS' NAME ON INDICTMENT.—Refusal to require the State to indorse the name of a witness on the indictment, as required by Crawford & Moses' Dig., § 3010, is not error where it does not appear that he testified before the grand jury or introduced any issue of fact which took defendant by surprise.

5. CRIMINAL LAW—HEARSAY—CORROBORATION OF WITNESS.—In a prosecution for robbery the prosecuting witness cannot be corroborated by proof that after the robbery he told a police officer that he recognized defendant as one of the men who robbed him.

6. CRIMINAL LAW—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.—Where the State did not rely wholly on circumstantial evidence, an instruction as to the sufficiency of testimony to support a conviction on such evidence was properly refused.

Appeal from Mississippi Circuit Court, Chickasawba District; *R. E. L. Johnson,* Judge; reversed.

M. P. Huddleston, for appellant.

Demurrer reaches defect of misjoinder. Sec. 3066, C. and M. Digest. *Harris* v. *State,* 140 Ark. 46, overruling *Gramlich* v. *State,* 135 Ark. 243; *Cox* v. *State,* 149 Ark. 387. Accessory after fact separate offense. *Gill* v. *State,* 59 Ark. 442; 12 Cyc. 192. *State* v. *Jones,* 91 Ark. 5; *Harrel* v. *State,* 80 Am. Dec. 95. Evidence inadmissible which shows accused has committed a crime wholly independent of one for which he is on trial. 23 R. C. L. 1157-8, § 24; *Johnson* v. *State,* 152 Ark. 218, 1917 L. R. A. D. 383 note; 10 R. C. L. 939, 940; *People* v. *Romano,* 84 App. Div. 318, 17 N. Y. Crim. Rep. 385, 82 N. Y. Supp. 749. Not admissible to show identity of accused. *Boyd* v. *United States,* 142 U. S. 450; 35 L. ed. 1077; *Lancaster* v. *State* (24), 200 S. W. 167, 3 A. L. R. 1533, note. Evidence that burglars' tools were found on accused when arrested not admissible, it not appearing they were used in commission of offense charged, nor of stolen property when. *People* v. *Sansome,* 24 Pac. (Cal.) 143; *Williams* v. *State,* 71 N. W. (Neb.) 729; *State* v. *Sullivan,* 17 A. L. R. (Idaho), 907. See also *Miller* v. *State* (Okla.), L. R. A. 1917-D, p. 383; *People v. Molineaux,* 62 L. R. A. 193; *People* v. *Fitzsimmons,* 128 N. Y. S. 996; *Com.* v. *Coyne,* 3 A. L. R. 1209 (Mass.), 117 N. E. 337; *Williams* v. *U. S.,* 42 L. ed. 514. Witness incompetent where name not indorsed as indictment. Sec. 3010, C. & M. Digest; *State* v. *Johnson,* 33 Ark. 174. Not corroborated by showing

former statement. Testimony not sufficient to convict. *State* v. *Campbell,* 29 N. W. (Iowa) 604; *People* v. *Fitzsimmons,* 128 N. Y. Supp. 996.

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

Indictment not void. Conceding two separate offenses charged misjoinder. *Baker* v. *State,* 4 Ark. 56; *State* v. *Jourdan,* 32 Ark. 203. Good on either count standing alone. Crawford & Moses' Digest, §§ 2410, 2310. *State* v. *Jones,* 91 Ark. 5. No error committed in overruling motion to quash. Demurrer and motion properly treated as motion to require election. *Ince* v. *State,* 77 Ark. 428. Testimony all directed to proof of first count, and no prejudice resulted, even if misjoinder, which there was not; the two offenses grew out of same transaction, and could be charged in separate counts of one indictment. *Baker* v. *State,* 4 Ark. 59; § 2313, Crawford & Moses' Digest; *Ince* v. *State,* 77 Ark. 426. Testimony of witnesses relative to previous arrest of defendant on similar charge, and certain wearing apparel, coat, hat, mask and sandbag found in his possession, properly limited by court's instructions. *Parker* v. *State,* 136 Ark. 562; *Nettle* v. *State,* 144 Ark. 564; *Blumenstiel* v. *State,* 148 Ark. 421; *Cain* v. *State,* 149 Ark. 619; *Casteel* v. *State,* 152 Ark. 69; *Johnson* v. *State,* 152 Ark. 218. No error in allowing witness to testify, though name not indorsed on indictment, nor in instructions given, and the testimony is sufficient to support verdict.

SMITH, J. Appellant was arraigned on an indictment containing two counts. The first count charged that he had robbed E. J. Mason. The second count charged that Jim Wise had robbed Mason, and that defendant had concealed the crime and had harbored and protected the criminal, thereby becoming an accessory after the fact.

There was a demurrer to the indictment, and a motion to require the State to elect, both of which were overruled, and exceptions saved. The testimony was di-

rected entirely to an effort to prove the allegations of the first count, and no testimony was offered in support of the second count. At the conclusion of all the testimony, and upon the submission of the case to the jury, an instruction was given in which the jury was advised that the State elected to stand on the first count alone, and did not ask a conviction upon the second count. Defendant was found guilty on the first count, and his sentence fixed at five years in the penitentiary. He thereafter filed a motion in arrest of judgment, in which he again called into question the sufficiency of the indictment, because it contained the two counts.

These counts should not have been joined, and the court should, at the beginning of the trial, have compelled the State to elect, because the offenses charged are not the same, and there is no statute authorizing them to be joined. One may be charged with having committed a crime himself, and as being an accessory before the fact to its commission, in different counts of the same indictment, and no election in such cases will be required; but this is true because the crime charged is the same, and the counts merely allege different methods by which it was committed. *Harper* v. *State,* 151 Ark. 338; *Gill* v. *State,* 59 Ark. 423.

When one becomes an accessory after the fact, a second crime is committed. It is a crime which is committed by one who has full knowledge that a first crime has been committed, and who, with such knowledge, conceals it from the magistrate, or harbors and protects the person charged with, or found guilty of, the crime. Sec. 2310, C. & M. Digest; Joyce on Indictments, § 394.

But, inasmuch as no testimony was offered in support of the second count, and the jury was instructed to consider only the question of defendant's guilt of the first count, no prejudice resulted, and the motion in arrest of judgment was properly overruled.

Defendant assigns as error the action of the trial court in admitting, over his objection, the testimony of

Charles Craig, chief of police of Jonesboro, as to an arrest of defendant on a charge of robbery occurring in April, 1922, five months previous to the robbery of Mason, and detailing a conversation he had with defendant while he had him under arrest. Craig testified that while he had defendant under arrest he searched his room, and found an old hat, doubled up in the pocket of a coat, which defendant admitted was his. He also found a mask in one of the pockets of the coat, and a pistol under the pillow on the bed, and in the pocket of one of the doors of defendant's automobile he found a sandbag, but defendant denied knowing that the sandbag was in the car. Craig further testified that a sandbag was an instrument used by hold-up men in cases of robbery, the victim being struck with it and rendered unconscious without being killed. Craig exhibited to the jury the hat, mask and sandbag referred to.

We think no testimony should have been admitted in regard to the commission of the first robbery, as there was no relation whatever between it and the robbery of Mason; and the majority think, for the same reason, that testimony should not have been admitted in regard to the hat, mask and sandbag.

In 23 R. C. L., p. 1157, it is said: "On the trial of one indicted for robbery, as in the case of other criminal prosecutions, the general rule is that evidence is not admissible which shows, or tends to show, that the accused has committed a crime wholly independent of the offense for which he is on trial. Under this rule, therefore, evidence of another separate and distinct robbery, committed the preceding night, by the defendant upon another person, in the same neighborhood, in much the same way, is not admissible in evidence against one who is being tried for robbing a pedestrian on the street in a city by pointing a pistol at him. Such is not an exception to the rule that evidence of matters other than those charged in the information are inadmissible. It is only when the testimony as to the separate offense will

have some tendency to prove the offense charged in the information that it is admissible. It must therefore have some logical connection with the offense charged."

In the opinion of the writer, the testimony about finding the mask and sandbag was competent, for the reason that the instruments mentioned are those of criminals, used in the commission of crime, and proof of their possession tended to show that defendant was equipped and prepared to commit the crime charged. It was a circumstance of probative value on the question of identity, inasmuch as the defense offered was that defendant had not been sufficiently identified as the robber, the robbers being masked at the time the crime was committed, although there was no proof that a sandbag had been used in robbing Mason.

In admitting the testimony of Craig, the prosecuting attorney said he would ask the court to instruct the jury that it was to be considered for no purpose unless the jury found that these articles were possessed by defendant for the purpose of robbery, and unless they further found that they had something to do with the robbery at Jonesboro about which Craig had testified, and the court limited the testimony as requested. But, as thus limited, it was not rendered competent, for the consideration of the testimony involved a determination by the jury of the question whether defendant had anything to do with the robbery at Jonesboro, a circumstance which the State had no right to prove for any purpose.

The court permitted the State to introduce and examine Ed Carey, whose name was not indorsed on the indictment. We considered this question in the recent case of *Cole* v. *State,* 156 Ark. 9, and held that the court should, on the application of the accused, require the State to indorse the names of the witnesses on the indictment, or to furnish the accused a list thereof. In that case, as in this, there was no showing that the witness in question had testified before the grand jury, and

we held that § 3010, C. & M. Digest (the statute requiring the names of witnesses examined before the grand jury to be indorsed on the indictment) was directory, and in this case, as in that, no effort was made to show that the witness in question introduced any issue of fact which took the defendant by surprise.

The court permitted Craig to testify that when Mason returned to Jonesboro, where he lived, Mason told him he recognized defendant, who also lived in Jonesboro, as one of the men who had robbed him. This was error. In the case of *Rogers* v. *State,* 88 Ark. 451, the syllabus reads as follows: "In a prosecution for robbery the prosecuting witness cannot be corroborated by proof that, two hours after the robbery, he stated to a police officer that defendant committed the robbery, nor is such testimony admissible as part of *res gestae.*"

An instruction was asked on the subject of the sufficiency of testimony to support a conviction where the State relied wholly on circumstantial evidence to secure the conviction, but the court refused to give it, and an exception was saved. A sufficient reason for refusing to give this instruction was that the State did not rely wholly on circumstantial evidence. *Nordin* v. *State,* 143 Ark. 364.

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

SUMMERS *v.* BROWN.

Opinion delivered March 12, 1923.

1. TAXATION—UNLAWFUL REDUCTION OF ASSESSMENT—FORFEITURE.—Where the 1913 assessment of lands, which was to be extended in 1914, was unlawfully reduced by the quorum court at the suggestion of the county board of equalization, forfeiture of the land for nonpayment of taxes in 1914 based on the assessment so reduced, was not void because the reduction of the assessment was illegal, and the tax deeds based on a sale for such forfeiture

were valid, as the reduction of the assessment favored the owner, instead of injuring him.

2. TAXATION—EQUALIZATION BOARD—POWERS.—The county board of equalization had no power to equalize assessments in 1914, and a blanket reduction of assessments in 1914 by the quorum court at the instance of the county board of equalization was illegal.

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

S. S. Hargroves and *John M. Prewett,* for appellant.

Tax sale not invalid because tax charged in wrong name. C. & M. Digest, § 10118; 134 Ark. 463. No excess fees charged. 61 Ark. 418. Action to test validity barred by 2 years statute. C. & M. Digest, § 10119; 46 Ark. 96; 55 Ark. 192.

Mann & Mann, for appellee.

Equalization board required to complete work before convening of county court. 96 Ark. 92. Tax sale void account gross reduction in value. Equalization board without authority to assess property. 64 Ark. 436; 84 Ark. 347. Record must be kept. 111 Ark. 97. Sec. 10119, C. & M. Digest, not applicable in this case. Appellee being in possession, matters complained of for avoiding deed, statute would not bar. 46 Ark. 96; 53 Ark. 204; 55 Ark. 192; 120 Ark. 528.

HUMPHREYS, J. The issue presented and determined by the trial court in this case involved the validity of two tax deeds executed by T. C. Merwin, county clerk of St. Francis County, on June 20, 1917, to appellant, pursuant to the certificates of purchase issued on the 14th day of June, 1915, under a sale of the land described in the deeds for the taxes of 1914. The lands are in sec. 32, township 6 N., range 2 E., one deed containing the S. W. ¼ N. E. ¼, assessed in 1913 at $160, and the other including the W. ½ of the N. W. ¼ N. E. ¼, assessed in the same year at $50. There was no assessment in 1914, the assessment of 1913 covering each year and holding good in 1914. In 1914 the clerk extended taxes against said S.

W. ¼ N. E. ¼ upon an assessment or valuation of $80 instead of $160, and against the W. ½ of the N. W. ¼ N. E. ¼ upon an assessment or valuation of $25 instead of $50. This was done because the equalization board of the county appeared before the quorum court and asked said court to indorse the following resolution:

"Came N. B. Nelson, Lon Slaughter and W. R. Kendrick, the board of equalization, and presented a resolution asking approval and indorsement of their action in reducing the assessment of all the real and personal property of St. Francis County as returned by the assessment for 1914 on each list and tract of land 50 per cent. of its present valuation." According to the records of the proceedings of the quorum court, the above resolution was adopted, and five mills was levied on one-half of the assessed valuation of the real and personal property of the county.

The trial court canceled the tax deeds in question, upon the theory that the forfeiture for the nonpayment of taxes for the year 1914 was void, because the taxes were levied and extended against the lands for only 50 per cent. of their assessed value, instead of their assessed value. The trial court, in doing this, agreed with the contention of appellees to the effect that the levy and extension of the taxes on said lands were void because based upon an attempted blanket reduction of the assessed valuation of the lands in the county by the quorum court at the instance of the equalization board. It is true that the equalization board had no right at that time, under the statute, to make a blanket reduction of the assessments of lands in the county. *Saline County* v. *Hughes,* 84 Ark. 347. In fact, the equalization board had no right to equalize assessments of real estate at all in 1914. They only had the right to equalize assessments in 1913, and the assessment made by an assessor and equalized by them in 1913 held good for the year 1914. It may also be observed that the quorum court had no authority whatever to assess or approve an assessment of value

for the purposes of taxation. The fact, however, that the taxes were extended by the clerk against the lands upon a 50 per cent. assessed valuation directed by the combined action of the equalization board and quorum court did not have the effect of rendering the forfeiture of that year void. The right to extend taxes levied upon a larger valuation necessarily included the right to extend the taxes upon a less or smaller valuation. The extension of a smaller amount than should have been extended was an irregularity merely, and favored rather than injured appellees. According to the regular assessment against the lands for 1914, a larger sum total might have been levied thereon for general, State, and county purposes than was levied, and a greater amount for such purposes might have been extended against the property by the clerk than was extended. No substantial right of the appellees was invaded by either the levy or extension of the taxes. As we understand, no complaint is made that improper amounts were levied or extended against the lands for school purposes. The valuations fixed by the assessor in 1913 were used as a basis for levying and extending the school taxes.

The forfeiture of the lands for the nonpayment of taxes for 1914 was not void because the taxes were levied and extended against them on the 1913 and 1914 assessment, improperly and irregularly reduced by the equalization board, and it was error to cancel the two tax deeds based upon the forfeiture.

The decree is therefore reversed, and the cause is remanded with directions to enter a decree sustaining the tax titles and upholding the deeds evidencing same.

MARTIN v. STRATTON.

Opinion delivered March 12, 1923.

1. LANDLORD AND TENANT—RECOVERY OF LAND—SUFFICIENCY OF COMPLAINT.—Under Crawford & Moses' Dig., § 4838, providing that a failure to pay rent when due after three days' written notice to quit, shall constitute an unlawful detainer, justifying an action for possession of the premises, a complaint alleging a failure of the tenant to pay rent as agreed was not demurrable.
2. PLEADING—MISJOINDER OF CAUSES.—A complaint to recover possession of leased premises and for damages for wounding plaintiff was not demurrable because joining an action for unlawful detainer with one sounding in tort, since the error could have been met by a motion to strike the action improperly joined or to require appellant to elect between the two causes of action.

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

J. N. Rachels, for appellant.

Three causes of action stated. Requisites of complaint, §§ 1187 third division, and § 1188, Crawford & Moses' Digest. 130 Ark. 499. Objections should have been raised by motion to make more definite instead of demurrer. 49 Ark. 277; 52 Ark. 378; 94 Ark. 370.

No appearance for appellee.

HUMPHREYS, J. Growing out of an alleged breach of contract between appellant, as landlord, and appellee, J. D. Stratton, as tenant, and an alleged unlawful attack upon appellant by appellee, appellant brought suit against appellee, in the White County Circuit Court, to recover possession of the land rented to him, damages for breach thereof, and rents, and for damages to his person inflicted by a gunshot fired by appellee. It was alleged, in substance, in the complaint: first, that appellant rented 160 acres of land in said county to said appellee, under written contract, for three years, beginning January 1, 1919, and ending December 31, 1922; that the contract

provided for J. A. Stratton to set out and cultivate eight acres in strawberries and ten acres in cotton; that he should pay appellant one-half the net proceeds of the berry crop in 1920 and 1921, in part payment of rent, and, in further payment thereof, to deliver appellant one-half of the lint cotton and seed, after paying for ginning same; that appellee failed to plant any cotton, to appellant's damage in the sum of $200, and failed to divide the net proceeds of the berry crop in 1920, to his damage in the sum of $250; second, that appellee came upon appellant's premises and unlawfully, maliciously, and feloniously shot him, to his injury in the sum of $10,000.

It was further alleged that said appellee's codefendant was brought upon the rented land to unlawfully assist him in holding the possession thereof, and was a trespasser.

Appellees filed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against them.

The court sustained the demurrer, and dismissed appellant's complaint, over his objection and exception, from which is this appeal.

The only question presented by the appeal for determination is whether the complaint states a cause of action. It is provided by statute in this State that a failure to pay rent when due, after three days' written notice to quit, shall constitute an unlawful detainer, justifying an action by the landowner against the tenant for the possession of the premises. Sec. 4838, Crawford & Moses' Digest. This is true, regardless of whether the rental contract or lease makes a failure to pay rent a ground of forfeiture. *Parker* v. *Geary,* 57 Ark. 301. The facts alleged in the complaint meet all the statutory requirements of an action for unlawful detainer. The court erred therefore in sustaining the demurrer.

An attempt was made to join an action sounding in tort with an action for unlawful detainer, but this was

not ground for demurrer. This error should have been met by a motion to strike the action improperly joined, or to require appellant to elect as between the actions pleaded. *Jett* v. *Theo Maxfield Co.,* 80 Ark. 167.

For the error indicated the judgment is reversed, and the cause is remanded, with directions to overrule the demurrer to the complaint.

NATIONAL UNION FIRE INSURANCE COMPANY *v.* WHITTED.

Opinion delivered March 12, 1923.

1. INSURANCE—PROOF OF LOSS—WAIVER.—Evidence that immediately after a fire plaintiff notified the insurer's local agent and its home office, and listed the household goods destroyed, showing the value of each item, and, at the request of the insurance adjuster, furnished an itemized statement of the cost of rebuilding the house, *held* sufficient to go to the jury on the question of waiver of proof of loss, the adjuster having made no objection to the form or manner in which proof of loss was presented.
2. WITNESSES—DISCRETION TO PREVENT REPETITION.—When a witness was asked and answered a question, it was not error to exclude a second question substantially the same; it being within the court's discretion to prevent unnecessary repetition in taking testimony.

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

George E. Neuhardt and *Prewitt Semmes,* for appellant.

Court erred in refusing to permit insured to be examined as to cost and date of purchase of items of personal property. *Rosenstein* v. *Railroad,* 78 Conn. 29; 60 Ark. 1061; *Hanley* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 154 Iowa 60, 134 N. W. 417. Evidence insufficient to go to jury on question of waiver. *Burlington Ins. Co.* v. *Kennerly,* 60 Ark. 532, 31 S. W. 155; *Phoenix Ins. Co.* v. *Flemming,* 65 Ark 54, 44 S. W. 464. *Commercial Fire Ins. Co.* v. *Waldron,* 88 Ark. 120, 120 S. W. 210.

Bogle & Sharp, for appellee.

Proof of loss waived. *Queen of Ark. Ins. Co.* v. *Malone,* 111 Ark. 229; *German Ins. Co.* v. *Gibson,* 53 Ark. 494; 94 Ark. 234; 72 Ark. 365; 94 Ark. 227; 108 Ark. 268; 111 Ark. 232. *Queen of Ark. Ins. Co.* v. *Forlines,* 94 Ark. 232. *American Ins. Co.* v. *Dannehower,* 89 Ark. 115. Verdict properly directed. 117 Ark. 81.

HUMPHREYS, J. This is a suit to recover $3,000 on a fire insurance policy issued August 27, 1920, by appellant company to appellee, indemnifying him for a period of three years against loss by fire to his dwelling in the sum of $2,000 and to his household and kitchen furniture in the sum of $1,000.

Appellant filed an answer, denying liability.

The cause proceeded to a hearing upon the pleadings and testimony, at the conclusion of which each party asked a directed verdict. The court thereupon directed the jury to return a verdict in favor of appellee for $3,000 with interest at 6 per cent. from September 25, 1921, and a penalty of 12 per cent., which was done. The judgment was rendered in accordance with the verdict, from which an appeal has been duly prosecuted to this court.

Appellant contends for a reversal of the judgment upon two grounds. First, the insufficiency of the evidence to go to the jury upon the waiver of the proof of loss. Second, refusal of the court to permit questions as to the cost and date of the purchase of the several items of the personal property.

(1) On December 25, 1921, the house and furniture were completely destroyed by fire. Appellee failed to furnish proof of the loss within sixty days after the fire, in the manner provided by the policy. The failure to do so was interposed by the appellant company as a defense to the suit. Appellee admitted that he did not file proof of loss, but claimed that the adjuster for the company waived the requirement. The record reflects that, immediately after the fire, appellee notified the local agent

of appellant and W. B. Frith, cashier of the Bank of Wheatley, of his loss, who in turn notified the company; that, at the suggestion of Mr. Frith, appellee made an itemized list of the personal property destroyed, in a small book, noting the value of each item, the total amounting to $2,257.88; that, in response to the notice and within three weeks after the fire, R. E. L. Turner, the adjuster of the company, viewed the place, in the absence of appellee, where the property was destroyed, and left a letter requesting him to come to Memphis to discuss the question of settlement; that during the meeting in Memphis the adjuster asked him if he had an itemized list of the property, to which he replied that he did, and showed him the book containing the list theretofore prepared; that the adjuster said the company could not be expected to pay the price of new goods for old, to which appellee responded that he did not expect it to do so, for the loss was three times as much as the property was insured for; that the adjuster then instructed appellee to furnish him with an itemized statement of what it would cost to rebuild the house, which was done, but made no further request concerning the list of personal property shown him. We think the conversation and conduct of the adjuster led appellee to believe that no further formality would be required concerning the proof of loss. A complete list of the personal property destroyed was shown the adjuster, and no objection was made as to form and manner in which it was presented. Appellee was not asked to verify it by oath. In fact, he was led to believe it was satisfactory by the adjuster's suggestion to make up an itemized statement of the cost necessary to rebuild the house. In reference to the personal property, appellee had done what he intended and thought was a satisfactory compliance with the requirements of his policy in respect to the proof of loss, and the adjuster should have notified him of any objection thereto. Silence on his part, under the circumstances, was calculated to mislead appellee to his disadvantage, and constituted

a waiver of additional proof of loss. *Gould* v. *Dwelling-house Ins. Co.*, 134 Pa. St. 570; *Hartford Fire Ins. Co.* v. *Enoch*, 79 Ark. 475; *Business Men's Accident Assn.* v. *Cowden*, 131 Ark. 419.

(2) In answer to an interrogatory of counsel for appellant, on cross-examination, appellee made the following answer: "I could not tell the cost price of the articles on the list, but the values set down on the list are about the market values. I placed the value on the list. I cannot tell how old the majority of the property was, some of it was twenty-odd years old." After this information had been elicited, the same question, in substance, was repeated, and, over the objection of appellant, it was excluded by the court. In the exercise of a sound discretion, the court may prevent unnecessary repetitions in taking testimony, and we are unable to say that the court's discretion was abused in sustaining the objection to the second question touching the same subject-matter.

No error appearing, the judgment is affirmed.

BRIGGS v. FRAZER.

Opinion delivered March 19, 1923.

FRAUDS, STATUTE OF—SALE OF LAND—LETTERS.—Letters passing between purchaser and vendor, relating to a land sale, which merely tended in a remote degree to show that there had been some understanding about a sale, but containing no description of the property nor any of the terms of the contract, were insufficient to take the transaction out of the statute of frauds.

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

John D. Shackleford, for appellant.

The unsigned memorandum contract of sale being definitely recognized and referred to by appellee in signed letters, constituted a memorandum in writing that takes the transaction out of statute of frauds.

Ft. Smith v. *Brogan,* 49 Ark. 306. Statute does not apply to contract of sale of land made by correspondence. *Joppa Mattress Co.* v. *Ark. Standard Oil Co.,* 101 Ark. 548. Statute not inflexible. *Pindall* v. *Trevor,* 30 Ark. 249. Actual offer of money for agreed purchase price not necessary to constitute tender, appellee having refused to accept it. *Burr* v. *Daugherty,* 21 Ark. 559; *Nix* v. *Rector,* 4 Ark. 251; 28 Am. & Eng. Encyc. 5.

T. N. Robertson and *A. J. DeMers,* for appellee.

Contract for resale of the premises not enforceable, not being signed nor any memorandum thereof to take it out of requirement of statute of frauds. Sec. 4862 C. and M. Digest. *Lee* v. *Vaughan Seed Store,* 101 Ark. 68; *Fort Smith* v. *Brogan,* 49 Ark. 306; *Cane* v. *Crowe,* 114 Ark. 121; *Holt* v. *Moore,* 37 Ark. 145; *Henry* v. *Knod,* 74 Ark. 390. Case of *Joppa Matress Co.* v. *Ark. Standard Oil Co.,* 101 Ark. 548, cited by appellant, distinguished Neither was there any tender of the purchase money nor any waiver of it. 38 Cyc. 143; 92 N. Y. Supp. 891.

McCULLOCH, C. J. Appellant instituted this action against appellee in the chancery court of Pulaski County to compel specific performance of an alleged contract for the conveyance of certain real estate in Little Rock and a lot of furniture and other household effects in the building on the premises. The trial before the chancery court resulted in a decree dismissing appellant's complaint for want of equity.

The real estate in controversy, a house and lot on West Third Street in the city of Little Rock, was owned by appellee and operated as a rooming house.

On May 18, 1918, appellee entered into a written contract with appellant to sell the property to appellant for the sum of $9,500, of which sum appellant paid $1,000 in cash, assumed a mortgage to a banking institution of Little Rock in the sum of $4,000, and gave forty-five notes for $100 each, payable monthly. Appellant took possession under the contract and occupied the house, and paid sixteen of the notes as they fell due. The sale included

also the furniture in the house at the stipulated price of $2,000, making a total of $11,500 for the house and furniture. Later appellee conveyed the real estate to appellant by warranty deed, reserving a lien in the deed for the unpaid balance of the price.

On July 30, 1919, appellant, being still in possession of the premises, executed and delivered to appellee a quitclaim deed conveying to appellee all her interest in said real estate and personalty, and delivered possession of same to appellee.

It is alleged in the complaint that at the time of the reconveyance of the property by appellant to appellee the latter entered into another contract in writing with appellant for resale of the property to appellant within one year upon the payment of the original purchase price. Appellee denied this allegation in her answer as well as in her testimony. Appellant exhibited with her complaint what purports to be a written contract for the resale of the property to appellant, but the instrument does not purport to have been signed by appellee. Appellant testified that the terms of the contract were orally agreed upon between her and appellee on the day she reconveyed the property to appellee, and that the contract was prepared on that day, but that appellee postponed signing it, and finally refused altogether to sign it, claiming that she desired to make changes in the contract.

Appellee testified that she entered into no written contract for the resale of the property, but that a day or two after the reconveyance of the property to her by appellant she orally agreed with appellant that she would resell the property to her upon the payment of the original purchase price in cash.

It is undisputed that the contract exhibited with appellant's complaint was never signed. It is conceded that the oral contract is within the statute of frauds, and this is undoubtedly true, for appellee was in possession at the time the alleged agreement was made, and

nothing was paid under this agreement, nor was there ever any change of possession. *Friar* v. *Baldridge,* 91 Ark. 133; *Barrett* v. *Durbin,* 106 Ark. 332.

Appellant removed to Fort Worth, Texas, and letters passed between appellant and appellee, which are brought into the record as being sufficient to show a contract for the resale of the property, taking the transaction out of the operation of the statute of frauds. These letters, however, are wholly insufficient for that purpose, as they merely tend, in a remote degree, to show that there had been some understanding between appellant and appellee about a sale, but none of the letters contain any description of the property nor any of the terms of the alleged sale. *St. L. I. M. & S. Ry. Co.* v. *Baldridge,* 45 Ark. 17.

The alleged contract being within the statute of frauds and void, it is unnecessary to discuss the other questions in the case.

Decree affirmed.

SCOTT *v.* COLUMBIA COMPRESS COMPANY.

Opinion delivered March 19, 1923.

1. BAILMENT—BURDEN OF PROOF.—The burden is on the bailee of cotton for hire to account for the loss thereof, but when it is shown that it was destroyed by fire the burden is upon the bailor to establish negligence on the part of the bailee or its servants in permitting the cotton to be thus destroyed.
2. APPEAL AND ERROR—HARMLESS ERROR.—Refusal of the court to charge that if a contract of bailment was written or caused to be written by the bailee, it should be construed more strongly against it, although the instruction was correct as an abstract proposition, was not prejudicial when the contract was not ambiguous, and was correctly interpreted by the court.
3. TRIAL—REFUSAL OF INSTRUCTION ALREADY GIVEN.—The refusal of an instruction substantially covered in a given instruction was not error.

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

Joe Joiner, for appellant.

The court erred in refusing to give instruction No. 2, telling the jury the receipt, being in writing, should be construed more strongly against the maker, and also instruction No. 6 requested. *Bertig v. Norman,* 101 Ark. 75; *Phoenix Cotton Oil Co.* v. *Pettus & Buford,* 203 S. W. 19; *Hornor Transfer Co.* v. *Abrams,* 233 S. W. 825. Should not have instructed that "the fire raises no presumption of negligence" nor given instruction No. 3. Note 9 A. L. R. 569. *Fleischman* v. *Southern R. Co.,* 56 S. E. 974.

McKay & Smith, C. A. Cunningham, of counsel for appellee.

Refused instruction No. 2 abstract, and No. 6 covered by others. Instructions 2 and 3, given at appellee's request, correctly state the law. *Kansas City Southern Ry. Co.* v. *Thomas,* 97 Ark. 287; *Little Rock & Ft. Smith Ry. Co.* v. *Hunter,* 42 Ark. 200. Notes 9 Am. Law Reports 559; 16 Am. Law Report 280.

McCULLOCH, C. J. Appellee is a corporation engaged in the business of compressing cotton and storing cotton for hire at Magnolia, Arkansas, and it received from appellant, for storage, two bales of cotton, and executed a receipt therefor, stipulating that the cotton would "be delivered to bearer only upon return of this receipt and payment of all charges," and the receipt also contained a stipulation exempting the company from liability for loss or injury on account of "accidents, concealed damages, water packs, acts of Providence, acts of the public enemy, or for damage or loss by fire, even when caused by negligence." Appellee failed to redeliver the cotton to appellant on demand, and this suit was instituted to recover the value of the cotton. There was a trial before a jury, which resulted in a verdict in favor of appellee.

The testimony adduced by appellee tended to show that the cotton belonging to appellant was destroyed by

fire when one of the buildings, the one in which this particular cotton was stored, was destroyed by fire.

Appellee also introduced testimony tending to show that it had exercised due care to protect the cotton and to prevent the occurrence of fire, and that the cotton was not lost on account of any negligence on the part of appellee or its servants. In other words, appellee, in its testimony, accounted for the cotton and showed that it was destroyed by fire without negligence on the part of appellee.

There was, however, testimony introduced by appellant which tended to show that the cotton was not in the particular building that was destroyed by fire, and, if the jury accepted this testimony as true, there might have been a finding that appellee had failed to account for the loss of the cotton, and was therefore in default in failing to redeliver the cotton on demand.

The issues as to the loss of the cotton was submitted to the jury upon instructions requested at the instance of the respective parties.

The court instructed the jury that the stipulation in the receipt against liability arising from negligence was void, and that, if the property was lost through any act of negligence of appellee or its servants, appellee would be liable for the value of the cotton.

The instructions given by the court told the jury, in substance, that the burden of proof rested upon appellee to account for the loss of the cotton, but that, if it was shown that it was destroyed by fire, the burden was upon appellant to establish negligence on the part of appellee or its servants in permitting the cotton to be thus destroyed. These instructions were in accordance with repeated decisions of this court. *James* v. *Orrell*, 68 Ark. 284; *Bertig* v. *Norman*, 100 Ark. 75; *Phoenix Cotton Oil Co.* v. *Pettus*, 134 Ark. 76.

The refusal of the court to give the following instruction, requested by appellant, is assigned as error:

"2. You are instructed that if you find from the evidence that the receipt issued plaintiff when he delivered the cotton in question to defendant was written by defendant or by some one for it at its request, then it should be construed more strongly against the defendant."

The refused instruction correctly stated an abstract proposition of law, but the refusal to give it was not prejudicial, for the reason that the court correctly interpreted the contract, and there was no ambiguity in it.

Again, it is contended that the court erred in refusing to give the following instruction:

"6. The receipt in this case constituted the contract between plaintiff and defendant, and if you find from a preponderance of the evidence that there was a contract between plaintiff and defendant, and under that contract the defendant was bailee for hire, you are instructed that, if the plaintiff has shown that the defendant is unable to comply with its part of the contract by returning the cotton to plaintiff when called for, the plaintiff should recover, unless the defendant is able to explain the loss why it is unable to return the property."

This instruction was substantially covered by the preceding one, No. 5.

There are other assignments in regard to the court's charge, which we do not deem of sufficient importance to discuss. We are of the opinion that the charge was correct, and that the issues have been settled against appellant upon legally sufficient evidence and correct charge concerning the law.

Judgment affirmed.

COOPER v. PHILLIPS.

Opinion delivered March 19, 1923.

1. EJECTMENT—LEGAL TITLE.—Where the owner of land executed a trust deed to secure a debt, and thereafter executed a warranty deed to another, and subsequently executed a warranty deed to the creditor whose debt was secured by the trust deed in satisfaction of the debt, *held* that the legal title was in the grantee in the first warranty deed.
2. MORTGAGES—TITLE OF TRUSTEE AFTER SATISFACTION.—While a trustee under a deed of trust may, after breach of condition and before satisfaction, bring ejectment for the land, yet where the creditor for whose benefit a trust deed was made has accepted a warranty deed in satisfaction thereof, the trustee cannot thereafter maintain an action for possession of the land, though the person in possession holds under a warranty deed executed after the deed of trust but before the warranty deed accepted by the creditor.

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

Henry Stevens, for appellant.

Court erred in permitting plaintiff, who alleged he was entitled to possession of lands, to amend by making trustee in the trust deed a party plaintiff, amendment being tantamount to a new suit. *State* v. *Rottaken,* 34 Ark. 157; *Grace* v. *Neel,* 41 Ark. 165; *Hopkins* v. *Harper,* 46 Ark. 251; *Railway Co.* v. *State,* 56 Ark. 155; *Schiels* v. *Dillard,* 94 Ark. 277; *Coleman* v. *Floyd,* 105 Ark. 300. Mortgage apparently barred by statute of limitations not admissible in evidence, same as unrecorded instrument. *Morgan* v. *Kendricks,* 91 Ark. 398; *Hill* v. *Gregory,* 64 Ark. 318. Peremptory instruction for plaintiff should not have been given.

McKay & Smith, for appellee.

An ejectment suit is a possessory action, and only the right to possession of the lands is involved. *Richie* v. *Johnson,* 50 Ark. 551; *Hill* v. *Plunkett,* 41 Ark. 65. Legal title to lands was in trustee in deed of trust, and only equitable title in mortgager. *Danenhauer* v. *Dawson,* 65 Ark. 129; *Turman* v. *Sanford,* 69 Ark. 95;

Trapnall v. *State Bank,* 18 Ark. 53; *Perry County Bank* v. *Rankin,* 73 Ark. 589; *Foreman* v. *Halloway,* 122 Ark. 341; *Crittenden* v. *Johnson,* 11 Ark. 94; *Pope Heirs* v. *Boyd,* 22 Ark. 535;. Mortgagor's deed conveying the lands to appellant, the mortgage being of record and the debt unpaid, only passed her equity of redemption. *Peuncell* v. *Gann,* 113 Ark. 332. When the mortgagee failed to pay overdue mortgage debt, the plaintiff and the trustee had the right to possession and could maintain ejectment against mortgagee. *Fitzgerald* v. *Beebe,* 7 Ark. 310. Owner of equity of redemption can't bring ejectment against mortgagee in possession after condition broken. *Cohn* v. *Hoffman,* 45 Ark. 376. Where equity of redemption conveyed to mortgagee, estates do not merge. 12 Cyc. 1381.

Henry Stevens, in reply.

Complaint shows Frank Phillips not in possession when suit was brought, and the testimony that he had never been. Cases cited by appellee in 7 and 45 Ark. not applicable. Neither is citation 27 Cyc., 1381. 27 Cyc., 1402, is controlling, the equity of redemption having been conveyed to the mortgagee in satisfaction of mortgage debt, and the trustee thereby eliminated.

McCULLOCH, C. J. Appellee instituted this action at law against appellant to recover possession of a tract of farm land in Columbia County. Both parties claim title from a common source, and the facts, as they appear from the pleadings and proof, are undisputed.

The land in controversy was originally owned by Lizzie Rowe, who, on May 22, 1916, conveyed it by deed of trust to R. K. Mason, as trustee, to secure a debt to appellee in the sum of $360, evidenced by a promissory note of that date, due and payable on January 1, 1917, with interest.

Lizzie Rowe conveyed the land to appellant by warranty deed dated September 27, 1918, for a price, part of which was paid at the time of the conveyance and the remainder was to be subsequently paid. On January 26,

1920, Lizzie Rowe executed to appellee a warranty deed purporting to convey the land in controversy to appellee in satisfaction of the said mortgage debt to appellee and the further sum of $150, paid at the time of the conveyance, and appellant took possession of the land under his conveyance from Lizzie Rowe, and this action was instituted against him by appellee in November, 1920. Subsequently R. K. Mason, the trustee in the deed executed by Lizzie Rowe in May, 1916, was, on motion of appellee, joined as a plaintiff in the action. This was done over appellant's objection.

The complaint of appellee alleged that the conveyance of Lizzie Rowe to him on January 26, 1920, "was made and executed in settlement of the indebtedness shown by said deed of trust hereinbefore referred to." Upon the facts shown, the court gave a peremptory instruction in favor of appellee.

We are of the opinion that, without discussing the question of the correctness of the court's ruling in permitting Mason, the trustee, to be made a party, the court erred in deciding in favor of appellee, and that the decision, upon the undisputed facts, should have been in favor of appellant. Appellee is not the legal owner of the land, and never has been such owner. The legal title did not pass to him, either under the deed of trust or under the warranty deed subsequently executed to him by Lizzie Rowe, and he could not maintain the action for possession. The defeasible legal title passed under the deed of trust to Mason, the trustee, and not to appellee as the beneficiary under the deed. At the time of the execution of the warranty deed by Lizzie Rowe to appellee in settlement of the mortgage debt, the legal title had passed from Lizzie Rowe to appellant under her prior deed executed to appellant. It is contended, however, by counsel for appellee that the trustee was properly made a party and that, notwithstanding the conveyance of the land by Lizzie Rowe to appellant, an action could be maintained by the trustee to recover possession for the purpose of

taking the rents and profits to apply on the mortgage debt or for the purpose of foreclosing under the power contained in the deed. It is correct to say that a trustee in a deed of trust can, after a breach of the conditions and before the satisfaction of the mortgage, maintain an action at law for the possession of the land. *Reynolds* v. *Canal & Banking Co.*, 30 Ark. 520; *Danenhauer* v. *Dawson,* 65 Ark. 129. The answer to this contention is that, according to the allegations of appellee's complaint and his own statement of the facts in his testimony, the debt secured by the deed of trust had been settled, and the defeasible legal title, which had passed to the trustee by the terms of the deed, had been thus defeated. There was no right of action remaining in the trustee under the terms of the satisfied deed of trust. Appellee has therefore neither alleged nor proved a right of action, either legal or equitable. If there is any relief from the effect of the acceptance by appellee of the warranty deed from Lizzie Rowe in satisfaction of the mortgage, sufficient facts are not stated in the complaint to entitle him to that relief.

The judgment of the circuit court is therefore reversed, and the cause is remanded with directions to enter a judgment in favor of appellant.

LOGAN v. MISSOURI VALLEY BRIDGE & IRON COMPANY.

Opinion delivered March 19, 1923.

1. PLEADING—CONSTRUCTION.—In construing a complaint to determine whether the cause of action be *ex contractu* or *ex delicto,* the allegations must be considered as a whole.
2. MASTER AND SERVANT—COMPLAINT HELD TO SOUND IN TORT.—Although a complaint for personal injury alleged that the relation between the parties was that of master and servant by contract of employment and stated the duties growing out of that relation, and that the injury grew out of a breach of such duties, yet where the manner of the injury was alleged as arising from defendant's failure to furnish a safe place to work and in failing

to furnish suitable appliances and tools, the complaint states a cause of action sounding in tort.

3. MASTER AND SERVANT—COMPLAINT IN EX DELICTO ACTION.—In an action *ex delicto* for personal injuries by a servant against the master, it is necessary to allege the contractual relation and duties arising therefrom.

4. MASTER AND SERVANT—INJURY TO SERVANT—RIGHT OF ACTION.—For a breach of a duty imposed by law, an injured employee may sue the employer either on contract or in tort, and an action in tort is not precluded because such duty arises out of a contractual relation.

5. TORTS—WHAT LAW GOVERNS.—In actions of tort the liability or right of action is determined by the law of the place where the injury is inflicted without regard to the law of the forum or the law of the place where the contract was made.

6. CONTRACT—WHAT LAW GOVERNS.—Where it was contemplated by the parties that a contract was to be performed in another State, the law of that State governs in determining the rights of the parties.

7. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.—The Workman's Compensation Act of Oklahoma is exclusive where an employee is injured while working in that State, and it provides that an action for injury to an employee can be maintained in no other court than before the Industrial Commission, and provides no machinery by which an employee injured in that State can avail himself of the benefits of the act in the courts of this State.

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

Sizer & Gardner and *Allyn Smith,* for appellant.

The demurrer admits the allegations of the complaint, and the only question in the case is whether or not appellant's remedy is under the Oklahoma Workmen's Compensation Act, or under the laws of Arkansas. Our courts take judicial knowledge of the laws of other States. Sec. 4110, C. & M. Digest. It is conceded that in Oklahoma appellant could only bring his suit before the Industrial Commission provided by its Workmen's Compensation Act, and the question hinges upon whether the action arises *ex contractu* or *ex delicto.* The workmen's compensation acts have substituted a

new cause of action for the common law action of the injured employee against his employer, and created new tribunals giving them exclusive jurisdiction of all such proceedings. The question involved here has not been determined, so far as we can learn, but its converse has been frequently decided. It is held, where the employer has complied with such act in the State of his residence, or where he maintains an office, an employee injured in the course of his employment outside that State may recover under the compensation act of the State where he and his employer resided. *Pensabene* v. *Auditor,* 140 N. Y. S. 226, 155 App. Div. 368. Under this holding plaintiff may receive under the Oklahoma Compensation Act in courts of Arkansas. The law of the place of contract of employment governs an action in tort for negligent injury of employee. *Schweitzer* v. *Hamburger,* 138 N. W. 944; 78 Minn. 448; *Cannaday* v. *Coast Line Co.,* 55 S. E. 836; 143 N. C. 439; 8 L. R. A. (N. E.) 939; *Ruck* v. *Ry Co.,* 143 N. W. 1074; 153 Wis. 158; *Grant Smith Partnership Co.* v. *Rhode,* 42 U. S. Sup. Ct. Rep. 157. The relation between the employer and employee is purely contractual. *Rogers* v. *Rogers,* 7070 Ind. App. 659; 122, N. E. 778; *Niser* v. *Miller,* 125 N. E. 652; *McDowell* v. *Duer,* 133 N. E. 840. The law of a place where a contract is made enters into it, and the right of the employee to recover under the Workmen's Compensation Act is controlled by laws of State where contract is made, not where injury occurred, and plaintiff is entitled to recover under laws of Arkansas. Even should the court hold plaintiff's action does not arise *ex contractu,* he should nevertheless recover under § 1070, C. & M. Digest, the action being transitory. *Pensabene* v. *Auditor, supra; Schweitzer* v. *Hamburger, supra.*

Rose, Hemingway, Cantrell & Loughborough, for appellee.

The only question for decision is whether the complaint states a cause of action enforceable in this

State. Cases cited by appellant reviewed and argued not to support his position, not one of them.

In an action *ex delicto* the right to recover and the amount of the recovery are governed by the law of the place where injury is received. *Carter* v. *Goode,* 50 Ark. 155; *St. L. I. M. S. Ry. Co.* v. *Brown,* 67 Ark. 155; *St. L. I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240; *Turner* v. *St. Clair Tunnel Co.,* 70 N. W. 146, W. 48. The appellant states an action *ex delicto* and his right to recover is dependent in the Oklahoma law, does not state an *ex contractu* cause of action. *Fordyce* v. *Nix,* 58 Ark. 136; *St. L. I. M. & S. Ry.* v. *Mynott,* 83 Ark 6; *Miller* v. *Mintun,* 73 Ark. 186. The court regards substance rather than form. *Johnson* v. *Dutlinger,* 140 Ark. 511, 1 Corpus Juris, 1016. Had plaintiff stated a cause of action *ex contractu* he could not recover here, since the parties contemplated performance was to take place in Oklahoma. *Johnson* v. *Nelson,* 150 N. W. 620; *Mitchell* v. *St. Louis Smelting & Refining Co.,* 215 S. W. 506; *Crebbin* v. *Deloney,* 70 Ark. 493. Granting the contract was made with reference to Arkansas law, the action *ex contractu* cannot be sustained, the injury having occurred in Oklahoma. *Arkadelphia Electric Light Co.* v. *Arkadelphia,* 99 Ark. 178; *Kansas, Ft. Scott & Memphis Ry. Co.* v. *Becker,* 67 Ark. 1; *Alabama G. S. & R. Co.* v. *Carroll,* 11 So. 803. We think the general statement as to the right of election between actions *ex contractu* or *ex delicto* is at most only applicable territorially, and then only when the law-imposed conditions result from express statutory enactment. *In re American Mutual Life Ins. Co.,* 102 N. E. 693; *Gooding* v. *Ott,* 87 S. E. 862; *American Radiator Co.* v. *Rogge,* 92 Atl. 85; *Spratt* v. *Sweeney & Gray Co.,* 153 N. Y. Supp. 505; *Post* v. *Burger & Goelke,* 216 N. Y. 544; Minor on Conflict of Laws, 507; *Bret* v. *Gulf C. F. & S. Ry. Co.,* 22 S. W. 1064. Our courts will not endeavor to enforce the Workmen's Compensation Act of Oklahoma. *Galveston, H. S. & A. Ry. Co.* v. *Wallace,* 223 U. S. 481; *Lehman* v. *Raymo Film*

Co., N. Y. S. 1032; *Slater* v. *Mexican National Ry.*, 194 U. S. 120.

Sizer & Gardner and *Allyn Smith*, in reply.

If the cause of action grows out of the relation of employer and employee, it is contractual, and the demurrer should have been overruled. *Parker* v. *Wilson*, 179 Ala. 361; 60 So. 150; 43 L. R. A. (N. S.) 87. *Telephone Co.* v. *Woughter*, 56 Ark. 206; *Choctaw R. R. Co.* v. *Jones*, 77 Ark. 362; 92 S. W. 246. Appellee corporation doubtless complied with the Arkansas law while doing business in the State, and it was doing business here when the injury occurred. *Person* v. *Dry Goods Co.*, 113 Ark. 467.

WOOD, J. The appellant instituted this action against the appellee to recover damages for personal injuries. The complaint alleged substantially the following:

The appellee is a Kansas corporation authorized and doing business in this State. On the 12th day of September, 1921, it was engaged in building a bridge from the foot of Garrison Avenue in the city of Fort Smith, Arkansas, on the south side of the river, to a point on the opposite bank on the north side in the State of Oklahoma. The appellant was a resident of the State of Arkansas and an employee of the appellee. He was required, as a part of his duties, to oil the steam shovel or clam-shell which was used by the appellee in excavating the earth from the river for the foundations of the bridge. The work had progressed from the Arkansas side to a point beyond mid-stream and to the Oklahoma side of the river. The appellee maintained its office from which the work of construction was conducted in Fort Smith, Arkansas, where it hired its employees. The appellant and other employees, in going to their work in the morning and in quitting at night, checked in at the Fort Smith office, and started to their work from that office and were paid at such office. Appellant, while engaged about his work on the day above mentioned, on the end of the bridge in Oklahoma, was severely injured, as

he alleges, through the negligence of the appellee. The manner of such negligence and the nature of his injuries he specifically sets forth. He alleged that his relation to the appellee at the time was purely contractual; that the contract of employment was entered into between him and the appellee in Arkansas and was made with reference to the laws of Arkansas; that these laws became a part of the contract, and that, under the laws of Arkanas, it was the duty of appellee to furnish appellant a reasonably safe place to work and reasonably safe tools and appliances with which to perform his work, which duties, the appellant alleges, appellee failed to perform. The appellant concludes his complaint by alleging that the injury was caused solely by the breach of contract between appellant and the appellee in that the appellee negligently failed to furnish him a safe place to work and suitable appliances and tools with which to do his work. The allegations of the complaint specify in detail the particulars in which the appellant charges that the appellee failed to discharge its duties as master toward him as servant. He concludes his complaint with a prayer for damages in the sum of $50,000.

The appellee filed the following demurrer to the complaint: "First. It does not state facts sufficient to constitute a cause of action. Second. Because the action, which sounds in tort, was committed in the State of Oklahoma, and is governed by the laws of said State, and can be prosecuted only in the court having proper jurisdiction in said State. Third. Because this court has no jurisdiction of the subject-matter of the complaint." The court sustained the demurrer. The appellant stood on his complaint, and the court entered a judgment dismissing the same, from which is this appeal.

1. The appellant contends, first, that his complaint states a cause of action against the appellee for a breach of contract entered into in this State which entitles him to recover damages under the laws of Arkansas; and second, that appellant, being a resident of Arkansas, and

having been employed by the appellee in Arkansas, may enforce in the courts of this State the liability of the appellee for the injury done him, through its negligence, while in its employ, under the Oklahoma Workmen's Compensation Act.

(a). In construing a pleading to determine whether it states a cause of action and consequent liability growing out of and caused by a breach of contract, or whether it states a cause of action growing out of and caused by a tort—in other words, whether the cause of action be *ex contractu* or *ex delicto*—the allegations of the complaint must be considered as a whole. As was said in *Fordyce* v. *Nix,* 58 Ark. 136, "the character of the action must be determined by the nature of the grievance, rather than the form of the declaration." Now, when this complaint is taken by its four corners, it seems clear to us that the pleader intended by its allegations to state a cause of action sounding in damages for a tort, rather than a cause of action wherein the tort was waived and liability and damages growing out of a breach of contract only were insisted upon. While the allegations of the complaint set forth that the relation between the appellant and the appellee was that of master and servant, by virtue of the contract of employment, and stated the duties of the one to the other growing out of such relation, and that the injury was caused solely by a breach of such duties, yet the manner of the injury is specifically set forth as follows: "That the defendant negligently failed to furnish him a safe place to work, and in failing to furnish him with suitable appliances and tools about which and with which he was required to work, in this, to-wit: that said defendant company allowed and permitted the cross-pieces nailed against said boom for use as a ladder to become rotten and unsafe, so that when the plaintiff placed his weight thereon, on climbing said ladder, the said cross-piece upon which he stepped pulled loose, and, being in its rotten condition, the nails which held it in place pulled through said rotten piece, the de-

fective condition of which said piece said defendant knew, or with reasonable care and diligence might have known and have repaired the same, and by so doing would not have been guilty of a breach of the said contract as aforesaid. * * * Plaintiff states that, by reason of the negligence aforesaid of the said defendant in failing to comply with the terms of said contract as aforesaid, he has been injured and damaged in the sum of $50,000."

Now, it was necessary in the action *ex delicto,* which we construe this to be, for the appellant to allege that the contractual relation of employer and employee existed between him and the appellee, because if he had been a mere volunteer, interloper, or trespasser, at the time of his injury, the appellee would have owed him no duty, and hence he could have had no cause of action against the appellee even for the tort. But in a cause of action in which the appellant purposed to waive the tort and claim damages only for a breach of contract, it was wholly unnecessary for appellant to emphasize the fact, as he did, that the "company negligently failed to furnish him a safe place to work" and "with reasonable care and diligence might have known and repaired," etc., and "by reason of the negligence aforesaid in failing to comply with the terms of its contract," etc. Such allegations are peculiarily apposite in an action of tort, but they are wholly unnecessary in an action wherein the tort is waived and only a breach of the contract relied upon. With painstaking amplification the pleader has stressed the contract relation between appellant and appellee and its breach, but we are nevertheless impressed, after consideration of all the allegations of the complaint, that the cause of action should be construed as one *ex delicto* and not one *ex contractu.* The appellant, after alleging that the relation between him and the appellee was purely contractual, further alleged that the injury was caused solely by breach of the contract, but this latter allegation is in conflict with other allegations which clearly state that the injury was caused by the neg-

ligence and want of reasonable care and diligence on the part of the appellee. The allegations setting forth the contractual relation of employer and employee between the appellee and appellant, and the negligence or wrongful acts of appellee's servants, resulting in the injury of which the appellant complains, constituted a cause of action in favor of the appellant against the appellee which can be more approximately classed as one *ex delicto* than one *ex contractu.*

It was necessary to allege the contractual relation and the duties of such relation, as we have seen, before the appellant could recover from personal injuries in an action *ex delicto.* These necessary allegations are contained in appellant's complaint. There are certain duties growing out of the contractual relation of employer and employee that do not arise by virtue of any express agreement between the parties, but are duties implied and imposed by law independently of the express terms of the contract, and a breach of such duties resulting in personal injury will constitute a tort. The injured employee may sue either for breach of the contract or in tort for breach of the duty imposed by law, and an action in tort is not precluded because such duty arises out of a contractual relation. 1 C. J. 1015-1016, secs. 138-139; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Becker,* 67 Ark. 1.

As we view the allegations of the entire complaint, the court below was certainly justified in treating the action as one *ex delicto. Fordyce* v. *Nix, supra; Millar* v. *Mintun,* 73 Ark. 186; *St. L. I. M. & S. Ry. Co.* v. *Mynott,* 83 Ark. 6.

"In actions of tort the law is well settled that the liability or right of action is determined by the law of the place where the injury is inflicted, without regard to the law of the forum or the law of the place where the contract was made." *Johnson* v. *Nelson,* 150 N. W. (Minn.) 620.

(b). But, if we are mistaken in this, and the action be considered one in which the tort is waived and recovery sought alone for breach of contract, nevertheless, the appellant could not maintain this action because it was clearly contemplated by the parties that the contract should be completely performed in the State of Oklahoma. The allegations of the complaint show that at the time of appellant's injury he was performing the work which he had contracted to do in the State of Oklahoma. In *Liebing* v. *Mutual Life Ins. Co. of New York,* 207 S. W. 230, it is said: "When the terms or nature of the contract show that it is to be performed in another country or State, then the place of making the contract becomes so far immaterial, and the law of the place where the contract is being performed governs in determining the rights of the parties." See also *Mitchell* v. *St. Louis Smelting & Refining Co.,* 215 S. W. 506; *Johnson* v. *Nelson,* 150 N. W. 620. It follows that, whether the action be construed as one *ex contractu* or one *ex delicto,* the issue as to whether or not the appellee is liable depends upon the laws of Oklahoma.

2. Appellant concedes that in Oklahoma the Workmen's Compensation Act is exclusive and that appellant could wage his suit in that State in no other court than before the Industrial Commission provided for by the Workmen's Compensation Act. But appellant contends that in an action *ex delicto* the courts of Arkansas will enforce a right of action in favor of an employee, a resident of the State, against his employer for personal injury which occurred in the State of Oklahoma. This contention is unsound and cannot be sustained. Appellant's right of action is transitory, but an examination of the Oklahoma Workmen's Compensation Act, of which we take judicial notice, will discover that no machinery is provided by statute by which appellant could avail himself of the benefits of the Workmen's Compensation Act in this State. Likewise, there are no judicial processes in this State that could be adapted to the enforcement of

the provisions of the Oklahoma Workmen's Compensation Act. The complaint contains no allegations that would make the provisions of the Oklahoma Workmen's Compensation Act available through any court procedure in this State.

The judgment of the circuit court sustaining the demurrer to appellant's complaint and dismissing the same is therefore correct, and it is affirmed.

BOURLAND v. POLLOCK.

Opinion delivered March 19, 1923.

1. MUNICIPAL CORPORATIONS—GENERAL WELFARE CLAUSE—CONTRIBUTION TO CHARITY.—Under the general welfare clause of Crawford & Moses' Dig., § 7494, conferring on municipal corporations power to make ordinances necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof, a city was authorized to contribute money to a welfare association organized "to cause afflicted and diseased children to receive medical attention, to maintain a maternity ward for expectant mothers unable to have sanitary and proper surroundings for their ordeal, to care for babies whose parents are unable to care for them, to furnish food and clothing for those unable to buy the same, and free soup for families unable to buy nourishing food, and to provide moral surroundings for girls without homes."
2. MUNICIPAL CORPORATIONS—CHARITABLE CONTRIBUTIONS.—Const. art. 12, § 5, providing that no municipality shall appropriate money for or loan its credit to any corporation, association, institution or individual, *held* not to prohibit a municipal corporation from making appropriations to a welfare association or committee organized to render aid to the poor and unfortunate of the city.
3. MUNICIPAL CORPORATIONS—CHARITABLE CONTRIBUTIONS.—The fact that the general statutes provide ways and means of doing the work which a welfare association organized to help the poor and unfortunate of the city was doing did not make a municipal ordinance appropriating money for the support of such association invalid.

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

Fadjo Cravens, for appellant.

Appellant contends that the ordinance of the city of Fort Smith appropriating or donating money to the welfare association is void, being in conflict with the Constitution. Sec. 5, art. 12, Constitution. The statutes make ample provision for caring for the unfortunate, the needy, the sick and afflicted. Sec. 2, act 629, Acts of 1919. Sec. 8159, Crawford & Moses' Digest.

Hill & Fitzhugh, for appellee.

The ordinance is not in conflict with the Constitution, nor invalid, and the decree should be affirmed. Provisions of articles of the Constitution of 1874 reviewed and construed in connection with and in the light of the history of the times, secs. 4, 5, 7 and 12 of art. 12; sec. 1, art. 11; secs. 8, 9 and 11 of art. 16; sec. 27, art. 19. The general rule is that no taxation can be levied for other than public purposes, and the objects of their association to relieve the unfortunate and improve the health and morals of the community stamp it a public purpose, for promotion of which taxation money can be expended. Cooley on Taxation, 204-5; *Cumnock* v. *Little Rock,* 10 L. R. 519; *Jonesboro* v. *Montague,* 143 Ark. 13; *Shepherd's Fold of the Protestant Church* v. *Mayor, Aldermen and Commonalty of City of New York,* 96 N. Y. 137. An analogous question presented in *Brizzolara* v. *State,* 37 Ark. 364. See also *DeWitt* v. *Lacotts,* 76 Ark. 250. *Brooks* v. *State,* 86 Ark. 364. The city is not divested of authority to do welfare work because the county or other public agencies are also engaged in it. A juvenile court has been created for another branch of the work. Secs. 5752-3, Crawford & Moses' Digest.

WOOD, J. The Fort Smith Federated Welfare Association (hereafter called welfare association) is a voluntary unincorporated organization, assembly, or committee, composed of the mayor of the city of Fort Smith, commissioner No. 1 of Fort Smith (the commis-

sioner in charge of public health and safety), the county judge of Sebastian County, the pauper commissioner of the Fort Smith District of Sebastian County, the juvenile officer of the Fort Smith District of Sebastian County, and representatives of various civic and social clubs, organizations and associations in the city of Fort Smith, which have as one of their objects the promotion of benevolences in that city.

The purposes of the "welfare association" are as follows: "To cause afflicted and diseased children to receive medical attention, to maintain a maternity ward for expectant mothers unable to have sanitary and proper surroundings for their ordeal, to care for babies whose parents are unable to care for them, to furnish food and clothing for those unable to buy the same, and free soup for families unable to buy nourishing food, and to provide moral surroundings for girls without homes."

There is held annually in the city of Fort Smith a mass meeting, pursuant to notice, of people interested in the sick and afflicted of the town. At that meeting two members are elected and representatives are chosen from the various civic and social clubs, associations and organizations above mentioned, and these, with the mayor and commissioner No. 1 of the city of Fort Smith and the county judge of Sebastian County, the pauper commissioner of the Fort Smith District of Sebastian County, and the juvenile officer of the Fort Smith District, constitute the "welfare association" or committee for the ensuing year. One of the members of the welfare association is designated as the president and another is designated as treasurer thereof. The members thus chosen are designated the "welfare association," but it is not in reality an association, institution, or corporation, but a mere committee of officers and charitably disposed citizens who undertake to effectuate the purposes of the welfare association as above set

forth. The committee maintains a day nursery to care for babies who have no mothers, or whose mothers are unable to care for them; maintains a maternity ward, and has established a free clinic. The medical association appoints members to serve weekly at such clinic without compensation, and there are brought to the clinic, through visiting committees consisting of men and women appointed by the welfare association, afflicted children for examination and treatment, for various dental work, vaccination, etc. The welfare association maintains a building to which matrons at depots and other persons carry homeless girls and place them there, under moral surroundings and restraints calculated to deter them from waywardness and immorality. The welfare association furnishes food and raiment to the indigent of the city who are in need thereof.

This action was brought by the appellants as the board of commissioners of the city of Fort Smith against the appellee in his individual capacity and as treasurer of the welfare association. The complaint alleges that the appellee, as treasurer of the welfare association, receives and disposes of all funds thereof; that the board of commissioners of the city of Fort Smith passed an ordinance appropriating to the welfare association the sum of $125 per month; that the city clerk, acting under the authority of the above ordinance, drew a check upon the general funds of the city for the month of November, 1922, in the sum of $125; that the ordinance appropriating the money for the purposes indicated is unconstitutional and void; that the check is negotiable and an outstanding evidence of indebtedness against the general funds of the city of Fort Smith. They allege that the appellee, unless restrained, will cash the check and thereby deprive the city of Fort Smith of the funds to which it is legally entitled; that the city has no sufficient or adequate remedy at law to prevent the collection of such funds by the appellee, and they therefore pray that he be enjoined from cashing the check and be

directed to return the same to the proper authorities of the city.

The treasurer of the appellee answered, setting up the organization and purposes of the welfare association as above set forth, admitting that he held the check as alleged in the complaint, and alleged that he was entitled to have the same paid out of the general funds of the city, and, unless restrained and enjoined, he will proceed to collect and expend the same under the auspices of the welfare association. He denied that the ordinance of the city, under the authority of which the check was drawn, is unconstitutional and void. He alleged that the appropriation of the money for the purposes indicated was not a loaning of the credit of the city to any corporation, association, institution, or individual, but the money was appropriated and about to be expended in the preservation of the health and to promote the prosperity and improve the morals, comfort and convenience of the inhabitants of the city in behalf of the sick and afflicted children, and the other benevolent and charitable purposes for which the welfare association, as above indicated, was constituted. The answer then sets up the manner in which the welfare association was constituted and its purposes, as already stated, and specifically enumerates the various charities it has conserved, in accordance with the purposes of the welfare association, and specifically states the amount of funds it had paid out for such charities.

There was a demurrer to the answer. The court heard the cause upon the complaint, the answer thereto, and the demurrer, and the testimony of one D. C. Green, who was the president of the welfare association. The testimony of Green shows that the work of the welfare association was materially aiding the health of the children of the city, especially through the free clinic and the nourishing food given those otherwise unable to receive the same; that it had improved the morals of the town in giving care and attention to wayward girls, and had re-

lieved much suffering among people unable to care for themselves and who were not sufficiently fed and clothed.

The court overruled the demurrer to the answer and entered a decree dismissing the complaint for want of equity. From that decree is this appeal.

Section 5, article 12, of the Constitution of 1874 is as follows: "No county, city, town, or other municipal corporation shall become a stockholder in any company, association or corporation, or obtain or appropriate money for or loan its credit to any corporation, association, institution or individual." The question for decision is whether or not the ordinance appropriating money to the Fort Smith Federated Welfare Association, as set up in the pleadings, is contrary to the above provision of the Constitution. The complaint alleges that the welfare association is "a benevolent organization organized for the purpose of rendering aid to the poor and unfortunate of the city" (Fort Smith). The answer alleged, and the demurrer admits, and the proof shows, that the welfare association "is not an association, institution, or corporation, but it is a mere committee of officers and charitably disposed citizens who undertake to carry on the work above mentioned in behalf of the sick and afflicted children, wayward girls, and worthy or indigent families who are undernourished and poorly clothed and fed."

It will be observed therefore that the so-called "welfare association" does not in fact come within the inhibitory words of the Constitution. It is not a "corporation, association, institution, or individual," but a committee formed in the manner alleged in the answer and shown by the proof, to effectuate the benevolent and moral purposes designated, all for the preservation of the health, the promotion of the prosperity, and the improvement of the morals of the inhabitants of the city of Fort Smith. The commendable objects for which this committee was organized come well within the general welfare clause of our statute which confers upon muni-

cipal corporations "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 and improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof." Sec. 7494, C. & M. Digest. Judge COOLEY says: "The support of paupers and the giving of assistance to those who, by reason of age, infirmity, or disability, are likely to become such, is, by the practice and common consent of civilized countries, a public purpose. The laws not only exempt from taxation the limited means of such persons, but they go further and provide public funds with which to furnish them retreats where they can be supplied with the necessaries, and, to a reasonable extent, with the comforts of life. Hospitals are also provided where dependent classes can receive medical aid and assistance, and asylums where the deaf, the dumb, and the blind may be supported and taught, and where the insane may be kept from doing or receiving harm, and can have such careful and scientific treatment, with a view to their restoration, as they would not be likely to receive elsewhere. He would be a bold man who, in these days, should question the public right to make provisions for these benevolent objects. And this provision might not only be made by the establishment of institutions for the purpose, but private institutions might undoubtedly be aided with public funds, in consideration of services to be rendered to the public, and expenses to be incurred by them in assisting and relieving the same necessitous and dependent classes." Cooley on Taxation, pp. 204-5.

Under the specific enumeration of powers conferred by statute upon municipal corporations contained in § 7529 of Crawford & Moses' Digest, the power to construct and maintain city hospitals is not mentioned, yet this court, in the recent case of *Cumnock* v. *Little Rock,* 154 Ark. 471, held that municipal corpor-

ations had such power, under the general welfare clause, to preserve the health and promote the comfort and convenience of the inhabitants of the city. If the building of a city hospital is within the implied powers granted to municipal corporations under the general welfare clause to preserve the health of the inhabitants of the city, then surely the benevolent purposes which the welfare association was organized to perform, and is performing, in the city of Fort Smith come also well within the compass of these powers. For there are no more worthy or higher objects of government to be attained than those of making suitable provision for the care and maintenance of those of the city's inhabitants who, through unavoidable casualty and misfortune, have become indigent and sick, and who are therefore wholly unable to care for themselves. This includes not only the aged and infirm, but orphans, or babies and poor dependent children whose parents are unable to care for them. In short, it would be difficult to imagine or state a more deserving public purpose or one coming more within the compass of the true functions of municipal government, than the benevolent objects set forth in the answer and shown by the proof in this record which the welfare association has sponsored and is successfully performing for the inhabitants of the city of Fort Smith.

The question then recurs, is there anything in the above provisions of the Constitution prohibiting the city government of the city of Fort Smith from passing an ordinance appropriating money out of the general funds in its treasury to aid the welfare association in carrying out the laudable work which it is doing? In *Jonesboro* v. *Montague,* 143 Ark. 13, we said: "When the powers to be performed by the governing body of municipal corporations are of a ministerial, administrative, or executive nature, they may delegate the power to a committee. The business of municipal corporations, like other corporations, must be conducted through agents.

To segregate a municipal corporation from all other corporations in the methods employed in the transaction of business would prove highly detrimental to all concerned, and if it could not act upon any matter properly before it which also affected the rights of its officers, few competent persons could be induced to accept such offices." That principle applies here. In contributing of its funds to this welfare association or committee to carry on governmental work which otherwise the city would have to perform, or at least should perform through some other agency, it in effect but adopts this welfare association as its own agency to do the character of governmental work which manifestly the city authorities conceived could be better, or at least as well, done as through some instrumentality which was exclusively of its own creation and over which it had supreme control.

It will be observed that the Welfare Association had in its membership a majority of the commissioners charged with the city government of the city of Fort Smith. Thus the city, through its officers as members of the welfare association, does have a large voice in the distribution of the fund contributed by it to the benevolences mentioned. It occurs to us that the fact that private individuals and civic clubs and organizations also contributed to a fund which is used to accomplish the same objects does not make the contribution by the city any the less a contribution toward the legitimate purpose of promoting the general welfare of its inhabitants, and thus performing a governmental function.

Any one at all familiar with the history of the times and the conditions and environment of our State Government when the Constitution of 1874 was framed will know that the wise men who laid the various provisions of our organic law, among them the section above quoted, did not have in mind the prevention of municipal aid to committees, or other *quasi*-municipal governmental agencies to carry out the purposes of municipal govern-

ment. The Constitution of 1874 was framed in convention as the organic law of the State of Arkansas by representatives chosen by the people just after they had been disenthralled from a government which had been foisted upon them by acts of Congress during the period known as the Reconstruction Era, and which government, out of popular derision and contempt for those then in authority, was designated as "the carpetbag government," because it was dominated for the most part by foreign political adventurers and freebooters who came among us for no other purpose than to exploit the resources of our people for their private gain. During this period the people of the State at large and of many of the counties and municipalities were burdened with oppressive exactions of taxation laid for the purpose of paying bond issues and guarantees of bond issues, of public and *quasi*-public corporations, granted ostensibly in aid of railroad and levee building and other such projects, but which projects in reality were never consummated, and from which the people themselves received no benefit whatever. In other words, there was a saturnalia of bond issues given to companies, associations, corporations, institutions, and individuals, which were conceived, planned, and carried out by those then having the reins of government, not for the public good, but for the private loot and enrichment of those in governmental control. Section 5, article 12, of the Constitution, *supra,* was intended to forever forestall and prohibit a recurrence of such conditions. It was with this in view that municipal corporations were prohibited from appropriating money or lending their credit to corporations, associations, institutions, or individuals who were either organized for or engaged in purely private enterprises, or who, if organized for or engaged in a public enterprise, or *quasi*-public enterprise, might exploit or use the public funds or resources of the State's governmental agencies for private gain. It was never the design of the builders of the framework

of our government to prohibit municipalities from carrying on governmental functions of the character indicated in this record through any agency which they might select for those purposes. It must be remembered that the intent of the framers of the Constitution, gathered from both the letter and spirit of the instrument, construed in the light of the history of events which gave it birth, is the law. *Martin* v. *State,* 60 Ark. 343-348.

As we have shown, the welfare association does not come within the letter of the constitutional inhibition, nor does it come within its spirit. Following the trend of thought expressed by Judge COOLEY, *supra,* and the doctrine in harmony therewith declared in *Cumnock* v. *Little Rock, supra,* we now hold that the work of the welfare association, as set forth in this record, was well within the sphere of the municipal government of the city of Fort Smith, and that section 5, article 12, *supra,* of the Constitution, should be construed as if such governmental purposes were expressly authorized by it. An illuminating authority in support of the conclusion thus arrived at is that of *Shepherd's Fold* v. *Mayor, etc., of New York,* 96 N. Y. 137. See also *Wisconsin Industrial School for Girls* v. *Clark County,* 103 Wis. 657-669; *McLean County* v. *Humphreys,* 104 Ill. 387, where it is declared, "it is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae,* to protect and provide for the comfort and wellbeing of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise," the above doctrine. A majority of us unqualifiedly approve.

It is argued in the brief of counsel for the appellants that, inasmuch as statutes of the State which apply to the area over which the city of Fort Smith has jurisdiction, and the general statutes of the State, adequately provide ways and means for doing the work of the welfare association other than through the instrumentality of such welfare association, therefore the ordinance under review is invalid because it undertakes to do or to aid in doing the same work through the agency of such association or committee. This argument is manifestly unsound. Because the county, as a governmental agency, may do a part of the same work under general statutes, or the city may do all, or a part of the same work in other or different ways, or through different agencies, is no reason why the city may not adopt the welfare association as the most economical and efficient instrumentality that could be adopted for accomplishing the purposes of municipal government as set forth in this record and authorized by the general welfare clause (§ 7494, C. & M. Digest) of our statute relating to municipalities. These powers and instrumentalities are not in conflict, but are concurrent and auxiliary. See, by analogy, *Brizzolara* v. *State,* 37 Ark. 369; *DeWitt* v. *LaCotts,* 76 Ark. 250; *Brooke* v. *State,* 86 Ark. 364.

It follows that the decree of the chancery court of Sebastian County is in all things correct, and the same is therefore affirmed.

HART, J., (dissenting). The Chief Justice and myself are of the opinion that the ordinance appropriating money to the Fort Smith Federated Welfare Association violates art. 12, § 5, of the Constitution of 1874, which reads as follows: "No county, city, town or other municipality corporation shall become a stockholder in any company, association or corporation, or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual."

It will be noted that this provision of the Constitution prohibits municipal corporations from appropri-

ating money for or loaning its credit to any corporation, association, institution or individual. Hence the first question to be considered is whether the Fort Smith Federated Welfare Association is an association within the meaning of the Constitution.

It is true the association is devoted to charitable purposes, but it is nevertheless a voluntary association, and is not under the legal control of the city. While the mayor was elected a member of the board of directors, this was done by the voluntary action of the members of the association, and he was not elected pursuant to any law requiring it, nor did he become a director by virtue of his office as mayor. Neither the city nor the State has any control whatever over the association or management of its affairs. The institution owes no duty to the city or to the State. The question is whether the association comes within the prohibition of the Constitution. The same principle would apply as in cases of public and private corporations. Under this provision of the Constitution a municipal tax must be for a public and not a private purpose. Under it, the Legislature has no power to authorize a municipal corporation to make a gift of money raised by taxation to a voluntary association of individuals or an institution organized to carry on private charity, although it may result in incidentally benefiting the public. See *Dartmouth College* v. *Woodward,* 4 Wheat. (U. S.) 518.

The ordinance under consideration by its terms made a donation for the support and maintenance of the Fort Smith Federated Association, and, by the terms of the section of the Constitution above quoted, such donation was prohibited. This provision of the Constitution is self-executing, and required no legislation to place it in full force and effect.

In considering a similar question under a similar clause of the Constitution of the State of Illinois, in the case of *Washington Home of Chicago* v. *City of Chicago,* 29 L. R. A. 798, the Supreme Court of that

State held that a corporation composed of private individuals, not restrained by law from conducting its business for private benefit, which does not report to and is not inspected by any State official, elects its own managers without the State's approval, and by law owes the State no duty, is a private corporation within the provisions of the Illinois Constitution prohibiting municipalities from making donations to private corporations.

In the article on Municipal Corporations in Ruling Case Law, it is said that the power of a municipal corporation under legislative authority to expend funds raised by taxation upon public institutions, such as hospitals, schools and similar undertakings which are owned, operated and controlled by the municipality, is unquestioned. Continuing his discussion of the subject the author said: "It is not, however, within the power of a municipal corporation, even with express legislative authority, to donate funds in aid of a private institution, although it is devoted to a charitable educational work for which public funds might lawfully be expended by the municipality directly if the corporation controls the institution, selects its own officers, manages its own affairs and owes no duty to the State except that which arises from the nature of the work undertaken by it. The incidental benefit to a city of town from the location of such an institution within its limits is not the kind of benefit and interest which will authorize a resort to the power of taxation." 19 R. C. L., sec. 25, pp. 716-717. Several cases in addition to the one above mentioned are cited in support of the text. Among others is the case of *Egan* v. *City and County of San Francisco,* 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915-A, 754. In that case the Supreme court of California held that, even if it should be granted that the municipality had the right, under its charter, to own and conduct an opera house, it did not have the power, after acquiring the ownership of such structure located on the land belonging to the municipality, to turn over to a body of pri-

vate citizens the absolute control and management of the property. The court said that the public use of public property could not coexist with the private management and control of such property.

The same reasoning applies here. If the management of a hospital or other like building owned by the city could not be turned over to the control and management of some private agency, the city could not donate the public funds to aid a private association, although its activities are devoted to charity and are beneficial to the public.

We think this principle was distinctly recognized in the case of *Shepherd's Fold* v. *Mayor, etc. of N. Y.*, 96 N. Y. 137, relied upon to sustain the majority opinion. In that case the court was construing secs. 10 and 11 of an amendment to the Constitution adopted by vote of the people in November, 1874. So much of the sections as are applicable are as follows:

"Sec. 10. Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes.

"Sec. 11. No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid and support of its poor as may be authorized by law."

The court in construing them said: "The general scheme of the constitutional provisions referred to seems to be that the general funds of the State shall not be given to local charitable institutions, except in aid of the blind, the deaf and dumb, and juvenile delinquents, and that the poor are to be provided for in their localities, counties, cities, towns and villages, being allowed to make any provision for the support of their poor which may be authorized by law. Carrying out the designated charities through the instrumentality of private corporations is not prohibited by the Constitution, but the giving away of the money either of the State or of its counties or other local divisions to individuals or private corporations, except for the designated purposes for which each is authorized to provide, is forbidden."

In addition there was a statute empowering the commissioners of charities to transfer orphans and friendless children to the charge of the Shepherd's Fold. There was also a statute authorizing the board of supervisors of the county of New York to levy and collect a tax and pay the same over to the Shepherd's Fold, to be applied to the purposes and objects of the said corporation. The court said that, having the authority, under the Constitution, to commit to the charge of the Shepherd's Fold the specified class of the poor, it was a matter of legislative discretion to determine how the expenses of these children should be provided for. So, too, we think *McLean County* v. *Humphreys*, 104 Ill. 378, relied upon by the majority opinion, supports our view. In that case there was a statute making it the duty of the county court to commit infant females of a designated class to the industrial school, and charging the county with the expense of their maintenance. Hence the question of the power of a county or municipality to donate to a private charity was not involved. The case of *Wisconsin Industrial School for Girls* v. *Clark County,* 103 Wis. 651, sustained the constitutionality of a statute providing for the commitment of infants of a certain

class to industrial schools, and charges the counties from which the commitments are made with the expense thereof.

In all these cases the courts recognized that a simple gift of the money to the institutions would have come within the constitutional prohibition, whether the money was regarded as State, city, or county money.

In construing the provision of the Constitution under consideration, this court has held that a municipal corporation cannot assist in the building of a courthouse for the county to be located within its limits. *Russell* v. *Tate*, 52 Ark. 541. Neither do we think that the case of *Cummock* v. *Little Rock*, 154 Ark. 471, lends any support to the majority opinion. In that case it was said that municipal corporations have only the powers expressly conferred by statute, and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation. Hence we held that, under the section of the statute relating to municipal corporations commonly known as the general welfare clause, the common council of the city had the power to provide by ordinance for the erection and maintenance of a public hospital by said city. This statutory provision, in our opinion, has no reference to or connection with private charitable hospitals which have been erected or established in a city by any private corporation, society, or voluntary association.

It is conceded that there is no express power in the statute conferred upon a city to make donations or gifts gratuities to private hospitals, and it is equally clear to our minds that no such power is essential to the existence and wellbeing of a city. If once the principle is adopted that a city may raise money by taxation for private purposes, or bestow money raised by taxation gratuitously, it will inevitably follow that municipal corporations might by insensible degrees increase their donations to various charitable objects until all the

people of the city must bend their backs to the burden of taxation, to such an extent that poor people, or those of moderate means, may become themselves in danger of being paupers. While the charity under consideration in this case is a wise and beneficent one, we do not think that the ordinance under consideration can be regarded as the proper exercise or application of the implied police powers of the city.

Our view on this branch of the case is well expressed in *St. Mary's Industrial School* v. *Brown*, 45 Md. 310. In that case the court said: "We have carefully examined all the statutes to which we have been referred, and all others in any manner relating to the subjects under consideration, and we have utterly failed to discover any express power, or any by fair implication, by which the appropriations to the appellants, in the manner in which they have been made, can be sustained. They are made without terms or conditions. The institutions could receive the money thus appropriated, and the day after, in the exercise of the powers completely in their control, discharge every inmate received from the city. We speak not of what would likely be done, but of the power to do. The city council, in making these appropriations, entirely abdicate all discretion over the subject of their application. They become therefore mere donations. Who shall or who shall not be the objects of the charity, the city retains no power to determine. Whether the inmates really belong to the pauper class,—whether they be really objects of municipal care and protection—are questions that the city authorities do not determine, and have no means of determining. It is all left to the discretion of those who manage the institutions, and they, as we have shown, are not municipal agents, nor subject to any control or accountability as to the use and application of the money. It is certain, we suppose, that the city council could have no power to make appropriations to these institutions simply as such, nor because merely of the very humane and laudable objects and purposes

for which they were created by their founders and promoters; it is only because of the actual services and benefits rendered the city that any claim could be urged for their support from the city treasury. And, if this is so, what guarantee has the city that services or benefits will accrue, commensurate with the appropriations that are made? The same principle that would sustain these appropriations would equally sustain appropriations to every private school and private charity in the city. And once concede the power to make them, and it will be in vain to invoke the courts to exercise a discretion as to any limit in the amount or extent of them.

"That the city has ample power delegated to it, and that it is a duty, to provide for the foundlings, the insane, the indigent, infirm and helpless, and for the correction of the vicious and vagrant portions of its population, is beyond all question; but whatever provisions may be made must be under the control and subject to the supervision of municipal authority." See also *Hitchcock* v. *St. Louis,* 49 Mo. 484.

Municipal corporations hold their money for their inhabitants to be expended for legitimate corporate purposes. The right of taxation by such corporations extends only to raising money for public purposes and uses. There is no definition of a public purpose or use which can include the maintenance and support of a private charitable institution by the donation of money levied and collected by taxation. It is one thing for a city to provide itself with a hospital or the like institution to care for the poor and the sick, and quite another to make gifts to a private institution for that purpose. The former is a public purpose, and is not prohibited by the Constitution; the latter is a private purpose, and falls within the ban of the clause of the Constitution of 1874 quoted above.

The Fort Smith Federated Welfare Association is a private institution not under the control of the city and having no legal connection with it. It will exist only

during the pleasure and for the purpose of its members. If the money collected by taxes may be given to it, it may also be donated to any other private corporation or person.

Therefore we respectfully dissent.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* WARDELL-WHITTON ROAD IMPROVEMENT DISTRICT.

Opinion delivered March 19, 1923.

1. JUDGMENT—COLLATERAL ATTACK.—A judgment may be attacked collaterally only where it is shown by the record that there was a want of jurisdiction, either of the subject-matter or of the person of the defendant.
2. HIGHWAYS—JUDGMENT OF COUNTY COURT CHANGING HIGHWAY.—Where the county court, in changing a road so as to run longitudinally on the right-of-way of a railroad company for a short distance, followed the provisions of the special act of 1919 creating the Wardell-Whitton Road Improvement District No. 2 of Mississippi County, its judgment is not void on the ground that no jurisdiction was acquired over the railroad company.
3. HIGHWAYS—AUTHORITY OF COUNTY COURT TO CHANGE HIGHWAY.—Where the county court was authorized under the special act of 1919 creating the Wardell-Whitton Road Improvement District, to change an existing highway so as to place it longitudinally on a railroad right-of-way if necessary to do so, and such use would not deprive the railroad of the use thereof or materially affect it, it will be presumed that the Legislature knew where the old highway was and that in authorizing necessary changes it had in mind the existing location of the highway.
4. HIGHWAYS—LOCATION—REMEDY.—The remedy of a railroad company, aggrieved by the judgment of a county court in changing a highway so as to place it longitudinally on its right-of-way, is by appeal therefrom, and it cannot attack such judgment collaterally by injunction, as the court had jurisdiction of the subject-matter.

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

STATEMENT OF FACTS.

This action was instituted in the chancery court by the St. Louis-San Francisco Railway Company against the commissioners of Wardell-Whitton Road Improvement District No. 2 of Mississippi County, Ark., to restrain them from opening or constructing a highway upon the right-of-way of the railroad company.

It appears from the record that the plaintiff is operating a line of road through Mississippi County, Ark. The Legislature of the State of Arkansas, by a special act, created Wardell-Whitton Road Improvement District No. 2 of Mississippi County, at a special session of the Legislature in 1919. Subsequently, pursuant to the provisions of the special act, ten petitioners filed a petition in the county court asking for an alteration in the line of the public road in two townships in said county. The county court appointed three viewers, and the public road was changed so as to run longitudinally on the right-of-way of the railroad company for a short distance. In making the change of the public highway the statute regulating the method of procedure in such cases was followed, and this was in accordance with the provisions of the special act creating the special road improvement district in question. No appeal was taken from the judgment of the county court establishing the public highway parallel with the railroad right-of-way and on a part of said right-of-way. Other facts will be stated or referred to in the opinion.

The chancellor dismissed the complaint of the plaintiff for want of equity, and the cause is here on appeal.

W. F. Evans, W. J. Orr, Taylor & Gladish and *Gautney & Gautney,* for appellant.

The description of the highway is indefinite and uncertain, and either takes a strip 20 feet wide longitudinally off the west side of the railroad right-of-way through section 36, or, as we construe it, none of the right-of-way is taken except for crossing south of section 36, where the highway continues south and the rail-

road curves to the west. The report of the viewers shows this contention correct, and apparently the county court did not construe its order as taking 20 feet off the company's right-of-way. Has the county court the power to lay out a highway upon the right-of-way of a railroad company? Sec. 7328, Kirby's Digest, as amended by act 1911. *Sloan* v. *Lawrence,* 134 Ark. 127. The Legislature could do it, but its intention must be clearly manifested. 13 R. C. L., Highways, § 34. See also *St. Louis & San Francisco Rd. Co.* v. *Fayetteville,* 75 Ark. 537. Usually it cannot be established longitudinally along a railroad right-of-way. 13 R. C. L., p. 44, sec. 35, citing *Bridgeport* v. *Railroad,* 36 Conn. 255; 4 Am. Rep. 63; *Ft. Wayne* v. *Lake Shore Ry.,* 32 N. E. 215, 18 R. L. A. 367. Especially *Northern Central Ry.* v. *Mayor, Baltimore,* 106 Atl. 159; *Mobile & O. Ry.* v. *Union City,* 194 S. W. 573; *Railroad* v. *Memphis,* 148 S. W. 662; 2 Nichols on Eminent Domain, sec. 358, 361. County court has no express authority for taking land devoted to a public use. See *Railroad* v. *Railroad,* 102 Ark. 492; *Railroad* v. *Fayetteville,* 75 Ark. 534. The county court being without power to condemn lands of a railroad company except for crossings, its attempt to take its property otherwise is void and its judgment subject to collateral attack. *Portland Ry. Light & Power Co.* v. *Portland,* 181 Fed. 632.

A. F. Barham, for appellee.

No uncertainty about description of highway nor about its taking part of railroad right-of-way. The establishment of the road was a proceeding *in rem,* and the county court's judgment is not subject to collateral attack unless it appears on its face the court was without jurisdiction. *Crittenden Co. Lbr. Co.* v. *McDougal,* 101 Ark. 390; *Hall* v. *Morris,* 94 Ark. 519. Court had jurisdiction, and could have established road in either of two ways. Sec. 3234; *Lonoke Co.* v. *Carl-Lee,* 98 Ark. 346; § 5249, C. & M. Digest; *Sloan* v. *Lawrence Co.,* 134 Ark. 121. Property not taken without due process of

law. *Dickerson* v. *Tri-County Drainage District,* 134 Ark. 477. County court had power to take railroad right-of-way for a public use. 20 C. J. 601. Not shown that right-of-way not taken insufficient for railroad use. 20 C. J., 605-606; note to *Zehner* v. *Miller,* 24 L. R. A. (N. S.) 383. 10 R. C. L. 201, 202.

HART, J., (after stating the facts). The change in the road in question was made in conformity with the statutes relating to the establishment and alteration of public highways. No appeal was taken from the decision of the county court establishing the road as laid out by the viewers. Hence the present suit is a collateral attack on the judgment of the county court in changing the public road.

It is well settled in this State that a judgment may only be attacked collaterally where, by the record, it is shown that there is a want of jurisdiction in the court rendering it, either of the subject-matter or of the person of the defendant. *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 390, and *Blanton* v. *Forrest City Mfg. Co.,* 138 Ark. 508.

The special act which created the special road district in question provided that the county court might make changes or alterations in the existing highway by following the method of procedure prescribed by the statute in such cases.

In *Sloan* v. *Lawrence County,* 134 Ark. 121, the act of 1911 relating to the power of the county court to open new roads and to make such changes in old roads as it might deem necessary and proper was held valid, in so far as provides for the taking of private property by order of the county court for a public road, without notice to the interested landowner or a determination of the necessity therefor.

Again, in *Dickerson* v. *Tri-County Drainage Dist.,* 138 Ark. 471, the court held that taking property for a drainage ditch falls within the State's right of eminent domain, and the right may be exercised without notice

to the property owner and without giving a hearing upon that question. Hence the contention that the judgment of the county court changing the public highway is void because no jurisdiction was acquired over the railroad company is not well taken.

It is next insisted that the judgment of the county court was void because the county court had no jurisdiction to change the existing highway so as to place a part of it longitudinally upon the right-of-way of the railroad company. We do not think that this fact rendered the judgment of the county court void. The county court was not laying out an entirely new system of highways. The improvement district was organized for the purpose of improving an existing highway, and the county court, under the special act creating the improvement district, was authorized to change the existing highway if it should be found necessary and proper to do so. The special act provided that the method of procedure adopted by the general statute for laying out and altering public highways should be adopted in case a change in the public road should be asked. We must presume that the Legislature knew where the old highway was, and that it was in some places in the county close to and parallel with the right-of-way of the railroad company, and that when it authorized the county court to make the necessary changes in the existing highway it had in mind its location.

In testing the right to attack the judgment of the county court collaterally, the question is one of jurisdiction. If the county court had jurisdiction of the subject-matter, then the injunction will not lie in the present case. As we have just seen, the statute creating the road improvement district authorized the county court to change the existing public highway when it was found necessary to do so. Bearing in mind that the Legislature must be treated to have knowledge of its location with reference to the railroad's right-of-way, the statute, by necessary implication, authorized the county

court to change the highway so as to run along the right-of-way of the railroad company, if necessary to do so and if such use would not deprive the railroad of its use of the right-of-way, or materially affect such use.

Therefore the remedy of the railroad company, if aggrieved by the act of the county court, was to take an appeal from its judgment to the circuit court, and there, on a trial *de novo,* to show the court that the laying out of a public highway longitudinally, even for a short distance, on its right-of-way would operate to deprive it of its right-of-way or to materially lessen its use for that purpose. See also *Lonoke County* v. *Carl-Lee,* 98 Ark. 345.

It follows that the chancery court was right in dismissing the plaintiff's complaint for want of equity, and its decree will be affirmed.

CITIZENS' NATIONAL BANK *v.* GANNON.

Opinion delivered March 19, 1923.

1. BAILMENT—PLEDGE BY BAILEE—RATIFICATION.—Where jewelry was deposited with a defendant for safe-keeping, and he pledged it with his co-defendant as security for a loan to himself, the owner is not bound by a simple ratification, but confirmation must rest on some consideration or upon an estoppel.
2. COMPROMISE AND SETTLEMENT—VALIDITY.—Where a bailee of jewelry pledged it as security for a loan to him and the bailor, becoming discouraged in her attempts to obtain its return, accepted a bill of sale from the bailee "subject to a loan" from the pledgee, the rights of the pledgee were recognized, and the confirmation of the pledge was supported by a good consideration; the bill of sale constituting a good compromise and settlement, of which the pledgee could take advantage.
3. COMPROMISE AND SETTLEMENT—CLAIM WITHOUT MERIT.—The settlement of a disputed claim furnishes a sufficient consideration to uphold the terms of a compromise, though the asserted claim is without merit and could not have been sustained in the courts.

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

STATEMENT OF FACTS.

This is an action in replevin by Eleanor O. Gannon against Citizens' National Bank of Hot Springs, Ark., and Frank L. Reed to recover a platinum bracelet containing forty-five diamonds, worth $1,250, a platinum brooch containing twenty-one diamonds, worth $250, a fourteen-carat gold ring containing one diamond, worth $875, a platinum solitaire diamond ring worth $500, and a platinum three-diamond ring, worth $1,750, and all of the aggregate value of $4,625.

The defendants admitted the ownership of the plaintiff in the property, but defended the suit on the ground that the plaintiff had given the defendant, Reed, the right to deposit the jewelry with the defendant bank as security for a loan obtained by him from it for $2,600.

Mrs. Eleanor O. Gannon was a witness for herself. According to her testimony, she is the owner of the jewelry involved in this suit. She is well acquainted with the defendant, Frank L. Reed, and in September, 1919, deposited the jewelry with him for safe-keeping, and he never returned it to her. She and her sister drove by Reed's place of business in Little Rock, Ark., on their way to their country home, about forty miles distant. Mrs. Gannon had the jewelry on her person, and her sister thought that it would be dangerous for her to wear it on the trip. The plaintiff then gave the jewelry to Reed to keep in his safe until she returned. Three or four weeks afterwards she returned to Little Rock, and asked Reed for the jewelry. Reed told her that he had borrowed $2,000 and had deposited the jewelry as security for the loan. Reed did not tell her where he had borrowed the money. He told her that he had borrowed the money for thirty days and would take up the loan at the end of that time. He subsequently told her that he had renewed the loan for sixty days, and would pay it at the end of that

time and give her back the jewelry. Reed obtained the $2,000 loan from the Worthen Bank at Little Rock, Ark., and that bank renewed the loan from time to time for eighteen months. During all of this time Reed never told Mrs. Gannon where he had obtained the money. At the end of eighteen months the Worthen Bank demanded payment of its loan. Reed then obtained a loan of $2,600 from the Citizens' National Bank of Hot Springs, Ark., and paid the Worthen Bank. The jewelry was deposited with the Citizens' National Bank as security for the loan obtained from it. Both the Worthen Bank and the Citizens' National Bank thought that Reed was the owner of the jewlery, and loaned him the money upon the faith of it. In the spring of 1921 the plaintiff first learned that Reed had borrowed the money from the Worthen Bank. She also learned that he had transferred his loan to the Citizens' National Bank at Hot Springs. In the spring of 1921, while the plaintiff was in California on a visit, she noticed that a part of her jewelry had been advertised for sale by a salesman of Reed. She returned to Little Rock and asked Reed about the matter, and then learned that the jewelry was deposited with the Citizens' National Bank of Hot Springs as security of a loan obtained by Reed from it. After talking with Reed about the matter, Mrs. Gannon became discouraged, and consulted an attorney. Her attorney wrote a form of notice to the Citizens' National Bank, to the effect that the jewelry was the property of Mrs. Gannon. Reed declined to sign the notice, and said that he would take the matter up with his attorney. Mrs. Gannon asked Reed to sign the notice so that the bank would know that the jewelry belonged to her. She wished it as evidence that the jewelry belonged to her. She had nothing at that time to show that she owned it.

Subsequently Reed signed a bill of sale of the jewelry in favor of Mrs. Gannon. The attorney of Mrs. Gannon then sent a copy of the bill of sale to the Citizens' National Bank of Hot Springs. This was to

notify the bank of Mrs. Gannon's title to the jewelry. Mrs. Gannon described in detail how she came to own it. It is sufficient to say that a part of it had been given to her by her husband and that she bought part of it.

Frank L. Reed was a witness for the defendant. According to his testimony, he gave a part of the jewelry to Mrs. Gannon himself, and gave her the money with which she purchased the balance of it, except one piece. She delivered the jewelry to him for the express purpose of enabling him to obtain a loan on it. She understood all the time that he had deposited it with a bank as security for the loan.

Mrs. Gannon was called in rebuttal, and denied this to be true. The defendants also introduced in evidence the bill of sale of the jewelry to Mrs. Gannon, which was dated May 16, 1921. The bill of sale contains the following:

"This conveyance is made subject to a loan of two thousand six hundred dollars ($2,600) upon the above described property and interest thereon, owing the Citizens' National Bank of Hot Springs, Arkansas, and upon payment thereof by either of the parties hereto, or any other person, the said Citizens' National Bank of Hot Springs, Arkansas, is hereby authorized and directed to deliver the above described property to the said Eleanor O. Gannon, grantee herein.

"And I, Frank L. Reed, grantor, hereby covenant with the said grantee that I will warrant and defend the title to the above described property against the lawful claims of any and all persons claiming under, by or through me only, excepting, however, the loan above referred to, for which said property is pledged."

No part of the loan has been paid by Reed, and he has become a bankrupt.

The jury returned a verdict for the plaintiff, and the defendants have appealed.

L. E. Sawyer, for appellant.

Appellant is entitled to a reversal because appellee knew Reed had pledged the jewelry for an individual loan and acquiesced in the transaction. She also later ratified his said act. The court also erred in not allowing appellant the opening and closing argument. Estoppel. *Jetton* v. *Tobey,* 62 Ark. 84; see also *Anderson* v. *Cox,* 42 Ark. 473; note to 25 L. R. A. (N. S.) 761-770; *Bank of U. S.* v. *Lee,* 13 Pet. 117-8, 21 C. J. 1176; *Van Horn* v. *Overman,* 75 Iowa 421. Silence acquiescence. 21 C. J. 1113, § 116, 1118, § 121, 21 C. J. 1150. 2 Herman on Estoppel and Res Adjudicata, 1061-3, 1065-6; *Despard* v. *Despard,* 53 W. Va. 463; *Forbes* v. *Page Lbr. Co.,* 20 Idaho 354; *Rothschild* v. *Title Guaranty & Trust Co.,* 204 N. Y. 458. Execution of the bill of sale was an express ratification of Reed's acts in pledging the jewelry for his loan. Appellant's admission that appellee was the owner of the property, but for its special interest entitled it to open and conclude the argument.

Schoggen & Shepherd, Martin, Wootton & Martin, for appellee.

Appellee not estopped by silence, under circumstances of this case. *Jetton* v. *Tobey,* 62 Ark. 84. She is the owner of the property, and gave Reed no authority to sell. She only gave him possession, and that without title would not enable him to convey a better title than he had. Note 25 L. R. A. (N. S.) 762. Cases and authorities cited by appellant reviewed. Note to 25 L. R. A. (N. S.) 761, supports appellee's contention. Silence alone is insufficient to work an estoppel. 10 R. C. L. 692, sec. 21. *Id.* 696-7. *Forrest* v. *Benson,* 233 S. W. 916. Court erred in submitting question under instructions 3 and 4. The recital in Reed's bill of sale to appellee was not a ratification by her of his act in pledging jewelry. Burden of proof was upon appellee. Secs. 4112, 4113, Crawford & Moses' Digest, § 1231. *Prescott & N. W. Ry.* v. *Brown,* 74 Ark. 606; 86 S. W. 89; *Mine LaMotte Co.* v. *Consolidated Coal Co.,* 85 Ark. 123, 107 S. W. 174. Sec. 8653,

C. & M. Digest. *Keller* v. *Sawyer,* 104 Ark. 375; *Gilley* v. *Accident Ins. Co.,* 96 N. Y. Supp. 282; *Lodany* v. *Assard,* 91 Conn. 316; 99 A 762. Plaintiff has right to open and close when it devolves upon him to prove any allegation of his complaint. *Bertrand* v. *Taylor,* 32 Ark. 471; *Johnson* v. *Nelson,* 3 Neb. 260, 91 N. W. 52; *Huffman* v. *Aldersen,* 9 W. Va. 616; *Prescott & N. W. Ry.* v. *Brown, supra; Mine LaMotte Co.* v. *Consolidated Coal Co., supra,* 23 R. C. L. 35, § 107; 1 Thompson on Trials, 231-2. See also *Simmons* v. *Pearson,* 61 S. W. 259, 22 Ky. Law Rep. 1907. A general objection to the giving of all instructions will not avail if any given are correct. *Ward* v. *Sturdivant,* 86 Ark. 103; *St. L. I. M. & S. Ry.* v. *Puckett,* 88 Ark. 204; *Roach* v. *Rector,* 93 Ark. 521; *St. L. I. M. & S. Ry.* v. *Carter,* 93 Ark. 589.

HART, J., (after stating the facts). According to the testimony of Reed, Mrs. Gannon let him have the jewelry for the purpose of obtaining a loan on it. Mrs. Gannon denied this, and said that she deposited the jewelry with him for safe-keeping. She did not know that he had obtained a loan on the jewelry until after he had done so. Hence, according to the undisputed evidence, Reed did not act or assume to act as the agent of Mrs. Gannon in obtaining the loan. In such cases the owner may subsequently confirm the sale or pledge of the property, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel.

In *Lafargue* v. *Markley,* 55 Ark. 423, where a husband sold his wife's horse, in her absence and without her consent, and executed a bill of sale therefor, this court affirmed a judgment for the recovery of the horse by the wife on the ground that there was no evidence in the case tending to show either an estoppel against her or a consideration for the confirmation of the sale of her horse by her husband. In discussing the question the court said: "There was no evidence that he was or assumed to act as her agent. There was no question of agency, and

consequently there was nothing to ratify. She could have confirmed the sale, but this could not have been done by a simple ratification. A confirmation, to have been binding upon her, must have rested upon some consideration upholding it, or upon an estoppel.'' (Citing authorities).

Here the facts are essentially different. The undisputed evidence shows that Reed executed a bill of sale to Mrs. Gannon to the jewelry in question on the 16th day of May, 1921. Mrs. Gannon, with full knowledge that he had deposited the jewelry with the Citizens' National Bank as security for a loan of $2,600, accepted the bill of sale and sent a copy of it to the bank. According to her own testimony, she had become discouraged about the matter, after waiting so long for Reed to redeem his pledge of the jewelry, and wanted something to show that she had title to it. He had had the jewelry pledged for a loan for eighteen months, and Mrs. Gannon knew that fact.

The recital in the bill of sale by Reed to her that it was made subject to a loan of $2,600 from the Citizens' National Bank, and with directions to the bank to deliver the jewelry to Mrs. Gannon, upon the payment of the loan by either Mrs. Gannon or Reed, was a sufficient consideration for the execution of the bill of sale. This was the fixing of a definite basis of their rights in the property, and amounted to a compromise or a settlement between Mrs. Gannon and Reed.

This court is committed to the doctrine that the compromise of a disputed claim furnishes a sufficient consideration to uphold the terms of a compromise, though the asserted claim is without merit and could not have been sustained in the courts. *First National Bank of Mena* v. *Allen,* 141 Ark. 328, and cases cited; *Bankers' & Planters' Mutual Insurance Assn.* v. *Archie,* 145 Ark. 481, and *Fair* v. *Beal-Burrow Dry Goods Co.,* 148 Ark. 340. The reason for the rule is that parties unable to agree about matters in dispute may go into court and have their rights adjudicated, or they have the right to

settle their differences between themselves in any way they choose.

The bill of sale in this case recognized the rights of the bank to hold the jewelry as security for the loan made to Reed by it, and directed that the jewelry be delivered to Mrs. Gannon upon payment of the loan either by herself or by Reed. This, as we have already seen, was in effect a settlement between Mrs. Gannon and Reed of their differences in the matter, and this was in itself a sufficient consideration for the bill of sale. The testimony in this respect is undisputed. We have no concern as to which party was right. It is sufficient that it settles their differences.

It follows that the court erred in not directing a verdict in favor of the bank, and for that error the judgment must be reversed.

Inasmuch as the case has been fully developed, no good purpose could be served by remanding it for a new trial, and the case will be dismissed here.

BACKES v. REIDMILLER.

Opinion delivered March 19, 1923.

1. EXECUTORS AND ADMINISTRATORS—LANDS AS ASSETS.—Lands are assets in the hands of an administrator for the payment of the debts of an intestate only where the personal property of the estate is insufficient to pay the debts.
2. EXECUTORS AND ADMINISTRATORS—APPLICATION FOR SALE OF LAND TO PAY DEBTS—LIMITATION.—While there is no statute limiting the lien of debts against a decedent's realty, application for sale of such realty to pay his debts must be made within a reasonable time, which is generaly fixed by analogy to the statute of limitations for bringing an action to recover real estate.
3. EXECUTORS AND ADMINISTRATORS—APPLICATION TO SELL LAND—LACHES.—Where all of the personal property of an estate, after paying the costs of administration, was turned over to decedent's widow, lands of the estate immediately became subject to the payment of the debts of the estate, and a delay of ten years

thereafter without excuse before applying for sale of such real estate was unreasonable, and will operate as a bar to such sale.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; reversed.

STATEMENT OF FACTS.

On August 9, 1918, Joseph Reidmiller brought this suit in equity against Mrs. Martha Backes and Annie Freyaldenhoven to subject 240 acres of land belonging to the estate of Michael Backes, deceased, to the payment of his claim as a creditor of said estate.

On November 5, 1902, Michael Backes executed his promissory note to Joseph Reidmiller for the sum of $300, due one year after date, with interest at the rate of 6 per cent. per annum from date until paid.

On April 1, 1905, Michael Backes executed his promissory note to Joseph Reidmiller for $100, due November 14, 1906, with interest at 6 per cent. from date until paid. In 1907 Michael Backes died intestate, leaving surviving him his widow, Mrs. Michael Backes, and Annie Freyaldenhoven, his daughter and sole heir at law. Soon after his death J. S. Moose was appointed administrator of his estate. On January 13, 1908, the $300 note above described was duly probated against his estate and allowed by the probate court, and ordered paid. On the same day the $100 note was also duly probated and ordered paid by the probate court.

In 1908 the widow brought suit against the administrator and the daughter and sole heir at law of said Michael Backes, and asked that $400, being the proceeds from the sale of the personal property belonging to said estate, be paid over to her, and said amount was paid over to her pursuant to the decree of said chancery court.

In 1913 J. S. Moose, as such administrator, filed an account current in which he accounted for all the personal property belonging to said estate and obtained credit for the disbursement thereof to the widow, and for costs of administration. The account was duly con-

firmed by the court, but no order was made discharging the administrator. The administrator, however, proceeded on the theory that he had already settled the estate, and abandoned the further administration thereof. Soon afterwards he left the State of Arkansas and resided in the State of California for two years before returning to this State.

There are 240 acres of land belonging to the estate of Michael Backes, deceased, and the widow and daughter are in possession of it. Michael Backes kept the interest paid on the $300 note up to the date of his death.

The court found that there was a balance due on the principal and interest on the two promissory notes of $760, and declared the same to be a lien against the lands of the estate of Michael Backes, deceased. It was also decreed that the land should be sold by a special commissioner to satisfy the lien.

The defendants have duly prosecuted an appeal to this court.

Edward Gordon, for appellant.

The lands of the estate could have been subjected, through the chancery court, to the payment of a valid claim had the administration been closed, the administrator discharged, and the heirs taken possession, but such is not the case. The administrator not having been discharged, the probate court only had jurisdiction. Const. 1836; § 34, art. 7, Const. 1874; Crawford & Moses' Digest, § 2256; *Biscoe* v. *Butt, Admr.,* 5 Ark. 305; *Trimble* v. *Jones,* 40 Ark. 393; *State* v. *Roth,* 47 Ark. 222; *Meredith* v. *Scullin,* 51 Ark. 366. *Flash* v. *Gresham,* 36 Ark. 529; *Hawkins* v. *Layne,* 48 Ark. 544. Probate court can compel discovery of assets of estate. *Moss* v. *Sanders,* 15 Ark. 381; *Welsh* v. *Lloyd,* 5 Ark. 367. Can determine whether creditors have lost rights by laches when. *Brogan* v. *Brogan,* 63 Ark. 405. See also on question of jurisdiction of probate court, *Ark. Valley Trust Co.* v. *Young,* 128 Ark. 42. Has exclusive original jurisdiction of estates of deceased persons, and chancery

court cannot take cognizance on grounds of ordinary equity jurisdiction, 34 Ark. 63. Claim is barred by 10-year statute of limitations. Section 6959, Crawford & Moses' Digest.

Strait & Strait, for appellee.

The correctness of appellee's claim is not disputed, nor that same was duly probated. There are no personal effects in hands of administrator, who has filed final report, and the heir appellant is in possession of the real estate. Suit was brought within less than five years after final settlement. Cause of action not barred. *Fort* v. *Blogg,* 38 Ark. 474; *Breining* v. *Lippincott,* 125 Ark. 77; *Jackson* v. *McNabb,* 39 Ark. 116; *Lester* v. *Bemis Lbr. Co.,* 71 Ark. 379. Equity has jurisdiction to charge real property in possession of the heir with payment of probated indebtedness. *Hall* v. *Brewer,* 40 Ark. 433, *Hill* v. *Ewing,* 31 Ark. 234; *Hitch* v. *Skaggs,* 53 Ark. 291; *Burton* v. *Anderson,* 56 Ark. 474; *Jones* v. *Franklin,* 30 Ark. 631; *Hendricks* v. *Keene,* 32 Ark. 714; *Hall* v. *Cole,* 71 Ark. 601; *Cole* v. *Hall,* 85 Ark. 144. Even if administration not closed. *Hall* v. *Brewer,* 40 Ark. 433.

HART, J., (after stating the facts). Lands are only assets in the hands of an administrator for the payment of the debts of the intestate where the personal property of the estate is insufficient to pay the debts. *Doke* v. *Benton County Lumber Co.,* 114 Ark. 1. There is no statute in this State limiting the lien of a decedent's debts against his realty. But it has been uniformly held that an application for the sale of a decedent's realty to pay his debts must be made within a reasonable time, and such time has been generally fixed by analogy with the statute of limitation for bringing an action to recover real estate. The reason upon which the limitation is placed is that the heirs are entitled to the possession of the real estate in order that they may improve and enjoy it as early as a just regard for the rights of creditors will permit.

In *Roth* v. *Holland,* 56 Ark. 633, in discussing the question the court said: "But delay on part of creditors alike postpones the unconditional enjoyment of the heir and deters him from improving or selling his inheritance, whether it relates to the procuring of letters or of an order of sale; and if it is sufficient to bar the power to sell in one case, for exactly the same reason it should be in the other. Delay in taking out letters, and delay in applying to sell after they are taken out, alike keep alive uncertainty in the tenure of the heir, and are alike due to the nonaction of the creditor. For, although letters are issued upon application of the administrator, it is within the power of creditors to compel administration after thirty days from the debtor's death, and, if it is delayed, it is as much due to them as is the delay in applying for leave to sell. Our conclusion therefore is that the right to sell is lost by delay in administering, whenever a like delay after administering, in procedings to sell, would forfeit it. *Unknown Heirs of Langworthy* v. *Baker,* 23 Ill. 491; *Richard* v. *Williams,* 7 Wheat. 116. See also, *Brogan* v. *Brogan,* 63 Ark. 405, and *Brown* v. *Nelms,* 86 Ark. 368, and cases cited.

It appears from the record that letters of administration were granted upon the estate of Michael Backes, deceased, soon after his death in 1907. The present action to subject the land belonging to his estate to the payment of his debts was not begun until August 9, 1918. The personal property of the estate was turned over to the widow in 1908. The administrator filed an account purporting to settle all the funds belonging to the estate in his hands in 1913. While he was not formally discharged as administrator, he abandoned the administration of the estate from that time, and soon afterwards left the State for a period of two years. After his return he took no further steps in the administration of the estate.

As we have just seen, the proceeds of the personal property of the estate, except a small part used in paying the costs of administration, were turned over to the

widow in 1908. The lands then became subject to the payment of the debts of the estate, and no excuse whatever is given for the long delay in applying for the sale of the real estate to pay the debts. Therefore we hold that the delay was unreasonable, and, no excuse having been made for it, the lapse of ten years from the time it became known that the land would be needed for the payment of debts until the present suit was brought will operate as a bar to a sale thereof.

In this view of the case it does not make any difference whether the application should have been made to the probate court or whether chancery was the proper forum, because the administrator had abandoned the administration of the estate before he was discharged by the probate court.

From the views we have expressed it results that the chancellor erred in granting the application of the plaintiff to sell the real estate of the decedent for the payment of his debt, and for that error the decree must be reversed. Inasmuch as the case has been fully developed, the cause will be remanded to the chancery court, with directions to dismiss the complaint of the plaintiff for want of equity.

ARNOLD v. MANSFIELD LUMBER COMPANY.

Opinion delivered March 19, 1923.

SALES—ESTIMATE OF PRICES FOR BUILDING MATERIAL SUBJECT TO CHANGE.—Where defendant submitted an itemized bill of the material required to build a house to plaintiff, who noted prices opposite each item, and 8 days later defendant ordered a substantial portion of the bill, and from time to time ordered the balance of the material, evidence *held* to sustain a finding that there was no contract to furnish the material at any fixed price, and no obligation to furnish it except at prices current at the time of delivery; the estimate being in legal effect a price list subject to change.

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

T. S. Osborne, for appellant.

Appellant contracted for the lumber at specified prices, and the evidence shows she was charged much more, and judgment should be reduced accordingly.

Daily & Woods, for appellee.

Appellee only furnished a preliminary estimate in first instance, appellant bought other and different kinds, grades and quantities of materials, was not overcharged on any items, and received proper credit for all materials returned.

SMITH, J. This is a suit on an account for the material to build a house on a lot owned by appellant in the city of Fort Smith, and there is involved here only the correctness of the account sued on. When the cause came on for trial, appellant, the defendant below, admitted that all the material set out in the exhibit to the complaint had been sold and delivered to her, and had gone into her building, and that plaintiff was entitled to a lien on the house and lot for whatever amount was due, and that the only questions at issue were certain alleged overcharges on specified articles furnished and the failure to give credit for articles returned.

The important question in determining the amount for which plaintiff should have judgment is the price of the material, as there is no dispute about the quantity.

Only two witnesses testified, one being the husband of the appellant, who was her agent in the transaction; the other was Mr. Reeves, the general manager of the plaintiff company.

Reeves testified as follows: He personally sold and checked out the bill of lumber sold Mrs. Arnold, and the itemized statement thereof attached to the complaint is true and correct. The exhibit B, introduced by Mr. Arnold, was also true and correct, the latter being a statement of account furnished Mr. Arnold in August after the material had been sold and delivered in the preced-

ing June and July. Mr. Reeves also testified that an exhibit A, introduced by Arnold, was a correct preliminary estimate of the cost of the material Mrs. Arnold would require, which witness furnished Arnold on June 9th. The material was not bought at that time, and there was a difference in the quality and quantity of material. The estimate was never referred to again, and the sales were not made thereunder. Mrs. Arnold bought two or three times as much stuff as was stated in the estimate. These estimates are furnished on request, and are not contracts. He admitted a door and window had been returned, for which credit should be allowed for $14.90. There was a controversy over 35 pieces of flooring, which witness testified were returned and credited at the price charged, and the same quantity of a better flooring later furnished at a higher price.

Mr. Arnold testified that his contractor had furnished him an itemized bill of the material that would be required to build the house, and on June 9th he submitted the bill to Mr. Reeves, who placed the price opposite each item, and on June 17th he ordered a substantial portion of the bill covered by the estimate. At the same time he also ordered 25 concrete blocks which were not in the estimate, the price of which was $5. He thereafter ordered a few extras not in the estimate, but the bill was otherwise substantially that covered by the estimate, there being only about $5 difference between the estimated price and the price charged on the articles included in the estimate. At the time witness gave the first order he paid $50 on the bill, and, while nothing was said about the prices covered by the estimate, he assumed the material was being sold in accordance therewith. A number of items were furnished throughout the month of July, and, when the bill was finally rendered in August, a higher price was charged for many of the articles than that shown on the estimate.

The first question for decision is whether Mrs. Arnold had the right to expect the material to be charged

for according to the estimate. Reeves testified that similar estimates were furnished every day, and many of them to persons who never bought any of the items priced, and that the articles delivered to Mrs. Arnold were charged at the prices current on the day of the delivery, and that nothing was said about the estimate when the material was furnished.

The majority are of the opinion that, under the facts stated, there was no contract to furnish the material at any fixed price, and no obligation to furnish it except at the prices current at the time of the delivery, for the reason that the estimate was, in legal effect, a price list, and in force only at the time made and subject to change to conform to the fluctuations in the market price.

It is the opinion of Justice HUMPHREYS and the writer that the estimate furnished should be regarded as an offer to contract, furnished for the purpose of enabling Mr. Arnold to determine whether he would buy all or any of the material covered by the estimate, and an offer which remained open for acceptance for a reasonable time, and that eight days was a reasonable time within which to accept an offer to furnish material to build a house. Inasmuch as the order was filled by the man who made the estimate, and all of the material ordered was substantially that covered by the estimate, we think Arnold had the right to assume, in the absence of notice to the contrary, that the material covered by the estimate was being furnished at the prices stated in the estimate.

The court below fixed the current prices on all the items in accordance with the testimony of Reeves, and the view of the majority approves that finding. There are, however, two errors in the account, even when stated on that basis.

The undisputed testimony shows that a bungalow door, priced at $15, and a door frame, priced at $5, were returned. Credit therefor should have been given for $20, but the credit allowed was only $14.90. Sixty-four

pieces of flooring were furnished and charged for at 4 cents, and of these 35 pieces, amounting to 163 feet, were returned and credited at 3 cents. Mr. Reeves testified that the 35 pieces of flooring returned were credited at the exact price charged, but such is not the case. The account should therefore be credited with the overcharge of a cent per foot, amounting to $1.63. Later other flooring was charged for at 5 cents per foot, but, under the views of the majority, this was not improper. Mr. Reeves testified 5 cents was the market price of the flooring at the time the last of it was furnished; the explanation was also made by Reeves that the last flooring was of a better quality. A few other items are in dispute, but in each case explanation was offered that the prices had advanced above the estimated prices, or that a better grade of material was furnished, and the lumber company has, under the view of the majority, the right to have the items covered by the estimate charged at the prices current when they were furnished; but the account as thus fixed by the court below must be credited with the items of $5.10 and $1.63, and, as thus modified, the decree of the court below is affirmed.

DeCamp v. Graupner.

Opinion delivered March 19, 1923.

1. Principal and agent—evidence of agency.—An agent may testify as to his agency and the extent of his authority.
2. Evidence—pleading.—A vendor's answer in a vendee's suit to rescind a contract of sale of land for fraudulent representations by the former's agent, in which the vendor admitted that her husband was her authorized agent, *held* competent to prove such agency.
3. Principal and agent—liability for agent's fraud.—One is liable for his agent's fraud and misrepresentations within the apparent scope of his employment, whether he authorized or knew of them or not.
4. Principal and agent—delegation of authority.—Where personal trust or confidence is reposed in an agent, and especially

when the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another, unless there is a special power of substitution, either express or necessarily implied; but an agent may generally employ others to assist him in the purely ministerial and unimportant details of his duty, or wherever there is a necessity therefor or the employment of subagents is usual and customary.

5. PRINCIPAL AND AGENT—RATIFICATION OF UNAUTHORIZED ACT.—Where one without authority made false representations inducing another to buy land, and subsequently became the owner's agent before the sale was made, the owner was not liable unless she had knowledge of such representations when she executed the deed; knowledge being essential to ratification.

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

Sam M. Wassell, for appellant.

The court erred in excluding the testimony and directing a verdict. *St. Louis S. W. Ry.* v. *Britton,* 107 Ark. 158; 154 S. W. 219; 145 S. W. 48; 103 Ark. 199. The agent may testify in regard to his agency and the extent of his authority. *Sandford* v. *Handy,* 23 Wend. 260. See *Udell* v. *Atherton,* 7 H. A. N. 171 Jur. (N. S.) 777, 3 L. J. Exch. 337, 4 L. T. Rep. (N. S.) 797. Foot note in Goddard Cases on Agency, 774, 2 Howard 311; 91 S. W. 484; 61 Mo. App. 401; 174 Mo. App. 555, 24 L. R. A. (N. S.) 511; 81 S. E. 426; 155 S. W. 979; 71 Atl. 223; Mechem on Agency, sec. 285, note 81; 198 S. W. 272; Words and Phrases, "Estoppel in Pais," 366; 16 Cyc. 679; *Rogers* v. *Galloway College,* 64 Ark. 627; 39 L. R. A. 636; 1 R. C. L. 468; 79 S. W. 1013. Implied and apparent authority. *Roach* v. *Rector,* 123 S. W. 339; 93 Ark. 521; *St. L. I. M. & S. Ry.* v. *Jones,* 96 Ark. 558, 132 S. W. 636; *U. S. Bedding Co.* v. *Andre,* 105 Ark. 111; 150 S. W. 413; *Kelley* v. *Carter,* 55 Ark. 116; 17 S. W. 707; 196 S. W. 818. Extent of agent's testimony. *Ayer Land Ins. Co.* v. *Young,* 90 Ark. 104, 117 S. W. 1080; 135 S. W. 332. Separate answer of appellee was admissible in evidence, 14 A. L. R. 22, and allegations of complaint not denied

admitted. 46 Ark. 132, 91 Ark. 30; 120 S. W. 393, 46 Ark. 132.

No brief for appellee.

Smith, J. On March 4, 1920, appellant purchased from appellee a house and lot for $5,700, making a cash payment of $700, and executing a number of notes for $100 each, payable one each month, and, in addition, assumed the payment of an outstanding mortgage. He made the payments due in May and June, but declined to make the July payment, contending that a fraud had been practiced upon him. He brought suit in the chancery court, asking for a rescission, but, as appellee had sold the notes, appellant surrendered the premises and brought suit for damages for the alleged fraud.

Appellant testified that Mrs. Gill, the saleswoman, showed the house to him and his wife at night, and made a number of representations in regard to it which induced him to buy, but which were in fact false. In the course of this testimony he stated what Mrs. Gill had said about the house, and objection was made to this testimony on the ground that Mrs. Gill's agency had not been shown. Mrs. Gill was then called, and her testimony was objected to on the same ground, and she was told to stand aside, and appellee's husband was called, and he was asked about his own agency, with the obvious purpose of proving Mrs. Gill's agency to show the property to prospective purchasers. An objection was made to the first question asked this witness, and the court ruled that "you cannot establish a subagency, or the delegation of authority, by the testimony of either the agent or the delegated agent."

Appellant then offered in evidence the answer appellee had filed in the suit for the rescission of the contract, in which she admitted that her husband was her authorized agent in negotiating and selling the property, but an objection to this admission was made and sustained.

This exhausted appellant's proof, and the court thereupon directed a verdict in appellee's favor, from which is this appeal.

The court erred in its ruling excluding testimony. The existence of an agency cannot be shown by proving the acts and declarations of the agent, but the agent may himself testify in regard to his agency and the extent of his authority. The court should therefore have allowed appellant to examine both appellee's husband and Mrs. Gill concerning their agency.

The court should also have admitted in evidence the answer in the rescission suit as an admission tending to prove her husband's agency. *Valley Planting Co.* v. *Wise,* 93 Ark. 1.

Appellant also insists that, inasmuch as Mrs. Gill sold the property to him, appellee, by executing the deed, ratified all the alleged false representations made by her in the course of the negotiations leading up to the sale. This may or may not be true, but, inasmuch as the court did not admit the testimony showing the existence of Mrs. Gill's agency, or the extent of her authority, we can only lay down a few general principles of the law of agency for the guidance of the court on the retrial of the cause, which must be ordered.

One is liable for the fraud and misrepresentation of his agent within the scope of the agent's employment, and this is true whether the principal authorized or had knowledge thereof or not. See article on Principal and Agent in 21 R. C. L., p. 850, and cases cited in the footnotes. In section 38 of the same article, p. 860, it is said: "It is a general rule that, in all cases of delegated authority, where personal trust or confidence is reposed in the agent, and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal, and cannot be delegated to another, unless there is a special power of substitution, either express or necessarily implied. * * * He may, however, as a general

thing, employ others to assist him in the purely ministerial and unimportant details of his duty. And their acts, when done in his name and recognized by him, either specially or according to his usual mode of dealing with them, are regarded as his acts, and as such binding on his principal. Furthermore, authority to employ subagents or assistants may be inferred in the absence of an express authorization, wherever there is a necessity therefor or the employment of subagents is usual and customary." The annotated cases cited in the note to the text quoted collect many cases which support the text. See also *Roach* v. *Rector,* 93 Ark. 521.

The question of ratification may not enter into the case after it has been fully developed. If the testimony shows that Mrs. Gill was appellee's agent, and if, acting within the scope of her employment, she made false and fraudulent representations in regard to the property, then appellee is responsible therefor, but the responsibility arises out of the general principles of agency stated above, and not by way of ratification. On the other hand, if Mrs. Gill was not appellee's agent when she made the false representations inducing the sale, if she made them, but became appellee's agent before the sale was made, then appellee would not be liable therefor, unless she had knowledge thereof when she executed the deed, for knowledge is essential to ratification.

But we proceed no further with this discussion, as we do not know what details will develop when appellant is permitted to examine appellee's husband and Mrs. Gill in regard to their agency.

For the errors in refusing to permit the examination of these witnesses, and in excluding the answer filed in the rescission suit, the judgment is reversed and the cause will be remanded for a new trial.

BANK OF DYER v. COLE.

Opinion delivered March 19, 1923.

1. MORTGAGES—DESCRIPTION OF LAND.—As government lands are described as being in section, township and range, a mortgage which describes the lands conveyed as being in Crawford County, Arkansas, and as being a certain subdivision of 35-10-30, being used in reference to the government surveys, undoubtedly means section 35 in township 10 north, range 30 west.
2. MORTGAGES—IDENTIFICATION OF INDEBTEDNESS SECURED.—The only requirement in the description of an indebtedness secured by mortgage being that it be sufficient to put interested parties on inquiry, a note was sufficiently identified in a mortgage where the debt was described as evidenced by a promissory note of even date for $600 with interest from date at the rate of 10 per cent. per annum.
3. EVIDENCE—UNSTAMPED NOTE.—An unstamped promissory note dated October 17, 1917, was admissible in evidence; the act of Congress of October 3, 1917, not requiring notes to be stamped till December 1, 1917.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

James B. McDonough, for appellant.

Description of land mortgaged to appellee Cole is void for uncertainty. *Fuller* v. *Fellows,* 30 Ark. 657; *Howell* v. *Rye,* 35 Ark. 470; *Peters* v. *Priest,* 134 Ark. 161. There was no effort to introduce testimony to show description in Cole mortgage could be corrected, and, it being imperfect, appellant's mortgage constituted a superior lien. *Adams* v. *Edgerton,* 48 Ark. 419; C. & M. Dig., § 1381 and cases. Deeds held void for insufficient description of lands. *Jack* v. *Chaffee,* 34 Ark. 530; *Howell* v. *Rye,* 35 Ark. 470; *Adams* v. *Edgerton,* 48 Ark. 419; *Cooper* v. *Lee,* 59 Ark. 460. Appellant's mortgage contains a correct description of the lands and is a first lien on the 120 acres. *Hamilton* v. *Ogre,* 10 Kan. A. 241; *Hartigan* v. *Hoffman,* 47 Pac. (Wash.) 217; *Miller* v. *Beardsley,* 175 Mich. 414, 141 N. W. 566. Note of appellant not sufficiently described in mortgage. *Bowen* v. *Ratcliff,* 140 Ind. 393. Was inadmissible, not being

stamped as required by U. S. Revenue Act. Sec. 9, act of Congress 1914; 38 U. S. Statutes, sec. 755, schedule A; Act 1898, 30 U. S. Statutes at Large, sec. 465. Law was in effect on Oct. 17, 1917. Note to sec. 6318 hh 1919 Supp. to U. S. Compiled Statutes.

Starbird & Starbird, for appellee Cole.

Description of land in mortgage sufficient. *Cooper* v. *Lee*, 59 Ark. 463. *Little Rock Ry. Co.* v. *Evins*, 76 Ark. 261; *Rucker* v. *Ark. L. & T. Co.*, 128 Ark. 180. Note also sufficiently described. 27 Cyc. 1095. *Curtis* v. *Flinn*, 46 Ark. 70; *Wood* v. *Cole*, 122 Ark. 460; *Blackburn* v. *Thompson*, 127 Ark. 450. No stamp was required to be put on note made Oct. 17, 1917. Other laws repealed, and act of 1917 does not require notes stamped made before Dec. 1, 1917. Act Oct. 3, 1917, sec. 800. 40 U. S. Statutes, 319. Decree should be affirmed.

HUMPHREYS, J. The questions presented for determination on this appeal grow out of a contest between appellant and appellee, J. H. Cole, as to the priority of mortgages held by each on the lands of J. F. Davidson.

On the 17th day of October, 1917, J. F. Davidson and his wife, B. Davidson, executed a mortgage on the following described real estate in Crawford County, Arkansas, to-wit: W½ NW, 35-10-30, 80 acres; W½ NW SW, 35-10-30, 20 acres; W½ SW SW, 35-10-30, 20 acres, to J. H. Cole to secure a note dated October 17, 1917, for $6,000, which was immediately recorded, and upon which $4,967.63 was due May 5, 1922, the day judgment was rendered in this case.

On the 5th day of May, 1921, the Davidsons executed a mortgage to appellant to secure two notes, one for $885.85 and the other for $3,600, upon the following described real estate in Crawford County, Arkansas, to-wit: W½ NW¼, W½ NW¼ SW¼, and W½ SW¼ SW¼, all in section 35, township 10 north, range 30 west. The mortgage was recorded May 27, 1921. On the 5th day of May, 1922, the day judgment was rendered in this case, $4,734.02 was due upon the mortgage.

In the mortgage executed by the Davidsons to J. H. Cole the $6,000 note was described as follows: "Whereas, the said J. F. Davidson and B. Davidson are justly indebted unto the said J. H. Cole in the sum of six thousand and no/100 dollars, evidenced by a promissory note of even date for six thousand dollars, with interest from date at the rate of ten per cent. per annum, if interest be not paid at interest paying time to become principal and bear the same rate of interest." The note was not stamped with an internal revenue stamp, and appellant objected to its introduction in evidence for that reason, which objection was overruled by the court.

The trial court rendered a judgment against J. F. Davidson in favor of appellant and appellee, J. H. Cole, for the respective amounts due them, and decreed a foreclosure of the lands to pay same, but declared the mortgage lien of J. H. Cole prior and paramount to that of appellant.

Appellant contends that the court erred in giving preference to the lien of said appellee for three reasons. First, that the description of the lands in the Cole mortgage was indefinite; second, that the $6,000 note was not sufficiently described in the mortgage; third, that the note was not admissible in evidence because it had not been stamped with an internal revenue stamp.

(1) The objection made to the description of the lands was that the words "section" before 35, "township" before 10, and "range" before 30, must be inferred in order to definitely describe the lands. We do not think the certainty of the description was dependent upon mere inference. The lands were described as being in Crawford County, Arkansas. The calls in the first part of each description referred unmistakably to United States Government surveys. In government surveys lands are described as being in sections, townships and ranges in the order mentioned. It is a necessary implication therefore that the figures 35-10-30, used in connection with government surveys, mean section 35, town-

ship 10, range 30. The base line is south and the meridian line east of Crawford County, so the lands are situated necessarily in township 10 north, range 30 west. We do not think a surveyor would have any trouble in locating the lands from the description in the mortgage.

(2) The $6,000 note was sufficiently identified in the mortgage. The date and amount were given, together with the interest it bore. The only requirement is that the description be sufficient to put interested parties upon inquiry, which, when followed up, will inform them of the extent of the incumbrance. *Word* v. *Cole,* 122 Ark. 457; *Blackburn* v. *Thompson,* 127 Ark. 438.

(3) The note was admissible in evidence without being stamped. The act of Congress of October 3, 1917, did not require notes to be stamped until the first day of December of that year. 40 U. S. Stat. 319. The Stamp Act of Congress of 1914 was repealed by an act of Congress of October 3, 1916, and the clause in the Stamp Act of 1898, making unstamped notes inadmissible in evidence, had long since been repealed by implication.

No error appearing, the decree is affirmed.

COLEMAN v. OWENS.

Opinion delivered March 19, 1923.

1. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—The court's finding that a broker did not warrant the financial condition of a proposed purchaser of stock, being supported by substantial evidence, is conclusive.
2. SALES—CONTRACT HELD A SALE, NOT AN OPTION.—Where each party to a contract of sale of a stock of merchandise at so much on the dollar, the total price to be determined by invoice, deposited in a bank, money to be forfeited to the other in case he should back out, the transaction constituted a sale, and not an option to buy; the forfeit being in the nature of earnest money to bind the contract.

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

Sullins & Ivie, for appellant.

Undisputed testimony shows that appellee was authorized only to sell to or procure a purchaser able to pay for stock of merchandise and that he failed to do so. Case not controlled by *Moore* v. *Irwin,* 89 Ark. 289, since appellee expressly warranted financial ability of purchaser. Express warranty defined. *Cornish* v. *Friedman,* 94 Ark. 282. Even if no express warranty of financial ability of purchaser appellees did not effect a sale at all. *Reeder* v. *Epps,* 112 Ark. 566. *White* v. *Fresh,* 106 Fed. 290. No more than as option or agreement to sell. *McWilliams* v. *Philadelphia Co.,* 159 Pa. 142, 28 Atl. 220; *Brickeller* v. *Atlas Assurance Co.,* 101 Pac. 16; *Swift* v. *Erwin,* 148 S. W. 267; *Indiana & Ark. Lbr. Mfg. Co.* v. *Pharr,* 82 Ark. 573; 9 C. J. 603, sec. 90; 4 R. C. L. 315, sec. 35; note 43 L. R. A. (N. S.) 91; *Hansom* v. *Blanchard,* 117 Me. 501, 105 Atl. 291, 3 A. L. R. 545; case should be decided as was *Howell* v. *Bennett,* 145 S. W. 535.

Duty & Duty and *John W. Nance,* for appellee.

The court's finding as conclusive as verdict of jury. *Boqua* v. *Brady,* 90 Ark. 512; *Midland Valley Ry.* v. *Monroe Bolt Co.,* 91 Ark. 108; *Warren* v. *Nix,* 97 Ark. 374. No testimony to warrant conclusion that purchaser not able to consummate contract, even had there been an express warranty, and there was none. The sale was effected. *Fagon* v. *Falkner,* 5 Ark. 161; *Chamblee* v. *McKenzie,* 31 Ark. 155; *Gans* v. *Holland,* 37 Ark. 483; *Shall* v. *Harrington,* 54 Ark. 305; *Lynch* v. *Daggett,* 62 Ark. 592; *Priest* v. *Hodges;* 90 Ark. 131; *Biggers* v. *Johnson,* 106 Ark. 89; *Emerson* v. *Stevens Grocery Co.,* 95 Ark. 426; *Hale* v. *Matterson,* 107 Ark. 230.

The evidence supports the court's finding, and it will not be disturbed. *Williams* v. *Ry.,* 103 Ark. 401; *Hutchinson* v. *Gorman,* 71 Ark. 305. Case is controlled by decision in *Moore* v. *Irwin,* 89 Ark. 289. The executory contract of purchase having been entered into, it was the business of the vendor to get the purchase money or

enforce contract of sale. *Moore* v. *Irwin,* 89 Ark. 289; *Pinkerton* v. *Hudson,* 87 Ark. 506; 19 Cyc. "Factors & Brokers," 207.

HUMPHREYS, J. This is an appeal from the Benton Circuit Court, challenging the right of appellee to recover commissions for negotiating a sale of the stock of merchandise owned by appellant to one Hughes. The material issues presented by the pleadings in the trial court and upon which the case turned were, first, whether appellee expressly warranted the financial ability of the proposed purchaser, Hughes; second, whether the contract entered into between appellant and Hughes was for the sale and purchase of said stock or merely an option for the sale thereof. The cause was submitted to the court, sitting as a jury, upon the issues joined and the testimony adduced, which resulted in a verdict that appellee did not warrant the financial condition of the purchaser produced by him, and that appellant accepted said purchaser and entered into a valid contract with him for the sale of said stock of merchandise. Based upon the findings, a judgment was rendered in favor of appellee for a commission in the sum of $237.50.

Appellant's first insistence for reversal is that the undisputed evidence shows that appellee warranted the financial condition of the proposed purchaser, Hughes, to pay cash for the stock of merchandise on a basis of $1.05 on the dollar, according to the invoice price thereof; that when the invoice was about completed, showing the total value of the stock to be about $8,500, said purchaser was unable financially to pay for same. Appellant testified that his contract with appellee provided that he should produce a purchaser able and willing to buy the entire stock of merchandise, and that, when he produced Hughes, appellee informed him that Hughes was A No. 1, and had a "barrel of money." Appellee denied making the statement attributed to him, but, on the contrary, said that when he had found Hughes he and appellant went to Mr. Nowlin, cashier

of the American National Bank, and inquired of him concerning the financial ability of Mr. Hughes, and were informed by the cashier that Hughes was A No. 1, whereupon appellant entered into a written contract with Hughes for the sale of the stock at $1.05 on the dollar, the total amount to be determined by the invoice. These conflicting statements made the issue of whether appellee warranted the financial condition of Hughes a disputed question of fact, and the finding of the court against appellant is conclusive. The finding is supported by evidence of a substantial character.

Appellant's next and last insistence for reversal is that the undisputed evidence shows that the contract was an option to buy, and not a sale of the stock of merchandise; that the purchaser refused to take the stock after the invoice was about completed, and for that reason appellee should not receive a commission under his contract to sell the stock of merchandise. The record reflects that appellee agreed to sell the stock, or at least to produce a purchaser acceptable to appellant, for which services he was to receive the usual real estate commission of 5 per cent. on the first $1,000 and 2½ per cent. on each additional $1,000 shown by an invoice; that appellee produced Hughes, with whom appellant contracted in writing for the sale of the stock. The written contract was lost. According to the oral evidence, establishing the contents thereof, it provided for a sale and purchase of the stock for $1.05 on the dollar, the total price to be determined by invoice. The contract was deposited in the American National Bank, at which time appellant and purchaser each deposited $1,000 therewith, to be forfeited to the other in case he should back out. When the invoice was nearing completion, Hughes declined to pay the balance and take the stock. Appellant accepted the $1,000 forfeit which Hughes had deposited in the bank, and made no effort to enforce the contract. He afterwards refused to pay appellee any commission, for the alleged reason that a sale had not

been effected. We think that the evidence shows that a written contract had been entered into between the parties which could have been specifically enforced. Appellant argues that the fact that each had placed a forfeiture in the bank stamps the transaction as an option to buy and not to sell. A forfeit presupposes a contract of sale. If not breached, the forfeit money is applied on the consideration for the sale, and if breached is treated as liquidated damages. An option is the payment of a certain amount for the privilege of buying something within a given time. It is quite clear that "forfeit," as used by the parties to this transaction, was employed in the sense of earnest money to bind the contract for the sale and purchase of the stock, and which should go as liquidated damages to the one without fault in the case the contract was breached. The construction placed upon the contract by the trial court was correct.

The judgment is affirmed.

GRIFFIN v. LITTLE RED RIVER LEVEE DISTRICT.

Opinion delivered March 19, 1923.

DRAINS—LEVEES—LIMIT OF TAX LEVY.—Though bonds issued by a drainage district and also those issued by a levee district on their face incorporated as part of their terms the resolution authorizing them, wherein the amount to be levied each year was limited, nevertheless it is within the power of the board of directors of the drainage district and of the board of commissioners of the levee district to increase the levy if necessary, since that power is reserved to them by Crawford & Moses' Digest, §§ 3620 and 6826, as the rates fixed in the resolution must be regarded as tentative only.

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

Culbert L. Pearce, Brundidge & Neeley, for appellant.

The reference in the levee and drainage bonds to the resolutions authorizing their issuance makes them a part thereof as though they were set out therein, and the negotiability of the bonds are limited thereby. The resolution sets out the exact per centum levied and to be collected each year from 1917 to 1941, and states: "This in lieu of all previous levies." After the bonds were sold the commissioners of the district twice raised the rate of taxation, which we contend they were without authority to do, notwithstanding the increased rates were within the total assessed benefits to the lands enhanced in the respective districts. 3 R. C. L. 844, § 20; *Ib.* 1076, § 281; 19 R. C. L. 989, § 286; 3 R. C. L. 870, § 54 and cases cited. 19 R. C. L. 1009, § 302; *Ib.* 1014, § 306. 28 Cyc. 1610-1624, Municipal Bonds; 8 C. J. 196-202, Bills & Notes; 9 C. J. 47-49, Bonds. *McClellan* v. *Norfolk Southern Ry.,* 18 N. E. 277. 1 L. R. A. 299; *McClure* v. *Oxford,* 94 U. S. 429, 24 L. ed. 129; *National Salt Co.* v. *Ingraham,* 122 Fed. 41. Notes to *Klots Throwing Co.* v. *Manufacturers' Commercial Company,* 179 Fed. 813; 30 L. R. A. 41. *Myrick* v. *Purcell,* 95 Minn, 113; Ann. Cases, 148; *Richardson* v. *Thomas,* 28 Ark. 387; *Rector* v. *Strauss,* 134 Ark. 374. Interest can be required paid on all unpaid portions of assessed benefits. *Oliver* v. *Whittaker,* 122 Ark. 291; *Jones* v. *Fletcher,* 132 Ark. 328.

Stephen Moore of Nashville, Tenn.; *Maurice A. Wear,* of Cassville, Mo., for appellees, Little Red River Dist. 2 and directors.

The board of directors of the district had authority to increase the rate of taxation. Sec. 6826 Crawford & Moses' Dig., but not in excess of assessed benefits for any purpose. Rule expressed in *Oliver* v. *Whittaker,* 122 Ark. 291; *Jones* v. *Fletcher,* 132 Ark. 328, not applicable to levee districts.

Lamb & Frierson, appellees for Mississippi Trust Company.

The commissioners of the district had authority to raise the rate of taxation to any extent short of exceed-

ing the amount of benefits assessed against the lands. § 3617 C. & M. Dig.; *Ib.* 3620. Had authority also to raise rates on levee bonds. Secs. 6826, 6830 C. & M. Dig.; *Hoehler* v. *Worthen*, 243 S. W. 822. See *Minden-Edison Light Company* v. *Minden*, 142 N. W. (Neb.) 673. *Ralls County Court* v. *U. S.*, 105 U. S. 733, 26 L. ed. 1220, 11 Rose's Notes 872; *City of Little Rock* v. *Board of Improvement*, 42 Ark. 152. The rights of bondholders are controlled by the law, not by resolution of the board. *Carville* v. *Road Dist. 2, Craighead Co.*, 152 Ark. 487, 238. S. W. 777; *Hoehler* v. *Worthen, supra.* The one limitation upon amount that can be taxed as a special assessment for a local improvement is that it shall not exceed the amount of betterments. *Cribbs* v. *Benedict*, 64 Ark. 555. *Hopgood* v. *Seattle*, 125 Pac. 965.

Rose, Hemingway, Cantrell & Loughborough, for appellees.

Loans are not made unless there is a margin of security. Improvement districts can not borrow the full amount of the assessed benefits. The assessed benefits mark the limit of possible taxation. *Kirst* v. *Imp. Dist.* 20, 86 Ark. 2; *McDonnell* v. *Imp. Dist.* 97 Ark. 243; *Withrow* v. *Nashville*, 145 Ark. 342. Whether anticipated benefits are realized or not furnishes no escape from payment of assessments thereafter. *Salmon* v. *Long Prairie Dist.*, 100 Ark. 366; *Board of Directors* v. *Dunbar*, 107 Ark. 290. Assessments of benefits in levee districts also bear interest. Sec. 3643, Crawford & Moses' Digest. *Russell* v. *Board of Improvement*, 110 Ark. 20; *Young* v. *Red Fork Levee Dist.*, 124 Ark. 63; *Guaranty Loan & Trust Co.* v. *Helena Improvement Dist.*, 148 Ark. 56.

Buzbee, Pugh & Harrison, for appellee Holt, receiver, Judsonia Drainage District.

County court had authority to increase rate of taxation or levy of percentage of assessed benefits. Sec. 3620, Crawford & Moses' Digest; sec. 1, act 136, Acts 1911; Act May 27, 1909. Laws under which bonds is-

sued and providing for payment also read into bonds. 19 R. C. L. 1009, No. 302. *McClure* v. *Oxford*, 94 U. S. 429. See also *Waite* v. *Santa Cruz*, 184 U. S. 302. Resolution of board of directors does not limit provisions of § 3620, Crawford & Moses' Digest.

J. C. Counts, of Oswego, Kansas, and *G. D. Henderson, amici curiae.*

We contend notes or per centum of assessed benefits to be collected annually as fixed by resolutions of the board of commissioners and board of directors are not subject to be increased. Sec. 3620, Crawford & Moses' Digest, does not authorize it when properly construed. It provides for making additional levies for completing improvements or paying bonds when tax first levied proves insufficient. We find no provision in the law authorizing an increase of the rate of levy because collections inadequate. The bondholders should be required to put in operation and rely upon the machinery provided by law *for enforcing* collection of the assessment, and not that provided for making the assessment. Argument applies with equal force to § 6826, Crawford & Moses' Digest, also. The board could only act by resolution, and the resolutions being legislative in scope, have effect of laws. Abbott, Municipal Corporations, § 514; *Mason* v. *City of Shawnee*, 77 Ill. 533; Abbott on "Public Securities," 300-2; sec. 40 *Ib.* 304. Resolutions part of contract. 5 Cyc. 750. Abbott on Public Securities, 575, 509. The resolutions nowhere provide for an acceleration of the rate of taxation, and the holders took the bonds with knowledge of the resolutions and the rate of taxation therein fixed.

HUMPHREYS, J. This suit was instituted in the White Chancery Court by appellants, who are taxpayers in "Little Red River Levee District Number Two," and in "Judsonia Drainage District," against the directors of said levee district and the commissioners of said drainage district, to enjoin them from raising the rates of taxation above the rate originally specified in resolu-

tions adopted by the boards of the respective districts, and referred to in the face of the bonds issued by said boards for the construction of improvements in each district. Each district was organized under the general laws authorizing the creation of levee and drainage districts.

The board of directors of the levee district issued three installments of bonds, totaling $145,000, and the board of commissioners of the drainage district issued two installments of bonds, totaling $120,000. Reference was made in the face of the bonds to resolutions adopted by each board prior to the issue thereof, in which rates, or per centum, of the assessed benefits to be collected annually for the purpose of paying the bonds were fixed. The resolutions provided a rate in the levee district not to exceed 4.3 per centum of the assessed benefits annually from 1920 to 1935, and 2.2 per centum annually from 1936 to 1941, and a rate in the drainage district not to exceed 3.3 per centum of the assessed benefits annually from 1920 to 1923, and 3.6 per centum from 1924 to 1936, inclusive. The Mercantile Trust Company of St. Louis, Missouri, was named as trustee in the bonds, and deeds of trust were executed to it pledging the entire assessment of benefits against the lands in the respective districts to the payment of the respective obligations. Thereafter the bonds were placed upon the market and sold by the trustee to various purchasers. In 1920 the board of directors of the levee district raised the rate from 4.3 to 4.8 per centum, and in 1921 from 4.3 to 5 per centum. In 1920 and 1921 the board of commissioners of the drainage district raised the rate from 3.3 to 4.1 per centum. This acceleration in rates became necessary in order to meet the payments due upon the bonds, as the revenues derived from the original levies provided in the resolutions were insufficient to do so. The increased rates were within the total assessed benefits to the lands embraced in the respective districts. The facts thus detailed are a summary of the allegations

contained in the bill of appellants. To this bill separate demurrers were filed by the directors of the levee district and Mercantile Trust Company, as trustee for the bondholders, and W. S. Holt, receiver for said drainage district under appointment of the United States District Court for the Eastern District of Arkansas, who was made a party defendant on motion. The demurrers to the complaint were sustained by the trial court, over the objection and exception of appellants, who refused to plead further. Thereupon the court dismissed appellants' bill for want of equity, from which is this appeal.

The contention of appellants is that the rates, or per centum, of the assessed benefits to be collected annually, as fixed by resolutions of the respective boards, were not subject to increase. The reason assigned for the contention is that the resolutions fixing the rates of levy for the years during the period for which the bonds were to run became a part of the bonds by reference, and should be read in connection with the bonds as one instrument, and that the persons purchasing the bonds were chargeable with notice of the contents of the resolutions and were bound by them. The bonds were issued and the resolutions adopted under the laws of the State of Arkansas authorizing them. They must necessarily conform to the laws, and the laws authorizing them must be read into them as a part thereof. The general law authorizing the creation of levee districts and the issuance of bonds to pay for the improvements therein confers full power on the board of directors of the levee district "to levy a tax upon the betterment estimated to accrue to said lands by reason of said work, sufficient to pay the cost thereof, which said tax may be paid as a whole or in such annual installments as the board of directors may decide." Section 6826, Crawford & Moses' Digest. The only limitation prescribed in the section aforesaid is to bring the levy within the estimated betterment to accrue to the lands within the district. The general law authorizing the creation of drainage dis-

tricts, and the issuance of bonds to pay for the construction of improvements therein, contains the following provision incorporated in Crawford & Moses' Digest as section 3620:

"If the tax first levied shall prove insufficient to complete the improvement, or to pay the bonds, both the principal and interest, issued by the board of commissioners on account of such improvement, as hereinafter provided, as the same shall become due and payable, the board shall, from time to time, report the amount of deficiency to the county court, and the county court shall thereupon make such levy or levies on the property previously assessed for a sum or sums sufficient to complete the improvement and to pay such bonds and interest, which shall be collected in the same manner as the first levy; provided, that the total levy or levies shall in no case exceed the value of the benefits assessed on such property; and the performance of such duties may be enforced by mandamus at the instance of any person or board interested."

When the laws authorizing the issuance of the bonds and adoption of the resolutions are read into the bonds, the rates fixed in the resolutions must be regarded and construed as tentative levies only, subject to increase, if necessary to meet payments due upon bonds, provided that the increased levies come within the total assessed benefits against each tract of land within the district. If the rates, or levies, fixed in the resolutions should be treated other than estimates, then the resolutions would conflict with the power vested in the boards under sections 3620 and 6826 of Crawford & Moses' Digest, authorizing the board of directors of the levee district, and the county court, at the request of the board of commissioners of the drainage district, to increase the rates originally levied.

The decree is affirmed.

Mr. Justice HART dissented.

HOME MUTUAL BENEFIT ASSOCIATION v. ROWND.

Opinion delivered March 26, 1923.

1. INSURANCE—MUTUAL BENEFIT INSURANCE—LIABILITY.—The liability of a mutual benefit association is restricted to the amount specified in the by-laws.
2. INSURANCE—MUTUAL BENEFIT INSURANCE—EVIDENCE.—In an action on a benefit certificate issued by a mutual benefit association, the by-laws of which were subsequently amended merely by substituting a new name and changing the place of business, the court, acting on the erroneous assumption that there were two distinct corporations, improperly excluded testimony as to the contents of a by-law of the association under its original name restricting its liability.

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

Longstreth & Bohlinger, for appellant.

Court erred in instructing a verdict for full amount of policy, as no more could be recovered than the circle assessment yielded under the terms of the contract and by-laws of the association. 25 Cyc. 742. *Woods* v. *Farmers' Life Ass'n,* 121 Iowa 44; *Woodmen of the World* v. *Hall,* 104 Ark. 538.

Abe Collins, for appellee.

Bill of exceptions not filed in time. Sec. 1321 C. & M. Digest. *London* v. *Hutchins,* 80 Ark. 415. No error in excluding testimony, and verdict properly directed. Sec. 6077, C. & M. Digest, has no application to this case.

Longstreth & Bohlinger, in reply.

Case controlled by *Home Mutual Benefit Association* v. *Rowland,* 155 Ark. 450.

McCULLOCH, C. J. Appellee instituted this action against appellant, under the name of Home Mutual Benefit Association, to recover on a benefit certificate issued to appellee's husband, and payable to her on the latter's death.

Appellant is a fraternal society, organized under the laws of this State in the year 1914, with its principal office at Fayetteville, and it does business on the assess-

ment plan, the members being divided into groups, or circles, according to age, and when a death occurs an assessment is levied on the members of the circle to which the deceased belonged. The by-laws provide that the society "shall not be liable for the full face value of the certificate unless full and prompt payment of all assessments shall have been made by all the members of the group to which the deceased member belonged, and in no event shall said certificate have a greater value than the amount paid in by the whole membership of said group on the last assessment preceding the death of the insured, after deducting the cost of collecting said assessment."

Appellant filed its answer in its true name, Home Mutual Life Association, and raised no question as to being sued in the wrong name. In some parts of the record the appellant is referred to as the Home Mutual Benefit Association, and in some places it is referred to as the Home Mutual Life Association.

It appears from the proof that, since the organization of appellant society and since the issuance of the benefit certificate to appellee's husband, the by-laws were amended so as to change the name of appellant from Home Mutual Benefit Association to Home Mutual Life Association, and changing the domicile and principal office from Fayetteville to Little Rock.

Appellant, in its answer, pleaded as a defense an alleged misrepresentation by Rownd, the member, with respect to his age, and also pleaded that, in accordance with the by-laws, appellee could only recover the amount of one assessment upon the members in the group of which Mr. Rownd was a member.

In the trial of the case, after the evidence had been adduced, the court peremptorily instructed the jury to return a verdict in favor of appellee for the amount stated in the policy, without regard to the amount which was raised by the collection of the last assessment prior to the death of appellee's husband.

The evidence in the case is undisputed that the last assessment preceding the death of W. W. Rownd raised

the sum of $382.05, and, according to the by-laws, liability was restricted to this amount. The case is ruled on this subject by our decision in the recent case of *Home Mutual Benefit Association* v. *Rowland,* 155 Ark. 450.

The trial court erroneously assumed that it had been shown by the testimony that appellant, Home Mutual Life Association, was a corporation distinct from the Home Mutual Benefit Association, and was the successor of the latter under consolidation proceedings whereby appellant, Home Mutual Life Association, assumed all liabilities of the other corporation. The fact is, however, as shown indisputably by the record, that there are not two distinct corporations involved, but that there was a mere change in the by-laws of the Home Mutual Benefit Association so as to substitute a new name and to change the place of business. The court, acting upon the erroneous assumption, refused to let a witness testify as to the contents of the by-laws of the Home Mutual Benefit Association. The court ruled that the witness could not testify on the subject, and that the by-laws could only be proved by the introduction of a properly certified copy. That ruling would undoubtedly have been correct if there had been another corporation, but appellant introduced the by-laws of the association, properly certified, and the witness should have been permitted to state that there were no other by-laws except those, and that the only change that had been made was with respect to the change of the name and location.

The judgment will therefore be reversed, and judgment will be entered here in favor of appellee for $382.05 as of the date of the judgment below. It is so ordered.

WEST v. E. V. COOK MERCANTILE COMPANY.

Opinion delivered March 19, 1923.

1. LANDLORD AND TENANT—LANDLORD'S LIABILITY FOR CROP RECEIVED IN EXCESS OF RENT.—Where a tenant of land turns over to his landlord cotton in part of which his subtenants have interests which are mortgaged, and gives the landlord a bill of sale on the cotton in satisfaction of the rent due, without the consent of the subtenants or their mortgagees, the landlord was liable to the subtenants and their mortgagees for the proceeds of the cotton in excess of the rent due him, though at the time of the transfer to him the cotton was not worth the rent, and it was necessary for him to hold it some time before he was able to sell it for an amount in excess of the rent.
2. APPEAL AND ERROR—FINDINGS OF CHANCELLOR.—Findings of a chancellor not clearly against the preponderance of the evidence will be affirmed.

Appeal from Pope Chancery Court; *W. E. Atkinson*, Chancellor; affirmed.

U. L. Meade and *John M. Parker*, for appellant.

Appellant had the right to buy the cotton when he did purchase it at the agreed market price, and because he held same till the price advanced and realized from its sale $2,200 more than the amount of the rent of his farm he was not liable either to his tenants, their mortgagees or furnishers of supplies for the overplus. No fraud is allleged in the purchase of the 84 bales by West from Savage, which must be both charged and proved to vitiate sale. *Jackson* v. *Reeve*, 44 Ark. 496. Never presumed. *Ferguson* v. *Little Rock Trust Co.*, 99 Ark. 45; *Huff* v. *Roane*, 22 Ark. 184. Hankins made no tender of rent. *Bloom* v. *McGee*, 38 Ark. 329. Should have done so and brought replevin for cotton. *Buck* v. *Lee*, 36 Ark. 525; *Lemay* v. *Johnson*, 35 Ark. 231; *Roth Co.* v. *Williams*, 45 Ark. 477; *Noe* v. *Layton*, 69 Ark. 551; *Jacobson* v. *Atkins*, 103 Ark. 91. Demurrer should have been sustained and action dismissed as to certain parties.

Hays, Wood & Hays and *J. T. Bullock*, for appellees.

Appellant undertakes to present a different case here that was tried by chancellor. The cases were based

alone on conversion. Appellant had no legal right to purchase crops grown on his lands in disregard of junior lien holders of whose rights he had notice by the recorded mortgages. *Peoples* v. *Hayley-Beine & Co.*, 89 Ark. 215; *Robinson* v. *Cruce,* 29 Ark. 275. West had wrong conception of a landlord's rights, claiming he would hold each tenant's cotton until entire rent was paid. *Storthz* v. *Smith*, 109 Ark. 552. The evidence abundantly supports the judgment, which should be affirmed.

U. L. Meade, John M. Parker, in reply.

Reargue testimony controverting appellee's position; cases cited not applicable, there being no surplus over rent due when cotton purchased. Appellant claims the cotton because he purchased it from Savage, who raised it, and received it in payment of the rents, and from tenants consenting to and authorizing the sale. Proof shows cotton sold to pay debt due purchaser and at market price. *Gilverson Gloriscina Co.* v. *Curnes,* 56 Ark. 414; *Anderson Co.* v. *Bowles,* 44 Ark. 108; *Meyer* v. *Bloom,* 37 Ark. 43. Mortgagee of tenant has no greater right than tenant and entitled only to what remains after rent paid. *Bourland* v. *McKnight Bros.,* 79 Ark. 427.

SMITH, J. B. F. West owned a farm of 550 acres in Pope County, which he rented to J. A. Savage for the year 1920 for $5,500. Savage subrented 140 acres of the land to J. M. May for $1,400. To obtain supplies and assistance to make a crop, May gave a mortgage on his crop and certain livestock and other personal property which he owned, to the E. V. Cook Mercantile Co. Advances secured by this mortgage, amounting, with interest, to $289, were made to May. Savage subrented 172 acres of the land to T. J. Hankins for $1,700. Hankins cultivated the land and made a crop, but after doing so sold his interest therein to W. D. and O. J. Whitlock, and took a mortgage back to secure the purchase money. The sum claimed by Hankins under his mortgage was $614.25.

Savage received from the subtenants 84 bales of cotton, all of which he turned over to West first, under a writing signed by Savage, dated April 21, 1921, authorizing West to sell the cotton when he thought best. West did not sell under this authority, and on July 2, 1921, Savage executed to West a bill of sale for the 84 bales of cotton in satisfaction of his rent, except that as to two of the bales West was to account to one Oscar Wilson for one-fourth of each of the two bales. At the date of this bill of sale the market price of the cotton was so low that, had it been sold at the prevailing price, the proceeds would not have paid the rent due West, who claims he should not be charged with a higher price for the cotton, although he admits that, after holding for some months, he sold it for $7,451.74.

The Cook Mercantile Co., as mortgagee of May's interest, sued West to recover the value of May's crop in excess of the rent due by May, and Hankins brought a similar suit as to the Whitlocks' crop. The cases were consolidated and tried together, and there was a decree for each of the plaintiffs, and the cases are here as one appeal.

The controlling question in the case is whether West should be required to account for the cotton at the market price prevailing on July 2, 1921, or at the price he received for it.

There is testimony to the effect that West did not claim to have bought the cotton from Savage, but was holding it for the benefit of the tenants, until the price of the cotton went up. This was denied by both West and Savage, and may not have been true, but we find it unnecessary to decide that question, for the reason hereinafter stated.

It was contended on behalf of Hankins that he offered to pay West the rent due on the land he had rented from Savage, but that West declined to receive the rent. There was some conversation between West and Han-

kins on this subject, but we do not think the testimony shows any tender of this rent.

It does appear, however, that Hankins did not consent to the sale of the cotton by Savage to West. There is conflict in the testimony on this question, but such is the fact, as we interpret the testimony. It is also true that May's cotton was sold by Savage without May's consent.

The rent was past due when Savage executed the bill of sale. West had the right, therefore, to demand that his rent be paid, or that the cotton be sold and its proceeds applied to his rent. But West did not sell the cotton at that time, or have it sold. His contention is that he bought it from Savage.

If Savage had been the owner of the cotton, this sale would have been the end of the matter. But he was not the owner. He was West's tenant, and his subtenants had an interest in the cotton which he turned over to West, and which he could not dispose of in this manner.

If, in the usual course of business, West had sold the cotton, he would be chargeable only with its proceeds; but he was chargeable with its proceeds when it was sold, and the purpose of this suit is to charge him with the proceeds of the sale. West admits that he received $7,451.74 for the cotton, and, after allowing him credit for interest, insurance, hauling, and storage, the cotton netted him $6,252.07, which is $1,199.72 in excess of his rent with all charges included for holding and handling the cotton.

The average price of the 84 bales which West sold was $88.71 per bale, and if he is charged with the cotton at that price there was a sum due both May and the Whitlocks sufficient to discharge their respective mortgages.

The briefs discuss numerous items of account between Savage and the subtenants, consisting chiefly of a controversy about the quantity and value of hay and corn received by Savage. We do not review these

figures in detail, for, with credits to which the subtenants are unquestionably entitled, the Whitlock and May cotton turned over to Savage, and by him delivered to West, brought enough, if accounted for at $88.71 per bale, to pay the rent and the mortgages; and, as there is no controversy about the amount due the mortgagees who have sued for the conversion, West must be held liable to them as having converted the cotton. *Peoples* v. *Hayley-Beine & Co.*, 89 Ark. 252.

The court below so found, and that finding does not appear to be clearly against the preponderance of the evidence, and the decree is affirmed.

SOUTHERN EXPRESS COMPANY *v.* COUCH.

Opinion delivered March 19, 1923.

1. APPEAL AND ERROR—HARMLESS ERROR.—Undisputed testimony that the American Express Company was operated at the same place where another express company was doing business when a certain shipment was made, and that, nine months after the shipment, the American Express Company delivered the property to plaintiff without explanation as to how it came into possession of the property, is sufficient to establish that the American Express Company had succeeded to the business of the other company, so that defendants were not prejudiced by permitting a witness to testify to that effect.
2. APPEAL AND ERROR—HARMLESS ERROR.—An instruction that it was a carrier's duty to transport a shipment as promptly as possible, and that a failure to do so would constitute negligence, even if it imposed too high a degree of care upon the carrier, was harmless where the undisputed testimony established the carrier's negligence, as where a shipment which should have reached its destination in a few days was misplaced and not delivered until nine months later.
3. CARRIERS—DAMAGES IN EXCESS OF VALUE CLAIMED.—Where a shipper in his claim filed with the carrier placed a reduced value upon the articles in order to procure an immediate settlement, he was not bound by such valuation in a suit by him to recover the true value of such articles.
4. CARRIERS—PENALTY FOR DELAY—CONSTITUTIONALITY OF STATUTE. —Crawford & Moses' Dig., § 937, imposing upon an express com-

pany a penalty of $2 per day for delay after 20 days' notice in paying for damages to or loss of goods, is unconstitutional because the penalty fixed is exorbitant and unreasonable.

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

Henry Stevens, for appellant.

Case should be reversed for error of court in allowing the station agent of the express company to testify that the American Express Company succeeded to the business of the Southern Railway Express Company. 2 Morawetz on Private Corporations, sec. 940. *Vassar* v. *Ford,* 37 Ark. 27. Peremptory instruction should have been given in favor of American Railway Express Company. *Wiggins Ferry Co.* v. *Ohio & M. Ry. Co.,* 142 U. S. 396, 35 L. Ed. 1055; *McAlester* v. *American Railway Express Co.,* 103 S. E. 129; *Austin* v. *Tecumseh National Bank,* 35 L. R. A. 114. The judgment is excessive and not supported by the evidence. 1 Sutherland on Damages, 785; 9 Encyc. of Evidence 958; 32 Ark. 346. The court erred in giving instruction 4. *Goodell* v. *Bluff City Lbr. Co.,* 57 Ark. 203; *St. Louis, I. M. & S. Ry.* v. *Beecher,* 65 Ark. 12; *St. Louis I. M. & S. Ry.* v. *Thompson-Hailey,* 79 Ark. 12; *Cornish* v. *Friedman,* 94 Ark. 282. Erroneous instruction not cured by a correct one on same subject. *Doyle* v. *Kavanaugh,* 87 Ark. 364; *Merchants' Ins. Co.* v. *Adams,* 88 Ark. 550. Conflicting instructions leave the jury without a correct guide and error in giving prejudicial *St. L. I. M. & S. Ry.* v. *Hudson,* 95 Ark. 506; *Helena Hardwood Lbr. Co.* v. *Maywood,* 99 Ark. 377; *Hodge-Downey Const. Co.* v. *Carson,* 100 Ark. 433; *Dove* v. *Harper,* 101 Ark. 37; *K. C. S. Ry.* v. *Brooks,* 84 Ark. 233.

Joe Joiner, for appellee.

Transcript does not contain all the evidence nor all the court's instructions. Judgment against the American Railway Express Company should be affirmed. *American Railway Express Co.* v. *Downing* (Va.), 111 S. E. 265. Neither is the judgment excessive. On the

cross-appeal the judgment should be reversed and appellee allowed the penalty for delay. Crawford & Moses' Digest, § 937.

Two years' statute applies. Sec. 6954, C. & M. Digest; 199 S. W. 707; 10 Mo. 781; 112 Me. 234; 127 Fed. 23; 123 Ark. 266; 277 Fed. 433.

Henry Stevens, in reply.

Record is complete. Sec. 937, C. & M. Digest, provides a penalty and two-year statute applies. *Western Union Tel. Co.* v *State,* 82 Ark. 309. Black on Interpretation of Laws, p. 470. Court ruled correctly on demurrer.

HUMPHREYS, J. This is the second appeal of this case to the Supreme Court. On the former appeal the judgment was reversed because the trial court submitted an issue of special damages to the jury. Upon remand of the cause the pleadings were amended to include the American Railway Express Company as a party defendant, alleging that it had taken over the Southern Express Company and assumed the latter's liability, and, in addition to claiming damages for depreciation in the value of appellant's goods for negligent delay in delivering them, claimed a penalty of $2,472, under sec. 937 of Crawford & Moses' Digest, for not doing so. For a statement, in the main, of the facts in this case, reference is made to the opinion on former appeal, which is recorded at page 513, vol. 143 Ark. Reports. In addition to the statement found there it may be added that the testimony in the instant case was directed to the depreciation in the value of the trunk and its contents occasioned by a delay in delivering same. Appellee testified that at the time he expressed the trunk it contained a set of jeweler's tools worth $200, wearing apparel worth $150, and a watch and stick-pin worth $160; that on November 9, 1918, the American Railway Express Company delivered the trunk and contents to him in a damaged condition; that when he received them the trunk was worth $10, the tools about

$25, the wearing apparel $50, and the watch and stickpin worthless. On February 4, after the trunk was expressed, appellee filed a claim, verified by oath, with the Southern Express Company for $261.50, on account of the loss of the trunk and its contents. On cross-examination he was questioned concerning this claim and the value placed by him at that time on the various articles, to which he responded that he undervalued the articles in the claim, believing that by so doing the company would pay him immediately; that he was very anxious to get an immediate settlement, because he needed the money. It may also be added that J. K. Mooney testified in the instant case, over the objection and exception of appellants, that the American Railway Express Company succeeded the Southern Express Company in business. The cause was submitted upon the pleadings, testimony, and instructions of the court, which resulted in a verdict and judgment in favor of appellee for $400.

Appellants contend for a reversal of the judgment on several grounds.

It is first insisted that the trial court erred in allowing J. K. Mooney to testify that the American Express Company succeeded to the business of the Southern Express Company. Learned counsel for appellant argues that the only way to have established this fact was by the introduction of the resolutions of the stockholders or directors of the respective companies, showing the consolidation of the two companies. We deem it unnecessary to pass upon this point, as the undisputed testimony in this case shows that the American Express Company was operating at the same place where the Southern Express Company was doing business when the shipment was made, and nine months after the shipment, delivered the trunk and its contents to appellee. The American Express Company made no explanation as to how it came in possession of the trunk, and the reasonable inference is that it succeeded to the business and assumed the liabilities of the Southern Express Com-

pany. The testimony was sufficient to establish this fact without the evidence of J. K. Mooney. So no prejudice resulted to appellant, American Express Company, on account of the testimony given by Mooney.

It is next insisted that the court erred in giving instruction No. 4. The particular part of the instruction assailed by appellant as erroneous is as follows:

"It was defendant's duty to transport the trunk in this case as promptly as possible, and a failure to do so by the defendant would constitute negligence, and if the plaintiff was damaged by such negligence, * * *".

It is urged that too high a degree of care was imposed by this instruction upon appellants; that the degree of care imposed upon them by the law was to deliver the shipment within a reasonable time, and that they could be held for damages only in case of an unreasonable delay in delivering. We deem it unnecessary to discuss the question raised, because the undisputed facts in the case show that the delay in delivery was unreasonable. The trunk was expressed from Magnolia, Arkansas, to Kansas City, Missouri. It should have reached its destination in a few days, but was misplaced in transit and was not delivered to appellee until nine months later. The delay in delivery was unreasonable, and the instruction given would not have prejudiced the rights of appellants in any way. In other words, the undisputed evidence conclusively establishes negligence in law upon the part of appellant.

The next and last insistence for reversal is that the judgment is excessive. It is true that the testimony of appellee conflicts with the claim filed by him, in so far as the value of the various articles is concerned, but he was not bound by the values fixed in the claim filed with appellants. He explained that he placed a reduced value in the claim upon the articles in order to procure an immediate settlement with appellants. His testimony was sufficient to support the verdict, if believed by the

jury, and the weight to be attached to it was a question solely for them.

Appellee has prosecuted a cross-appeal and asked that appellants be penalized $2 per day for failure to pay the claim, under sec. 937 of Crawford & Moses' Digest. The penalty statute referred to is unconstitutional because the penalty fixed is exorbitant and unreasonable. *Beckler Produce Co.* v. *American Ry. Exp. Co.*, 156 Ark. 296.

No error appearing, the judgment is affirmed.

CARPENTER v. PHILLIPS.

Opinion delivered March 26, 1923.

1. BROKERS—CONTRACT—JURY QUESTION.—Whether a landowner contracted with a firm of brokers to sell his farm *held* under the evidence to be a question for the jury.
2. BROKERS—RIGHT TO COMMISSION.—Where a real estate agent employed to sell land introduces a purchaser to the owner, and through such introduction a sale is effected, the agent is entitled to his commission, though the sale is made by the owner.
3. APPEAL AND ERROR—INSTRUCTION—NECESSITY OF SPECIFIC OBJECTION.—In an action for a commission for selling land, an instruction that if plaintiffs procured a buyer by contract with defendant, or if they introduced the purchaser to him, and the sale was effected through their efforts, they were entitled to their commission, *held* not reversible error as being in conflict with other instructions or as being an erroneous declaration of law, in the absence of a specific objection.
4. BROKERS—TELEGRAMS AS EVIDENCE.—In an action by brokers for a commission for procuring a purchaser of land, a telegram and letter from the purchaser to plaintiffs, directing them to hold the farm, *held* admissible, in view of testimony tending to prove that plaintiffs were then acting as defendant's agent.

Appeal from Fulton Circuit Court; *J. B. Baker*, Judge; affirmed.

C. E. Elmore and *Oscar E. Ellis*, for appellant.

No evidence of any contract with appellees to sell appellant's farm, and there must be a contract to entitle

broker to commission. *Horton & Co.* v. *Beall,* 116 Ark. 273; *Murry* v. *Miller,* 112 Ark. 227; *Scott* v. *Cleveland,* 122 Ark. 229; *Brannen* v. *Poole,* 142 Ark. 48; *Gammell* v. *Cox,* 143 Ark. 72. Court erred in giving instructions 1a, 2a, 3a, 4a and 5a, and also 3 and 5. Also erred in allowing the introduction of letters and telegrams from appellees to Thompson and from him to them, same being incompetent and self-serving declarations.

J. C. Ashley and *H. A. Northcutt,* for appellees.

Cases cited by appellant reviewed. Broker employed to sell is entitled to commission when. 53 Ark. 49; 76 Ark. 375. The jury was properly instructed and the evidence is sufficient to sustain the verdict. 83 Ark. 202; 90 Ark. 301; 89 Ark. 185; 127 Ark. 429. Appellees were the procuring cause of the sale. 132 Ark. 378; 102 Ark. 200; 137 Ark. 23.

WOOD, J. This action was instituted by the appellees against the appellant to recover the sum of $400 which the appellees alleged that appellant owed them for services rendered appellant in the sale of a certain farm in Fulton County, Arkansas. The appellees alleged that they were partners in the real estate business, and that they were employed by the appellant to sell his farm at the price of $8,000; that they procured a purchaser for the farm, who purchased the same at that price, and that the appellant agreed to pay them for their services as commission five per cent. of the purchase price, which he had refused to do. The appellant denied all the material allegations of the complaint.

The testimony of Richard Stockard, one of the appellees, was to the effect that the appellees were partners in the real estate business. They were advertising their business in the Daily Oklahoman, a newspaper in Oklahoma. One Mr. Thompson saw their ad. and answered it, telling the appellees that he wished to purchase an improved farm in the Ozarks. Appellees wrote him in regard to a farm they had on Big Creek. Thompson came, and appellees took him to look at certain farms,

but Thompson was not pleased with these, and he and the appellees started back to Ashflat, where the appellees resided and had their business office. On the way they stopped at the appellant's. Appellant said to one of the appellees, "Who have you got with you?" and the reply was "A fellow by the name of Thompson from Castle, Oklahoma—a land buyer." Appellant said, "Sell him my place." One of the appellees told Thompson that the appellant wanted to sell his place, and told Thompson that the appellant had an ideal farm. One of the appellees took Thompson in and introduced him to appellant. They all went down to the barn, and appellant showed Thompson a crib full of corn, and Thompson said, "This is the kind of a place I want." They went back and looked over the house, and Thompson stated that he was going home and tell his wife about the place, and was pretty sure she would take it, and that he would wire the appellees whether to hold the place for him or not. Thompson at that time said to appellant, "I want you to understand that I am dealing through these boys" (referring to appellees). In about three or four days appellees got a telegram from Thompson which read, "Hold Mac Carpenter farm. Letter of instructions will follow." In about a week Thompson came back. Appellees had received a telegram to meet him and his wife. One of the appellees met him and his wife on the 9th of December and took them out to Ashflat, and on out to appellant's the next morning, to look over appellant's farm. Thompson said, while they were examining the farm, "This is the farm I want." After examining the farm they went back to appellant's house, and there appellant said to the appellees, "You can go on home now, and we will come down Monday or Tuesday, and I will settle up with you," and of course appellees supposed that he would come and pay them their commission.

Thompson had told the appellees that he was going to take the farm. Appellant came in in about a week and said, "I have got the deed made, and the notes

drawn up." Thereupon one of the appellees said to him, "We are really entitled to ten per cent. on this trade, but we are going to settle with you for $400." Appellant replied, "Well, that is what Boss Woods charged to sell this farm two years ago, but it seems like this deal was made mighty quick." In a few days he came back again and said to appellees, "I have been studying this over, and all I am willing to pay you is $5 a day and car fare and expenses." On cross-examination the witness was asked if appellant agreed to pay appellees five per cent. commission for selling the place, and witness answered, "He said, 'Sell him my place. I would just as soon pay you boys a commission as anybody'." Appellant knew that appellees were in the real estate business. Appellant's place had not been listed with the appellees for sale, and they had no other contract for selling same than that made that night.

Phillips, the other appellee, in his testimony substantially corroborated the testimony of Stockard, and further testified that, after the negotiations were on and the place was sold, and while they were trying to settle with the appellant as to their commission, he remarked that they had never sold the place, and said, "Thompson would not give $8,000 for the place," and further stated in the same conversation, "If you can sell it for $8,000 I will give you the $400 right now." Appellees told him that they considered that they had already sold it for that. It was the first time they were out at appellant's with Thompson that appellant made the contract. He told appellees then, in the presence of Thompson, that he would just as soon pay them as anybody. But the testimony of the appellees further tends to show that, between the time they were first out at the appellant's with Thompson, appellant had made inquiries of appellees as to whether they had heard anything from Thompson, and when appellees received the telegram from Thompson they called up the appellant and told him about it. They

talked to appellant over the 'phone in regard to the deal. The testimony of appellees was also to the effect that five per cent. was a reasonable charge for their services; that it was the usual and customary commission where they sold land as they did this.

Mr. Thompson was introduced as a witness by the appellant, and he testified, corroborating substantially the testimony of the appellees as to the circumstances under which he became acquainted with appellant. He stated that the appellees said that they did not know that Carpenter wanted to sell; that if they had known, they would like to have sold it for him. They stated they didn't have any contract on the farm. Witness bought the farm from Carpenter because it was the ideal farm he had been looking for. It was something over forty days after witness first met Carpenter before he purchased the farm. Witness and his wife were staying at Carpenter's, and while they were there Carpenter showed them his farm and other farms. Witness didn't purchase the farm because of any recommendation or solicitation of the appellees or either of them. He denied that he stated, in the presence of Carpenter and the appellees, that night when he first met Carpenter, that he "was dealing through these boys," meaning Dee Phillips and Richard Stockard. Witness made no such statement. Carpenter priced the farm to witness and stated the condition on which it could be bought. Neither of the appellees ever told witness the terms of the purchase or the price, or anything about it, and neither of them ever represented to witness that they had it for sale. Witness, on cross-examination, stated the circumstances of the meeting with Carpenter about as it had been detailed by the appellees, and stated that he was introduced by Stockard to Carpenter as a prospective buyer of a farm. He had decided that night that he would take the farm, but he was buying it for his wife, and she had to see it. Before he came back he sent the telegram to the appellees in which he told them to hold the Mac

Carpenter place, and wrote them a letter stating that he would be back some time the next week with his wife, and to be sure to see that "old Mac Carpenter holds the farm," and wired the appellees to meet him. The appellees did meet witness at the train and went with him to the appellant's. The deal for the farm was closed between the witness and Carpenter some weeks after that. The consideration of the purchase to Carpenter was $8,000.

The appellant testified, and, without setting out his testimony in detail, it suffices to say it was substantially the same as to the meeting of Thompson as detailed by the appellees and Thompson, that he was introduced to Thompson by Stockard, but closed the deal with Thompson himself. Appellant stated that when the appellees came back the second time with Thompson he decided that they were trying to work into the deal. So he took Stockard out and told him that he would not pay any commission, and wanted to tell him so before he went any further. He said to Stockard, "Mr. Thompson is here, and the place is for sale; he can look at it, and if he don't want it he don't have to take it at any price." Witness testified that he did not agree to pay the appellees five per cent. He said to the appellees, when they were claiming that they had sold the place, "I would like to know what you got for it, and to know when you sold it and what you got for it, and how the payments are arranged, before I pay you $400. I will pay you $400 if you will tell me what you got for it, what the terms are, and how the payments are arranged. They just stood there and looked at me." Witness stated that he never authorized them to sell his farm, and that the night that he first met Thompson was the first time he ever knew that the appellees were in the real estate business. On cross-examination he said that he sold the farm himself, that the appellees had nothing to do with it. Witness acknowledged that he told the appellees at Ashflat that, if they had sold the place, and could tell witness the

terms and conditions upon which they sold it and how the payments were arranged, he would give them $400. He denied having any conversation over the telephone with appellees about Thompson's telegram and letter.

Another witness for the appellant testified that he heard a conversation between Thompson and Stockard about the appellees' commission, in which Stockard said he wondered if Mac would be willing to pay them anything. Witness asked Stockard if there was any understanding about what they were to get and he said "No." The telegram and letter referred to from Thompson to the appellees concerning the deal were introduced as evidence, over the objection of appellant.

The court, on its own motion, gave several instructions, which, in effect, told the jury that, before they were authorized to find for the appellees, they would have to find from a preponderance of the evidence that they had a contract with the appellant to pay them a commission for selling his farm, and that appellees secured the purchaser, who was willing and able to purchase the farm from the appellant upon the terms agreed upon between purchaser and appellant; that, although the purchaser came to Ashflat at the instance of the appellees, and afterwards purchased property from the appellant, this of itself should not be sufficient to authorize the appellees to recover a commission from the appellant, unless they had a contract with the appellant by which they were to sell his farm, and, through their influence and effort, brought appellant in touch with the purchaser and thus caused the sale of the lands to be made. The court further instructed the jury that, if they found from the evidence that the appellees were in the real estate business and rendered service to the appellant in the sale of his farm, which he had accepted, appellees were entitled to recover a reasonable compensation for their services.

In its instruction No. 3 the court, in effect, told the jury that, if they found from a preponderance of the evidence that the appellees procured a buyer for appellant's farm by contract or agreement with the appellant, or *if they introduced the purchaser* to the appellant and negotiations were begun and the sale of the property was effected through the efforts and influence of the appellees, they were entitled to their commission, although the owner sold the property himself. Only a general objection was saved to the instructions of the court. The jury returned a verdict in favor of the appellees for the sum of $375, and from a judgment rendered in their favor for such sum is this appeal.

1. The appellant contends that there is no evidence to prove that there was a contract between the appellees and appellant for the sale of the latter's farm. The testimony concerning this is set forth in detail above, and we are convinced that the issue as to whether or not there was a contract by which the appellant engaged the appellees to sell his farm was one for the jury. There was a sharp conflict in the evidence, but it cannot be said that there was no substantial evidence to prove that appellant agreed to pay the appellees a commission for selling his farm, nor can it be said that there was no legal evidence to prove that the appellees procured a purchaser who was ready, willing and able to purchase on the terms prescribed by the appellant. The law is well settled that, where a real estate agent, employed to sell land, introduces a purchaser to the seller, and through such introduction a sale is effected, the agent is entitled to his commission, though the sale be made by the owner. *Scott* v. *Patterson,* 53 Ark. 49; *Hunton* v. *Marshall,* 76 Ark. 375; *Warmack* v. *Perkins,* 132 Ark. 378; *Hodges* v. *Bayley,* 102 Ark. 200.

2. The instructions of the court were in harmony with the law applicable to the facts of this record, and as announced in the above and many previous decisions of this court.

The language in instruction No. 3, to-wit, "*or if they introduced the purchaser*" is inaccurate, but it is manifest, when this language is considered in connection with the other instructions which the court gave, that the court did not mean by the above language to tell the jury that a real estate broker who had no contract to sell land had earned his commission if he had only introduced the purchaser to the seller. Obviously, instead of the word "or" the court intended to use the word "and;" otherwise instruction No. 3 would be in conflict with several other instructions which the court gave. When the instructions are considered together, it clearly appears that the court did not intend to give conflicting instructions. Therefore if the appellant conceived that the language of the clause quoted, to which he now objects, was in conflict with other instructions, and was an erroneous declaration of law, he should have specifically directed the attention of the court to the objectionable language. Had he done so, the court doubtless would have readily corrected the same to meet his objection. The inaccurate phraseology called for a specific objection.

Instruction No. 6, given by the court on its own motion, was in harmony with the law as announced by this court in *Hodges* v. *Bayley, supra. Poston* v. *Hall,* 97 Ark. 23; *Branch* v. *Moore,* 84 Ark. 464. See also *Harris & White* v. *Stone,* 137 Ark. 23-29.

3. The court did not err in allowing the telegram and letter from Thompson to the appellees to be introduced in evidence. Under the testimony tending to prove that the appellees at that time were acting as the agent of appellant as well as the agent of Thompson in bringing about the sale, the letter and telegram were competent testimony.

There is no error. Let the judgment be affirmed.

MORROW v. MERRICK.

Opinion delivered March 26, 1923.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where evidence is so conflicting that the preponderance can not be determined, the chancellor's findings will be adopted.
2. WATERS AND WATERCOURSES—DIVERSION OF SURFACE WATER.—A landowner may divert the flow of surface water in good faith for reclamation of his land if injury to adjoining land is not intended; and where his land could not be reclaimed by reasonable care and expense otherwise than by means of ditches and levees, he may construct them, provided that by so doing he does not necessarily obstruct the natural flow of surface water to an adjoining property owner's injury.
3. WATERS AND WATERCOURSES—DIVERSION OF SURFACE WATER—INJUNCTION.—Where a person, by ditch, levee or other means, asserts his right continuously to cast surface waters in a body upon the lands of another to the latter's irreparable and permanent injury, the party causing such injury is guilty of a private nuisance which the injured party may abate by injunction.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

J. Allen Eades, for appellant.

Appellant had the right to improve his land by cutting off surface waters from it, and he did nothing more. *American Shovel & Tool Co.* v. *Anderson,* 90 Ark. 235; *McCoy* v. *Plum Bayou Levee Dist.,* 95 Ark. 349; *Little Rock & Fort Smith Ry. Co.* v. *Chapman,* 39 Ark. 476; *Baker* v. *Allen,* 66 Ark. 276.

Edward Gordon, for appellees.

Proof shows appellant wrongfully changed the natural flow of the water and caused it to flow over lands of appellees. *Taylor* v. *Rudy,* 99 Ark. 132; *Holtzman* v. *Boiling Spring Bleaching Co.,* 14 N. J. Equity, 335; *Clay* v. *Middleburg Electric Co.,* 11 L. R. A. (N. S.) 693. See *Wellborn* v. *Davies,* 40 Ark. 83.

WOOD, J. This action was brought by the appellees against the appellant. The appellees alleged in their complaint that they are the owners of certain lands which they described; that these lands are situated at the foot

of Pigeon Roost Mountain and north of Point Remove Creek; that there is a branch or ravine into which the waters along the side of the said mountain drain and which flows on to and across the lands of defendant, adjoining plaintiffs'; that defendant is digging a ditch and building a levee at the foot of said hill on his land for the purpose of diverting and changing the natural flow of water and forcing the same to flow on to the lands of plaintiff, which will overflow about fifty acres of plaintiffs' land, to plaintiffs' irreparable injury and damage. The complaint concludes with a prayer for a mandatory injunction requiring the defendant to remove all levees and other obstructions and to fill up such ditches as he had dug to divert the natural flow of the water.

The appellant, in his answer, denied all the material allegations of the complaint, and alleged that he was digging the ditch complained of on his own land for the purpose of straightening the natural flow to where it has a natural outlet under the public road by a large culvert that was put there by the road construction people, and that said watercourse had been there for years, unknown to the defendant. He alleges that he is cutting away from plaintiffs' land a part of the overflow of water that would naturally come through there during high water, and is thus benefiting plaintiff's land, instead of injuring it.

The cause was heard upon the depositions of the witnesses taken at the instance of the respective parties and the exhibits to these depositions, and the court entered a general finding for the appellees, and entered a decree directing the appellant "to clean out the channel of the branch leading from the road culvert at the foot of the hill north of Point Remove Creek on the Hattieville & St. Vincent Road in Road District No. 4, from where same passes under said culvert, beginning at the east side, to where same empties into Point Remove Creek, and to completely fill up the ditch dug by him, within ten days from the rendition of the decree." The court

further decreed that the appellant be "perpetually enjoined from reopening said ditch or filling said branch, or placing any obstruction in said branch which might cause same to refill, or in any way change or divert the natural flow of the water."

It is the contention of the appellees that the appellant has dug a ditch and built a levee on his own land which has the effect of diverting and changing the natural flow of surface waters through a branch or ravine which runs across and through the lands of the appellant, emptying into Point Remove Creek, and forcing them to flow in a body on to the lands of the appellees, to their great and irreparable injury. On the other hand, the appellant, while admitting that he has dug the ditch and built the levee as alleged, nevertheless contends that the ravine or branch, which the appellees claim he has obstructed, was nothing more nor less than the left-hand prong of a wet-weather branch which had only about a quarter of a mile to gather water in, and that this prong really brings water on to the land of the appellant from the appellees' land, and that it meanders over appellant's rich bottom land, about two acres, and that he dug the ditch and built the levee for the purpose of reclaiming his own land from the effect of the surface waters which were gathered up and brought on to his land through this wet-weather branch or ravine; that appellant's purpose was only to control this surface water, and that the building of the ditch and levee only had the effect of turning the water and causing it to flow in a natural channel that went through the appellee's land and emptied into Point Remove Creek; that the ditch and levee thus constructed did not in any manner injure the appellees' land, but, on the contrary, would have the effect of benefiting the same.

The parties litigant introduced testimony to sustain these respective contentions. The testimony is exceedingly voluminous, and it could serve no useful purpose to set forth and discuss in detail the testimony of the wit-

nesses. After a careful reading of the record we have reached the conclusion that this is one of those cases where it is utterly impossible for this court to determine where the preponderance lies. In *Leach* v. *Smith,* 130 Ark 465-470, we said: "When chancery causes reach this court on appeal they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius.* In determining the issues of fact by this court in chancery causes, no weight is given to the findings of fact by the trial court, unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. But the issues of fact, as well as law, are tried by this court anew."

We have carefully reviewed the evidence in this record, and it is so conflicting, and, to our minds, so evenly poised that we are unable to say which of the litigants is entitled to the preponderance. We are not convinced that the findings of the trial court are clearly against the weight of the evidence, and therefore must adopt the findings of the chancellor as our own. To be sure, if the appellant had done nothing more than merely divert the flow of surface waters, and was doing so in good faith for reclamation of his own land, and with no purpose of injuring the adjoining lands of the appellees, and if the appellant could not have reclaimed his own land, by reasonable care and expense, otherwise than in digging the ditch and building the levee complained of, then he would have had the right to do so, provided that, by so doing, he did not unnecessarily obstruct the natural flow of the surface water in such manner as to injure the land of the appellees. *Little Rock & Fort Smith Ry. Co.* v. *Chapman,* 39 Ark. 463; *Baker* v. *Allen,* 66 Ark. 271; *Ames Shovel & Tool Co.* v. *Anderson,* 90 Ark. 235;

McCoy v. *Board of Directors of Plum Bayou Levee Dist.*, 95 Ark. 345-349.

The converse of the doctrine above stated is equally true. If the trial court found that the appellant was dealing with the surface water, it must also have found that he unnecessarily diverted its natural flow by digging the ditch and building the levee mentioned, and that by so doing he did the appellees an irreparable injury. We cannot say that such finding of the trial court would be clearly against the preponderance of the evidence, for there was testimony to justify the court in finding that the appellant, instead of handling the surface waters as he was attempting to do, could, at much less expense, and with greater benefit to himself, and without any injury to the appellees, have cleaned out the channel of the branch which he had obstructed and allowed the water to flow through the same and in its natural course and outlet into Point Remove Creek. Furthermore, the court was justified in finding from the evidence that the appellant had gathered up the waters, which, through various small drains or tributaries, made their way into what counsel for appellant called the "left-hand prong of this surface water branch," and by digging the ditch and building the levee had cast these waters in a body into the prong, depression, swale, or slough, that ran into and upon the land of the appellees, where there was no sufficient natural outlet for them, and thereby had caused appellees' land to overflow, and which overflows, in times of high water, would result in practically destroying several acres of valuable land.

The facts, as the court might have found them, bring this phase of the case well within the doctrine of *St. Louis, I. M. Ry Co.* v. *Magness,* 93 Ark. 46-53, where we said: "Even if these waters had been nothing more than surface waters, appellant could not gather them into its ditch and cast them in a body upon the lands of appellees. This was practically the effect of appellant's ditch. For the evidence shows that when the waters of

Thomas Creek were by this means added to the waters that usually passed through other lower natural and artificial drains, these drains were insufficient to carry them off, so they passed on over and overwhelmed appellees' lands."

Where a person, by a ditch or levee, or other means, asserts his right to continuously cast the surface waters in a body upon the lands of another, to the irreparable and permanent injury of the latter, the party causing such injury is guilty of a private nuisance. The party injured may, if he so elects, resort to a court of chancery for a mandatory injunction to abate such nuisance and to have the offending party forever enjoined thereafter from causing and maintaining such nuisance. *Wellborn* v. *Davis,* 40 Ark. 83; *Taylor* v. *Rudy,* 99 Ark. 128; High on Injunctions, secs. 794 *et seq.;* Farnham on Water Courses, 582a.

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

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