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IN THE

Supreme Court of Arkansas

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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

SPORE *v.* STATE.

Opinion delivered January 14, 1924.

1. CRIMINAL LAW—JUDGMENT OF JUSTICE—VALIDITY.—Where a judgment of conviction by a justice of the peace recited the essential jurisdictional facts and that defendant appeared and pleaded guilty to the charges, and there was nothing on the face of the record showing that items of cost assessed were illegal, the circuit court did not err in refusing to quash it on certiorari.
2. CRIMINAL LAW—NECESSITY FOR MOTION FOR NEW TRIAL.—In the absence of a motion for a new trial, the Supreme Court cannot review issues of fact that were determined on the evidence in the trial court.
3. COSTS—REMEDY FOR ILLEGAL EXACTIONS.—Where illegal costs are charged, the proper remedy is to move to retax.

Appeal from Crittenden Circuit Court; *W. W. Bandy,* Judge; affirmed.

R. G. Brown, for appellant.

J. S. Utley, Attorney General, *John L. Carter,* Assistant, for appellee.

WOOD, J. The judgment of the circuit court, from which this appeal comes, recites as follows: "This case came on to be heard on the 26th day of September, 1923, one of the days of the September term, upon the appeal prosecuted by the defendant from a judgment rendered against him by H. A. McGee, a justice of the peace for Crittenden County, on the 2d day of August, 1923, imposing on the defendant in one judgment a fine of $25 and court costs for malicious mischief; $25 and court costs for running a car without lights; $100 and court costs for speeding; and $100 and court costs for assault; and also upon the certiorari proceeding filed in this court on September 24, 1923.

"And thereupon the district attorney moved in open court that the appeal be dismissed upon the ground that the defendant had pleaded guilty in the lower court, and could not thereafter prosecute an appeal, which motion was by the court granted, to which action of the court the defendant at the time excepted and asked that his exceptions be noted of record, which is done.

"And thereupon the matter came on to be heard upon the writ of certiorari granted this day to the defendant, upon his petition for same, the defendant being represented by his counsel, R. G. Brown, Esq., and the respondent, H. A. McGee, and the State of Arkansas being represented by Hon. Cecil Shane, district attorney. The petitioner testified in his own behalf, and introduced in evidence the oral testimony of H. M. Burnett, Esq., and the affidavits of J. M. Glancy and J. V. Britton. H. A. McGee, Esq., and Si Bond, Esq., testified as State's witnesses, and the original information was introduced in evidence.

"From all of the evidence the court finds that there was no duress or deceit practiced upon the defendant at the hearing before the justice of the peace, and that the plea of guilty was made by him freely and voluntarily, after being advised by the assistant district attorney of the maximum fines which could be imposed under a plea of guilty. The court further finds that the court costs adjudged as in four cases and the allowance of $10 fee to the assistant district attorney on each case was legal.

"It is therefore adjudged that the petitioner in the certiorari proceeding is not entitled to any relief, and that the State of Arkansas have judgment for the costs of this court. To all of which the defendant excepts, and his exceptions are ordered noted of record.

"And thereupon the defendant prays and is granted an appeal to the Supreme Court of Arkansas, and the issuance of execution upon the judgment is stayed upon defendant giving an appeal and supersedeas bond in the sum of $600, with security to be approved by the clerk.

"Fifty-five days are allowed the defendant to prepare and present to the court a bill of exceptions and perfect his appeal. All of which is ordered, adjudged and decreed this 26th day of September, 1923."

It appears from these recitals of the judgment that the trial court treated the cause as if the appellant had appealed from the judgment of conviction in the justice court, and sustained a motion of the prosecuting attorney to dismiss the appeal from the judgment of the justice court, on the ground that the appellant had pleaded guilty in the justice court and was thereby precluded from taking an appeal to the circuit court. The recitals of the judgment show that the court did not take this action until after hearing the testimony that was introduced in evidence, and after finding from the evidence that there was no duress or deceit practiced upon the defendant at the hearing before the justice of peace, and after finding that the plea of guilty was made by him freely and voluntarily. The court found that the allowance of $10 attorney's fee adjudged in each of the four cases was legal, and that the petitioner, the appellant here, was not entitled to any relief in certiorari proceedings.

The judgment of the justice court does not show on its face any lack of jurisdiction in that court to render judgment. It recites the essential facts, showing that that court had jurisdiction and that the defendant, appellant here, "appeared and pleaded guilty to the charges of malicious mischief, speeding on the highway, driving without lights, and assault." There is nothing on the face of the record itself showing that the items of cost were illegal. Therefore, on the face of the judgment of the justice itself, it cannot be said that the court erred in refusing to quash it on certiorari.

The recitals of the judgment of the trial court show that the court also inquired into the facts, treating the cause as if it were on appeal *de novo* from the judgment of the justice court, and determined, after hearing this evidence on the State's motion to dismiss, that the judg-

ment of the justice was correct. The record does not show, upon these findings of fact by the trial court, that the appellant moved for a new trial. There is no motion for a new trial in the record. In the absence of a motion for a new trial, this court cannot review issues of fact that were determined on the evidence in the court below. *Kromer* v. *Central Coal & Coke Co.*, 129 Ark. 86; *Smith* v. *Wallace-McKinney Coal Co.*, 140 Ark. 218; *Free* v. *Adams*, 148 Ark. 654, and other cases cited and collated in Cumulative Supp. to Crawford's Digest, 1924, "Appeal & Error," § 116.

The Attorney General has called our attention to the fact that the record contains no motion for a new trial, and, upon examination, we find that he is correct.

It is contended by counsel for appellant that illegal costs were adjudged. If so, the proper remedy is to move to retax.

No error is made to appear in the rulings of the trial court. The judgment is therefore affirmed.

LEE *v.* OSCEOLA & LITTLE RIVER ROAD IMPROVEMENT DISTRICT NO. 1.

Opinion delivered January 14, 1924.

1. TAXATION—GOVERNMENT PROPERTY.—The Legislature has no power to enforce a tax of any character upon any property of the United States, and this immunity applies to special assessments for local improvements.
2. TAXATION—TITLE PASSING FROM GOVERNMENT.—Where the title to land passed from the United States to purchasers or homesteaders, the land became subject to general taxation and to special assessments for local improvements.
3. CONSTITUTIONAL LAW—DUE PROCESS.—A State may, without violating the Fourteenth Amendment, exercise authority to assess property on account of special benefits resulting from an improvement already made.

Appeal from Mississippi Chancery Court, Osceola District; *J. M. Futrell*, Chancellor; affirmed.

STATEMENT OF FACTS.

This action was brought in the chancery court by a road improvement district against certain landowners to collect the assessment of benefits levied against their lands.

The road district was created under § 5399 *et seq.* of Crawford & Moses' Digest, providing for the establishment of road improvement districts. The lands involved in this suit are what are known as lake lands, or sunk lands. They were included in the organization of the district, and the benefits were assessed against them as lands of the riparian owners. Subsequently the lands were adjudged to belong to the United States. The claimants of the lands then homesteaded them under an act of Congress, and the title passed from the United States to the homesteaders. Subsequently the board of assessors of the improvement district reassessed all of the lands within the district, including the lands in controversy in this case. The reassessments were regularly made, according to the provisions of the statute made and provided in such cases, and there was a judgment of the county court confirming the reassessment, which was also made in conformity with the statute. No appeal was taken from the order of the county court confirming the reassessment.

The chancellor found the issues in favor of the road improvement district, and it was decreed that the statutory lien of the assessments be foreclosed and the lands sold to pay the same.

The landowners have duly prosecuted an appeal to this court.

D. F. Taylor, Prewitt Semmes, for appellant; *Chas. M. Bryan, Arthur G. Brode,* and *Blan R. Maxwell,* of counsel.

The enhancement in value to the lands occurred while they were the property of the United States, and, when subsequently granted to appellants, were transferred in their enhanced value, and could not be assessed for a local improvement which had been created while the title to such property was in the United States. 73 Pac. 1056.

In 155 Ark. 89 the court held that certain lands could be taxed in a drainage district, because, though owned by the government, Congress had expressly consented thereto. The logical converse of this proposition would be that the lands could not be taxed for the improvement formed while the lands were government owned, but subsequently transferred to appellants, if Congress had not assented to their taxation at the time of the formation of the district. To so hold would be an interference with the disposal of government property, and a violation of the 14th Amendment Const. U. S., and art. 2, § 22, Const. of Arkansas. There could be no valid "reassessment" of benefits against these lands, since there had been no original assessment. See 241 S. W. 389 (Ark.); 145 Ark. 438. There must be a special act of the Legislature or of Congress to legally reassess or assess benefits against lands which were, at the time of the creation of the district, property of the United States.

J. T. Coston, for appellee.

Section 5430, C. & M. Digest, authorizes a reassessment of lands, which shall be made, etc., as in the case of the original assessment, and with like effect. A reassessment has been held to be valid, even if the original assessment was entirely void. 2 Page and Jones, § 962; 48 Ill. 449; 95 Minn. 183; 13 Wash. 144; 13 Wash. 428; 87 Cal. 499. When a person buys land, whether from an individual or the government, he takes it subject to the right of the sovereign and its sub-agents to assess it for special benefits arising from any improvement, present, past or future. See 195 U. S. 359; 239 U. S. 216; 104 N. W. 555; 39 N. E. 352. The term reassessment applies to all property of the district. 224 S. W. 967. Appellants had their day in court. C. & M. Digest, §§ 5430 and 5424.

HART, J., (after stating the facts). The landowners rely for a reversal of the decree upon the ground that the title to the lands in controversy was in the United States at the time the original assessment of benefits was made, and that, after the road was constructed,

there could be no reassessment of benefits so as to include the lands in controversy, notwithstanding the fact that the title at the time of the reassessment of benefits had passed from the United States to the landowners sued in this action.

We do not agree with the landowners in their contention. It is true, as contended by counsel for appellants, that the Legislature has no power to impose a tax of any character upon any property of the United States, and that this immunity includes special assessments for local improvement. *Fagan* v. *Chicago,* 84 Ill. 227; *Ford* v. *City of Great Falls* (Mont.), 127 Pac. 1004; *Ivinson* v. *Hance,* 1 Wyo. 270, and *Whittaker* v. *Deadwood* (S. D.), 139 Am. St. Rep. 1076. The reason is that the Federal Government is supreme within the purview of the powers granted to it by the Constitution, and the property of the United States cannot be subject to general taxation or to the levy of special assessments against it, without the consent of Congress. This view was recognized in the case of *Pierce* v. *Drainage District No. 17,* 155 Ark. 89. In that case the United States, through Congress, had expressly consented that the lands be taxed for drainage purposes.

So, too, in *Ahern* v. *Board of Improvement District No. 3 of Texarkana,* 69 Ark. 68, the principle was recognized when the court said that public property was not assessable, and was properly excluded from the assessment of benefits in that case. So it will be seen that the property is exempt from special assessments because the title is in the United States, and not because no benefits accrue to it. When, however, the title passes from the United States to purchasers or homesteaders, the reason for the rule ceases, and the rule therefore itself no longer obtains. The general rule is that, when the United States has ceased to have any proprietary interest in property, it becomes private property, and, as such, is subject to general taxation. *People* v. *Shearer,* 30 Cal. 645; and *Carroll* v. *Safford,* 3 How. (U. S.) 441.

With like reason the lands would be subject to special assessments for local improvements after the title had passed from the United States to individuals.

But it is contended that such special assessments could not be made upon lands after the construction of the public improvement. This question has been expressly decided adversely to the contention of appellants by the Supreme Court of the United States in *Seattle* v. *Kelleher,* 195 U. S. 351. In that case the court held that, after the improvement of a street had been made, there could be a reassessment of benefits, notwithstanding a previous invalid attempt to assess. The court said that the reassessment might be a new assessment, and that whatever the Legislature could authorize, if it were ordering an assessment for the first time, it equally could authorize, although the first assessment was invalid.

Again, in *Wagner* v. *Baltimore,* 239 U. S. 207, the court held that a State may, without violating the Fourteenth Amendment, exercise authority to assess property on account of special benefits resulting from an improvement already made.

This court has held that the Legislature may provide for a new assessment of benefits in a drainage district for a reassessment of benefits of a road district. *Burr* v. *Beaver Dam Drainage District,* 145 Ark. 51, and *Earle Road Imp. Dist. No. 6* v. *Johnson,* 145 Ark. 438.

It results from the views that we have expressed that, when the title to the lands in question passed from the United States to private owners, the lands became subject, not only to ordinary taxes, but to special assessments for public improvements. The lands are included within the boundaries of the improvement district, and the question of the amount of benefits assessed against the lands is not raised. The only issue raised by the appeal is whether or not the lands are subject to the special assessment of benefits, and, that question being decided adversely to the landowners, it follows that the decree must be affirmed.

It is so ordered.

MEYER v. RING.

Opinion delivered January 14, 1924.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—POWERS.—The powers of the commissioners of an improvement district are given by statute, and in exercising such powers the board of commissioners acts as the agents of the property owners in the district.
2. MUNICIPAL CORPORATIONS—AUTHORITY OF IMPROVEMENT DISTRICTS TO BORROW MONEY.—Under Crawford & Moses' Dig., § 5708, authorizing improvement districts to borrow money, a board of commissioners of a paving district may borrow not exceeding 90 per cent. of the estimated cost of the work as reported by the commissioners to the city council, and it was error to restrain the board from issuing bonds in a sum not exceeding 90 per cent. of a sum less than such estimated cost.

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

STATEMENT OF FACTS.

Charles T. Meyer brought this suit against the commissioners of the board of improvement of Pulaski Street annex to Street Improvement District No. 288 of the city of Little Rock, Arkansas, to enjoin said commissioners from borrowing money or issuing bonds for the purpose of constructing said improvement.

According to the allegations of the complaint, the plaintiff is the owner of real property within the boundaries of said Pulaski Street annex, and the defendants are the commissioners duly authorized under the statute to construct the street improvement.

The complaint is divided into paragraphs. In the first paragraph it is alleged that the said commissioners proposed to issue negotiable bonds for the purpose of raising money with which to make the improvement; that the said bonds, if issued, will be a lien upon the property of the plaintiff, and will get into the hands of innocent purchasers and thereby constitute a cloud upon the title to his property.

In the second paragraph it is alleged that the estimated cost of the work as shown by the report of the

board of commissioners on file in the office of the city clerk is $19,195; but that the real estimated cost is $18,000; that said commissioners have declined to file a revised report and estimate, and propose to borrow money to the amount of 90 per cent. of said sum of $19,195. The prayer of this paragraph is that the defendants be restrained from borrowing a greater amount of money than 90 per cent. of $18,000.

The case was submitted to the chancery court upon the complaint and a demurrer thereto. The court sustained the demurrer to the first paragraph and overruled it as to the second paragraph of the complaint.

The plaintiff and defendants both declined to plead further. It was therefore decreed that the defendants be restrained from issuing bonds for more than 90 per cent. of $18,000. The case is here on appeal.

Robert D. Lee and *A. L. Rotenberry,* for appellant.

1. While the Legislature has authority to empower a board of improvement to issue negotiable bonds and borrow money to make a local improvement, yet such authority was not conferred by § 5708, C. & M. Digest. Under it the board can only pledge uncollected assessments. In the sense used, there could be no pledge without delivery, and there could be no delivery of uncollected assessments. 186 Fed. 451. Municipal improvement districts have no powers except those expressly conferred by statute, and those necessarily implied from powers expressly given. 94 Ark. 380. Their power to borrow money and to issue bonds or other negotiable obligations must be found in the statute under which the district is created, else it does not exist at all. 79 Ark. 234; 138 U. S. 1076, 1077; 134 U. S. 198, 203.

2. The district is not authorized to issue bonds to the extent of 90 per cent. of the estimated cost of the work on file with the city council, and should be restricted to 90 per cent. of the present estimated cost, as prayed in the second count of the complaint. In this case, no bonds had been issued and passed into the hands of innocent purchasers, and the contention that the estimated

cost referred to in § 5708, C. & M. Digest, is evidently the estimated cost referred to in §§ 5656 and 5657, *Id.*, has no application. The board is not required to borrow the full amount of ninety per cent. of the estimated cost of the work, and the only way lenders could be affected would be for the board to attempt to borrow *more* than 90 per cent. of the estimated cost.

3. It is evident that the purpose of the proposition to add to the 90 per cent. of the estimated cost of the work a sum amounting to six per cent. per annum, and to convert all of such loan into bonds bearing interest at 5½ per cent. per annum, is to evade the limitation restricting the amount borrowed to 90 per cent. of the estimated cost of the work. 102 Ark. 308.

Wallace Townsend and *Rose, Hemingway, Cantrell & Loughborough,* for appellees.

1. The power to issue negotiable bonds by improvement districts of this kind is so well established in this State that a change of the court's ruling in this respect would amount to a disaster. 81 Ark. 286; 109 Ark. 90; 123 Ark. 471; 130 Ark. 44; 151 Ark. 398, 399; 156 Ark. 498; 130 Ark. 162; 135 Ark. 315; 155 Ark. 324; 70 Ark. 211, 215; 102 Ark. 307, 308; 131 Ark. 29; *Id.,* 431; 148 Ark. 634; 135 Ark. 98. It is true that § 5708, C. & M. Digest, does not specifically authorize the issuing of negotiable paper, but that power is necessarily implied from the authority given to borrow money. 70 Ark. 211; 152 Ark. 422.

2. The district is authorized to issue bonds to the extent of 90 per cent. of the estimated cost. C. & M. Digest, §§ 5656, 5657; *Id.*, § 5708. It is evident that estimated cost referred to in the last-named section is the estimated cost referred to in the first two, and it means 90 per cent. of the estimated cost as it appears in the report filed by the commissioners with the city council.

3. Appellant's position might be tenable if the act had provided that the district could *issue bonds* only to the extent of 90 per cent. of the estimated cost, but such is not the case. The statute, § 5708, contains no limita-

tion upon the power to issue bonds, but upon the borrowing power of the district, viz: that the district "may borrow money not exceeding 90 per cent. of the estimated cost of the work, at a rate of interest not exceeding 10 per cent. per annum."

HART, J., (after stating the facts). Under our Constitution the Legislature is empowered to create local improvement districts in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of the majority in value of the property holders owning property adjoining the locality to be affected. According to the allegations of the complaint, the improvement district in question was organized in conformity with the provisions of the statute, and the defendants were duly appointed as commissioners to make the improvement. The powers of the commissioners are given by our statute, and, in exercising the powers conferred, the board of commissioners acts as the agent of the property owners in the district. *Fitzgerald* v. *Walker*, 55 Ark. 148.

Under § 5656 of Crawford & Moses' Digest the board is authorized to form plans for the improvement and to procure estimates for the cost thereof.

Section 5657 provides that, as soon as said board shall have formed said plans and shall have ascertained the cost of the improvement, it shall report the same to the city or town council.

According to the allegations of the complaint, the estimated cost of the work as shown by this report on file, as required by the statute, is $19,195.

Section 5708 of the Digest provides that, in order to hasten the work, the board may borrow money not exceeding 90 per centum of the estimated cost of the work, at a rate of interest not exceeding 10 per centum per annum, and may pledge all uncollected assessments for the repayment thereof.

The language of the statute is plain and unambiguous. It manifestly refers to the estimated cost of the work provided for in § 5656. There is no allegation in the

complaint that the estimate of the cost of the work reported by the board to the city council was the result of fraud or gross mistake. Therefore, under the statute, the board had the authority to borrow money in any sum not exceeding 90 per centum of $19,195, which was the estimated cost of the work as reported by the commissioners to the city council, and on file with the city clerk.

It follows that the chancery court erred in restraining the commissioners from issuing bonds for more than 90 per centum of $18,000.

The court sustained a demurrer to the first paragraph of the complaint. This was not error. Under § 5708 the right to borrow money to construct the improvement is conferred upon the commissioners, and they are given the power to pledge all uncollected assessments for the repayment thereof. This section, by necessary implication, gives the board the power to borrow money and to issue bonds or other written evidence of the indebtedness to the creditors of the district. *Altheimer* v. *Board, etc., Plum Bayou Levee Dist.,* 79 Ark. 229.

As we have already seen, the powers of the commissioners are given by the statute, and we cannot know in advance that there will be any innocent purchaser of bonds within the meaning of the law merchant. Certainly no such parties are before the court, and, as stated in the case of *Fitzgerald* v. *Walker,* 55 Ark. 148, we are not called upon to decide whether a board of improvement, by making notes or bonds negotiable in form, can invest them with all the characteristics of commercial paper issued by individuals or private corporations. Questions of this sort will be decided when they arise, but will not be determined in anticipation of the possibility that they may arise.

It follows that the decree will be reversed, and the cause remanded with directions to sustain the demurrer to the second paragraph of the complaint.

ANDERSON v. STATE.

Opinion delivered January 14, 1924.

1. INTOXICATING LIQUORS—POSSESSION OF STILL—EVIDENCE—Evidence *held* sufficient to sustain a conviction for having a substitute for a still for the purpose of using the same for the production of distilled spirits.
2. CRIMINAL LAW—QUESTION NOT RAISED BELOW.—Where no objection was raised in the court below on account of a variance between the indictment and proof, such variance cannot be assigned as error on appeal.
3. CRIMINAL LAW—QUESTION NOT RAISED BELOW.—Objection that an indictment charged defendant with having a still in his possession which, after being set up, may be used for the production of distilled spirits, instead of charging him with having such still for the purpose of producing distilled spirits, cannot be raised for the first time on appeal.

Appeal from Baxter Circuit Court; *John C. Ashley,* Judge; affirmed.

Sam Williams, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock* and *Darden Moose,* Assistants, for appellee.

HART, J. Andrew Anderson prosecutes this appeal to reverse a judgment of conviction against him for the crime of possessing a still in violation of the statute.

The indictment in this case is drawn under § 2 of act 324 of the General Acts of 1921, which reads as follows:

"No person shall keep in his possession any stillworm or still, without registering the same with the proper United States officer, and no person shall set up, to be used as a distillery, any stillworm or substitute therefor and a still or substitute therefor, such as a kettle, washpot, metal tank, or any other vessel of any kind, for the purpose of using same, or which, after being so set up, may be used for the production of distilled spirits." General Acts of 1921, p. 372.

It is first insisted that the evidence is not legally sufficient to support the verdict. We cannot agree with counsel for the defendant in this contention. The sheriff

and a deputy sheriff of Baxter County, Ark., were the principal witnesses for the State. According to their testimony, they received information that the defendant had a still on his place in Baxter County. His house was situated in his field. When they went to investigate the matter, they saw the defendant in his field, gathering corn. He ran off, but was subsequently arrested. The sheriff and his deputy found a metal tank in the field, near a spring. A fire had been built under the tank, and there was some mash in it. There was also found near there an iron pipe and a smaller tank. There was a hole in the large tank in which the iron pipe fitted. The two tanks, with the pipe connecting them, could have been used as a still, and, from the evidence of fire which had been under the larger tank and the mash still in it, they had been used for that purpose. At the conclusion of his testimony the sheriff said that he subsequently went to the home of the defendant and arrested him. The defendant admitted to him that he had bought the apparatus mentioned above for the purpose of using it as a still, but said that he had never used it. The sheriff also testified that, when he arrested the defendant, he found two stills. One of them was in his house, and the other one was in his yard. He also found about thirty-five gallons of wine in the house of the defendant.

While the defendant denied his guilt, the evidence above set out was sufficient to warrant the jury in convicting him of having a substitute for a still for the purpose of using the same for the production of distilled spirits, contrary to the provisions of the section of the statute above quoted.

It is next insisted by counsel for the defendant that there is a fatal variance between the indictment and the proof. The body of the indictment reads as follows:

"The said Andrew Anderson, in the county and State aforesaid, on the 15th day of September, A. D. 1921, unlawfully, wilfully, and feloniously did have and keep in his possession a stillworm and still which, after

being set up, may be used for the production of distilled spirits, without registering the same with the proper United States officer, against the peace and dignity of the State of Arkansas."

No objection was made to the indictment in the court below, and for that reason the defendant cannot assign as error here a fatal variance between the second count in the indictment and the proof offered to sustain it. *Beard* v. *State,* 79 Ark. 293; *Birones* v. *State,* 105 Ark. 82; and *Clayton* v. *State,* 159 Ark. 592.

It will be observed that the indictment charges the defendant with having a still in his possession, which, after being set up, may be used for the production of distilled spirits. This, inferentially at least, charges him with having such a still in his possession for the purpose of using it for the production of distilled spirits. It is true that the language in this respect is ambiguous, but, if the defendant intended to object to the indictment on that account, he should have done so in the trial court. He cannot submit to a trial on the merits and, after having been convicted, object that the indictment was ambiguous or misleading.

It is evident from the proceedings at the trial that the defendant was fully advised of the charges against him, and met the same with such proof as he was capable of producing at the trial. He was not misled in any way to his prejudice, and the judgment will be affirmed.

McCORMICK v. DAGGETT.

Opinion delivered January 14, 1924.

1. VENDOR AND PURCHASER—DILIGENCE IN RESCINDING.—A purchaser of land who claims to have been deceived is required, as soon as he learns the truth, to disaffirm the contract with reasonable diligence, so that both parties may, as nearly as possible, be restored to their original positions; and if, after discovering the deceit, he conducts himself with reference to the transaction as though it were still subsisting and binding, he waives the right to rescission.

2. VENDOR AND PURCHASER—LOSS OF RIGHT TO RESCIND—RIGHT TO RECOUP.—It does not follow that, because a purchaser of land has lost his right to rescission for fraud by his lack of diligence in disaffirming the contract, he has no right to recoup for the damages caused by the deceit.

3. BILLS AND NOTES—ACCRUAL OF INTEREST.—The rule that, when the maker of a note has the option of having accrued interest added to the principal and to bear interest as such, no action can be brought for it until the principal becomes due, does not apply where the owner of a note has the option of demanding payment, and, if the payment is not made, the accrued interest becomes principal and bears the same rate of interest, but remains payable at the option of the owner, and the right to enforce payment of the accrued interest is not postponed until the principal debt matures.

4. BILLS AND NOTES—MATURITY.—In determining the maturity of a note, a contemporaneous trust deed executed as a part of the same transaction should be read along with the note, and the maturity of the note may be accelerated by a clause appearing only in the deed of trust.

5. MORTGAGES—ACCELERATION CLAUSE.—An acceleration clause in a deed of trust which matures the debt matures it for all purposes.

6. BILLS AND NOTES—ACCELERATION—NEGOTIABILITY.—A note loses none of its negotiable properties because its payment is or may be accelerated upon default in payment of any installment.

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

Mann & McCulloch, for appellant.

1. The suit was prematurely brought. The provision in the notes that interest, if not paid at maturity, should be added to the principal, and bear the same rate of interest, did not authorize suit for the interest until the principal of the notes matured. 7 Cyc. 864, § 16; 8 C. J., § 613; 67 Iowa 676, 25 N. W. 847.

2. The acceleration clause in the mortgage did not mature the notes for the purpose of personal judgments upon them, but, if at all, only for the purpose of foreclosing the mortgage. 7 Cyc. 860; 133 Mo. 323; 40 L. R. A. 154, 157; 19 L. R. A. 673; 42 Ohio St. 113; 103 U. S. 766-761; 26 Law. ed. 554-556. See also 161 Mo. 270, 61 S. W. 811; 155 Mo. App. 678, 135 S. W. 511; 36 Mo. 348; 32 Mo. 438; 83 Mo. App. 425; 81 *Id.* 169; 19 R. I.

149, 32 Atl. 305; 68 Kans. 612, 75 Pac. 1044; 69 Wash. 151, 124 Pac. 373; 63 Fla. 631; 94 Ore. 1.

3. The maturity of the notes, to render them negotiable, must be determined by the face of the notes, not by reference to the mortgage. If maturity may be determined by the mortgage, the notes lose their character of negotiability and render those transferred subject to the same defenses as are available between the original maker and payee. By our State negotiable instrument law, an instrument, to be negotiable, must be payable on demand or at a fixed and determined future time, and it is declared that, though the time may be uncertain, the event by which it is to be determined must be one that is certain to happen. There is nothing in the act which declares, or suggests, that collateral writings may be looked to for the purpose of changing any of the terms, but it is made clear that the instrument alone shall govern. See also 8 Corpus Juris, 113, § 206; Paton's Digest of Legal Opinion, 554, § 2443, issued by American Bankers' Association.

4. The decree denying rescission of the contract, or recoupment for fraud and deceit, was contrary to, and not supported by, the evidence. 11 Ark. 58; 33 Ark. 425; 71 Ark. 99; 99 Ark. 442; 47 Ark. 148; 30 Ark. 535.

Daggett & Daggett, for appellees.

1. On the proposition that the suit was prematurely brought, attention is called to the interest clause in each of the notes, viz: "Interest payable annually, and, if not paid when due, *to become principal and bear same rate of interest.*" Counsel are in error in stating that, in default, the interest would be *added to* the principal. 42 L. R. A. (N. S.) 108.

2. Appellant's counsel seem to overlook the fact that suit is brought on the vendor's lien retained in the deed from Bowen to McCormick, as well as on the deed of trust from the latter to the former, and that in the deed it is expressly stated that interest on the notes for deferred purchase money is *payable annually*; "and that, if either of said notes, or the interest thereon, be not

paid, as the same becomes payable, then, *at the option of the legal holder,* the whole of the said debt may be declared due and payable." These contemporaneous writings are to be construed together. 28 Ark. 387; 44 S. W. (Tex.) 936; 66 Ark. 367; 61 S. W. (Tex.) 386; 46 L. R. A. (N. S.) 475-479; 59 N. W. (Neb.) 115; 27 N. W. (Iowa) 296; 94 Fed. 347; 28 Fed. 741.

3. Appellant was in no position to avail himself of the defense of fraudulent misrepresentations set up in his cross-complaint. He was advised of the alleged shortage in acreage, as well as of the other alleged fraudulent misrepresentations, and, by his own conduct in paying the obligations then matured, and in continuing to operate the plantation, taking no steps to rescind the contract or to recoup, he is estopped to complain. 2 Pomeroy, 3d ed., §§ 897, 916, 917; Pomeroy, Specific Performance, § 222; 46 Ark. 348; 1 Ann. Cases, 906; 24 Sup. Ct. Rep. 259; 59 Ark. 251; 140 Ark. 336; 142 Ark. 553.

4. Appellant's contention that the acceleration clause in the deed and deed of trust, if read into the notes, renders the time of payment uncertain, and therefore destroys their negotiability, is contrary to the decided weight of authority. 89 Ark. 132; 96 Ark. 105; 10 Sup. Ct. Rep. 999; 25 Ann. Cases 163; Ann. Cases, 1916-C, 499; *Id.,* 1914-A, 315.

5. On the question of rescission and recoupment, counsel in their argument overlook the most essential element, *scienter.* 47 Ark. 164. As to the contention to the effect that if, by payment of the matured obligation, and subsequent occupancy of the plantation, appellant was estopped from rescinding the contract, he would still be entitled to recoup damages for the alleged fraud, we submit that the issue is not one of rescission or recoupment, but solely *of a waiver of the right to rescind or recoup* for the alleged fraud. 77 Ark. 261; 85 Fed. 740; 52 L. R. A. 745.

SMITH, J. In 1919 Sam Bowen was the owner of a tract of land in Lee County, known as the Horseshoe Plantation. He owned and operated the plantation dur-

ing the years 1918 and 1919, having acquired it from J. L. Hutton and F. G. Jones, of Memphis, who had purchased it from R. L. Hope in 1916.

In June, 1919, Bowen listed the land for sale with Shelton & Ward, a real estate firm in Memphis, who caused the land to be advertised for sale in the Memphis papers, and the tract was described in the published advertisement as containing 1,735 acres, of which 800 were in cultivation. A. L. McCormick, of Mississippi, read the advertisement and became interested in the proposition, and opened negotiations through the sales agents which resulted in the purchase of the land, but, before the deal was closed, McCormick visited the land and spent a few hours riding over it, and, being satisfied with the appearance of the farm and the representations made concerning it, he contracted to buy the land, including the growing crops, the live stock, and farming implements on the place, and the tenants' accounts. For all this he agreed to pay $147,475.03, payable $25,000 cash, $25,000 January 1, 1920, and $67,475.03 in seven equal annual payments of $9,639.29 each, due January 1 in the years 1921, 1922, 1923, 1924, 1925, 1926 and 1927, and bearing interest at the rate of six per cent. per annum from date until paid, and it was recited in each note, that "interest payable annually, and, if not paid when due, to become principal and bear same rate of interest."

A deed was executed on September 6, 1920, conveying the land and the other property traded for, which recited that, in addition to the payments to be made in cash, McCormick had assumed and agreed to pay $30,000 due the Southern Trust Company, of Little Rock, which was evidenced by three notes of $10,000 each, of Sam Bowen and wife, dated October 10, 1918, and due November 1, 1925, with interest at six per cent., payable annually, and, to secure the unpaid purchase money, a vendor's lien was reserved in the deed from Bowen to McCormick, and, in addition, McCormick executed a deed of trust to C. E. Daggett, as trustee for Bowen.

The deed of trust was in usual form, and described the land and the personal property therein, and contained the following clause: "But, in the event of the failure of the party of the first part to pay said principal debt, together with interest thereon, or any part of either, when the same shall become due and payable according to the tenor, date and effect thereof, or in the event the said party of the first part fails or refuses to comply with any or all of the covenants, agreements or conditions of this instrument, then, at the option of the legal holder or holders of the indebtedness hereby secured, the whole of the said indebtedness hereby secured shall, without notice, become immediately due and payable, and the trustee shall take immediate possession of said real estate and personal property and proceed to sell the same, or any part thereof, to the highest bidder, for cash, at such time and place as may be designated."

Suit was filed October 14, 1921, to foreclose the deed of trust and to enforce the vendor's lien, and it was alleged in the complaint that McCormick had paid the note for $25,000 due January 1, 1920, and also the note for $9,639.29 which fell due January 1, 1921, and had also paid the interest accruing on all of said notes up to and including September 6, 1920, but that the interest on the remainder of the notes accruing from September 6, 1920, to September 6, 1921, amounting to $3,470.15, was past due and unpaid. It was alleged that, default having been made in the payment of this interest, the plaintiffs had elected, under their option so to do, to declare the whole of said indebtedness due and payable. It was also alleged that all the notes, except the notes due in 1926 and 1927, which were owned by Bowen, had been assigned for value to Jones and Hutton. There was an allegation that the interest due the Southern Trust Company was unpaid. It was also alleged that the land comprised a plantation of about 800 acres, and that arrangements would have to be made for its cultivation

prior to January 1, 1922, and there was a prayer for a receiver, and a receiver was appointed by consent.

There was a prayer for judgment against McCormick for the balance of purchase money, and the interest thereon, and that the judgment be declared a lien on the land, subject to the prior incumbrance to the trust company, and that the property be ordered sold.

McCormick filed an answer and cross-complaint, in which he admitted the execution of the notes sued on, and the deed of trust sought to be foreclosed, and he admitted that the interest due September 6, 1921, had not been paid. By way of cross-complaint, it was alleged that the sale of the land had been induced by reason of false and fraudulent representations in the following particulars: It was represented there were 800 acres in cultivation, whereas there were in fact less than 400. That it was represented the land was free from noxious grasses, when a considerable area was infested with coco grass. That the land was represented to be above overflow, when, as a matter of fact, it was subject to annual overflows from the St. Francis River. It was also alleged that a certain tract of land was falsely designated as being within the boundaries of the land conveyed. There was a prayer in the cross-complaint that the sale be rescinded on account of fraud, and McCormick executed and tendered a deed to the land. There was also a prayer that, if rescission were denied, judgment be rendered in McCormick's favor for the difference between the market value of the land as represented by Bowen and its actual value at the time of the sale, as shown by the testimony.

An answer to the cross-complaint denied that there was any fraud or misrepresentations.

Upon final hearing the court dismissed the cross-complaint as being without equity, and rendered judgment as prayed for in the complaint, from which is this appeal.

It is clear that McCormick is not now entitled to rescind the contract. One who claims to have been

deceived is required, as soon as he learns the truth, to disaffirm the contract with all reasonable diligence, so that both of the parties may, as nearly as possible, be restored to their original position. "He is not," says Pomeroy, "allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations." Pomeroy's Equity Jurisprudence (4th ed.) vol. 2, § 897.

This doctrine finds expression and approval in a number of our own cases, and, among others, the following: *Fitzhugh* v. *Davis*, 46 Ark. 337; *Bowden* v. *Spellman*, 59 Ark. 251; *Kilgo* v. *Continental Casualty Co.*, 140 Ark. 336; *Fleming* v. *Harris*, 142 Ark. 553.

Appellant practically concedes, because of his delay, that he can not ask rescission on the ground only of misrepresentation in regard to the acreage, as he discovered, soon after taking over the land, the presence of the coco grass, and discovered, during the first year of his possession, the fact that the land was subject to overflow from the St. Francis River, and he made two crops after acquiring this knowledge, and he must necessarily have soon known of the shortage in the acreage of the cultivated land.

It does not follow, however, that, because there is no right of rescission, there is no right of recoupment. A leading case on the subject is that of *Matlock* v. *Reppy*, 47 Ark. 148. A syllabus in that case reads as follows: "To maintain an action for damages for false and fraudulent representations as to land sold, the vendee must prove: 1. That the fraud related to some matter of inducement in the making of the contract. 2. That it wrought injury to him. 3. That the relative position of the parties was such, and their means of information such, that he must necessarily be presumed to have

contracted upon the faith reposed in the statements of the vendor; and, 4. That he did rely upon them and had a right to rely upon them, in full belief of their truth. *Yeates* v. *Pryor*, 11 Ark. 58."

We think these tests are met by the proof in the instant case, and especially is this true in regard to the deficiency in the cleared land. The testimony very clearly establishes the fact that the representation was made that there were 800 acres; indeed, the advertisement of sale so stated, and the complaint asking the appointment of a receiver to take charge of and to rent the land so alleged. It is now practically conceded that there are not to exceed 400 acres of cleared land, and, according to one survey, there is but little over 300 acres; but figures are submitted by counsel for appellee attempting to show that, even on the basis of 400 acres, appellant is entitled to no relief, because of the value of the other property included in the sale.

We have carefully considered this question, and, while it is difficult to say, with any feeling of certainty, just what recoupment should be allowed for the difference in value, we have decided that it at least equals the face of two of the notes given for purchase money, which notes were for $9,639.29 each.

Several interesting questions are raised by appellant. It is insisted, (1) that the suit was prematurely brought; (2) that the accelerating clause in the mortgage did not mature the notes for the purpose of personal judgment upon them, but, if at all, only for the purpose of foreclosure of the mortgage; (3) the maturity of the notes cannot be determined by a reference to the deed of trust, and, if so determined, their negotiability is destroyed, and they become subject to the same defenses as are available between the original maker and the payee.

Upon the question of the suit having been prematurely brought, authorities are cited to the effect that, when the maker of a note has the option of having accrued interest added to the principal and to bear

interest as such, no action can be brought for it until the principal becomes due. But here the maker of the note has no option, and it is not provided that accrued interest shall be added to the principal. The owner of the note has the option of demanding payment, and, if payment is not made, the accrued interest becomes principal and bears the same rate of interest, but it remains payable at the option of the owner, and the right to enforce payment of this accrued interest is not postponed until the principal debt matures because the accrued interest becomes principal and bears interest.

In addition to the clause in regard to acceleration of payment copied from the deed of trust above, there was a clause in the deed from Bowen to appellant which reads as follows: "It is expressly agreed and understood that a vendor's lien is hereby retained by the grantors herein on the lands herein described, for the purpose of securing the remainder of the purchase money due on said lands, as hereinbefore set out, and that, if either of said notes, or the interest thereon, be not paid, as the same matures and becomes payable, then, at the option of the legal holder, the whole of the said debt may be declared due and payable."

It is familiar law that these contemporaneous writings, which were executed as a part of the same transaction, are to be read together to interpret the contract of the parties; and, when they are so read, we think it was the clear purpose of the parties to make the entire debt payable upon default in payment of any part thereof, either of principal or interest.

It is true the acceleration clause does not appear in the notes themselves; but it does appear in the deed of trust and in the deed, and, as we have said, these instruments are all to be read together.

In *Fairbairn* v. *Bofahl*, 144 Ark. 313, the attempt to accelerate the payment of certain notes was resisted upon the ground that the acceleration clause appeared only in the contract of sale, and did not appear in any of the notes. The opinion cited the case of *Farnsworth* v.

Hoover, 66 Ark. 367, where the acceleration clause was in the notes but not in the mortgage. The acceleration clause was enforced in both of the cases, the effect of the two cases being to make the acceleration clause valid and enforceable if it appears in either the notes or the deed, or deed of trust.

In this connection, it may be pointed out that the deed in which the vendor's lien was reserved does not contain any provision as to the manner in which Bowen should proceed to collect or enforce the maturing obligations; and, if the accelerating clause did not mature the entire indebtedness upon default being made, it is difficult to see just what meaning can be given it.

The point stated was considered by the Supreme Court of Washington in the case of *Castor* v. *Muramoto,* 69 Wash. 145, 125 Pac. 153, 42 L. R. A. (N. S.) 108, and the court said: "If respondent's contention be true, this last provision of the mortgage is meaningless, since the only time the mortgage would be subject to foreclosure, irrespective of prior defaults in the payment of interest, would be a default in the payment of the original and the increased principal with the last annual interest at the maturity of the note, when, under all theories, all sums payable under the note and mortgage were subject to default for nonpayment. What need, then, for stipulating that, in case of a foreclosure, 'the whole of said principal and interest, whether the same shall be then due or not,' shall be retained? If the only foreclosure can take place subsequent to the maturity of the note, what sum is it, not then due, that is to be retained in case of a sale because of a default in the payment of principal or interest? Manifestly such a clause in this mortgage is indicative of the intention of the parties that the mortgage did stipulate for its foreclosure prior to the maturity of the note, in case of any default in the payment of the annual interest, as such a foreclosure could be the only one when the whole of the principal and interest would not be due, which situation is further illus-

trated by describing the note as one in which the interest is payable annually."

The case of *Clark* v. *Paddock,* 132 Pac. 795, is extensively annotated in 46 L. R. A. (N. S.) 475. The annotator, in his note, says: "Upon the weight of authority a clause only in the mortgage providing that the debt shall become due upon a contingency therein set forth will mature the note, although it be not due by its terms."

Many of the cases cited in the annotator's note have been examined, and we have concluded that the better rule, as well as the weight of authority, is that an acceleration clause which matures the debt, matures it for all purposes.

We are also of the opinion that the note loses none of its attributes as a negotiable instrument because its payment is, or may be, accelerated by the recitals of the instrument securing its payment. The argument is that the acceleration clause in the deed and in the deed of trust, if read into the note, renders the time of payment, and consequently the amount to be paid, uncertain, and thereby destroys the quality of the note as a negotiable instrument. The weight of authority appears, however, to be against this view, although the authorities are divided.

But the negotiable instruments law, which has been adopted in this State, appears to settle this question. Section 1 of this act (which is § 7767, C. & M. Digest) defines the requirements of negotiable instruments, the second of which is that the instrument must contain an unconditional promise or order to pay a sum certain in money, and the third that it must be payable on demand, or at a fixed or determinable future time. Section 2 of this negotiable instruments act (which is § 7768, C. & M. Digest) defines the conditions under which the sum payable is a sum certain, the third of which reads as follows: "(3). By stated installments with a provision that, upon default in payment of any installment or of interest, the whole shall become due."

Thus it appears that sanction is given in the negotiable instruments act to the acceleration of payment, and that negotiability is not thereby destroyed. *Thorpe* v. *Mindeman*, 68 L. R. A. 146.

However, as we are allowing credit by way of recoupment to the extent only of two notes, and as there are two notes which are owned by Bowen, the relief to which appellant is entitled may be granted by canceling these two notes as being without consideration, and that relief will be granted.

It is therefore ordered that the decree of the court below be modified by crediting thereon the amount of two notes held and owned by Bowen, the same being the notes which mature in 1926 and 1927, and in all other respects the decree will be affirmed.

LEMING v. HERRING.

Opinion delivered January 14, 1924.

BROKERS—LOAN OF STOCK—CONVERSION.—The delivering or loaning by a broker of a stock certificate to another, who sells it, and later returns another certificate for the same number of shares in the same company in its place, does not constitute a conversion for which the broker is liable.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann*, Judge; affirmed.

Sam T. & Tom Poe, for appellant.

1. Disposal of the ten shares of stock, without authority, amounted to a conversion which rendered appellees liable in damages. 4 R. C. L. 286; 50 Am. Rep. 507; 93 Am. Dec. 174 and note; 13 Am. Rep. 507; 4 Thompson on Corporations, 667; 72 Am. St. Rep. 557, 75 N. W. 443; 58 N. Y. 425; 18 Mich. 60, 100 Am. Dec. 146; 51 Am. Rep. 91; 36 Ill. 513; 40 Ill. 313.

2. The attempt of appellees to show the custom among brokers in Little Rock, in dealing with oil stock,

was inadmissible, and admission of such testimony was erroneous. 4 R. C. L. 288-289; 42 Am. Dec. 87.

John P. Streepey, for appellee.

Cases cited by appellant deal with the right of a broker to *sell* stock of his customer and later replace it with other stock bought on a lower market; but this is not a case of that kind. Appellee never sold the stock, nor reaped any benefit therefrom. It was the custom amongst brokers to lend each other small blocks of stock in making daily sales, until larger blocks could be broken up, and another certificate given back to the broker who made the loan. It was competent to prove this custom. 9 Corpus Juris, 530, § 30; 4 R. C. L. 271, § 21.

SMITH, J. This suit was begun by appellant, who sued for himself and his infant son, to recover the par value of eleven shares of the capital stock of the Little Giant Oil & Gas Company, it being alleged that appellee, the defendant below, had wrongfully converted and disposed of the stock. Appellee is a stockbroker engaged in buying and selling stock.

There was a controversy as to whether the letter of transmission contained the direction to sell the stock at par, and a special interrogatory was submitted to the jury on that question, and the jury answered in the negative.

The testimony was to the effect that appellant owned ten shares of the stock, which was covered by one certificate, and that his infant son owned one share, which was covered by a separate certificate, and that the par value of the stock was ten dollars per share.

Appellee sold the one share, and sent appellant a check for six dollars as the net proceeds, less commissions; but, when the point was made that the instruction was to sell at par, appellee tendered ten dollars, the face value of the stock.

The ten shares were not sold, and it developed that appellee had let another broker have this certificate, with the understanding that it should be replaced when appellee found a purchaser. This was done because the

other broker had for sale a certificate for a large number of shares which he desired to have "broken up" into certificates for smaller number of shares to meet the demands of prospective purchasers. There was some delay in having this done, on account of the absence of the secretary of the corporation. Later the large certificate which the other broker had was broken up, and a certificate for ten shares of this Little Giant Oil & Gas Company stock was delivered to appellee for the one which appellee had loaned to the other broker, and this certificate was tendered to appellant by appellee. It was shown that this transaction accorded with the custom of the local brokers.

It was the opinion of the trial court that the only question in the case was whether the direction to appellee was to sell at par, and the jury was told to find for appellant for the face of the stock, if they found that such was the direction to appellee. It was evidently the opinion of the trial court that, in the absence of specific direction, appellee had the right to handle and dispose of the stock in accordance with the local custom. Appellant insists, however, that the court should have submitted the question of the conversion of the stock to the jury, and insists that it was a conversion of the stock for appellee to deliver the certificate to the other broker.

We think it unnecessary to pass upon this question, for the reason that appellee returned ten shares of the Little Giant Oil & Gas Company stock, and tendered the sum claimed for the other share. There is no contention that one share of this stock was worth any more than any other share. Appellant sent ten shares to be sold, and ten shares were returned to him.

Of course, the question of depreciation in value of the stock might have been raised if any loss had been sustained on account of appellee not having the stock to return on demand; but no such issue was submitted to the jury, nor was the court asked to submit that question. Recovery was sought upon the sole ground of a conversion; and we think the failure to return the identical

certificate was not a conversion, where another certificate for the same number of shares in the same corporation was returned.

At section 21 of the chapter on Brokers, in 4 R. C. L., page 271, it is said: "As in the case of any other bailee, a broker is usually bound to keep and return the identical property that has come into his hands, but with respect to stocks a different rule obtains. Courts have said that no good reason exists for requiring stockbrokers to whom clients have pledged or intrusted their shares of stock to preserve at all times a careful separation of distinguished certificates connected with each transaction or pledge, and maintain the identity of each certificate distinct and unbroken. Consequently it is held to be unnecessary for a broker to retain in his possession the identical stock purchased by him on his customer's order, or received as collateral security, so long as he has in his possession at all times a sufficient quantity of like stock to respond to the call of his customer."

No error appearing, the judgment is affirmed.

HOVIS v. STATE.

Opinion delivered January 14, 1924.

MISCEGENATION—CONCUBINAGE.—Under Crawford & Moses' Dig., § 2605, defining the offense of concubinage as the unlawful cohabitation of persons of the Caucasian and negro races, the offense is not proved by evidence of specific instances of illicit intercourse; the term "cohabitation" conveying the idea of living or dwelling together as husband and wife.

Appeal from Yell Circuit Court, Dardanelle District; *J. T. Bullock,* Judge; reversed.

Wilson & Majors and *Herbert C. Scott,* for appellant.

J. S. Utley, Attorney General, *John L. Carter,* Assistant, for appellee.

SMITH, J. Appellant, a Caucasian, was convicted and sentenced to the penitentiary on a charge of con-

cubinage, alleged to have been committed by illegally cohabiting with Nona Thompson, a female person of the negro race. The prosecution was had under §§ 2601 and 2602, C. & M. Digest. By § 2601 it is provided that concubinage between a person of the Caucasian or white race and a person of the negro or black race shall be a felony. Section 2602 defines concubinage as follows: "The living together or cohabitation of persons of the Caucasian and the negro race shall be proof of the violation of the provisions of § 2601. For the purpose of this act, concubinage is hereby defined to be the unlawful cohabitation of persons of the Caucasian race and of the negro race, whether open or secret." By § 2605, C. & M. Digest, it is provided that no person shall be convicted of the crime of concubinage upon the testimony of the female, unless the same be corroborated by other evidence.

The testimony shows that Nona Thompson was employed as a domestic servant by a white family in Dardanelle, and that she resided in a servant's house in the rear of the premises, and that appellant frequently went to the room of Nona Thompson for purposes of sexual intercourse, and that on each occasion he paid her the price charged.

There was no corroboration of the testimony of Nona Thompson about these visits. There was testimony, however, that appellant's visits were suspected, and the sheriff caused him to be watched, and, while the family of Nona's employer was away for the summer, Nona was in charge of the premises, and on one occasion she permitted appellant to visit her in the home of her employer. The sheriff, who was watching, saw appellant enter the house, and he and two deputies attempted to enter, but the officers found all the entrances securely fastened. When appellant left the house he discovered that the officers were after him, and he attempted to run away, but one of the officers overtook him. Both appellant and the colored girl asked to be allowed to plead

guilty that night, but the sheriff told them the case would have to be investigated. The testimony shows that appellant had met the colored girl for the purpose of having sexual intercourse with her on the night of his arrest, and that he had met her on frequent prior occasions for the same purpose.

This, however, does not constitute concubinage as defined by the statute. The statute creates and defines the offense. There was no testimony that appellant and the colored woman were living together, or had ever done so.

The word "cohabitation" has a well-defined meaning. We have long had a statute (§ 2600, C. & M. Digest) against illegal cohabitation, which is an offense that can be committed by persons of the same race as well as those of opposite races. The statute under which appellant was convicted is directed solely against persons of opposite races who cohabit, but the act of cohabiting is common to both offenses and means the same in each.

Among other cases which define the word "cohabit" is that of *Turney* v. *State,* 60 Ark. 259. It was there said: " 'Cohabit' means 'to dwell with; to dwell or live together as husband and wife.' Webster. To 'dwell' means 'to abide as a permanent resident, or to inhabit for a time; to live during a considerable period in a place, to have a habitation for some time or permanence; to be domiciled; to remain.' Webster. The law lexicographers define it: 'To dwell together in the same house; to live together as husband and wife; to live together in the same house, claiming to be married.' Rapalje's, Burrill's, Bouvier's, and Kinney's Law Dictionaries, *verbo,* 'Cohabit.' " In the same case it was further said: "The term 'cohabitation' has a definite legal signification, and, when used in criminal statutes, conveys the idea of living or dwelling together as husband and wife."

Other cases to the same effect are *Sullivan* v. *State,* 32 Ark. 187; *Lyerly* v. *State,* 36 Ark. 39; *Bush* v. *State,*

37 Ark. 215; *Tylor* v. *State,* 36 Ark. 84; *McNeely* v. *State,* 84 Ark. 484; *Leonard* v. *State,* 106 Ark. 449.

There being no testimony that appellant and Nona Thompson lived or cohabited together, the judgment of conviction must be reversed, and it is so ordered.

MORGAN *v.* STATE.

Opinion delivered January 14, 1924.

1. BANKS AND BANKING—ACCEPTING DEPOSIT WHILE INSOLVENT.—Crawford & Moses' Dig., § 697, making it a felony for officers of a bank to receive deposits after knowledge of its insolvency, means a general deposit by which the bank becomes the debtor of the depositor, but does not apply in the case of special deposits.
2. BANKS AND BANKING—COVERING OVERDRAFT NOT A GENERAL DEPOSIT.—Where money was deposited in bank to cover an overdraft, this was not a general deposit, but a payment of an existing debt.

Appeal from Perry Circuit Court; *Marvin Harris,* Judge; reversed.

G. E. Garner and *Lewis Rhoton,* for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

SMITH, J. Appellant was indicted upon a charge that, while president of the Bigelow State Bank, he did assent to and receive a deposit from W. E. Jones, knowing, at the time, that the bank was insolvent.

The testimony shows that Jones, who was a depositor in the bank, drew a check on the bank in payment of a bill which he owed. He did not have the money in the bank to take the check up, but he advised the cashier of the bank that the check had been drawn, and he requested the cashier to let him know when the check had gone the rounds and had been returned to the bank for payment, and promised, upon receipt of this information, to make a deposit to take care of the check. After a few days the check came to hand, and the cashier

advised Jones of that fact, whereupon Jones came to the bank and deposited a sum of money which was sufficient, when added to the sum he previously had on deposit, to take up the check. Upon this testimony it was insisted that no deposit was made within the meaning of the statute.

There are a number of other assignments of error, but we do not discuss them, as we are of opinion that the testimony set out above is insufficient to show that a deposit was made.

By § 697, C. & M. Digest, it is made a felony for any president, director, manager, cashier or other officer or employee of any bank, or member of a firm, after having had knowledge of the fact that it is insolvent, or in a failing condition, to assent to the reception of any deposits or the creation of any debts by it.

Evidently the deposit here referred to is a general deposit, whereby the bank would acquire the title and control of the deposit and the relation of debtor and creditor be created between the bank and the depositor. It is settled law that, in case of a general deposit of money in bank, the moment the money is deposited it becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor. 3 R. C. L. p. 519.

Of course, the bank contracts to repay this money on the check of the depositor; but there is no contract to keep any particular money, and the depositor, having made a general deposit, parts with the title to the deposit and takes his place as one of the bank's general creditors. There may, of course, be a special deposit, the title to which remains in the depositor, in which case the bank has usually only some agency to perform, generally that of returning the deposit upon demand made. "In the case of a special deposit, the bank assumes merely the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the

right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor. Thus, the depositor may always guard against the effect of an insolvency of the institution by making a special deposit; that is, by depositing his money in a bag or box, or by affixing some mark upon it by which it can be distinguished from the general funds of the institution. * * *" Section 150 of the chapter on Banks in 3 R. C. L., page 522.

Here the sum deposited by Jones was not a general deposit. It was not made for the purpose of creating the relation of debtor and creditor between the bank and Jones and of giving the bank the title to the deposit. It was, in fact, the purpose of Jones to take up an outstanding check—to pay an existing debt, the ownership of which was evidenced by the indorsements on the check.

We do not think the transaction which Jones had with the bank constituted the reception of a deposit within either the letter or the spirit of the law, and the court should have so instructed the jury.

The judgment will be reversed, and, as the facts appear to have been fully developed, the cause will be dismissed.

MITCHELL v. WILLIAMS.

Opinion delivered January 14, 1924.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Questions of fact are conclusively determined by the jury where there was sufficient evidence to support their finding.

2. ACCOUNT STATED—EVIDENCE.—Evidence that an account rendered by a materialman to a building contractor covered only items furnished during the current month, and allowed no credits for damages caused by delay, and where there were items of damage that could not then have been determined, *held* to warrant refusal to submit the issue whether the account sued on was an account stated.

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

E. L. Matlock, for appellant.

Holland & Holland, for appellee Williams, and *Warner, Hardin & Warner,* for appellee Wright.

The evidence is legally sufficient to support the verdict, and this court will not disturb it. 133 Ark. 30; 136 Ark. 310; 144 Ark. 641; 148 Ark. 654. The surety was released by failure to bring suit within six months after completion of the building. C. & M. Digest, § 6913; *Davis* v. *Chrisp,* 159 Ark. 335. An account stated was not pleaded by the plaintiff either in the original complaint, the amended complaint, or in the reply to the defendant's answer. It is not available here. 137 Ark. 565. It is not available, under the facts in this case, even had it been pleaded. 23 App. Div. 498; 1 C. J., § 278; *Id.,* § 279; 1 C. J., §§ 281, 288, 290, 292; 150 Ark. 197, 203; 73 Fed. 983; 74 Ark. 468.

SMITH, J. This suit was brought by the appellant lumber company against A. R. Williams, contractor, and Ozette Wright, surety on the contractor's bond, for a bill of material used by him in the construction of a school building for a rural special school district in Crawford County. The account of the lumber company was practically unquestioned, the main issue being upon the counterclaim of the defendant Williams for damages growing out of alleged delays in furnishing the material sued for.

The jury found for the plaintiff in the sum of $249.19, and found also that the surety was not liable for that amount, and the plaintiff has appealed.

The principal claim of the defendant Williams for an offset against the plaintiff's account is that the plaintiff agreed and undertook to furnish him the material known as the "mill-work" to be used in the construction of the school building, and that the delay in so doing was responsible for the damages claimed by Williams. A delay in delivering shingles was also alleged as a cause

of damage. The lumber company denied that it had agreed to furnish the mill-work, but had merely ordered it for Williams from another dealer; and denied that there was any delay causing damages in the delivery of the shingles.

These questions of fact were submitted to the jury, and are concluded by the verdict, and, without setting out the testimony, it suffices to say that it was legally sufficient to support a finding either way, as it was conflicting.

An objection is urged to an instruction numbered 1, which substantially submitted the issues, on the ground that the jury might have interpreted the instruction to permit either Williams or his men to take credit for the delay. We think, however, the instruction was not open to the objection made. The laborers were not parties to the suit, and we do not understand the instruction, when fairly interpreted, to permit a double recovery, or to permit the laborers to recover at all.

The bond sued on was executed in compliance with § 6913, C. & M. Digest, and the defense of the surety was that suit had not been brought within six months after the completion of the building, as required by § 6914, C. & M. Digest.

There was a question as to the time of the completion of the building, and this question of fact was submitted to the jury, and is concluded by the verdict in favor of the surety, as there was testimony legally sufficient to support the finding that the suit was not brought until more than six months had expired after the completion of the building.

It is also insisted, for the reversal of the judgment, that the account sued on had become an account stated. It is insisted that this issue was not raised by the pleadings in apt time against the defendant Williams, and was not raised at all against his surety. We do not decide that question, however, as, in our opinion, the testimony did not warrant the submission of the question

whether the account sued on had become an account stated. The account rendered covered items furnished during the current month, and took no account whatever of the credits claimed by way of damages; indeed, such credit has at all times been, and is now, denied. There were items of damage for which Williams could not claim credit until he had settled with the school district, among which was the claim of the district for liquidated damages for delay in completing the building beyond the contract period.

The case appears to have been properly submitted to the jury, and the testimony is sufficient to support the verdict, so the judgment must be affirmed.

MARTIN v. BLAYLOCK.

Opinion delivered January 14, 1924.

DRAINS—ORDER ESTABLISHING DISTRICT.—An order of the county court establishing a drainage district was not invalidated by adding to the description of the lands "and of other lands which might be benefited by system of ditches," evidently added in recognition of authority to subsequently extend the boundary so as to include other lands under Crawford & Moses' Dig., § 3614, as it will be regarded as surplusage.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; affirmed.

Lamb & Frierson, for appellant.

1. The order undertaking to create the district is void for uncertainty in the description. Not only is there no description of "all other lands which would be benefited by such system of ditches," but no possible way is suggested whereby it might be determined what other lands should be included. 122 Ark. 491; 105 Ark. 380.

2. The county court was without power, at a subsequent term, to cure defects in the order establishing the district. 96 Ark. 434; 92 Ark. 305; 87 Ark. 438.

Frierson & Penix, for appellees.

1. The language in the order creating the district, with reference to the inclusion of other lands, was without effect, jeopardized the rights of no one, and does not affect the validity of the order. If it can reasonably be determined what lands the court intended to include in the district, this court will uphold its validity, regardless of ambiguities. 138 Ark. 339, 344; 122 Ark. 491, 497.

2. It was within the well recognized powers of the court, on the ground that the language complained of did not constitute a part of the court's original judgment, to order the language stricken from record at a subsequent term. 103 Ark. 453; 40 Ark. 224; 33 Ark. 218; 23 Cyc. 864; *Id.* 867; 15 Corpus Juris, 975, 976; 35 Ark. 278; 34 Ark. 291; 35 Ark. 585; 33 Ark. 475.

HUMPHREYS, J. The main and only question necessary to be determined on this appeal is whether the order or judgment of the county court establishing Drainage District No. 25 of Craighead County, Arkansas, was invalidated by adding to the description of the lands the following expression, "and of other lands which might be benefited by such a system of ditches."

The act under which the district was formed makes provision for subsequently including lands in the district then outside of the district, if benefited by the improvement. Section 3614 of Crawford & Moses' Digest. We think the added words attributable to the power conferred in the act to embrace additional territory within the district, rather than an attempt to describe lands and include same in the district. It was simply added in recognition of the authority to subsequently extend the boundaries of the district so as to include other lands which might be benefited by the improvement. In this view the added expression must be regarded as surplusage in nowise affecting the order.

The decree will therefore be affirmed.

CORDELL v. ENIS.

Opinion delivered January 14, 1924.

1. MINES AND MINERALS—FORFEITURE OF OIL LEASE—WAIVER.—The rule that equity will follow the law and declare a forfeiture against defaulting lessees in oil leases wherever inequitable results would follow failure to do so, does not impair the general rule that equity will refuse to enforce forfeitures where there has been a waiver.
2. EQUITY—FORFEITURES.—Equity abhors a forfeiture, and will seize upon slight circumstances indicating a waiver to avoid them.
3. MINES AND MINERALS—WAIVER OF FORFEITURE OF LEASE.—Retention for about a week of a rental check tendered 16 or 17 days after it was due according to the terms of an oil and gas lease before returning it and declaring a forfeiture, *held* a waiver of the forfeiture when the delay in tendering the rent was inadvertent, and where a valuable consideration of $4,000 had been paid for the lease, and the parties lived near each other, and the lessor could have acted promptly.

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

Frank M. Betts, for appellant.

In view of equity's abhorrence of forfeitures, this is a case which, under the facts, makes peculiarly applicable the principle that a forfeiture will not be declared where it would be unjust, inequitable or unconscionable to do so. 125 S. W. (Ark.) 345; 16 Cyc. 78; 59 Ark. 405; 77 Ark. 168; 220 S. W. 1078; *Id.* 578; 79 Texas 391; 98 Ark. 328. The clause providing for the drilling of a well or payment of rentals is in a subsequent clause, and in direct conflict with the preceding, granting clause, providing that the lease shall remain in force five years and as long thereafter as oil or gas should be produced by the lessee, and is therefore void. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48; *Graysonia-McLeod Lumber Co.* v. *Duke,* 160 Ark. 76; 93 Ark. 5; 94 Ark. 615.

Pat McNalley and *Robert A. Kitchen,* for appellee.

True that equity abhors forfeitures, but not to the extent that it will deny a forfeiture when, by so doing, it will work inequity and fail to protect a landowner from

laches of the lessee under a lease while exploring for oil and gas. Such leases commonly contain covenants for diligent operation and for forfeiture in case of suspension. Moreover they yield nothing to the landowner unless worked, and are an incumbrance on the land, standing in the way of its sale or lease to others. 96 Pa. St. 307; 225 S. W. 345; 97 Ark. 167; 133 S. W. 837; 177 Pac. 86; 3 A. L. R. 352. Appellant had drawn the lease in question, and the blanks and additions to the agreements and covenants therein were made at her suggestion. The lease therefore, as it now stands, contains an expression of her contract, from which she seeks relief from the court, merely because she neglected to pay the rentals when due, and because her affairs were in such shape that she forgot to pay them. 96 Pa. St. 307; 169 Ind. 53, 79 N. E. 971; 225 S. W. 345, and cases cited. This court has already upheld leases of the same form as the lease in controversy, and there is no merit in appellant's contention that the drilling and rental payment clause is void.

HUMPHREYS, J. Appellees instituted suit against appellant in the chancery court of Union County to cancel an oil and gas lease which they executed to her on a ten-acre tract of land in said county, upon the alleged ground that she failed to drill a well on the land therein described, or to pay rent thereon, within the time specified in the lease.

In apt time appellant filed an answer denying that she had forfeited her contract on account of her failure to drill a well or pay delay rentals, and interposing, among other defenses, a waiver by her to pay delay rentals within the time specified in the lease.

The cause was submitted upon the pleadings and testimony introduced by appellees and appellant, which resulted in a decree canceling the lease, from which is this appeal.

There is no material dispute in the testimony. On the 19th day of February, 1921, appellees executed an oil and gas lease to appellant, who was their friend and neighbor, upon ten acres of land, for a cash consideration

of $4,000, in which she was required to drill a well on said lands or to pay delay rentals thereon of $1 per acre before February 19, 1922. After particularly describing the land, the lease contained the two following clauses pertinent to the issues involved on this appeal:

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil and gas, or either of them, is produced from said land by the lessee."

"If no well be commenced on said land on or before the 19th day of February, 1922, 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 Citizens' National Bank of El Dorado, which shall continue as the depository, regardless of changes in the ownership of said lands, the sum of one dollar ($1) per acre, which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve (12) months from said date." Appellant did not drill a well or pay the delay rentals prior to the 19th day of February, 1922. Appellees did not declare a forfeiture of the lease for the nonpayment of rent until a check therefor had been received by them for same.

Appellees lived about four miles from El Dorado, and in going to town passed appellant's home. They were good friends, and met each other frequently. Appellant had taught the school patronized by appellees. On March 7, 1922, sixteen or seventeen days after the last day specified in the lease for the payment of delay rentals, appellant mailed appellee, C. F. Enis, a check therefor, which he received not later than March 9. On March 7 appellant had occasion to offer the lease as collateral to her banker, at which time her attention was called to the fact that she had not paid the delay rentals. She had overlooked this clause in the lease, and in an attempt to comply therewith immediately mailed a check to Mr. Enis for the amount. Enis retained the check for about a week, and then mailed it back to appellant, claiming a forfeiture of the lease because the amount

had not been paid or deposited prior to the 19th day of February, 1922. On the day he mailed her the check he passed her home going to El Dorado. He testified that he regarded the check as good and did not return same because it was her personal check, but because she had not sent it within the time specified in the lease.

In the case of *Epperson* v. *Helbron,* 145 Ark. 566, this court had under consideration a lease similar to the one in the case at bar, with one exception. The amount of the cash consideration in the Epperson case was only one dollar, whereas in the case at bar the cash consideration paid by appellant was $4,000. In construing the Epperson lease this court recognized that the drilling of a well in the specified time was a part of the consideration, which could not be avoided except by paying the delay rentals yearly in advance, which were stipulated for in the lease. In construing the lease the court took occasion to say: "Leases of this kind are prepared by the lessee, and holding to the lease after ceasing to search for oil or gas is often for the purpose of speculation. When the lessee is not exploring the land for oil or gas, he is out nothing, and it is valuable for him to hold the lease for the purpose of speculation, or to await developments of other persons in that vicinity. Hence, we think that time is of the essence of the contract. It is contemplated that the lessee should do the affirmative act of paying the annual rental in advance in order to prevent the lease from being declared forfeited by the lessor." For this and other reasons assigned by the court in the Epperson case, courts of equity will follow the law and enforce forfeitures against defaulting lessees in oil and gas leases, where inequitable results follow if they refused to do so. This rule, however, does not impair the general rule that courts of equity will refuse to enforce forfeitures where there has been a waiver thereof. Equity abhors forfeitures and will seize upon slight circumstances indicating a waiver, to avoid or prevent them. In the case at bar appellees retained the check of appellant, covering the contract

rentals for delay in drilling, for about a week before returning same, although living only a short distance from her. In good conscience it was their duty to act promptly. They were not warranted in holding the check for an unreasonable time so that they might speculate upon whether it would be more profitable to declare or not declare a forfeiture of the lease. The retention of the check for this unreasonable length of time constituted a waiver of the forfeiture.

For the error indicated the decree is reversed, and the cause is remanded with directions to dismiss appellees' bill for want of equity.

McMILLAR v. STATE.

Opinion delivered January 14, 1924.

CRIMINAL LAW—EVIDENCE.—In a prosecution for selling intoxicating liquor, testimony as to previous raids upon defendant's home and the finding of intoxicating liquor in her possession was a competent circumstance tending to show that she was engaged in the illegal sale of whiskey, though it was insufficient within itself to establish the sale.

Appeal from Garland Circuit Court; *Earl Witt*, Judge; affirmed.

Randolph & Cobb, for appellant.

J. S. Utley, Attorney General, *John L. Carter*, *Wm. T. Hammock* and *Darden Moose*, Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted of selling whiskey, in the Garland County Circuit Court, and, as punishment therefor, was adjudged to serve a term of one year in the State Penitentiary. She has prosecuted an appeal to this court.

The only assignment of error insisted upon for a reversal of the judgment is the admission by the trial court, over the objection and exception of appellant, of testimony of the sheriff and city detective, to the effect that they raided the home of appellant several times sub-

sequent to the alleged sale and found liquors in her possession. The testimony introduced by the State showed that appellant sold whiskey in the fall of 1922 and winter of 1923 at her home. The raids were made in the spring, summer, and fall of 1923. The trial court admitted the testimony relative to the discovery of intoxicating liquors in the possession of appellant as a circumstance tending to show that she was engaged in the illegal sale of whiskey. While the testimony was not sufficient, within itself, to establish the sale, it was a competent circumstance tending to prove said charge. *Ketchum* v. *State,* 125 Ark. 275; *Larkin* v. *State,* 131 Ark. 445; *Marsh* v. *State,* 146 Ark. 77; *Casteel* v. *State,* 151 Ark. 70.

No error appearing, the judgment is affirmed.

CENTRAL BANK *v.* DOWNTAIN.

Opinion delivered January 21, 1924.

1. APPEAL AND ERROR—OMISSION OF TESTIMONY—PRESUMPTION.—Where a decree recited that oral testimony was heard by the chancellor, and such testimony is not preserved and incorporated in a bill of exceptions, it will ordinarily be presumed that the omitted testimony would have supported the decree, in so far as the decree is dependent upon the facts established by the testimony.
2. APPEAL AND ERROR—AGREED STATEMENT—NECESSITY FOR BILL OF EXCEPTIONS.—No bill of exceptions is necessary when a cause is heard upon an agreed statement of facts which is incorporated in the decree itself.
3. ADVERSE POSSESSION—OCCUPANCY OF TENANT AS NOTICE.—One who takes a mortgage upon land in possession of a tenant is not charged with notice of a subsequent purchase of the land by such tenant.
4. SPECIFIC PERFORMANCE—VERBAL CONTRACT OF PURCHASE.—When a vendee of land under an oral purchase was already in possession as tenant, his continuance in possession was not such part performance as to warrant specific performance.

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

Rose, Hemingway, Cantrell & Loughborough, for appellants.

1. The agreed statement of facts upon which the suit was tried having been incorporated in the decree, a bill of exceptions, or other preservation of the evidence, is not necessary. 66 Ark. 182; 111 Ark. 356; 141 Ark. 374; 150 Ark. 193.

2. Appellee had no enforceable contract, since his possession was not sufficient to take his contract of purchase out of the statute of frauds. Having entered into possession as a mere tenant, the fact that he later agreed to purchase would give him no equities which might be enforced against third parties. 136 Ark. 447; 123 Pac. 1118.

3. Morgan's act of conveying to appellant amounted to a repudiation of the oral agreement, and appellant, being in privity with Morgan, is entitled to plead the statute against the appellee, as to the validity of the oral agreement. 106 S. E. 243; 137 N. W. 575; 123 Pac. 1118; 25 R. C. L. 732-734; 130 U. S. 123. It cannot be said that Morgan's act in executing the warranty deed after the execution of the mortgage was a ratification of the prior oral agreement; on the contrary, when he executed the mortgage conveying the property to the bank as security for his indebtedness, he absolutely repudiated the contract with appellee. 59 N. E. 763.

F. M. Betts, for appellee.

1. The appeal should be dismissed, or the decree of the lower court be affirmed, for failure of the appellant to file a complete transcript of the record. It is deficient in failing to include the demurrer of appellee, Downtain, together with two letters or statements of Downtain and J. T. Tatum, as also some receipts and exhibits, and fails to bring before this court any of the oral proceedings of the lower court. Rule 9 of the Supreme Court; 89 Ark. 349; 154 Ark. 263; 156 Ark. 473; 144 Ark. 436; 149 Ark. 215; *Floyd* v. *Booker*, 161 Ark. 87. If the court holds that the record is sufficient to justify a trial here *de novo,* we insist that, since none

of the evidence upon which the case was submitted to the lower court is before this court, the presumption in favor of the correctness of the decree ought to prevail, and it should be affirmed.

2. It should be affirmed also because the record does disclose the filing of appellee's demurrer, the effect of which was to show that the mortgage sought to be foreclosed did not include the "other indebtedness" clause; and all indebtedness alleged, as shown by the exhibits filed by appellants, was incurred subsequent to the mortgage. 78 Ark. 141; 91 Ark. 458; 12 Ark. 581.

3. Downtain's possession of the land was notice to the world of his claims thereto. It was appellees' duty to inquire of him what rights he claimed in the land. 33 Ark. 465; 105 Ark. 201; 101 Ark. 163.

SMITH, J. This appeal is from a decree which contains the following recitals: "On this day come the plaintiffs, Central Bank of Little Rock, and C. C. Kavanaugh, trustee, by their solicitors, Snodgress & Snodgress, and comes the defendant, O. W. Downtain, by his solicitor, George M. LeCroy, and announce ready for trial. Thereupon this cause is submitted to the court upon the original complaint of the plaintiffs with its exhibits, the amendment to the complaint filed May 7, 1921, the demurrer of the defendant, O. W. Downtain, to the plaintiff's complaint and exhibits, and the answer of the defendant, O. W. Downtain, and the following agreed statement of facts:

" 'J. T. Tatum was the duly authorized agent of S. R. Morgan, the latter owning the following described real estate, to-wit: (Describing it).

" 'In 1915 or 1916 O. W. Downtain orally agreed to purchase the above property from S. R. Morgan, but was unable to do so. It was then orally agreed between him and Tatum that he should rent the property, and that if, later, he was able to purchase, Morgan would sell it to him. Rent was paid until April 22, 1920. At that time Tatum, in behalf of Morgan, orally agreed to sell Downtain the above property for $1,100. Downtain orally

agreed to purchase, and instructed Tatum to have prepared an abstract, orally agreeing to pay the $1,100 when the abstract was furnished, showing a fee simple title in Morgan, free of all incumbrances. The abstract as prepared omitted the deed of trust executed by Morgan to plaintiff, and on October 26, 1920, Morgan, by warranty deed, conveyed the above property to Downtain for the consideration of $1,100, which was paid to Morgan on that day.

" 'In the meantime Morgan executed a deed of trust to C. C. Kavanaugh, as trustee for the Central Bank of Little Rock, the plaintiff herein, conveying the above described property. The said deed of trust was duly executed, acknowledged and filed for record on May 17, 1920, with the clerk and ex-officio recorder of Union County, as appears in record book 89, page 414, of the records of Union County, Arkansas. That the said deed of trust is the one sought to be foreclosed in this action, and that the said Morgan has defaulted in the obligations therein undertaken by him.' The foregoing was all the evidence submitted to the court."

Upon these recitals the court dismissed the complaint of the bank as being without equity, and quieted the title of Downtain.

When the transcript was prepared the exhibits referred to in the decree were lost, whereupon the bank instituted proceedings to restore them. This proceeding was heard, and the court made an order supplying the exhibits. Later, appellee filed a petition praying the court to make a *nunc pro tunc* order amending the decree copied above, showing that the cause was submitted and heard on (1) the demurrer of Downtain; (2) a letter written by J. T. Tatum; (3) a letter written by Downtain; (4) oral testimony taken before the court. The court heard the petition for a *nunc pro tunc* order, and decreed that the pleadings and the matters of evidence above referred to were offered and were considered on the original hearing, and it was ordered that the original decree be amended to reflect this fact.

This *nunc pro tunc* decree presents an anomalous situation. It is thus made to appear that, in addition to the two letters, there was oral testimony, which does not appear in the record. There was no bill of exceptions.

The ordinary rule in such cases is that a presumption arises that the omitted testimony, had it been preserved and incorporated in a bill of exceptions, would have supported the court's decree in so far as the decree was dependent upon the facts established by the testimony. But it is an established rule of practice that no bill of exceptions is necessary when the cause is heard upon an agreed statement of facts which is incorporated in the decree itself. *Carroll County* v. *Poynor,* 142 Ark. 546; *Cummins Bros.* v. *Subiaco Coal Co.,* 150 Ark. 187; *Sizer* v. *Midland Valley R. Co.,* 141 Ark. 369; *Winn* v. *Simpson,* 156 Ark. 601.

In *Webster* v. *Goolsby,* 130 Ark. 141, we quoted from 1 R. C. L., page 778, paragraph 5, the following statement of the law: "Where parties to a case agree to submit the same for decision upon an agreed statement of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statements of fact thus agreed to, so far as the trial in which the stipulation is made is concerned; and where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties, where the same issues are involved, but it is not absolutely binding and conclusive upon the parties in other litigation."

We do not understand the effect of the decree on the petition for a *nunc pro tunc* order to be to question the agreed statement of facts. We must assume therefore that the facts are, so far as the decree recites them, as stated in the decree which we have copied. This being true, the decree rendered was erroneous.

It appears, from this agreed statement of facts, that Downtain was in possession as tenant, but on April 22, 1920, he made an oral contract to acquire the title, which

contract was consummated by a deed executed and delivered to him on October 26, 1920. But on May 17, 1920, the mortgage sought to be foreclosed was filed for record.

It is true, ordinarily, that possession by a person under a contract of purchase, although unrecorded, is notice of his equitable rights and interests in the property. As was said in *American Bldg. & Loan Assn.* v. *Warren,* 101 Ark. 169, "Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally, actual, visible and exclusive possession is notice to the world of the title and interest of the possessor in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor; and if he does not do so, notice thereof will be imputed to him."

The rule just stated does not apply here, however, for the reason, as stated in the agreed statement of facts, that Downtain was in possession as a tenant when his contract of purchase was made. In *Ashcraft* v. *Tucker,* 136 Ark. 447, it was said: "It has been held by this court that delivery of possession of land to the vendee under a parol contract of purchase takes the case out of the operation of the statute of frauds, and that possession alone is sufficient part performance of an oral contract for the sale of land to sustain a decree for a specific performance. But possession alone, in order to be sufficient, must be taken pursuant to the contract. Where the alleged purchaser is already in possession as tenant, and merely continues in possession after making the contract, that alone is not sufficient to take the case out of the operation of the statute. *Phillips* v. *Jones,* 79 Ark. 100, and *Moore* v. *Gordon,* 44 Ark. 334. In the instant case Tucker was the tenant of Ashcraft, and merely continued in possession of the land after making the oral contract for the purchase of it. Under the authorities just cited, this was not sufficient part performance to

warrant specific performance." In addition to the authorities cited in appellant's brief, see also *Rugan* v. *Vaughan,* 142 Ark. 176; *McNeill* v. *Jones,* 21 Ark. 277.

It follows therefore that the decree of the court dismissing the complaint must be reversed, because the error thereof appears from the face of the record; but it does not follow that the cause should be remanded with directions to foreclose the mortgage, as appellant insists. We have an anomalous record before us. The mortgage sought to be foreclosed is not copied into the record; but it does appear that most, if not all, of the exhibits which were supplied by the petition of appellee are items dated subsequent to the date of the mortgage, and it is insisted that these were negotiable instruments which the bank discounted and placed to the credit of its mortgagor, after the execution of the mortgage, whereas, in fact, the mortgage secured only the indebtedness then existing, and not any indebtedness subsequently created, and that this fact would appear if the mortgage were before us. As this may be true, although the case was not disposed of on that theory in the court below, as appears from the agreed statement of facts, we remand the cause for further proceedings, and it is so ordered.

PORTER v. HUFF.

Opinion delivered January 21, 1924.

HIGHWAYS—ADVERSE POSSESSION.—Where a landowner placed gates across a road running through his land and maintained same for 10 or 11 years with the public's acquiescence, the public lost any right it previously had in such road.

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

E. H. Lamore and *H. A. Northcutt,* for appellant.

1. The public has established a right to use the roadway by prescription. 102 Ark. 553.

2. The obstruction of the road worked a peculiar injury to appellant, not common to the general public, and he is entitled to have the same abated as a nuisance. 89 Ark. 177; 77 Ark. 228.

C. E. Elmore, for appellee.

1. Appellee had the right to discontinue the permissive travel through his premises at any time. The fact that he kept up his fence and gates since 1912 shows that he never intended to dedicate the road to public use, and that those who passed through his farm did so permissively. To constitute a public road by adverse use, this use must be open, adverse, notorious and continuous for seven years, and with the knowledge of the owner of the land. 47 Ark. 431; 50 Ark. 53. See also 47 Ark. 66; 135 Ark. 496; 59 Ark. 35-42; 83 Ark. 236, 240.

HUMPHREYS, J. The question presented by this appeal for determination is whether appellee had the right to obstruct a road running through his land to the Moton school and churchhouse and burying ground, situated on the Ash Flat road. He purchased the land over which the road ran from appellant in 1911, and moved thereon in the early part of the year 1912. He inclosed same in April, 1912, and, in doing so, built a fence on the division line between appellant and himself, placing a gate at the point where the road crossed the dividing line. Before leaving his land the road passed through his barn lot, where he placed two more gates. These gates remained across the road for ten or eleven years, at which time he built a new fence on his own side and closed up the gate. During the ten or eleven year interval appellant and his family used the road in going to and from the school and church. Other neighbors occasionally used it. The gates were opened and closed by those who made use thereof. The road was never worked by the public. The county court exercised no actual control over it by appointing a road overseer or otherwise. Appellant introduced testimony tending to show that, before the gates were put in, the public had used the road, more or less, for forty or fifty years. Appel-

lee testified that the so-called road was a mere way or trail through his land, which he permitted his neighbors to use as a matter of convenience.

Appellant seeks to reverse the decree of the chancery court upon the ground that the public had either acquired a right to use the road by prescription, or else by using it openly, continuously, and adversely for more than seven years. It is unnecessary to decide whether the public acquired a right to the use of the road as a public road by prescription or seven years adverse possession, for it lost any right it may have acquired by acquiescing in a permissive use thereof for a period of more than seven years after the road was closed by gates. When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee across the road for ten or eleven years, without objection on the part of the public.

No error appearing, the judgment is affirmed.

FIRST NATIONAL BANK OF HARTFORD v. LEWIS.

Opinion delivered January 14, 1924.

1. APPEAL AND ERROR—CONFLICT IN INSTRUCTIONS—HARMLESS ERROR.—In an action by a bank against the indorsers of a note, while a correct instruction that it was the duty of the bank to use reasonable diligence in filing the mortgage which secured the note, was contradicted by an erroneous one to the effect that it was the bank's duty to file the mortgage in apt time, no prejudice resulted where the bank delayed for an unreasonable time before filing the mortgage.
2. MORTGAGES—NAME OF MORTGAGOR.—Where a mortgagor was the same person in two mortgages of same property under different names by which he was known, both mortgages were valid between the parties thereto, and the question of priority depended upon the date of filing.

Appeal from Sebastian Circuit Court, Greenwood District; *John E. Tatum,* Judge; affirmed.

A. M. Dobbs and *G. W. Dodd,* for appellant.

Plaintiff's motion for a directed verdict in its favor should have been sustained:

1. Before the defendants could recover on their cross-complaint, it was necessary to show that they would have had a valid subsisting lien by virtue of their mortgage, if it had been filed without delay; and, in order to make of the mortgage a valid and subsisting lien, it must have been indorsed as required by C. & M. Digest, § 7384; 130 Ark. 287; 37 Ark. 507; 43 Ark. 144; 52 Ark. 164; 83 Ark. 109; 121 Ark. 346.

2. When Presson took the cotton, defendants' mortgage was then on file, and if their mortgagor's correct name was J. H. Rottenberry, they could have recovered as against Presson, even though Presson's mortgage was filed prior to their mortgage, and if J. P. Rodenberry was the man's correct name, they could not have recovered as against Presson, if their mortgage had been filed as it is alleged should have been. 156 Ark. 291; 34 So. (Ala.) 392.

3. The burden was on appellees to show that the mortgage given by their principal to Presson was a valid lien, in order to establish their case for recoupment against the appellant bank; and, in order to do this, it devolved on them to show that the Presson mortgage was supported by a valid subsisting indebtedness. 156 Ark. 142.

Holland & Holland, for appellees.

1. Appellant became the agent of appellees for the purpose of filing the mortgage. It was therefore its duty to properly indorse and sign the mortgage in compliance with the statute, C. & M. Digest, § 7384. If it be held that there was no proper indorsement on the mortgage, the fault lies with the appellant. 11 Corpus Juris, 510, § 186. See 121 Ark. 349; 40 Ark. 431; 60 Ark. 112. Substantial compliance with the statute is all that is required.

130 Ark. 287, and cases cited. Appellant should not be permitted to take advantage of its own fault or negligent act, nor to plead the same as a defense. 54 Ark. 273; 20 R. C. L. 22.

2. If appellant had promptly filed the mortgage, it would have been notice to a searcher of the records, and notice to the subsequent mortgagee, Presson, notwithstanding the slight misprision in the spelling of the names, since it recited such facts and matter as to place a person on inquiry from which the identity of the mortgagor and of the property would have been revealed. 152 N. W. 354; 19 R. C. L. 288; 23 R. C. L. 194; 54 Ark. 273.

SMITH, J. J. H. Rottenberry borrowed a sum of money from the Bank of Hartford and executed a note therefor on April 19, 1920, with M. B. Lewis and J. W. Smedley as indorsers. To hold the indorsers or sureties harmless a mortgage was taken on certain live stock and a crop of cotton. This mortgage, which was dated April 19, 1920, was left with the bank to be indorsed and filed with the clerk and recorder, but was not indorsed and filed until May 26, 1920.

On May 5, 1920, the same mortgagor, under the name of J. P. Rodenbery, executed a second mortgage to J. L. Presson, on the same property, and on that date Presson indorsed his mortgage: "This instrument to be filed but not recorded. (Signed) J. L. Presson, mortgagee," and filed it with the clerk and recorder on that date.

When the mortgage to Smedley and Lewis was filed it contained the following indorsement: "J. H. Rottenberry, mortgagor, to J. W. Smedley and M. B. Lewis, mortgagees. This instrument to be filed but not recorded. Bank of Hartford, by ....."

The proceeds of the mortgaged property were used in paying the Presson debt.

The Bank of Hartford was succeeded by the First National Bank of Hartford, which bank sued the signers

of the note, upon its maturity and nonpayment, and Smedley and Lewis defended upon the ground that the bank, through its negligence in failing to file the mortgage to them, had occasioned them a loss in excess of their liability on the note sued on. There was a verdict and judgment for Smedley and Lewis, and the bank has appealed.

The court gave, at the bank's request, an instruction to the effect that it was the duty of the bank to use reasonable diligence in filing the mortgage; and also gave an instruction, at the defendant's request, to the effect that it was the bank's duty to file the mortgage in apt time. It is pointed out that these instructions are in conflict, and that the one given at the bank's request correctly declared the law. We think this is true, but, in our opinion, no prejudice resulted from this conflict, because the bank delayed for an unreasonable length of time the filing of this mortgage. As we have said, the mortgage was executed April 19, and was not filed until May 26, and no explanation was offered of this delay for thirty-seven days to do a thing which could have been done in a short time on any day.

It is insisted, for the reversal of the judgment, that there was no damage to Smedley and Lewis, for the reason that the mortgage to them would not have been a lien on the property therein described. Two reasons for this statement are advanced. The first is that the mortgage as filed was not properly indorsed, and could not, therefore, have been a lien on the property mortgaged. Two answers are made to this argument. The first is that the bank, having undertaken to file the mortgage, could and should have made a proper indorsement thereon, and could not free itself of this responsibility by making an indorsement which was insufficient to accomplish the purpose of its agency. The second answer is that the bank so long delayed the filing that a proper indorsement would have been ineffective, as the second mortgage was filed before the Smedley and Lewis mortgage was filed. In other words, the lien of the sec-

ond mortgage had attached by the prior filing of that mortgage before the bank offered to file the Smedley and Lewis mortgage, and the prior lien thus acquired would not have been displaced, even though the Smedley and Lewis mortgage had been properly indorsed.

The second insistence is that, when Presson took the cotton, resulting in appellees' loss, their mortgage was then on file, and, if the mortgagor's name was J. H. Rottenberry, they could have recovered as against Presson, even though the Presson mortgage was filed prior to their mortgage; and if J. P. Rodenbery was the mortgagor's correct name, they could not have recovered as against Presson, if their mortgage had been filed promptly.

In support of this contention the case of *McReynolds* v. *First National Bank,* 156 Ark. 291, is cited. In this case it was held (to quote a syllabus): "Where one full Christian name of the grantor in a deed or mortgage is used, this imparts notice to one examining the title, though there is an error in the middle initial of his name; but where initials only are used, they take the place of the Christian name, and in such case the correct initials are necessary to give notice."

There would be much force in this argument if the question were whether the mortgagor's name was Rottenberry or Rodenbery; but the testimony shows that the mortgagor was the same person in both mortgages, and that he was known by both names. This being true, both mortgages were valid as between the parties thereto, and the question of priority would depend upon the date of filing. This being true, it would be no defense for the bank to show that, when it filed the mortgage from Rottenberry, no other mortgage from Rottenberry had been filed, because the mortgage from Rodenberry had been previously filed, and that was a valid mortgage because the mortgagor was known and could be identified by the name which he there signed. There was no mistake in the initials, such as was present

in the McReynolds case, *supra,* and, unlike the McReynolds case, each mortgage here considered would have constituted a valid lien from the time of its proper filing.

There appears to be no error, and the judgment is affirmed.

HALEY v. SULLIVAN.

Opinion delivered January 14, 1924.

1. HIGHWAYS—CLAIM FOR PRELIMINARY EXPENSES—VOID ACT.—A claim for preliminary expenses in organizing a road district must be founded on a valid statute.
2. HIGHWAYS—ENCROACHMENT ON COUNTY COURT'S JURISDICTION.—Special act No. 341 of 1920, creating an improvement district to construct a highway between certain towns, the highway to follow as near as practicable the present traveled road between the towns, but empowering the commissioners to build the road "over and along the most favorable and practicable route," conferred authority on them to select a route different from that designated by the act, and was invalid, under Const., art. 7, § 28, for encroaching on the jurisdiction of the county court in matters relating to public roads.

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

Norwood & Alley, for appellant.

The trial court erred in holding that a contract could only be made with the engineer for preliminary surveys and estimates, and that this does not include such work by the engineer as called for cross-sectioning preparatory to applying for Federal aid. The engineer was entitled to recover the proportionate value of the work done to the whole engineering service to be furnished. 115 Ark. 445. While the contract for the entire work was premature, yet it must be considered as evidence in determining the value of the services rendered. 149 Ark. 476; 151 Ark. 47. Federal aid was necessary to the district, and the work done was necessary, and properly classed as preliminary expenses. 119 Ark. 201.

Lake & Lake, for appellee.

Act 321 contravenes art. 7, § 28, of the Constitution, and is void. The Legislature exceeded its authority in authorizing the commissioners to deviate materially from the route as laid out if it was found more favorable to adopt such new route. 89 Ark. 513. Since the act is unconstitutional, no liability rests upon the taxpayers to pay for anything that was done thereunder by Haley and the commissioners. 126 Ark. 416; 122 Ark. 491.

HUMPHREYS, J. There is a direct and cross-appeal in this case.

The direct appeal presents the question of whether the trial court allowed a sufficient amount to J. F. Haley for his services as engineer in making the preliminary survey of the road to be constructed and in estimating the cost of the improvement.

The cross-appeal presents the question of whether act 341 of the General Assembly, approved February 25, 1920, conflicts with § 28, article 7, of the Constitution of the State, by encroaching on the exclusive original jurisdiction of the county court over all matters relating to public roads in the county.

We proceed to a consideration of the latter question because, in the view of the majority, the act is void, which view automatically eliminates the question presented for consideration on the direct appeal. A claim for preliminary expenses in organizing a road district must be founded on a valid act. A void act will not support such a claim.

Section 3 of the act in question is as follows: "Said district is hereby created and organized for the purpose of building, improving and maintaining a public highway from the town of Wicks, in Polk County, Arkansas, eastward to Baker Springs, in Howard County, Arkansas, and to intersect the public highway in Road Improvement District No. 2 in Howard County, Arkansas, at or near said Baker Springs, and which said road shall follow, as near as practicable, the present traveled road from the said town of Wicks to the termini at or near

said Baker Springs, in Howard County, Arkansas. Said commissioners here appointed are empowered, however, to build said road over and along the most favorable and practicable route. Said highway is to be constructed of macadam or such other materials as the commissioners may deem best or suitable, and they are authorized to build such bridges and culverts as may be by them deemed necessary and desirable. Any bridges of the first class built shall be approved by the county court in the county in which such bridge or bridges may be built."

The constitutionality of the act might be upheld under the rules of construction invoked in the recent case of *Wimberly* v. *Road Improvement District No. 7*, 161 Ark. 79, if it were not for the following clause of § 3 thereof:

"Said commissioners here appointed are empowered, however, to build said road over and along the most favorable and practicable route."

This clause follows language in the same section similar to language used in § 2 of act 312, passed at the same session of the Legislature, which we construed in the Wimberly case as conferring power upon the commissioners to make immaterial changes only in the Mena-Cherry Hill Road. The sentence or clause quoted is much broader than the language which precedes it, and plainly attempts to confer authority on the commissioners to materially deviate from the present traveled road between the towns of Wicks and Baker Springs by clothing them with power to select a different or new route altogether, if more favorable and practicable than the route designated in the act. The intent of the Legislature was to authorize the commissioners to make these material changes without the consent of the county court, as indicated by the fact that provision was made in the same section to obtain the approval of the county court in case bridges of the first class should be necessary in constructing the improvement. It is true it was not necessary to obtain the consent of the county court to

construct a bridge which constituted a part of the improvement, but this provision, deferring to the wishes of the county court, showed that the Legislature had article 7, § 28, in mind when it enacted the law. Certainly the Legislature would not have deferred to the wishes of the county court in express terms on an immaterial matter and have omitted to do so on a material matter. It would be illogical to say that, by silence, the Legislature intended to defer to the wishes of the county court in important particulars, when in the same section it gave expression to this intent in unimportant matters. It is obvious that the intent of the Legislature was to confer uncontrolled authority upon the commissioners to make material changes in the route designated in the act. The Legislature was without authority to do this.

The decree is therefore reversed, with directions to restrain the commissioners from levying and collecting a tax upon the property described in the act to defray preliminary expenses in the district.

DISSENTING OPINION.

McCULLOCH, C. J. Where the language of a statute is open to two reasonable interpretations, one of which will render it valid and the other invalid, it is the duty of the court to adopt such interpretation as will render the statute valid. This rule of interpretation has been quite frequently announced by this court. *Duke* v. *State,* 56 Ark. 485; *Leep* v. *Railway Company,* 58 Ark. 407; *Dobson* v. *State,* 69 Ark. 376; *Waterman* v. *Hawkins,* 75 Ark. 120; *Stillwell* v. *Jackson,* 77 Ark. 250; *Sallee* v. *Dalton,* 138 Ark. 549; *Booe* v. *Sims,* 139 Ark. 595; *Dobbs* v. *Holland,* 140 Ark. 398; *Commissioners* v. *Quapaw Club,* 145 Ark. 279; *Logan* v. *State,* 150 Ark. 486.

The statute under consideration contains no reference to an approval by the county court of the route selected for the road, but there is no express authority for the commissioners to select a route other than an established public road, regardless of the approval of the county court. This court has frequently decided that the Legislature cannot authorize commissioners of a road

improvement district to make material changes in the route of a road without the consent or approval of the county court, and we should indulge the presumption that, in enacting the statute now under consideration, the lawmakers intended to authorize the commissioners to change the route, subject to the approval of the county court, rather than in defiance of the will of the county court, or without obtaining the consent of the court. In other words, we should presume that the Legislature intended to enact a statute which would conform to the constitutional requirements as declared by this court. I think the point is well illustrated in the case of *Sallee* v. *Dalton, supra.* In that case we had under consideration a statute which created a road improvement district, and contained a provision to the effect that, if any part of the road to be improved "has not been laid out as a public road, it is hereby made the duty of the county court of Randolph County to lay the same out." It was contended that this compelled the county court to lay out the public road selected by the commissioners of the district, and we declared that the purpose was to leave the county court in possession of its constitutional powers in determining whether or not the road should be laid out, and that it was an encroachment upon the jurisdiction of the county court, and in reaching this conclusion we announced the principle which I have stated in the beginning, and quoted Judge Cooley in support of the rule, as follows:

"The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not, at first view, seem most obvious and natural. For, as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect." Cooley's Constitutional Limitations, 7 ed. 236.

The Legislature, in the instance now under consideration, described a public road as the one to be improved, but added the provision that the commissioners were "empowered, however, to build said road along and over the most favorable and practicable route." It is a reasonable presumption that the lawmakers intended, in the event of a necessary change in order to select the most favorable route, that the judgment of the county court would be invoked in laying out the new route. This is not a case where the commissioners have attempted to change the route without the consent of the county court. The point was never reached for a change in the route, for the reason that it was determined that it was impracticable to build the road at all, and it became necessary to levy assessments to pay the preliminary expenses which were properly incurred in selecting a route and in determining whether the cost of the improvement would exceed the benefits.

The majority lay stress on the express provision in the statute that bridges of the first class should be approved by the county court, and it is argued that this shows that the framers of the statute did not contemplate the approval of the county court in the selection of the route. It seems to me that the majority have drawn the wrong inference from the provision with respect to bridges. There is no provision of the Constitution requiring the approval by the county court of the construction of the bridge through the agency of the improvement district (*Shibley* v. *Bridge District,* 96 Ark. 410), but the framers of the statute now under consideration deemed it wise to place that matter under the direction of the county court, therefore they put in an express provision to that effect, deeming it, we should assume, unnecessary to place a like provision with respect to the selection of the route, as that was required by the Constitution and needed no legislative direction.

My conclusion is therefore that the statute is not in conflict with the Constitution, and should be upheld.

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

Opinion delivered January 21, 1924.

1. APPEAL AND ERROR—FORMER APPEAL—LAW OF THE CASE.—The principles announced in the opinion of the court on a former appeal have become the law of the case.
2. TRIAL—INSTRUCTION—SINGLING OUT CIRCUMSTANCE.—In an action for personal injuries received in a collision with a train, after a general instruction on damages, a direction to the jury to consider infection resulting in blood-poison, if it was found that the same was caused or contributed to by the injury received, was not objectionable as on the weight of evidence, nor as singling out a particular circumstance, but was proper in view of the fact that the jury might not understand that they should consider a resulting injury.

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

W. F. Evans and *W. J. Orr,* for appellant; *Gladish & Taylor* and *J. W. Rhodes, Jr.,* of counsel.

1. Since the complaint was in fact amended by the "substituted complaint" at the second trial, and the evidence is in some respects more favorable to appellant's contention that plaintiff's own negligence was the direct and proximate cause of his injuries, we ask the court to consider again the proposition that the plaintiff is barred as a matter of law. As supporting this contention, see 135 Mo. 440; 249 Mo. 523; 70 S. W. 734; 42 N. E. 579; 43 N. Y. 502. Regardless of plaintiff's negligence, the evidence as to appellant's negligence is not sufficient to support the verdict. 105 Ark. 299.

2. After having instructed the jury on every element of damage which the evidence justified, it was manifest error to direct the jury's attention specially to consideration of the infection resulting in blood-poison. Constitution, art. 7, § 23; 75 Ark. 86; 105 Ark. 467; 57 Ark. 512; 130 Ark. 371.

J. T. Coston, for appellee.

1. Uncontradicted evidence in the record shows that plaintiff was not guilty of contributory negligence; but if

contributory negligence be conceded, still it was a question for the jury to decide after comparing his negligence with that of the defendant. 235 S. W. 410; 155 Ark. 560.

2. If the blood-poisoning, which arose a few hours after the injury, was caused by the injury, it was a proper element of damages to be considered by the jury, as much so as the original injury. 224 U. S. 582; *Mo. Pac. R. R. Co.* v. *Cathey,* 160 Ark. 153. Moreover, paragraph 5 of the instruction on the measure of damages dealt only with the original injury, and it was necessary to add the paragraph pertaining to blood-poison, in order to let the jury know that that was to be considered in arriving at the amount of damages. 13 Cyc. 234. In any case it was not reversible error to single out that fact appearing in the evidence. 216 S. W. 23; 93 Ark. 416.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover damages for personal injuries sustained, also for injuries to appellee's team of mules and wagon, which resulted from a collision with one of appellant's trains backing in the yard at Osceola. Negligence of appellant's servants was alleged in failing to keep a lookout and failing to exercise ordinary care to prevent injuring appellee and his property, after discovering the peril of the situation.

There was a former appeal in the case from a judgment in favor of appellee, and the judgment was reversed, and the cause remanded for a new trial. 155 Ark. 632. The issues in the case and the testimony introduced in support of them were set forth in detail in the opinion on the former appeal, and it is unnecessary to restate them, as they are substantially the same as in the first trial. This court, on the former appeal, decided that the evidence was sufficient to sustain the verdict, but reversed the judgment on account of error of the trial court in its charge on the subject of contributory negligence. The principles announced in the opinion have, of course, become the law of the case.

Liability of appellant for damage to appellee's wagon and team is conceded, but it is contended, as on the former appeal, that the evidence is not sufficient to sustain the verdict on the issue of liability for appellee's injuries, in that it showed beyond dispute that the negligence of appellee himself was the sole and proximate cause of his injury. We have carefully examined the evidence, and, in comparison with the statements made in the former opinion, we think that there is no substantial difference, and, as we said in the former opinion, we cannot say on the evidence adduced below that appellee was, as a matter of law, guilty of contributory negligence in returning to the danger zone, caused by the approach of the train, to rescue his team from danger. The evidence created an issue which justified its submission to the jury. Appellee's leg was injured by coming in contact with some portion of the wagon after it was struck by the train, or, rather, after the box-car against which the wagon was backed was struck. The injury appeared at first to be trivial, and appellee resorted to simple remedies to effect a cure and to alleviate the pain, but a few days later blood-poisoning developed, and it became necessary to have the services of a physician, who treated appellee for the malady. According to the evidence adduced, appellee was totally incapacitated from work for about four months, suffered considerable pain during the time, and, at the time of the trial, he still had not fully recovered, and continued to suffer pain from the injury. There is also testimony that appellee's spine was injured.

After giving a general instruction on the measure of damages, against which no objection is made here, the court gave the following instruction at the request of appellee:

"6. In fixing the amount of damages, if any, on account of the injury to plaintiff, you will take into consideration the infection resulting from blood poison, if you find that the same was caused or contributed to by the injury received by the plaintiff."

Objection was made to the instruction just quoted, and it is insisted now that the court erred in giving this instruction, for the reason that it singled out the question of resulting blood poison after the subject had been fully covered in another general instruction. It is also contended that the instruction amounts to one on the weight of the evidence. We do not think that the instruction is open to the objection that it is on the weight of the evidence. If it be conceded that it should be treated as one singling out the particular subject mentioned, the answer to the argument is that, while it is not good practice to give an instruction singling out a particular circumstance in the evidence, a judgment will not be reversed on account of the giving of such an instruction. It can scarcely be said, however, that this instruction is open to the objection that it unnecessarily singles out the particular subject. It is true that the instruction dealt only with the matter of blood-poisoning as resulting from the original injury, but it was proper to instruct the jury on that subject, for the reason that this element should not have been considered by the jury as an element of damages unless they found that it was caused or resulted from the original injury. But for this instruction, the jury might not have understood whether or not they should take into consideration the blood poisoning, which was not a part of the original injury, even though it resulted from that injury. At any rate, we find no reversible error in the giving of this instruction.

It is contended that the verdict awarding compensation for personal injuries was excessive, but no reasons are pointed out why the evidence is not sufficient to sustain the award; on the contrary, we think that the evidence is sufficient.

Judgment affirmed.

BUTLER v. BLACKSHARE.

Opinion delivered January 21, 1924.

1. CERTIORARI—DELAY IN APPLICATION.—Issuance of a writ of certiorari to review proceedings of a public nature, such as establishment or vacation of a public road, rests in the sound discretion of the court, which should not grant relief where there has been an unaccountable delay in applying for it.
2. HIGHWAYS—DELAY IN APPLYING FOR CERTIORARI.—Where a petition for certiorari to review an order vacating part of a public road and establishing a new road on petition of county road commissioners acting as such, pursuant to Special Acts 1919, p. 569, was not filed for more than two years, the court did not abuse its discretion in quashing the writ.

Appeal from Clay Circuit Court, Eastern District; *W. W. Bandy,* Judge; affirmed.

L. Hunter and *Carl L. Hunter,* for appellant.

The procedure to vacate a public road, or any part thereof, is clearly set out in § 5247 of C. & M. Digest. The action of the county court in vacating the road was void. 13 Ark. 356; 15 Ark. 43.

W. E. Spence, for appellee.

The county court had jurisdiction. 134 Ark. 121; § 5249, C. & M. Digest.

McCULLOCH, C. J. Appellant filed his petition in the circuit court of Clay County to bring up to that court for review an order of the county court, changing the route of a public road by vacating a portion of the old route and laying out a new route. Appellant alleged in his petition that he owned real estate affected by the order vacating the old route of the road, that the order was made without notice, and that he did not know of the pendency of the proceeding in the county court until after the order was made. The writ was granted by the judge of the court, but, on a hearing, the court sustained a demurrer to the petition and quashed the writ.

It appears from the petition that the order of the county court sought to be reviewed was rendered on

August 19, 1919, and that the petition for certiorari was filed in the circuit court on October 17, 1921.

It appears also that the order of the county court was made on the petition signed by the county road commissioners, who were acting as such pursuant to a special statute then applicable to Clay County. Special Acts 1919, p. 569.

It appears from the original petition of the commissioners that they merely recommended the establishment of the new route of the road, but that there was appended to the petition another petition, signed by the appellees, asking that the old route be vacated. The court seems to have treated the two petitions as being a single one, and made the order vacating the old route and establishing the new one. The contention of appellant is that the order is void on its face to the extent that it attempted to vacate the old route without there having previously been filed a petition signed by the property owners and notice given of the presentation of the petition.

It appears from the above recital that appellant's petition for certiorari was not filed for more than two years after an order was entered vacating the old route of the road and establishing the new route. Under repeated decisions of this court, the issuance of a writ of certiorari to review proceedings of a public nature, such as the establishment or vacation of a public road, rests in the sound discretion of the court, and relief should not be granted where there has been an unreasonable delay in applying for the relief. *Johnson* v. *West,* 89 Ark. 604; *Rust* v. *Kocourek,* 130 Ark. 39; *Brinkley Township Road Dist.* v. *Dixon Township Road Dist.,* 146 Ark. 167.

There is no reason shown in the present case for the delay of more than two years in applying for relief, therefore we are of the opinion that the court did not abuse its discretion in quashing the writ of certiorari and refusing to review the orders of the county court.

Judgment affirmed.

MICKLISH v. GRAND LODGE OF THE LOYAL STAR.

Opinion delivered January 21, 1924.

1. INJUNCTION—RIGHT TO RELIEF.—Where, after the executive board of a fraternal mutual benefit association removed plaintiff from the office of secretary-treasurer and another was appointed in her place, the new appointment was revoked and plaintiff was restored to her office, there was no ground for injunctive relief, as it is only where injury has been inflicted or property right invaded that plaintiff is entitled to such relief.
2. ACTION—SPECULATIVE AND ABSTRACT QUESTIONS.—Courts do not determine speculative and abstract questions of law or lay down rules for the conduct of individuals in their business and social relations, but are confined to real controversies where the legal rights of the parties are necessarily involved, and can be conclusively determined.
3. INJUNCTION—COMPLAINT.—Where an injunction is the relief sought, the facts entitling plaintiff to such relief must be set out in the complaint and must be established at the hearing.

Appeal from Craighead Chancery Court, Western District; *Archer Wheatley,* Chancellor; affirmed.

STATEMENT OF FACTS.

Appellant brought this suit in equity against appellees to enjoin them from in any way interfering or attempting to interfere with her in the rights of her office as secretary-treasurer of the Grand Lodge of the Loyal Star.

According to the allegations of the complaint, the Grand Lodge of the Loyal Star is a fraternal mutual benefit association, with its principal office in the city of Horton, Kansas. Mrs. Harriette B. Hyland is its president, and resides in said city. Mrs. Margaret Lushbaugh, Mrs. Anna Wilson, Mrs. Mary Adams, Mrs. Emma Longeway and Mrs. Alta Stevens compose the grand executive board. Mrs. Margaret Lushbaugh is chairman and Mrs. Anna Wilson is secretary of the board. The office of the secretary-treasurer of the grand lodge is at Jonesboro, Ark., and, at the time of the transactions herein complained of, Mrs. Florence E. Micklish, as such secretary-treasurer, had on deposit in the First National

Bank, in the city of Jonesboro, funds of the grand lodge to the amount of $20,000 or $25,000. She is officially responsible for said funds, and has given a $20,000 bond for the faithful performance of her duties. On November 13, 1922, the executive board of the grand lodge convened in the city of Jonesboro and made an examination of her books and accounts as such secretary-treasurer, and found them to be correct. Said executive board, without cause, undertook and attempted to remove appellant from her office as secretary-treasurer of the Grand Lodge of the Loyal Star. The attempted removal was without authority, and appellant was not given an opportunity to be present or heard at the trial.

Mrs. Harriette B. Hyland, as president, then attempted to appoint the defendant, Mrs. Estella Slatton, as secretary-treasurer of the grand lodge. Written notice that appellant had been removed from office for the misappropriation of the funds of the grand lodge, by issuing two checks for $75 each and one for $50, was given her by the executive board. The date of the removal was stated as November 21, 1922. Appellant took an appeal from the action of the grand executive board, in the manner and form prescribed by the by-laws of the grand lodge. On the following day Mrs. Harriette B. Hyland revoked the appointment of Mrs. Estella Slatton as secretary-treasurer of the grand lodge, and Mrs. Slatton acknowledged the receipt of the revoking order, and the appellant was directed to continue in said office. The appeal taken from the order of the executive board, dismissing appellant, cannot be heard until the next meeting of the grand lodge, which will be about August, 1925.

Article 4, § 1, of the constitution of the order prescribes the duties of the president. Among the duties given her is the power to convene the executive board and to fill vacancies in the offices of the grand lodge, subject to the approval of the grand executive board.

Section 3 of the same article prescribes the duties of the grand secretary-treasurer.

Section 4 of the same article prescribes the duties and authority of the grand executive board. It provides that the members of the said board shall examine all accounts and books of grand lodge officers at the end of each fiscal year. Said board shall promptly investigate all charges against grand lodge officers, and shall have the power to examine witnesses, and, upon proper and sufficient evidence, to remove said officers.

The constitution also provides the manner in which charges shall be preferred against an officer of the grand lodge, and also the manner in which the trial shall be conducted.

Appellant was first granted a temporary injunction against appellees by the circuit judge. Estella Slatton was expressly enjoined from discharging the duties of grand secretary-treasurer of the Grand Lodge of the Loyal Star, and Mrs. Harriette B. Hyland and other officers of the executive board of the grand lodge were enjoined from interfering with appellant in the lawful exercise of her duties as grand secretary-treasurer of the Grand Lodge of the Loyal Star until further orders of the chancery court.

In January, 1923, appellees filed a motion in the chancery court to dismiss the complaint of the appellant for want of equity, and also filed a demurrer to the complaint. The court sustained the demurrer of appellees, and dismissed the complaint of appellant for want of equity.

The case is here on appeal.

H. W. Applegate, for appellant.

The court erred in sustaining the demurrer and in dismissing the complaint. All parties materially interested in the subject-matter of the litigation should be made parties to the suit. 37 Ark. 511; §§ 1096, 1097, 1098, C. & M. Digest. Where any person or party is wrongfully joined as defendant, such person or party should be dismissed if the court finds they should not have been made a party defendant, and the action should pro-

ceed against all other defendants. 101 Ark. 179. Under the doctrine of virtual representation, it is within the power of a court of equity to name as defendants in certain classes of cases a few individuals who are, in fact, the representatives of a large class having a common interest. 150 Ark. 398; 20 R. C. L. 672; 5 C. J. 1371; Pomeroy's Code Remedies (4 ed.) §§ 285-291; 28 Ann. Cas. 1913-C. Before an officer can be removed from office for specified cause, there must be notice and hearing given to him. 84 Ark. 540; 141 Ark. 206. Courts of equity will exercise jurisdiction and use their power to protect the incumbent of an office against any illegal or unjust interference therewith. 69 Ark. 606; 84 Ark. 540; 141 Ark. 206; 5 Corpus Juris, p. 1348, § 50; 59 N. J. L. 142; 77 Misc. N. Y. S. 1043. Where a member has been elected to office by the association for a definite term, he can be removed only for adequate cause and after an investigation of the charges against him, of which he has been given proper notice and has had an opportunity to reply and defend. 4 N. Y. S. 534; 5 Corpus Juris 1348, § 50; 1 A. L. R. 423; Ann. Cas. 1918-E.

Humphrey & Boxley and *E. L. Westbrooke,* for appellees.

There was no error in sustaining the demurrer and dismissing the complaint. In the absence of a statute authorizing it, an unincorporated association cannot be sued in its society or company name. 150 Ark. 401; 3 Ann. Cas. 699; 140 Ark. 124. The courts will not interfere with the internal affairs of an unincorporated association, so long as the government of the society is fairly and honestly administered in conformity with its laws and the law of the land. 5 C. J. 1364, art. 9, § 101; 7 C. J. 1123, § 84; 100 Atl. 731; 194 S. W. 1179; 241 S. W. 524; Ann. Cas. 1918-E 1178; 25 R. C. L., § 15.

HART, J., (after stating the facts). The decision of the chancery court was correct. Appellant was the plaintiff in the chancery court. According to the allegation of her complaint, the grand executive board had the power to remove her from the office of grand secretary-

treasurer for cause, and the president of the order had the authority to appoint some one in her place. The grand executive board first removed her from the office of grand secretary-treasurer, and Mrs. Estella Slatton was appointed in her place. On the very next day the appointment of Mrs. Estella Slatton was revoked, and she never attempted to exercise the duties of grand secretary-treasurer. Appellant was notified of this fact, and was directed to continue in the discharge of the duties of her office. Since that time she has continued in the discharge of her duties, without any interference whatever on the part of appellees. It was not necessary for her, under the circumstances, to have instituted this action to protect her rights.

In *Bonham* v. *Brotherhood of Railroad Trainmen,* 146 Ark. 117, it was held that no action to recover damages for the wrongful expulsion of a member from a fraternal benefit society may be maintained until the member first exhausts his remedy by appeal to the highest appellate tribunal of the society, as provided by its by-laws.

It is true that the Loyal Star is a fraternal and mutual benefit order, but, under the facts alleged, it is not necessary to decide whether appellant might maintain an action in the courts, without first exhausting her remedy by appeal to the highest tribunal of the society, as provided by its constitution and by-laws, or whether the decision of that tribunal would be conclusive of her rights.

It is only when some injury has been inflicted on the person, or some right of property has been invaded by the action of such society, that a member is entitled to maintain a suit in the courts for redress or protection. The courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations, but are confined in their judicial action to real controversies, where the legal

rights of parties are necessarily involved and can be conclusively determined. *Thomas* v. *Musical Mutual Protective Union,* 121 N. Y. 45, and *Bigelow* v. *Hartford Bridge Company,* 14 Conn. 565.

It is well settled that, where an injunction is the final relief sought, the facts which would entitle the plaintiff to relief must be set out in the complaint and must be established on the hearing.

In the case at bar there is no invasion of the appellant's rights. The order removing her from office was immediately rescinded, and she was never interfered with in any manner in the actual discharge of the duties of her office. Therefore there was no ground for equitable injunction, and the chancery court properly refused to continue the injunction in force, upon the final hearing of the case. According to the allegations of her own complaint, the remedy by injunction would not lie in appellant's favor, as no violation of her property rights has happened or may ever happen, and no injury thereto is threatened in such a sense as justified a preventive remedy.

It follows that the decree must be affirmed.

BETHEL v. STATE.

Opinion delivered January 28, 1924.

1. CRIMINAL LAW—INSTRUCTION—HARMLESS ERROR.—Where defendant did not claim that he had married prosecutrix or offered to marry her, giving an instruction in the words of Crawford & Moses' Dig., § 2415, providing that marriage suspends a prosecution for seduction, *held* not prejudicial error.
2. CRIMINAL LAW—OFFER OF COURT TO SUSPEND SENTENCE.—A statement by the court to the jury, in a prosecution for seduction, that if they convicted defendant, and defendant would at any time marry prosecuting witness, the court would suspend the sentence, *held* prejudicial error; not being cured by Gen. Acts 1923, p. 40, authorizing trial courts to suspend sentence.
3. INDICTMENT AND INFORMATION—LAWFUL ASSEMBLY OF GRAND JURY.—Where, on the reassembling of the grand jury at a special

term, it was discovered that an indictment against defendant had been lost without having been recorded, and the court referred the matter to the grand jury for a new indictment, when four of the grand jurors failed to report, whereupon the court completed the panel by ordering the sheriff to summon bystanders, and the grand jury so formed returned a new indictment. *Held* that a motion to quash the indictment on the ground that the grand jury was not legally formed or assembled was without merit.

4. INDICTMENT AND INFORMATION — FINDING NEW INDICTMENT. — Where the grand jury, without attempting to restore a lost indictment, returned a new indictment under Crawford & Moses' Dig., § 3037, the new indictment operated as a suspension of the old indictment.

5. GRAND JURY—NO REVIEW OF CHARGE TO.—There can be no review of alleged errors of the court in its charge to the grand jury, preceding the finding of an indictment.

6. JURY—EXAMINATION OF JURORS AS TO KU KLUX KLAN.—Where an offer was made to prove that, on the night of defendant's arrest, men disguised as members of the Ku Klux Klan endeavored to interview defendant, it was error to refuse to permit examination of the trial jurors on their *voir dire* concerning membership in the Ku Klux Klan.

7. JURY—DISCRETION OF COURT AS TO EXAMINATION OF JURORS.—In passing on the question of good faith of attorneys in examining jurors on their *voir dire*, the court is vested with a large amount of discretion, and may interrogate them as to their motive.

8. WITNESSES—CROSS-EXAMINATION.—On the issue of credibility, it was error to refuse to permit cross-examination of a material witness as to whether he went in disguise to defendant's home on the night he was arrested and tried to interview defendant.

9. SEDUCTION—PROOF OF PROMISE OF MARRIAGE—EVIDENCE.—A promise of marriage in a seduction case cannot be proved by a declaration of the female.

10. SEDUCTION—AS BETWEEN INFANTS.—Seduction is complete as between infants above the age of puberty when the act of sexual intercourse is induced and consummated by reason of a false promise of marriage.

11. SEDUCTION—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to warrant a conviction for seduction.

12. SEDUCTION—DEFENSE.—Where, subsequent to an express promise of marriage and while its influence still continued, prosecutrix yielded to sexual intercourse for the purpose of obtaining the consent of defendant's mother to the marriage, *held* that it cannot be said, as a matter of law, that the act was not obtained by virtue of a promise of marriage.

13. SEDUCTION—INSTRUCTION.—A requested instruction that, if prosecutrix yielded to sexual intercourse in order to become pregnant and thus obtain the consent of defendant's mother to the marriage, there would be no unlawful seduction, *held* properly refused.

Appeal from Scott Circuit Court; *John E. Tatum,* Judge; reversed.

Bates & Duncan and *Evans & Evans,* for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock* and *Darden Moose,* Assistants, for appellee.

McCULLOCH, C. J. The defendant, Justin Bethel, was tried below on an indictment charging him with the crime of seduction, alleged to have been committed by having carnal knowledge of Edna Sliger, an unmarried female, by virtue of a false and feigned express promise of marriage.

It appears from the testimony adduced at the trial that defendant and Edna Sliger, the girl alleged to have been seduced, were each about seventeen years of age—slightly under that age—at the time the alleged promise of marriage and act of sexual intercourse occurred, and that the girl was a few months older than the defendant. It is conceded that the two were "keeping company" with each other for a period of several months, covering the time during which the offense was committed; but defendant, in his testimony, denied that he had engaged himself to marry the girl, or that he ever had sexual intercourse with her. On the other hand, the girl testified that defendant proposed to marry her, that she accepted the proposal, and that the first and numerous succeeding acts of intercourse occurred during the pendency of their agreement to marry. In describing the place, time and circumstances of the act of sexual intercourse, the girl said: "He told me we would never get to marry in any other way unless we did, and let him get me pregnant; he said his mother would not agree to it without we were in that trouble. Q. Would you have surrendered your virtue to him under any other circumstances? A. No sir." It appears from the testimony that at that time defendant's father was dead, and he was

living with his mother. He was a schoolboy, and he and the girl attended the same school; her mother was dead at that time, and she lived with her father.

The State introduced the father of the girl, and other witnesses, to show the ostensible relations between the defendant and the girl, in order to corroborate her statement as to the promise of marriage and acts of sexual intercourse. The girl testified that she became pregnant as a result of her sexual intercourse with defendant, and that she gave birth to a child prior to the trial of this case. She testified that she and defendant became engaged to be married on July 31, 1922; that the first act of sexual intercourse occurred on August 26, 1922, and was frequently repeated from then up to some day during the month of November; that defendant continued to visit her until January, 1923, when he broke his promise of marriage, offered her money to leave the country, and refrained from associating with her any more.

Defendant denied, as before stated, that he promised to marry the girl, or had sexual intercourse with her. He admitted, however, that he visited her frequently during the summer and autumn of 1922, but that he ceased his visits and association with her on Thanksgiving day of that year, on account of her conduct on that day.

The court, in its charge to the jury, gave the following instruction, over defendant's objection:

"3. The court further instructs the jury, if any man against whom a prosecution has begun, either before a justice of the peace or by an indictment by a grand jury, for the crime of seduction, shall marry the female alleged to have been seduced, such prosecution shall not then be terminated, but shall be suspended; provided that if, at any time thereafter, the accused shall wilfully, and without such cause as now constitutes a legal cause for divorce, desert and abandon such female, then at such time said prosecution shall be continued and proceed as

though no marriage had taken place between such female and the accused."

The bill of exceptions recites that, "after the instructions of the court and the arguments of counsel, and just immediately before the court instructed the jury as to the form of their verdict, the court stated to the jury that, in view of the arguments of counsel, he deemed it proper to state to the jury that, in the event the jury should convict the defendant, if the defendant would, at any time, marry the prosecuting witness, he would suspend the sentence."

There was an exception saved to the giving of each of these instructions, and the rulings of the court are assigned as error.

There are numerous other assignments of error to be considered, but, in view of the fact that the Attorney General concedes that a reversal must follow on account of the court's last statement to the jury, unless the act of the General Assembly of 1923 (General Acts 1923, p. 40), authorizing trial courts to suspend criminal sentences, cures the error in these instructions, we deem it proper to consider this assignment first, before disposing of the others.

It is unnecessary to discuss the force and effect or validity of the recent statute just referred to, for we are of the opinion that it has no bearing upon the question whether or not the court erred in charging the jury upon the effect of the statute suspending prosecutions in seduction cases, or in telling the jury, just before the final submission of the cause, that the court would suspend judgment, under the recent statute, if the jury convicted the defendant and he afterwards married the girl. The court set forth the statute (Crawford & Moses' Digest, § 2415) in the instruction quoted above, but it had no application in the trial of the present case, for the reason that there was no contention from any quarter that the defendant had married the girl or offered to marry her, and the sole effect of the statute was to sus-

pend the prosecution, not to authorize the suspension of sentence. We do not think, however, that there was any prejudice in giving instruction No. 3, for it is undisputed that the defendant had not married the girl or offered to marry her. The error in the court's final charge to the jury, however, arose from the fact that it constituted an inducement to the jury to find the defendant guilty by expressing a promise on the part of the court that, if there was a verdict of guilty returned and the defendant married the girl, he would suspend sentence. The court had no right to hold out such a promise to the jury. We have no means of knowing what effect it had upon the jury, but it was calculated to lessen, in the eyes of the jury, the ultimate effect of a verdict of guilty, and might have been part of the inducing cause to bring about the verdict. *Bishop* v. *State,* 73 Ark. 568; *Pittman* v. *State,* 84 Ark. 292; *Bird* v. *State,* 154 Ark. 297. Our conclusion therefore is that the final charge of the court to the jury was erroneous and prejudicial, and that it calls for a reversal of the judgment.

Questions embraced in other assignments of error, which may arise again, will now be discussed and disposed of for the guidance of the court in the next trial.

The record shows that the indictment against the defendant for this offense was returned by the grand jury at the regular August term, 1922, and that there was an adjournment of the court over to September 19, 1922, on which date this cause was set down for trial. The grand jury had not been discharged, but it had adjourned over to that date, or, rather, subject to the call of the court, and the grand jury was ordered to report to the court on that date. It was discovered on that date that the indictment had been lost without having been recorded, and the court, at the request of the prosecuting attorney, referred the matter to the grand jury for a new indictment. Four of the grand jurors failed to report, and the court completed the panel by having the sheriff summon bystanders. There was a

reference to the grand jury, and a new indictment returned. Defendant waived arraignment, and pleaded not guilty, and the trial was proceeded with, resulting, as before stated, in a verdict of guilty being rendered. Without attempting to restore the lost indictment, the grand jury could return another indictment, which, under the statute (Crawford & Moses' Digest, § 3037), operated as a suspension of the old indictment. There was a motion to quash the indictment on the ground that the grand jury was not legally formed or assembled at the time the indictment was returned, but this is fully answered by the foregoing recitals as to what was done. Another ground for quashing the indictment was that the court failed to fully charge the grand jury in resubmitting the matter to the jury, and failed to give correct instructions. There can be no review of alleged errors of the court in its charge to a grand jury preceding the finding of an indictment. The indictment is only an accusation, and if it be returned by a legally constituted grand jury, for obvious reasons there can be no review of errors of the court in its charge. We are therefore of the opinion that there is no merit in these assignments of error.

In the examination of trial jurors on their *voir dire,* counsel for defendant proposed to inquire of each juror whether or not he was a member of the organization known as the Ku Klux Klan, but, objection being made by the prosecuting attorney, the court refused to permit the question to be asked. Counsel then proposed to ask each juror, as he was presented for examination, the same question, but the court refused to permit it to be done. The following colloquy took place between defendant's counsel and the court: "Mr. Evans: I propose to ask each and very one of the jurors the question, and the purpose of the question is to determine, to enable us to determine, what peremptory challenges we will make in this case. It is not cause for challenge itself to be a member of the Klan, but we desire to ask the question

for the purpose of enabling us to determine, with that information, whether or not we will exercise peremptory challenges, and we are entitled to that information in order to determine whether we will challenge a juror or not. I will state this to the court, that it will be proved in this case that on the night, I am informed and believed, that the defendant was arrested in the justice of the peace's court, certain persons came to the defendant's mother's house, where he was, disguised as members of the Ku Klux Klan, and wanted to interview him with reference to this matter, and in that way it brings that question into issue here; and as a matter of precaution, and acting in the utmost good faith, we insist that we are entitled to have that information from each of the jurors called for the purpose stated." The Court: "It is the court's view that a man belonging to the Ku Klux Klan would be no more subject to be challenged than if he belonged to the Masons, the Odd Fellows, or a member of any other order, or a member of Baptist Church, or Methodist or Presbyterian Church; such membership does not disqualify a man as a juror, and the court holds that in this case it is improper and irrelevant to ask the jurors whether or not they are members of the Ku Klux Klan, and the court will not allow counsel to ask that question."

Exceptions were duly saved to this ruling of the court. Counsel for defendant then asked permission to propound the further inquiry to the jurors whether or not they were members of any organization "which is bound, either directly or indirectly, to prosecute or punish any person for alleged crimes against women." The court permitted this question to be asked.

During the progress of the trial defendant offered to prove that, on the night after he was arrested, a small group of masked men went to the home of defendant's mother, where he resided, and wanted to call him out, but that defendant's mother declined to permit him to go out to see the men. Defendant's mother said that she saw one man in the group, and that he was dressed in a

brown coat, or raincoat, and had a black mask over his face. Defendant attempted to impeach one of the State's witnesses by asking him whether or not he was a member of the Ku Klux Klan and was the leader of the group of men who went, masked, to the home of defendant the night he was arrested, and called him out. The court refused to admit this testimony, and also excluded testimony offered by defendant to show that Edna Sliger had endeavored to get several persons to secure the interest and intervention of the Ku Klux Klan, and that her father, W. H. Sliger, proposed to one of the witnesses that they get the Ku Klux Klan at Bates, where all the parties lived, to "handle the case," and that Sliger had said that he would get the Klan at Heavener, Oklahoma, to handle the case, as the Klan at Bates did not "have the guts to do it." Sliger himself denied, on the witness stand, that he had made this statement, and the court refused to permit the introduction of testimony of other witnesses to prove that he made the statement accredited to him by the witness.

In the case of *Clark* v. *State*, 154 Ark. 592, we decided that "mere membership in committees, or in societies, or other organizations for the suppression of crime, or the achievement of any other particular purpose, does not operate as a disqualification of a juror, unless it is shown that the particular individual has actual bias, or is directly connected with the matter under investigation in a way from which bias or prejudice will be implied," but that an accused has the right, for the purpose of determining the extent to which he will avail himself of the statutory peremptory challenges, to inquire as to the membership of the proposed jurors in an organization "where it is shown that there are reasons why membership in an organization might influence the parties to the litigation in the exercise of peremptory challenges," and that "the court ought to permit the inquiry to be made, if it appears to be made in good faith."

In the more recent case of *Snyder* v. *State*, 160 Ark. 93, we recognized the same rule, but held that

where nothing more was shown than that the trial judge, the prosecuting attorney, the sheriff, deputy sheriff and employed counsel were members of the Ku Klux Klan, an organization of which the accused could not be a member, because of the fact that she was a woman, is not sufficient reason for being permitted to interrogate jurors concerning their membership in said organization. We did not decide in either of those cases that it was necessary for the accused or his attorney to prove the grounds for interrogating the witnesses, but that, on the contrary, if the questions were asked in good faith, and were not merely capricious or impertinent, the court should permit the inquiry to be made, in order for the accused to intelligently and satisfactorily exercise his right of peremptory challenge. In the Clark case, *supra,* we said:

"If there were merely involved an inquiry by the accused as to membership in a particular organization, this alone would not show that the inquiry was material or that prejudice resulted, but, in the present case, appellant's counsel informed the court of the fact that there were certain possible antagonisms between the membership of the organization to which appellant belonged and the one to which the proposed jurors belonged, and he was entitled to ascertain the fact whether or not the jurors were members of the other organization, so that he could determine in what instances he would exercise his rights of peremptory challenge."

In the Snyder case we said that, in order to be entitled to ask such a question, "it should be made to appear that the organization to which the officers and jurors belong, or that the members thereof, were antagonistic to an accused or some organization to which he belongs," but that does not mean that the accused or his attorney must make actual proof before he can be permitted to ask the question. It is, in other words, a question of good faith, and the court necessarily must exercise a large amount of discretion in passing on this question. If the court doubts the good faith or accuracy of the information of the accused or his counsel in pro-

pounding the questions to jurors, the court may inquire further into his motives by interrogating the attorney on the subject, but it is not essential that, as grounds for making the inquiry as to membership of jurors in organizations, proof be first adduced establishing the connection between the proposed juror and the organization, or to introduce proof that there is actual antagonism between the defendant and the organization inquired about. The same question may arise in the lower court in a different form or aspect, and it is unnecessary to determine now whether or not the court would have abused its discretion in holding that the inquiry was not made in good faith, for the court did not pass on that question, but held that the inquiry was not permissible at all. It is true that the court permitted the counsel to ask jurors about membership in any organization for the purpose of punishing crime against women, but this did not reach to the point that defendant sought to bring out from the jurors, that they were members of a particular organization, the Ku Klux Klan, which, counsel informed the court, was taking an interest in this particular prosecution. The inquiry which the court permitted the counsel to make did not in anywise accomplish the same purpose sought in asking about the membership in the particular organization named.

The court erred in refusing to permit the defendant to interrogate witness Raymond Cook, on cross-examination, as to whether or not he was one of the three or four men who went in disguise to defendant's home on the night that he was arrested and tried to take him out and have a talk with him; the court refused to permit the inquiry to be made. Counsel for defendant stated to the court, at the time, that this testimony was sought to be drawn out on cross-examination to show the bias of the witness, but the court refused to permit the testimony to go in. We think this testimony was admissible, and that the court erred in its ruling excluding it. Cook was a material witness, for he testified to circumstances which

tended to corroborate Edna Sliger as to her relations with the defendant. This was the only means of corroborating the witness, and when the State availed itself of the opportunity of proving these relations by witness Cook, it was important to the defendant to discredit him by showing that he was taking an active interest in the prosecution, even to the extent of going to the home of defendant, disguised, with other men, for the purpose of calling him out and talking with him. The ultimate purpose of the disguised men in going there, if indeed they did go there, as declared by the witness, is not shown, but, if it occurred, it was an unusual incident, and constituted unjustified conduct on the part of the men, and if the witness, Cook, joined in such an enterprise, the defendant was entitled to have the jury consider it in testing his credibility as a witness.

W. H. Sliger, the father of Edna, was introduced as a witness for the purpose of corroborating her testimony as to the promise of marriage. He did not testify to any act or declaration of defendant which tended to show a promise of marriage or sexual intercourse, except the intimate relations between the boy and the girl, covering a period of two or three months, almost to the exclusion of other visitors, and the witness was permitted to testify, over objection of defendant, that his daughter told him some time in November, 1922, that she and defendant were engaged to be married. Counsel for defendant specifically objected to the testimony, on the ground that it was hearsay, but the court held that statements of parties to a marriage contract might be proved as an exception to the general rule against hearsay testimony or self-serving declarations. In this ruling the court was clearly in error, for a promise of marriage cannot be proved by the declaration of the injured party. The ruling is in direct conflict with the decision of this court in *Carrens* v. *State,* 77 Ark. 16, and *Woodard* v. *State,* 143 Ark. 404. In the Carrens case we held that the injured female could not be corroborated merely by her own

letters to the accused, and in the Woodard case, *supra,* we held that neither acts nor declarations of the injured female, in the absence of the defendant, were competent testimony for the purpose of corroborating her as to the promise of marriage.

It is next contended that, as the proof in the case showed that defendant was under seventeen years of age, and legally incapable of entering into the marriage relation without the consent of his parents, the defendant would not be guilty of having sexual intercourse with the girl under a false promise of marriage, unless she was ignorant of the fact that he was under age. The defendant asked instructions to that effect, which the court refused to give, and, on the contrary, told the jury that the fact that the defendant was under age would be no defense to the charge. In the case of *Polk* v. *State,* 40 Ark. 482, this court decided that the fact that the person accused of seduction was below the age at which he could marry, without the consent of his parents or guardian, did not constitute a defense to the charge. The court said: "The offense consists in having illicit connection with an unmarried female, who yields to the solicitations of her seducer under the inducement of a promise of marriage. And it may be committed by an infant upon an infant, provided they have reached the age of puberty." The court did not, in that case, mention any exception to the rule as to knowledge or information on the part of the girl that the accused was under age at the time of the commission of the act. On the contrary, the rule was laid down unqualifiedly that the offense is complete as between infants above the age of puberty, where the act of sexual intercourse is induced and consummated by reason of a false promise of marriage.

Finally, it is insisted that the verdict is contrary to the uncontradicted evidence, in that it is shown by the testimony of the girl herself that the sexual intercourse was not induced by an unconditional promise of marriage. Counsel insist that, when the girl testified that the sole reason why she yielded her virtue to the defend-

ant was his statement that it was necessary for him to have intercourse with her and that she become pregnant as a result, so that his mother would agree for them to marry, this showed that there was no inducement by an unqualified promise of marriage. We cannot agree with counsel in this. The girl testified that there was an express promise of marriage, on a certain day prior to the first act of sexual intercourse, and that the relations established by the agreement to marry extended beyond the first act of sexual intercourse and the frequent acts of intercourse which occurred thereafter. The fact that she finally yielded to the embraces of the defendant solely upon his assurance that it was necessary that she should become pregnant in order to secure the consent of his mother to the marriage did not lessen the unconditional quality of the marriage agreement to which she had testified. It is true that the jury might have found that there was no promise of marriage, or that, if there was a promise of marriage, it was made conditional upon the consent of defendant's mother, and that the sexual intercourse was induced merely as a means of obtaining the consent of defendant's mother. But it cannot be said, as a matter of law, that because, subsequent to the express promise of marriage, and while its influence still continued, the girl yielded to the embraces of her lover for the purpose of obtaining the consent of his mother, the act of intercourse was not obtained by virtue of the promise of marriage. The two things are not at all inconsistent, for the girl may have yielded her virtue because of the promise of marriage and also in order to create conditions which would permit the consummation of the marriage. The case does not therefore fall within the rule announced by this court in decisions cited by counsel to the effect that, when sexual intercourse is obtained by virtue of a conditional promise of marriage if pregnancy resulted, it did not come within the statute. *Taylor* v. *State,* 113 Ark. 520; *Davie* v. *Padgett,* 117 Ark. 544; *Oaks* v. *State,* 135 Ark. 221; *Woodard* v. *State,* 140 Ark. 258. The instructions asked by the defendant,

which would have told the jury that, if the girl yielded in order to become pregnant and thus obtain the consent of defendant's mother to the marriage, it would not constitute unlawful seduction, were erroneous, and were properly refused.

There was, we think, sufficient evidence to warrant the submission of the case to the jury, both as to unconditional promise of marriage and the acts of sexual intercourse which were induced by such promise. The girl testified positively as to those facts, and she was corroborated by proof as to the relations which apparently existed between the parties, as observed by the girl's father and other witnesses, and also there was some corroboration in the statement of defendant to another girl, as testified to by her, after the birth of the child. All of the circumstances made a case for the jury, we think, and the court was correct in refusing to take it away from the jury on a peremptory instruction.

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

COLEMAN v. McKEE.

Opinion delivered January 28, 1924.

LICENSES—AUTHORITY OF DEALER TO SELL STOCK OF COMMON-LAW TRUST. —Under Crawford & Moses' Dig., § 750 *et seq.* and Acts 1923, p. 694, requiring licenses for the sale of stock of an "investment company" by a "dealer," the Bank Commissioner improperly refused a dealer's license to sell stock in a common-law trust, under the ground that the laws of the State did not authorize such an association.

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

Horace Chamberlin, for appellant.

The instrument under consideration here created a trust, and its existence as a legal entity is not prohibited by the laws of the State. Appellant's application for a

dealer's license was made in conformity with the statute, C. & M. Digest, §§ 750-771. Section 751, *Id.*, specifically recognizes the existence of a trust, and names the person acting therefor as an investment company, if he shall himself, or through others, desire to sell, in this State, stocks issued by him. Appellee and his successor in office should be required to hear appellant upon the merits of his application.

Gordon & Combs, for appellee.

A company operating under a declaration of trust has no legal existence in this State, is not a legal entity, and cannot issue anything of value. 113 Pac. 447; 19 *Id.* 268; Ann. Cas. 1912-B, 1344; 99 Pac. 109; 181 N. W. 102, 12 A. L. R. 1060; 20 R. C. L. 882; *Id.* 912; 1 Purdy's Beach on Corporations, 162; 3 *Id.* 1397; 20 R. C. L. 1061; 10 Wall. 566, 19 L. ed. 1029; 20 R. C. L. 808; 203 Mass. 311; 133 A. S. R. 296; 60 N. H. 294; 49 Am. Rep. 313.

McCULLOCH, C. J. Appellant filed his application with the Bank Commissioner of this State on September 29, 1922, for the issuance to him of a dealer's license to sell shares of stock in an association of trustees doing business at Wichita Falls, Texas, under the name of Wichita Royalty Company. Appellant set forth in his application the trust agreement or declaration under which the association known as the Wichita Royalty Company was operating, and also stated that he was the owner of fifty thousand shares of the stock of said association, of the par value of one dollar per share, and desired to sell the same, and asked for a license from the Bank Commissioner to permit him to sell stock in this State.

A copy of the trust agreement, exhibited with appellant's application to the Bank Commissioner, and with the complaint in this action, shows that the agreement was a common-law trust, whereby the trustees undertook to operate the business specified in the agreement and pay dividends out of earned profits in proportion to the shares of stock issued to purchasers, and that the holders of stock should not incur any liability for the indebtedness

of the association. The Bank Commissioner refused to issue a license to appellant, on the ground that "the laws of the State of Arkansas do not authorize the legal existence of an association under a common-law agreement or declaration of trust, and for this reason the application is hereby denied without consideration of the merits of the securities sought to be sold," whereupon appellant instituted this action in the chancery court, as provided by the statute. Crawford & Moses' Digest, § 769.

The statute known as the "Blue-sky Law," under which this application to the Bank Commissioner was made, defines the term "investment company" and the term "dealer," and requires a license for the sale of stocks falling within that definition, and also provides a method of the issuance of license by the Bank Commissioner. Crawford & Moses' Digest, § 750 *et seq.*, and Acts of 1923, p. 694. The powers and duties under this statute were transferred from the Bank Commissioner to the Railroad Commission. The section of the statute defining "investment companies" reads as follows:

"Section 751. Every person, corporation, copartnership, company, or association (except those exempt under the provisions of this act), organized, or which shall hereafter be organized, in this State, whether incorporated or unincorporated, which shall either himself, themselves or itself, or by or through others, sell or negotiate for the sale of any contract, stock, bonds or other securities issued by him, them, or it, within the State of Arkansas, shall be known, for the purposes of this act, as a domestic investment company. Every such person, corporation, copartnership or association a resident of or organized in any other State, Territory or Government, shall be known, for the purposes of this act, as a foreign investment company." Crawford & Moses' Digest.

The section defining "dealer" is as follows:

"Section 758. Any person, firm, copartnership, corporation or association, whether domestic or foreign,

not the issuer, who shall, in this State, sell or offer for sale any of the stocks, bonds or other securities issued by any foreign or domestic investment company, except the securities specifically exempted in this act, or who shall, by advertisement or otherwise, profess or engage in the business of selling or offering for sale such securities, shall be deemed to be a 'dealer' in such securities within the meaning of this act, and no dealer within the meaning of this act shall sell or offer for sale any such securities, or profess the business of selling or offering for sale such securities, unless and until he shall have filed a list of the same in the office of the Bank Commissioner, as in this act provided. The term 'dealer' shall not include an owner, nor issuer, of such securities so owned by him, when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who, in a trust capacity created by law, lawfully sells any securities embraced within such trust." *Id.*

The reason stated by the Bank Commissioner in refusing to grant a license to appellant is in direct conflict with the decision of this court in the recent case of *Betts* v. *Hackathorn,* 159 Ark. 621. We held that the trustees under a common-law trust may do business in this State under general statutes other than those regulating limited partnerships and corporations. Appellant's application was, however, presented to the Bank Commissioner and denied before our decision on this subject.

The section of the statute defining "investment companies" seems to embrace individuals and ordinary copartnerships as well as corporations and limited partnerships, but we need not undertake to decide now the extent of this statutory definition, for the reason that the securities sought to be sold by appellant in his application to the Bank Commmissioner fell within our decision in the case cited above.

We are of the opinion that the chancery court erred in refusing to grant relief against the wrongful refusal

of the Commissioner to issue the license. This decision, however, does not reach to the question of the merits of the case in determining the value and *bona fides* of the securities offered by appellant, which can be inquired into by the Railroad Commission on renewal of the application.

The decree of the court is therefore reversed, and the cause remanded with directions to enter a decree in favor of appellant, declaring his right to receive license upon proving to the Railroad Commission the value and *bona fides* of his securities, in accordance with the statute. It is so ordered.

WILLIAMS v. JONES.

Opinion delivered January 28, 1924.

1. MORTGAGES—FORECLOSURE SALE—VALIDITY.—On a motion to set aside a mortgage foreclosure sale for one-fifth less than it was reasonably valued at, *held* that the sale did not amount to a fraud upon the mortgagor's rights.
2. MORTGAGES—IMMEDIATE CONFIRMATION HARMLESS WHEN.—The fact that a mortgage sale was immediately reported to, and confirmed by, the court did not injure the appellants where the court heard their motion to set aside the confirmation and sale as if there had been no confirmation.

Appeal from Lawrence Chancery Court, Eastern District; *Lyman F. Reeder,* Chancellor; affirmed.

Schoonover & Jackson and *Block & Kirsch,* for appellant.

We think there was an abuse of discretion in refusing to set aside the confirmation of the sale to Jones. While the inadequacy of the consideration, standing alone, might not have been sufficient to justify the court in setting aside the sale after he had once confirmed it, yet the other circumstances attending the sale cast upon it that suspicion which ought to have moved the court to set it aside on appellant's application. 131 Ark. 397; 117 U. S. 180.

W. P. Smith, for appellee.

The record shows that the chancellor was justified in his decision by the evidence. We submit the case upon the authorities cited by the appellant.

HUMPHREYS, J. This is an appeal from an order refusing to set aside a confirmation of a sale of certain land which was sold on the 19th day of September, 1922, to Charles Jones, at public sale under a mortgage foreclosure, wherein Fairbelle Byrkett was petitioner and Williams *et al.* were respondents. The lands in question were sold on May 31, 1921, in the same foreclosure proceeding at which sale Charles Jones purchased them. Later, however, this sale was set aside at the instance of F. E. Williams on the ground of inadequacy of price, and no appeal was taken by Jones from said order. After the sale was set aside Judge W. A. Cunningham loaned F. E. Williams enough money to pay the indebtedness due Fairbelle Byrkett, and, as security, took an assignment of the judgment and decree. Upon failure of F. E. Williams to pay Judge Cunningham the amount advanced, the land was again advertised and sold by the commissioner. At the sale D. O. Williams, brother of F. E. Williams, made the highest bid, same being $1,350, subject to a prior lien or mortgage thereon in favor of Clay Sloan for about $2,600. D. O. Williams was given thirty minutes by the commissioner to make a good and sufficient note to cover his bid. The testimony is conflicting as to whether he returned within the time allowed him. At any rate, during his absence the commissioner again offered the lands at public sale to the highest bidder. Charles Jones was the highest bidder, and became the purchaser for $1,025. He bid against D. O. Williams at the sale made earlier in the afternoon, offering $1,325 therefor. The second sale was immediately reported to the court and confirmed, after which a deed for the lands was executed by the commissioner and delivered to Jones. On October 26 thereafter D. O. Williams and F. E. Williams filed a written motion to set aside the sale and confirmation

thereof, upon the ground that the action of the commissioner in making the second sale amounted to a fraud upon their rights. A response was filed to the motion by appellee, and the issue joined was submitted to the court upon testimony introduced by the respective parties, which resulted in a denial of the motion.

The witnesses introduced agreed that the commissioner gave D. O. Williams thirty minutes after the first sale to make a note and bond for the amount of his bid, with good and sufficient sureties thereon, and that he and his brother, F. E. Williams, returned in company with W. R. Lane, vice-president of the Planters' National Bank, after the lands had been sold the second time. D. O. Williams and F. E. Williams testified that Mr. Lane came down with them to take care of the note, and did not sign it because Judge Cunningham told him it was too late, as the land had been sold again five minutes before their arrival. Judge Cunningham testified that W. R. Lane spoke to him about the matter, and that he told him the facts about the sale of the property, whereupon Lane remarked that he would have nothing to do with it.

D. O. and F. E. Williams testified, in substance, that they returned within thirty minutes after the sale, with the note unsigned, but that they had made arrangements with Mrs. Fairbelle Mitchell (formerly Byrkett) to sign the note that evening, but found the property had been sold; that they obtained the signature of Mrs. Mitchell and her husband to the note the next day, but did not present it to the commissioner because he had again sold the property; that he and his brother signed the note the afternoon the sale was made. D. O. Williams testified that he purchased the land for himself, but his brother contradicted this statement, saying that he had bought it for him. W. A. Cunningham and Charles Jones testified, in substance, that D. O. and F. E. Williams did not return until about three o'clock; that the first sale occurred about 1:30 or 2 o'clock p. m.; that the commissioner waited until five minutes before 3 o'clock, at which

time W. A. Cunningham requested him to sell the property again, so that the sale would be between the hours for judicial sales of land; that Jones bid the property in at the second sale for $1,025, which was reported to and confirmed by the court at once; that D. O. Williams did not return within the time required and cover his bid with a note properly secured, and did not offer such a note to the commissioner at all.

The note executed by the commissioner and signed by D. O. and F. E. Williams and the Mitchells was introduced in evidence. The solvency of the Mitchells was not shown, but the solvency of Lane was admitted.

The testimony showed that the property was worth about $5,000, and that Clay Sloan had a prior lien or mortgage thereon for about $2,500.

At the first sale in May, 1921, Charles Jones bid $2,000 for the property, subject to the first mortgage, which amounted at that time to about $2,000. Sloan, after that time, paid some taxes on the land, which increased his lien, including interest, to about $2,500, in September, 1922. Between the sales in May, 1921, and September, 1922, a barn, worth about $500, situated on the place, had been burned.

After a careful reading of the testimony we are unable to say the chancellor abused his discretion in refusing to set the sale aside. The first sale had been set aside in order to give F. E. Williams an opportunity to redeem the land. We think F. E. Williams was the real purchaser at the second sale. He went to the sale for the purpose of buying in the land. He should have been prepared to make a good note for the purchase money. He was not, but was given thirty minutes in which to do so after the sale. The chancellor found that he did not return with a good and sufficient note within the time accorded him. We think the finding of the chancellor in this respect is supported by the weight of the evidence. It is admitted that the note was not signed by any one on that day except the Williams brothers. It was not signed

until the next day by the Mitchells. It is not shown that the Mitchells were solvent. Lane never signed the note. It is a disputed question as to whether he intended to do so. He was not placed upon the witness stand by appellants. Cunningham testified that he did nothing to keep him from signing the note; that he simply stated the facts to him, after which he remarked that he did not intend to sign the note. The fact that the sale was immediately reported to and confirmed by the court in no way injured appellants, as the court heard their motion to set aside the confirmation and sale just as if there had been no confirmation of the sale. The inadequacy of the price bid is not gross. According to the testimony the property was not worth over $5,000, and, including the prior lien, it sold for nearly $4,000. It cannot be said that it sold for a price so inadequate as to shock one's conscience or to amount to a fraud. The Williams were not diligent, and we cannot say the circumstances surrounding the sale, taken in connection with the price for which the property sold, amounted to a fraud upon their rights.

No error appearing, the judgment is affirmed.

DAVIS v. ROAD IMPROVEMENT DISTRICT No. 7.

Opinion delivered January 21, 1924.

1. STATUTES—SPECIAL ACT—THIRTY-DAY NOTICE.—The presumption that the thirty-day notice required by the Constitution (art. 5, § 26) before a bill for a special act can be introduced in the Legislature, was given for the passage of Road Laws 1919, vol. 1, p. 1205, creating a special road district, is conclusive.
2. STATUTES—LEGISLATIVE FINDING AS TO NECESSITY FOR SPECIAL ACT.—The legislative finding, under Const., art. 5, § 25, as to the necessity of passing Road Laws 1919, vol. 1, p. 1205, a special act creating a road district, is conclusive.
3. STATUTES—DESCRIPTION OF ROAD.—In 1 Road Laws 1919, p. 1205, creating a road district, indefinite words describing the road as passing through a certain town "on streets to be selected by the commissioners, to a point near the east quarter corner of section

27," etc., obviously constituted a clerical error not affecting the validity of the district, especially since the act authorized the commissioners to adopt the most favorable route.

4. HIGHWAYS—BASIS OF ASSESSMENT.—A statute creating a road improvement district need not specify a basis for assessment of property, but may leave the ascertainment of a basis to the board of assessors appointed by the commissioners.

5. HIGHWAYS—CORRECTION OF CLERICAL ERRORS.—Where assessments of land in a road improvement district were made by zones, and clerical errors in placing some lands in the wrong zones were corrected before the assessments were extended on the taxbooks, the clerical errors did not invalidate the assessment.

6. HIGHWAYS—VALIDITY OF ORDER ASSESSING TAXES.—Where it did not appear that the installments of taxes levied by the county court for a road improvement district exceeded the benefits, the order was not void on its face, and the remedy for correcting any errors, under 1 Road Laws 1919, p. 1213, § 8, is exclusively by appeal.

7. HIGHWAYS—BUILDING OF LATERALS—MODE OF ASSESSMENT.—Where a statute creating a road improvement district provided for the assessment of benefits and taxation of lands contiguous to certain laterals, the fact that all of the lands were embraced in one assessment list did not invalidate the entire assessment, as the funds arising from the taxes for the laterals could be separated from the taxes for the main line.

8. HIGHWAYS—OBJECTIONS TO MODE OF ASSESSMENT.—The validity of an assessment of benefits in a road improvement district cannot be questioned in equity on the grounds that the assessors adopted an improper system, or made arbitrary and discriminatory assessments, or that the assessments made were confiscatory; the remedy for raising such questions being by appeal.

Appeal from Little River Chancery Court; *A. P. Steel,* special chancellor; affirmed.

E. F. Friedell and *Evans & Evans,* for appellants.

1. The assessment of benefits upon which the taxes in this suit are sought to be collected was filed November 10, 1920, and was an assessment made without notice to the landowners, and without notice given of a time and place when and where the taxpayers could be heard. It is therefore void as in violation of the due process and equal protection clauses of the State and Federal Constitutions. The burden was upon the plaintiff to make out its right to recover by a preponderance of the evi-

dence, and this included a showing by the greater weight of the evidence that due notice of the assessment was given in the manner required by law.

2. The act, No. 292, attempting to create the district, is void because too indefinite and uncertain in the description of the roads to be improved. There is no such thing as an "east quarter corner" of a section of land, and such a description of a terminal point or of a direction point in the road describes nothing.

3. The act is void, because it violates art. 5, § 25, of our State Constitution, since, at the time this act was passed, there was a general law upon our statute books applicable to the subject covered or attempted to be covered by this act. While this court, in *Davis* v. *Gaines,* 48 Ark. 384, appears to hold that the provisions of the Constitution with reference to the enactment of special laws where general laws can be made applicable, and with reference to the passage of local laws without notice, are merely directory and not mandatory, yet, upon review of the authorities in *Booe* v. *Road Improvement District,* 141 Ark. 140, it held that the provision with reference to the enactment of local laws without notice is mandatory and binding upon the Legislature. Under the reasoning in that case, it must be held that the constitutional provision against the enactment of a special law where a general law can be made applicable, is mandatory.

4. The court erred in sustaining the demurrer to the seventh paragraph of the answer setting up, in effect, that a considerable body of land in the district, owned by various church organizations, was intentionally omitted from the assessment of benefits, and intentionally not levied upon for the purpose of making the improvement. Article 2, § 8, State Constitution, and the 5th and 14th Amendments, U. S. Constitution; 69 Ark. 68; 130 Ark. 70.

5. The commissioners failed to comply with § 26 of the act, authorizing the commissioners to build lateral roads, in that they did not make separate assessments of benefits on the lands supposed to be benefited by the proposed lateral roads, but such assessment and the levy of

taxes thereon was made upon one assessment of benefits for improving the two primary roads and the six lateral roads. The assessment and levy were therefore void, being in violation of the due process and equal protection clauses of the State and Federal Constitutions. The only justification for the imposition of special taxation is that special benefits are to be enjoyed. 155 Ark. 309; 86 Ark. 1.

6. The court erred in sustaining the demurrer to the 10th paragraph of the answer, alleging that the act prescribes no definite standard for determining or assessing the benefits. Article 2, § 8, Constitution of Arkansas; 5th amendment U. S. Constitution; 14th amendment, *Id.*; 256 U. S. 658, 65 Law. ed. 1151.

7. The assessment of benefits is discriminatory and void, since, under the zone system adopted, the assessment was not made according to a standard which would probably produce approximately correct general results, nor approximately correct individual results. 256 U. S. 658, 65 L. E. 1141.

Otis Gilleylen, for appellee.

1. The assessment of benefits upon which the taxes are sought to be collected was filed July 18, 1919, and was made the basis of the levy of taxes by the county court on the real property in the district by its order and judgment of September 26, 1919. The so-called assessment insisted on by appellant as having been filed November 10, 1920, was not an assessment, but a copy of the original, wherein certain obvious clerical errors were corrected. The determination of this issue presented a question of fact for the court, and its finding should be sustained. The method provided by the statute for attacking the validity of the assessment is exclusive. It has become final in this case, and collateral attack will not lie, unless the assessment is void on its face. 156 Ark. 226; 155 Ark. 89; 151 Ark. 484; 153 Ark. 85; 144 Ark. 632.

2. On the question of the burden of proof, § 8 of the act 292 provides that the remedy against such levy of taxes shall be by appeal, which must be perfected within

twenty days from the time the levy is made, and that, on such appeal, "the presumption shall be in favor of the legality of the tax." See also § 12 of the act; act No. 223, Acts 1921; act No. 534, Acts 1921, §§ 1, 2, 4. One who complains that an assessment is excessive, confiscatory, etc., has the burden of proof. 145 Ark. 382.

3. The description of the road to be improved, as found in § 1 of the act, contains the starting point, direction points and terminal point. Moreover, § 2 provides that said roads will follow the best route attainable and adhere to the existing roads as near as practicable, and that, if any part of said roads has not been laid out as a public road, it shall be the duty of the county court to lay the same out in accordance with act No. 422, Acts 1911. The description is sufficient. 142 Ark. 52; 147 Ark. 469. A construction invalidating an act should not be adopted, if a construction upholding its validity can be placed upon it not inconsistent with any of its parts. *Wimberly* v. *Road Imp. Dist. No. 7,* 161 Ark. 79.

4. The contention that the act violates art. 5, § 25, of the Constitution is without merit. This court has held that this provision is merely cautionary to the Legislature. 35 Ark. 69; 48 Ark. 370; 80 Ark. 333; 142 Ark. 52, dissenting opinion.

5. The remedy of a property owner whose rights have been infringed upon by the omission of lands from the assessment of benefits, is not to impeach the validity of all of the assessments in the district, but to move for the proper assessment of the omitted lands. 158 Ark. 357.

6. The objection raised that the assessment was invalid because there was no separate assessment of benefits for the purposes of the lateral roads has been determined adversely to appellants' contention, in the case of *Davis* v. *Cook,* 159 Ark. 84.

7. Paragraph 10 of the answer, alleging that the act provides no definite standard for determining benefits, etc., fails to allege any abuse of discretion on the part of the commissioners or assessors. If appellants felt that

their assessments were excessive, they should have availed themselves of the remedy provided in the act.

McCULLOCH, C. J. Appellee is a road improvement district, created by special statute enacted at the regular session of the General Assembly in the year 1919 (vol. 1 Road Acts, 1919, p. 1205), and the commissioners of the district instituted this action in the chancery court of Little River County to enforce payment of delinquent assessments. Appellants, who were owners of lands in the district, appeared and filed an answer, attacking the validity of the statute creating the district as well as the validity of the assessment of benefits. The court sustained a demurrer to some of the paragraphs of the answer, and there was a trial of the issues on other paragraphs, which resulted in a decree in favor of appellee, foreclosing the lien on the lands of appellants for the delinquent assessments. An appeal has been prosecuted in apt time.

The validity of the statute is attacked on the ground that notice of the introduction of the bill was not given as required by the provisions of the Constitution, and also that the enactment was in conflict with the provision of the Constitution that "where a general law can be made applicable, no special law shall be enacted." Constitution of 1874, art. 5, § 25. These questions have been so often decided by this court against the present contention of appellants that it is unnecessary to discuss them at this time. We must treat the questions as settled that a conclusive presumption will be indulged that notice of the introduction of the bill for the statute was given and that the legislative finding as to the propriety and necessity of passing a special law was conclusive. *Booe* v. *Road Improvement District*, 141 Ark. 140.

The validity of the statute is also assailed on the ground that the description of the road to be improved was too uncertain to afford identification. The description is as follows:

"A road beginning on the north side of the railroad, on the western boundary of the county, in section twenty-

six (26), township eleven (11) south, range thirty-three (33) west, and running southeasterly and southerly to the south line of section twelve (12), township twelve (12) south, range thirty-three (33) west; thence easterly and southerly through said town of Rocky Comfort, or Foreman, on streets to be selected by the commissioners, to a point near the east quarter corner of section twenty-seven (27), township twelve (12) south, range thirty-two (32) west, thence southeasterly and easterly to the boundary of the district on the north line of section six (6), township thirteen (13) south, range twenty-nine (29) west."

The contention is that that portion of the description which refers to "a point near the east quarter corner of section twenty-seven" is indefinite, in that there is no point to which it can definitely refer. This is an obvious clerical error, and does not affect the validity of the description. The language in question describes a certain public road, and part of it runs through the town of Foreman (or Rocky Comfort, the other name by which the town is designated), and an error in one of the calls does not lessen the effectiveness of the description as a designation of this road. The statute authorizes the commissioners to adopt the most favorable route through the town, and, even if the description were not otherwise sufficiently definite, the error would be cured by the authority of the commissioners to select a route through the town. This attack on the validity of the statute is therefore unfounded.

It is next contended that the statute is void because it fails to prescribe the standard to be adopted by the assessors in appraising benefits. It is true that the statute does not provide a specific basis for determining benefits, but § 5 merely provides that the commissioners "shall appoint three assessors, who shall proceed to assess the lands within the district, and shall inscribe in a book each tract of land, and shall assess the value of the benefits to accrue to such tract by reason of such improvement." The clear meaning of this provision is

to require the ascertainment of actual benefits to accrue from the improvement, and it is left to the assessors to consider all elements which enter into the question of benefits and to assess according to actual benefits. It is not essential to a law authorizing an assessment that there shall be a special direction as to the basis to be adopted. The lawmakers may specify such basis as a legislative determination that actual benefits will accrue in accordance therewith, but it is not essential that the basis of valuation be specified in the law. It is sufficient merely to provide for an assessment according to actual benefits. Learned counsel for appellants seem to think that the effect of the decision of the Supreme Court of the United States in *Kansas City Southern Ry. Co.* v. *Road District,* 256 U. S. 658, is to hold that the Legislature must specify the basis of the assessment of benefits, but we do not think that the decision in question is an authority to that effect.

The atttack on the validity of the assessments begins with the contention that the list of the assessments sued on was not the basis of the order of the county court levying the taxes, and that no notice was given of the filing of the assessments in accordance with the statute so as to afford the landowners an opportunity to be heard. The facts of the case, as disclosed by the record, are against this contention of appellants. The assessors adopted what is termed the zone system of assessments, and filed the list of assessments, as provided by the statute, with the county clerk on July 18, 1919, and the order of the county court levying the taxes was entered on September 26, 1919, based on the list of assessments filed by the board of commissioners. It appears from the evidence in the case that, before the taxes were actually extended on the taxbooks, it was discovered that there were clerical errors in placing some of the tracts in the wrong zone, and this was corrected, in the extension of the taxes, so as to place them in the zone to which they belonged and to extend the taxes in accordance with the benefits assessed on lands in those zones. Under the

direction of the commissioners, an employee made a copy of the assessment list with the proper corrections thereon as to the zones, and this copy was certified by the commissioners and left with the clerk to be used in the extension of the taxes. The proof shows that the original assessment was the basis of the county court's order in levying the taxes. The validity of the assessments was not affected by the obvious errors, in some instances, of putting certain tracts in the wrong zone, for the assessment itself showed that land a certain distance from the road was to be placed in a certain zone, and this made any error in placing land in the wrong zone an obvious one. In other words, the assessment shows on its face that the benefits on all lands were assessed in accordance with the location in zones, therefore the location of the land determined the amount of appraised benefits.

It is also contended that the order of the court levying the tax on assessments was void because the levy was for an amount in excess of the actual cost of the improvement. Section 8 of the statute provides that the remedy against the levy made by the county court must be by appeal, and we have held that the remedy by appeal is exclusive, unless the assessment is void on its face. *Pierce* v. *Drainage District No. 17,* 155 Ark. 89. It does not appear that the installments of taxes levied by the county court were in excess of the benefits, therefore the order is not void on its face, and the remedy for the correction of errors by appeal is exclusive.

Again, it is contended that the assessment of benefits was void for the reason that there was not a separate assessment for the lateral roads authorized under the statute to be constructed. The statute does provide for the assessment of benefits and taxation thereon for the construction of laterals, but it does not appear that the lands contiguous to the laterals were not separately assessed under the zone system for that purpose. It is true that the lands were all embraced in a single assessment list, but it does not follow, from this mode of assess-

ment, that the funds arising from the taxes could not be separated so as to be devoted to the identical purposes for which they were to be collected under the statute. This same question was raised in the recent case of *Davis* v. *Cook,* 159 Ark. 84, involving the affairs of the same district, and it was decided that the assessments of the laterals were, in effect, separately made. We think that it is the same in the present case. The present proceeding is not one in which the action of the commissioners in the expenditure of funds arises, and there is no attempt to show here that the commissioners have abused their powers in using funds taxed for one part of the improvement to pay for another portion of the improvement. Of course, there is a remedy for any abuse of power, but those questions are not presented here now.

The validity of the assessment is also attacked on the ground that it was improper for the assessors to adopt the zone system; that the assessments were arbitrarily made, without regard to value or condition of the particular tracts of land; that the assessments were confiscatory; and that there was discrimination in omitting from the assessment lists real property owned by certain churches in the district. The answer to all of these contentions is that the statute provides a direct method of attacking the assessments within a limited time, and, unless the assessment list is void on its face, the statutory method for testing the validity is exclusive. Many recent decisions of this court are decisive of the question. *Road Imp. Districts* v. *Crary,* 151 Ark. 484; *Pierce* v. *Drainage District No. 17,* 155 Ark. 89; *House* v. *Road Improvement District,* 158 Ark. 330.

We have decided that the adoption of the zone system is not, on its face, an erroneous basis for assessing benefits. Of course, on a direct attack upon this method of assessment, a landowner has the right to show that the adoption of the system does not afford a proper method of establishing a uniform assessment, but the

attack on this ground must be a direct one, and not collateral, as in the present case. There is nothing on the face of the assessments, in the present case, to show that they are arbitrary or unjust or that all the elements entering into the question of benefits were not considered in adopting this method of assessing.

This disposes of all of the alleged grounds of attack on the validity of the statute and of the assessments of benefits, and, as we have concluded that all of the attacks are unfounded, it follows that the decree must be affirmed, and it is so ordered.

WOOD and HART, JJ., dissent.

GUILD v. WHITLOW.

Opinion delivered January 21, 1924.

1. PHYSICIANS AND SURGEONS—CONDITIONAL CONTRACT FOR COMPENSATION.—A physician may make a contract whereby his right to compensation may be dependent upon his curing the patient by treatment or operation.
2. FRAUDS, STATUTE OF—ORIGINAL UNDERTAKING.—Where a surgeon examined a patient, and thereafter made an agreement with the patient's brother for a fee for operating, the latter's agreement to pay therefor is an original undertaking, and not within the statute of frauds.
3. PHYSICIANS AND SURGEONS—FEE FOR OPERATION—INSTRUCTION.—An instruction that, if defendant was induced to agree to pay plaintiff, a surgeon, a specified amount for an operation in reliance on plaintiff's representation that such sum was a reasonable charge, and if the sum charged was an excessive fee, then defendant would be liable only for a reasonable fee, *held* erroneous; there being no evidence that the representation was fraudulent.
4. PHYSICIANS AND SURGEONS—RECOVERY ON QUANTUM MERUIT.—In case of emergency, where a patient or the person employing a surgeon was laboring under such great excitement or stress of mind that an unconscionable advantage was taken of him, the contract will be set aside on the ground of fraud, and recovery allowed on a *quantum meruit.*
5. PHYSICIANS AND SURGEONS—FRAUD IN CONTRACT.—It cannot be said that a contract for a surgeon's fee was procured by fraud

because he charged more than other surgeons of the same locality charged for similar operations.

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

STATEMENT OF FACTS.

W. A. Guild is a surgeon, and brought this suit against R. H. Whitlow to recover the sum of $1,000, alleged to be the balance due him upon a contract with the defendant for operating upon the latter's sister.

R. H. Whitlow defended the suit on the ground that he had not made the contract sued on, and that the contract he did make with the plaintiff was conditioned upon the operation upon his sister being successful, and that she died as the result of it within a few days. He had already paid the plaintiff $500 of his fee, and he made his answer a cross-complaint to recover this sum from the plaintiff.

Dr. W. A. Guild was the principal witness for himself. According to his testimony, he lives in Des Moines, Iowa, and is a graduate physician and surgeon. He has license to practice in the States of Arkansas, Iowa, and Florida. In February, 1921, while at Hot Springs, Ark., he was called to Rogers, Ark., to see Mrs. Freeman, the sister of R. H. Whitlow, who was at that time in the sanitarium of Dr. Love. He arrived at Rogers on the morning of February 24, 1921, and, after consultation with Dr. Love, made an immediate examination of Mrs. Freeman. The defendant then came to the hospital and consulted with the plaintiff about the operation. The plaintiff had an agreement with the defendant about his fee for operating, and the defendant agreed to pay him $1,500 for the operation. Dr. Love was present at the time. Mrs. Freeman was too sick to be consulted about the matter. The plaintiff then operated upon Mrs. Freeman, and was assisted by Dr. Love and two other physicians. After the operation was performed the defendant gave a check to Dr. Love for $500, which was indorsed by Dr. Love to the plaintiff. At the same time

the defendant told the plaintiff that he would see that the balance of the $1,000 was in Des Moines by May 1, and said that the plaintiff need not write to him about the matter. The plaintiff denied that there was any agreement that the operation would be successful, or that his fee was in any way conditioned upon the success of the operation. The plaintiff explained the difficulties of the operation to Mr. Whitlow as best he could. He was informed by Whitlow, and it was an evident fact, that Mrs. Freeman was addicted to the use of morphine. He performed the operation in good faith, under the agreement made with Whitlow that the latter would pay him $1,500 for his services. The testimony of the plaintiff was corroborated by that of Dr. Love and Susan A. Lowdermilk, a nurse, who attended Mrs. Freeman at Dr. Love's sanitarium. Evidence for the plaintiff also showed that the operation was performed in a skillful manner.

R. H. Whitlow was the principal witness for himself. According to his testimony, he went to Texas and brought his sister, Mrs. Mary Freeman, to his home at Rogers, Ark., in January, 1921. Dr. Love was his family physician, and was called to see her. In February, 1921, Mrs. Freeman was carried to the sanitarium of Dr. Love in Rogers. Dr. Love advised the defendant that his sister needed an operation badly, and, owing to his confidence in Dr. Love, the defendant told him that the case was in his hands, as far as he was concerned. The defendant, however, would not consent to an operation until he had taken the matter up with Mrs. Freeman's husband. Dr. Love suggested Dr. Guild as the best man to perform the operation. Dr. Love then sent for Dr. Guild to come to Rogers. After Dr. Guild had arrived and examined Mrs. Freeman, the defendant was sent for. Dr. Guild told him that an operation was necessary, and would cure Mrs. Freeman. Dr. Guild told defendant that the price of his services would be $1,500. The defendant told Dr. Guild that neither he nor Mrs. Free-

man's husband was in a position to pay $1,500. Dr. Guild said that was all right, and that he would perform the operation any way. Dr. Guild told the defendant that the operation would absolutely cure Mrs. Freeman; that he knew that her condition would be easily remedied by the operation, and stated that, within two or three weeks, she would be able to go out driving in an automobile. Dr. Guild told him that $1,500 was a reasonable fee for the operation. The defendant paid $500, upon the reliance of the statements of Dr. Guild in reference to his sister's condition and the success of the operation. In other words, Dr. Guild warranted that the operation would be successful. The defendant was ignorant of what would constitute a reasonable charge for an operation of this kind, and relied upon the statement of Dr. Guild that $1,500 was a reasonable fee. After the operation was over, and at the time the defendant paid Dr. Guild the $500, he told him that, if his sister got well and that the result of the operation was such as Dr. Guild told him it would be, he would see that he got a thousand dollars additional by the first of May.

Several physicians and surgeons testified that $200 or $250 would have been a reasonable fee for an operation of that kind. Mrs. Freeman died, as the result of the operation, in two or three days.

The jury returned a verdict in favor of the defendant, on his cross-complaint, for $250. The case is here on appeal.

Sullins & Ivie, for appellant.

The court erred in giving instruction No. 9 requested by the defendant. Where a valid contract has been made as to the amount of compensation to be paid for medical services, no question as to the actual value of the services can arise. 30 Cyc. 1599; 97 N. Y. Supp. 389; 91 N. W. 322.

Duty & Duty, for appellee.

Ruling not urged or discussed in the brief of counsel will be deemed to have been waived. 108 Ark. 357; 90

Ark. 608 In the absence of an express agreement, a physician or surgeon is entitled to reasonable compensation for his services. 83 Ark. 601. Where an express agreement is made, but it is shown that such contract is obtained by undue influence, or by fraud or imposition, or where it is shown that the compensation is so clearly excessive as to amount to extortion, the courts will protect the party aggrieved and will grant relief. 110 U. S. 42; 84 Ark. 575; 15 Am. Dec. 572; 201 Ill. 86; 23 Kans. 474. Instruction No. 9 was correctly given. 110 U. S. 42.

HART, J., (after stating the facts). The theory of the plaintiff was that he had made an express contract with the defendant whereby the latter agreed to pay him the sum of $1,500 for operating on Mrs. Freeman, the defendant's sister. He seeks to recover the balance due him under the contract.

On the other hand, it was the theory of the defendant that the plaintiff was not entitled to compensation unless the operation was successful and the patient was entirely cured.

Special contracts with physicians or surgeons upon the principle of "no cure, no pay," are generally held valid. They are conditional contracts, and there seems to be no reason why a physician may not enter into a contract whereby his right to compensation may be dependent upon his curing the patient entirely by treatment or by operating upon him. *Jones* v. *King*, 81 Ala. 285; *Mock* v. *Kelly*, 3 Ala. 387; *Hollywood* v. *Reed*, 57 Mich. 234; *Fisk* v. *Townsend*, 7 Yerger (Tenn.) 146; *Smith* v. *Hyde*, 19 Vt. 54, and *Dye* v. *Corbin* (Sup. Ct. of Appeals W. Va.) 53 S. E. 147.

In *Henderson* v. *Hall*, 87 Ark. p. 1, the plaintiff sought to recover for medical services under an express contract to pay a certain sum. The defendants admitted having employed the plaintiff, but denied having agreed to pay him any particular sum. The court held that it was not error to instruct the jury that, if defendant agreed to pay the sum named, they should find for plain-

tiff accordingly; but, if there was no contract for any certain amount, the jury should find for the plaintiff a reasonable compensation for the services rendered.

Thus it will be seen that it is well settled that a physician or surgeon may make an express contract whereby he is to receive a stipulated sum for his services, or he may make a special agreement to cure his patient by an operation or, in case he fails to do so, to receive no pay.

The respective theories of the parties, under the principles of law decided above, were submitted to the jury, in certain instructions given by the court. In this connection it may also be stated that, under the testimony of the plaintiff, the agreement of the defendant was an original undertaking, and not a collateral one within the statute of frauds. In *Cleveland* v. *Maddox*, 152 Ark. 538, the plaintiff testified that defendant employed him to perform a surgical operation on his adult son, and told the plaintiff that he would pay the bill, and it was held that the evidence was sufficient to sustain the finding that defendant's undertaking was an original one.

It is claimed by counsel for the plaintiff that the court gave an instruction which ignored these principles of law. The instruction complained of is No. 9, and reads as follows: "Although you may find that defendant is primarily liable upon the contract sued on, still, if you find and believe, from a preponderance of the evidence, that Whitlow was induced to agree to pay $1,500 for the operation upon Mrs. Freeman in reliance upon the representation of plaintiff that $1,500 was a reasonable charge for such character of surgical services; that defendant believed said representations, and did not himself know whether said charge was reasonable for such services; and you further find that a charge of $1,500 was excessive and exorbitant for such services, then defendant would only be liable for a reasonable fee for the services performed, and, if he has paid more

than you find is a reasonable compensation for such services, then he is entitled to recover any excess paid, as shown by the proof. And, in determining what is a reasonable fee, you will take into consideration the skill and care and expense required and used in the diagnosis of, preparation for and execution of the operation, but you are not authorized to diminish a reasonable fee because of the fact that Mrs. Freeman died following the operation, unless there was a warranty of the result, as explained in these instructions."

We think this assignment of error is well taken. It will be noted that the instruction tells the jury that, although it may find that the defendant is liable upon the contract sued on, still if he agreed to pay $1,500 for the operation upon his sister, in reliance upon the representations of plaintiff that this was a reasonable charge for the operation, and that, if defendant believed this to be true, and did not know whether the charge was reasonable or not, and the jury should further find that $1,500 was an excessive fee, then the defendant would only be liable for a reasonable fee, and would be entitled to recover any excess paid, as shown by the proof. It was error to narrow the inquiry by instructing the jury that the right of the plaintiff to recover under the contract depended upon whether he represented to the defendant that $1,500 was a reasonable fee, and the defendant, in ignorance of what was a reasonable fee, believed the representations to be true. This tended to concentrate the mind of the jury upon a single question and to place too narrow a limit upon the plaintiff's right to recover.

As we have already seen, when the contract was made, no confidential relation existed between the parties, and a contract for the amount of fee to be charged by a surgeon is valid and unobjectionable, and will be enforced, unless there are special circumstances from which it appears that it was induced by fraud or some improper or undue advantage over the patient or the

person employing the surgeon. There may be cases where, from the nature of the transaction and the situation of the parties, fraud and imposition may be inferred from the representations of the surgeon that his fee was reasonable. Such a case would be where there was necessity for an immediate operation and no other surgeon was available. Such a case might also be presented where a party was induced to go to the sanitarium of another and was persuaded that an immediate operation was necessary to save the life of a patient. It may be stated that, in any case of emergency, where the patient or the person making a contract for the patient was laboring under such great excitement or distress of mind that an unconscionable advantage has been taken of him, then the contract will be set aside on the ground of fraud, and recovery for services will only be allowed upon a *quantum meruit*.

Here none of these elements existed. There was no necessity for an immediate operation. No emergency existed. The defendant was at home, and his sister was in a hospital in the same town. If he made the contract testified to by the plaintiff, he did so of his own volition. He did not ask Dr. Love if the fee was reasonable. There was another physician in the city who had attended his sister. He had time to have consulted him about the reasonableness of the fee. He did neither. If he made the contract as testified to by the plaintiff, his only ground for setting it aside on the ground of fraud is that it was unreasonable. This is not sufficient. It cannot be said that the contract was procured by fraud because the plaintiff charged more than other physicians and surgeons would charge for a similar operation in the same city. There must be some mental distress caused by the attending circumstances which would constitute constructive fraud because the party seeking to enforce the contract had taken an unconscionable advantage of one who had the right, under the circumstances, to rely upon his representations that the fee was a reasonable one.

This principle was recognized in the case of *Cotnam* v. *Wisdom,* 83 Ark. 601. In that case a surgeon was called in to attend a person injured in an accident, and, in an effort to save his life, performed an operation on him while he was unconscious. The patient died without regaining consciousness, and the law implied a contract on his part to pay a reasonable compensation to the surgeon.

The same principle would apply to a helpless man, without friends to aid or advise him, who would be induced to make an unconscionable contract with a physician or surgeon in order to save the life of himself or some one near to him.

It follows that the court erred in giving instruction No. 9 to the jury, at the request of the defendant, and for that error the judgment must be reversed, and the cause remanded for a new trial.

TULLIS v. STATE.

Opinion delivered January 21, 1924.

1. HOMICIDE—DEFENSE OF INSANITY—EVIDENCE.—In a prosecution for murder, evidence *held* to sustain a conviction of murder in the second degree, as against plea of insanity.
2. WITNESSES—IMPEACHMENT.—In a prosecution for murder, in which defendant's daughter testified that the deceased had threatened to kill defendant, and, on cross-examination, denied that she had made a statement that defendant was going to kill the deceased with a certain pistol, the admission of testimony that she had made such statement was prejudicially erroneous, as the statement related to a collateral issue.
3. HOMICIDE—REFUSAL OF INSTRUCTION AS TO MANSLAUGHTER.—In a prosecution for murder a requested instruction that, although defendant believed he was in danger of losing his life or receiving great bodily injury at the hands of the deceased, still, if he was negligent in coming to such belief, he should be found guilty of manslaughter, should have been given.

Appeal from Howard Circuit Court; *B. E. Isbell,* Judge; reversed.

James S. Steel and *Steve Carrigan,* for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

HART, J. Elmer Tullis was indicted for murder in the first degree, charged to have been committed by killing Jim Norwood by shooting him with a pistol, in the town of Mineral Springs, Howard County, Ark. He was tried before a jury and convicted of murder in the second degree, his punishment being fixed at fifteen years in the State Penitentiary. To reverse the judgment of conviction against him, the defendant has duly prosecuted an appeal to this court.

According to the evidence adduced by the State, Jim Norwood came into the store of T. F. Dillard, at Mineral Springs, Howard County, Ark., on the afternoon of Saturday, the seventh day of April, 1923, and took a seat on the counter, about the middle of the store. About four o'clock in the afternoon the defendant, Elmer Tullis, came to the back door of the store, and called Jim Norwood out behind the store. In a few minutes after Norwood went out of the back door, the persons in the store heard a gun fire. Then Jim Norwood came running through the store, with Elmer Tullis running after him, about two or three feet behind him. Tullis was snapping his pistol at Norwood. Norwood was crying, "Oh, don't shoot me!" The pistol fired once while they were going through the store, and the shot went into the stairway about the middle of the store. They then ran out of the store, and another shot was fired. This shot struck an old negro who was in the street. Norwood continued running, and ran through another store, and Tullis kept close behind him, snapping his pistol at him. Norwood then fell, and died in fifteen or twenty minutes.

The town marshal heard the shots, and ran to the scene of the killing. Tullis told him that he had shot Jim Norwood. He said that Jim Norwood had got a license to marry his daughter, and that he objected to it.

He said that he demanded the license from Norwood, and, when he did that, Norwood ran his hand in his bosom, and he shot him.

Other witnesses for the State testified that Norwood was running, with his hands up, and that Tullis laughed after he had killed Norwood.

The father of Norwood said that he had had a conversation with Tullis some weeks before the killing, and that Tullis remarked to him that if ever a man tried to marry his daughter he would kill him.

Another witness testified that he had a conversation with Tullis, about three weeks before the killing, and that Tullis told him that, before he would let Jim Norwood marry his daughter, he would kill him, even though he went to the electric chair in fifteen minutes.

In the application for a license to marry Jewell Tullis, Jim Norwood gave his own age as 19 and Jewell Tullis' age as 15 years.

The defendant was a witness for himself. According to his testimony, he had lived in Howard County nearly all of his life, and was a farmer. He had a wife and six children living. Jewell Tullis was his oldest child, and was fourteen years old at the time he shot Jim Norwood. About a month before the defendant shot Norwood he found out that he was courting his daughter. Norwood had been married before, and his wife had been dead something like a year. The defendant was informed that she had died on account of neglect. He objected to Jim Norwood's courting his daughter, and told him that his little girl was too young to keep company with any one. He used all the means in his power to keep Norwood from courting his daughter. Within a week before the killing two persons had told him that Norwood had threatened to kill him if he did not let him marry his daughter. The defendant sent an order to the county clerk, directing him not to issue a marriage license to Jim Norwood and Jewell Tullis. On the day of the killing Norwood passed the house of the

defendant, in a wagon, going to Mineral Springs. The defendant got on the wagon and rode a short distance with Norwood. He told Norwood that he had heard that he was fixing to run away with his daughter and marry her the next day. Norwood denied this, and said that they had never thought about marrying. The defendant told Norwood that his little girl was too young to keep company with any one. Norwood replied that, if the defendant objected to her keeping company with him, he would stop, and never write to her again. The defendant then got off the wagon and went home. A neighbor came by later in the day and told him that Norwood had already got a license to marry his daughter. The defendant then spoke to his daughter about it, and asked her if she was going to marry Jim Norwood the next day. She said "Papa, Jim Norwood said he was going to kill you if I did not marry him, and I don't want to marry him. He pulled a gun out of his pocket and says, 'If you don't marry me I am going to kill your daddy.'" The defendant then hitched a horse to his buggy and went to Mineral Springs. He saw Jim Norwood's team back of Dillard's store, and went into the store and saw Jim Norwood sitting on the counter. He told Norwood that he wanted to talk to him, and asked him to go out back of the store. He told Norwood that he heard that he had bought a license to marry his girl. Norwood replied, "I have not got a license, but I will get you." At the same time Norwood stuck his hand in his bosom like he was going to get his gun, and the defendant said that he did not know what happened from then on. He did not know whether he followed Norwood or not. He remembered nothing more until after the whole transaction was ended, and he found himself up stairs, looking out of a window of a room.

A brother of the defendant and two other witnesses testified that, within a week before the killing, Jim Norwood had told them that he was going to have Jewell Tullis or kill Elmer Tullis. Another witness testified

that, just after the shooting, Tullis snapped his pistol at him because he tried to stop him; that the defendant was jerking, and laughed an unnatural laugh, and appeared to be insane.

Several physicians testified as expert witnesses. It was their opinion that Elmer Tullis was suffering from paranoia and was insane at the time of the killing. He had a delusion that Norwood's first wife had died from neglect, and that his daughter would die in the same way if she married Jim Norwood.

The evidence for the State is sufficient to warrant the verdict of the jury.

The main reliance of counsel for the defendant for a reversal of the judgment is that the trial court erred in admitting the testimony of Beatrice Norwood, to contradict the testimony of Jewell Tullis on a collateral issue. It appears that Jewell Tullis was introduced by the defendant, and testified that she told Jim Norwood that she had decided not to marry him, and that he reached in his pocket and pulled out a gun, saying, "If you don't marry me I will kill Elmer Tullis, your daddy." She told her father about this threat on the day of the killing, before it occurred.

On cross-examination she was asked if she did not show Beatrice Norwood, a sister of Jim Norwood, a pistol hanging on the wall at her father's house, and tell her that it was the pistol with which her father was going to kill Jim Norwood. She denied having told this to Beatrice Norwood.

Beatrice Norwood was called by the State in rebuttal, and, over the objection of the defendant's attorneys, was allowed to testify that Jewell Tullis had told her that a gun which she saw in the house of Elmer Tullis some time before the killing was the gun that Elmer Tullis was going to kill Jim Norwood with, and that she believed that she, Jewell Tullis, would throw it in the well.

We think that this assignment of error is well taken. The general rule is that any evidence is admissible if it

tends to prove the issue or constitutes a link in the chain of proof. This rule excludes all evidence of collateral facts. The reason is that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them.

It was within the discretion of the court to allow the State to ask Jewell Tullis, on cross-examination, if she had not made the statement attributed to her to Beatrice Norwood, for the purpose of affecting her credibility as a witness. The testimony, however, was not evidence of a substantive character tending to establish the guilt of the defendant. His guilt could not be established by statements or declarations made by his daughter when he was not present. The court properly permitted the question to be asked solely for the purpose of testing the credibility of Jewell Tullis. Jewell Tullis answered that she had not made the statements attributed to her, and this should have ended the matter. The court erred in allowing the State to contradict Jewell Tullis by the testimony of Beatrice Norwood, as stated above. A party cannot examine a witness as to collateral matters and then impeach him by proof of contradictory statements. *Hinson* v. *State,* 76 Ark. 366; *Ware* v. *State,* 91 Ark. 555; *Sellers* v. *State,* 93 Ark. 313, and *McAllister* v. *State,* 99 Ark. 604.

The testimony was prejudicial because it may have aroused in the minds of the jury a suspicion or belief that Elmer Tullis had formed the design to kill Jim Norwood, and thereby caused the jury to find the defendant guilty of a higher grade of crime than it otherwise would have done. We cannot know how far the minds of the jurors were prejudiced by the admission of this testimony. Under the authorities just cited, the action of the court in admitting the testimony of Beatrice Norwood constitutes reversible error.

The next assignment of error is that the court should have given instruction No. 19 requested by appellant. The instruction reads as follows:

"You are instructed that, although you may believe that the defendant, at the time he shot deceased, believed he was in danger of losing his life or receiving great bodily injury at the hands of the deceased, still if you should believe, beyond a reasonable doubt, that the defendant was negligent, as explained in these instructions, in coming to such belief, then it would be your duty to find him guilty of manslaughter."

At the outset it may be stated that, even though the court should have given this instruction, or a similar one, at the request of the defendant, the refusal to give it would not constitute reversible error. The reason is that the jury, by its verdict, found the defendant guilty of a higher decree of homicide than manslaughter, and the error could be cured by reducing the punishment to that for manslaughter and sentencing the defendant for that crime. Inasmuch, however, as the judgment of conviction must be reversed for the error in the admission of testimony, as above stated, we call attention to the fact that, in *Brooks* v. *State,* 85 Ark. 376, it was held that it was not error to give an instruction, over the objections of the defendant, in precisely similar language. Therefore the court should have given this instruction, or one of similar import. *Bruder* v. *State,* 110 Ark. 402.

It is claimed by the State that other instructions given by the court cover this point. Without setting out the instructions, we are of the opinion, after examining them, that they do not fully and fairly submit this issue to the jury. Therefore the court should have given the instruction, or one of similar import to the jury.

For the error in admitting the testimony of Beatrice Norwood, as indicated in the opinion, the judgment will be reversed and the cause remanded for a new trial.

BURKHART MANUFACTURING COMPANY v. BERRY.

Opinion delivered January 21, 1924.

1. FRAUDS, STATUTE OF—ORIGINAL UNDERTAKING TO PAY ANOTHER'S DEBT.—A parol promise to pay the debt of another is not within the statute of frauds where it arises from some new and original consideration of benefit or harm moving between the newly contracting parties.
2. BILLS AND NOTES—WRITTEN ACCEPTANCE.—Crawford & Moses' Dig., § 7898, requiring acceptances to be in writing, has reference to executory acceptances where possession of the bill, together with written acceptance thereon, is retained by the owner, and is not applicable where the drawee retained possession of an order which it had promised to pay in order that the drawer might deliver to it lumber which the drawee had promised to turn over to the payee in payment of his account.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

The agreement amounted to nothing more than to pay the debt of another. Such agreements cannot be enforced unless executed in accordance with the statute of frauds. C. & M. Digest, § 4862. Appellant never accepted the order in writing, and is therefore not bound. *Id.* 7898.

D. D. Glover and *D. M. Halbert*, for appellee.

The promise was an original undertaking. 12 Ark. 174. The promise to pay the debt of another is not within the statute when it arises from some new consideration moving between the newly contracting parties. 45 Ark. 67; 64 Ark. 462; 93 Ark. 346. But the promise must be unconditional. 113 Ark. 544.

HUMPHREYS, J. Appellee instituted suit in the circuit court of Hot Spring County against appellant for $143.95. It was alleged in the complaint that F. H. West was indebted to appellee in the sum of $148.95 on open account; that appellant induced him to get a written order on it from West, under promise that it would pay appellee the amount; that he procured the order, which was accepted by appellant, whereupon he balanced the

account against West and charged same to appellant; that he thereafter purchased $5 worth of oats from appellant, leaving a balance due him of $143.95, and interest.

Appellant filed an answer denying all the material allegations in the complaint, and, by way of further defense, pleaded the statute of frauds in bar of the claim.

The cause was submitted to the jury upon the pleadings, evidence and instructions of the court, which resulted in a verdict and consequent judgment in favor of appellee, from which is this appeal.

Appellee and his clerk, Anna Selph, testified, in substance, that Walter Burkhart, vice president of appellant and general manager of its plant near Donaldson, came into appellee's store, and, upon inquiry from appellee, informed him that West was in a position to make some money; that appellee told Burkhart that West owed him a balance on open account of $148.95, which he had promised to pay in lumber, whereupon Burkhart said he would prefer for the matter to be settled through him, and if he would get a written order from West, who was sawing lumber for his company, he would pay it; that, pursuant to the promise, he procured the following order:

"Donaldson, Arkansas, 7/10/1921. Burkhart Manufacturing Company, Donaldson, Arkansas: Please pay to R. T. Berry $148.95, one hundred forty-eight and 95/100, and charge same to me;" that he handed the order to Burkhart, who received and placed same in his pocket; that he then credited the account of West with the sum evidenced by the order, and charged the amount to appellant on his books; that, sixty days thereafter, he asked Burkhart for the money, who refused to pay it, under the claim that his company owed West nothing, either at the time of receiving the order or thereafter.

F. H. West testified that he was indebted to appellee in the amount evidenced by the order, which he had agreed to pay in lumber; that when he gave the order he was under contract with appellant to furnish it most

of the output of his two mills, but that he was also sawing lumber for others; that appellant was indebted to him at and after that time.

Walter Burkhart testified that he took the order for the purpose of sending it to the head office of appellant in St. Louis for payment, on condition that his company was, or should become, indebted to West; that it had a contract at the time with West for the entire output of his mills, but that, during the entire time the mills were in operation, West was indebted to the company. He was corroborated in this statement by appellant's bookkeeper.

Appellant contends for a reversal of the judgment upon two grounds; first, that, if the testimony be viewed in the most favorable light to appellee, the transaction was a collateral undertaking and void because not in writing; and second, because, under § 7898 of Crawford & Moses' Digest, it was not bound by an oral acceptance of the order.

(1) When given its strongest probative effect, the testimony introduced by appellee tended to establish an original undertaking. It tended to show that, in order to obtain possession of lumber which West had agreed to turn over to appellee in payment of his account, it would pay the amount of said account to appellee upon the written order of West. This court is committed to the doctrine that "a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties." *Kurtz* v. *Adams*, 12 Ark. 174; *Chapline* v. *Atkinson & Co.*, 45 Ark. 67; *Gale* v. *Hart*, 64 Ark. 462. The issue of whether the undertaking was an original or a collateral one was submitted to the jury, under instructions under the principle of law announced in the cases cited, and, as the verdict is supported by substantial evidence upon this issue, it must be sustained.

(2). The facts in this case do not bring it within § 7898 of Crawford & Moses' Digest, requiring written

acceptances to be in writing before binding upon the drawee. The undisputed evidence shows that the drawee took and retained possession of this order, and, according to the testimony introduced by appellee, it did so in order to get lumber which West had promised to turn over to appellee in payment of his account. If this was true, the acceptance was executed for a consideration. The statute has reference to executory acceptances where the possession of the bill, together with the written acceptance thereon, is retained by the owner. This issue of fact was submitted to the jury, and, as the verdict is supported by substantial evidence, it must be sustained.

The judgment is therefore affirmed.

WM. R. MOORE DRY GOODS COMPANY v. MULLINIX.

Opinion delivered January 14, 1924.

1. BANKRUPTCY—REPLEVIN BY TRUSTEE—EVIDENCE.—In replevin against the trustee of a bankrupt to recover goods sold to the bankrupt on the ground that the bankrupt's purchase was upon fraudulent representations and with intent to defraud, evidence *held* to sustain verdict for the trustee.
2. BANKRUPTCY—SUIT AGAINST BANKRUPT—DUTY OF TRUSTEE.—A trustee in bankruptcy may exercise his own judgment with reference to defending a suit pending against the bankrupt at the time of the bankruptcy proceedings, and it is not necessarily his duty in such matters to follow the wishes of a majority in number and amount of his creditors.
3. BANKRUPTCY—PENDING REPLEVIN SUIT—EFFECT OF DISCHARGE.—Where a replevin action was pending against a merchant who became bankrupt, and he had given retention bond before his bankruptcy, *held* that the court in the replevin action properly overruled plaintiff's motion for judgment against the bankrupt and his sureties on the retention bond in the action of replevin; it appearing that the defendant had received his discharge.
4. BANKRUPTCY—EFFECT ON PENDING ACTION.—After the intervention of the trustee in bankruptcy in a pending action, it was not incumbent on the bankrupt to answer the complaint, and no judgment by default could be taken against him for failure to answer.

5. APPEAL AND ERROR—INSTRUCTION—SPECIFIC OBJECTION.—Objection to the form of language used in an instruction should be specific.

Appeal from Clay Circuit Court, Western District; *W. W. Bandy,* Judge; affirmed.

F. G. Taylor and *Oliver & Oliver,* for appellant.

The trustee was not a proper party to the suit, and, although judgment was in his favor, this does not affect the suit as to the bankrupt, who failed to plead in the case. The trustee is vested only with the title the bankrupt had. Bankruptcy Acts, 1898, § 72-a. He can only sell such title as he has, which he does not warrant. *Johnson* v. *Baum,* 158 Ark. 441. The rule of *caveat emptor* applies to purchasers at sales by trustees in bankruptcy. 32 Ark. 97; 32 Ark. 32; 73 Ark. 37.

C. T. Bloodworth, for appellee.

A trustee in bankruptcy can make any defense which the bankrupt could have made. Collier on Bankruptcy, 11th ed., pgs. 302-303. Specific objection should have been made by appellant to the instructions about which he complains, and, not having done so, he cannot do so now.

WOOD, J. The William R. Moore Dry Goods Company (hereafter called company) is a corporation of Tennessee engaged in the wholesale dry goods business. It sold to one W. R. Wyse of Peach Orchard, Arkansas, a large amount of merchandise during the fall of 1919. In May previous Wyse made a statement of his financial condition to R. G. Dun & Co., purporting to reflect the condition of his finances as of January 1, 1919. This statement showed that Wyse had total available assets at that time of $14,715, and he enumerated the various items that constituted the total amount of his assets as stated. Among the items was the following: "Cash on hand and in bank, $4,000." The total liabilities were given as $2,250. The statement was made on one of the forms furnished by R. G. Dun & Co., and per its request for a report. The statement contained answers to the questions requested by R. G. Dun & Co., purporting to

give all his personal property and his real estate and the annual amount of his business done, and the names of a few houses from whom he made the largest purchases, and purporting to be a complete statement of his financial condition at that time.

The company instituted this action against Wyse on April 21, 1920, and alleged that it had sold dry goods to Wyse, part of which had been sold by him, and that he had the balance of the goods so sold him on hand, of the value of $800, of which the company alleged it was entitled to the immediate possession; that the possession of these goods had been wrongfully obtained by Wyse, and they were wrongfully detained by him from the company. The complaint contained the necessary allegations in the ordinary suit for replevin. A writ of replevin was issued, describing the goods mentioned in the invoices, which were attached as exhibits to the complaint. The sheriff served the writ on the 22d of April, 1920, and Wyse executed a bond for the retention of the property. Wyse filed a general demurrer to the complaint on November 2, 1922. The record does not show that this demurrer was ever acted upon, and it does not appear that Wyse afterwards filed an answer in the cause. On November 2, 1922, F. C. Mullinix, trustee in bankruptcy, filed a pleading designated as a motion and answer, in which he set up that in May, 1920, Wyse had been duly adjudged bankrupt, and that Mullinix had been duly appointed, and had qualified and acted, as trustee in bankruptcy of Wyse's estate; that the title to the property in controversy vested in Mullinix as the trustee, and that he was the real party in interest. He admitted that the company had sold Wyse the goods described in the invoices attached to the complaint, and alleged that these goods were sold on open account to Wyse, and that the title passed and vested in him under the sale, and that the company had no right, title or interest whatever in the same. He denied all the other material allegations of the complaint.

It was agreed by the parties that Wyse was adjudged a bankrupt in the United States Court for the Jonesboro Division, Eastern District of Arkansas, on April 27, 1920; that he was discharged in bankruptcy by such court in July, 1920; that Mullinix was the trustee, and, as such, he and his successors took possession of the goods in controversy and other property of the bankrupt, and made a sale of the same, and had duly accounted to the bankrupt court for the proceeds thereof, and that Wyse was the purchaser at the bankrupt sale. It was admitted that the price of the goods in controversy was $425.

V. G. Lane testified that he was the credit man of the company in the fall of 1919, when the company received orders from Wyse for merchandise. It had received the financial statement of Wyse made to R. G. Dun & Co., January 1, 1919, and based the credit extended to Wyse on that statement, which was in substance as above referred to. If the statement was false, then the company was defrauded. Witness was unable to state any account that Wyse owed in January, 1919, that he had not paid. Witness did not know whether the list of debts as given in the statement was correct or not. The financial statement was not correct, because the cashier testified that Wyse only had $1,000 in cash when Wyse, in the statement, showed that he had $4,000 in cash. The witness stated that he was acquainted with the condition of the country generally in northeastern Arkansas in 1919, and that those conditions were the best he had ever known, and that general prosperity prevailed until July, 1920.

Wyse was called as a witness for the company, and testified to the effect that he filed the petition in bankruptcy in the year 1920. He had made a report to the United States Government of his income for the year 1919, and had paid that year about $80 as income tax. He had his attorney to write his creditors in the spring of 1920 in an effort to settle with them on a percentage

basis. He didn't write the letters himself, but saw them, and when his creditors talked with him about it he did not tell them that any of the statements in the letters were untrue. The letters contained, among others, the following statement: "Mr. Wyse of Peach Orchard, Arkansas, finds himself in the unfortunate position of having sold his goods on a credit to unreliable persons, trusting to their honesty for his pay, until he has nothing but trust left." That statement was not wholly true. Witness had several accounts he considered good, but, under the conditions, he could not get the money. The letter continues: "He has several thousand dollars in accounts which are not worth ten cents on the dollar." That also was not true. Witness would not have listed them that way. The letter further says: "His liabilities to various creditors totals up close to $15,000." Witness stated that he did not owe quite that much. Witness made the financial statement to Dun & Company mentioned above on May 12, 1919, showing his financial condition as of January 1, 1919. Witness further stated that he did not have his money buried out anywhere. He never kept large sums of money anywhere except at the bank. During 1918, 1919 and 1920 he did not do business with any other bank than the People's Bank of Peach Orchard. In the spring of 1920 witness found himself with a heavy stock of goods on hand, a great deal of which was winter goods, and heavy bills coming due, which he could not meet. He wrote his creditors and offered for them to come and take over his stock and dispose of it and pay his debts. Witness collected and paid on his accounts just as long as he had anything to pay with. The salesman of the company sold witness the goods in controversy at witness' store. He insisted that witness take as much stock as witness would. A lot of the merchandise lost forty or fifty per cent. of the price that obtained in the spring of 1920. Witness did not want to go into bankruptcy, and offered his creditors everything he had, and invited them to examine his stock, his

accounts and his books. If there was any false statement in the report he made to R. G. Dun & Co., he was not aware of it. Evidently he had the amount of money on hand or in the bank at the time he made the report, for he knows that he never made a false statement. When witness made the statement, he knew that people were going to rely on it. Witness supposed that he went to the bank to see how much cash he had, or else he checked up with his deposit book.

B. F. Lewis testified that he was cashier of the People's Bank of Peach Orchard, and was in active charge of the bank. He exhibited the ledger sheets showing the bank account of Wyse January 1, 1919. On December 31, 1918, Wyse's account showed a balance of $1,064.38. On January 2, 1919, it showed a balance of $1,317.17. The largest amount Wyse had to his credit at any time during December, 1918, was $1,697.17, and the largest amount he had to his credit during the year 1919 was on January 30, when it amounted to $1,516.49. It was $1,106.12 in May of that year, and from January to May of that year it never did amount to as much as $4,000. It ran all the way from an overdraft to $1,610 on December 11, 1920. Witness was acquainted in a general way with Wyse's stock. Witness would have estimated that his available assets in May, 1919, at the time he made his report to R. G. Dun & Co., would have been more than he reported. Witness considered that his assets about the first of that year would have amounted to something in the neighborhood of $15,000.

Bloodworth, the attorney for Wyse, testified that, in writing to Wyse's creditors, he made a statement of Wyse's financial embarrassment as his own estimate from an examination of his stock. It looked as though Wyse had articles on hand that had been on hand for years, together with a whole lot of good fresh stock. While Wyse authorized witness to write the letter, the specific statements made in it witness doesn't suppose that Wyse saw until some time afterward, and witness

made them on information that Wyse furnished witness about what his liabilities were.

There was introduced in evidence a restraining order by the referee in bankruptcy, addressed to G. B. Oliver and Oliver & Oliver, which recited: "You are hereby restrained from taking a judgment in the circuit court of the Western District of Clay County, Arkansas, in behalf of Wm. R. Moore Dry Goods Company *v.* W. R. Wyse, bankrupt, which suit in replevin you instituted within four months prior to the filing of the petition in involuntary bankruptcy by above W. R. Wyse." This order was dated November 3, 1920.

There is also in the record a petition by Oliver & Oliver, attorneys for the company, in which they set up that the action was instituted on the 21st day of April, 1920; that a writ of replevin was issued and served by taking certain property from Wyse; that a retaining bond was executed by Wyse, and he retained possession of the property, and that the cause was still pending; that the clerk had dropped the cause from the docket, over the protest of the plaintiff, and praying that the cause be reinstated on the docket. This petition was filed on the 4th of April, 1922.

The court, over the general objection of the company, gave, on its own motion, among others, instructions Nos. 1 and 5. Instruction No. 1 defined the issues between the trustee in bankruptcy and the company, and, in effect, told the jury that the interpleader contended that, after this suit was commenced, Wyse went into bankruptcy and his property was turned over to Mullinix, as trustee in bankruptcy, and all title that Wyse might have had in the property turned over to the trustee passed to the trustee; that the trustee came into the suit as an interpleader, contending that Wyse was the actual owner of the property at the time the writ of replevin was sued out, and that, because of the fact that he went into bankruptcy, Mullinix was appointed trustee, and the title vested in him, and for that reason the title to the goods

at the present time was in the trustee, because the same were turned over to him as such; that these were the issues for the jury to decide.

In instruction No. 5 the court told the jury that they were called upon to pass upon the question of whether or not there was a fraudulent representation, and that, in reaching a conclusion on this proposition, they should take into consideration all the facts and circumstances in proof, after giving the testimony of the witnesses and the circumstances such weight as they thought same were entitled to; that the burden of proof was on the interpleader, and that the court supposed he had the opening. The court also instructed the jury that; if they found that the title to the goods in controversy was in the company, they would return a verdict in its favor; and also to the effect that, if Wyse made false and fraudulent statements of his assets and liabilities, and that the company had access to this statement and relied on it in making its sale to Wyse, then title to the property remained in the company and never vested in Wyse at all. But, on the other hand, if the statement was not fraudulent, but substantially correct, then the verdict should be in favor of the interpleader, Mullinix.

The jury returned a verdict in favor of the interpleader, Mullinix. The company thereupon moved for judgment against Wyse and the sureties on his bond. The court overruled its motion, to which the company excepted. The court then rendered judgment against the company for costs and dismissing its action, from which judgment is this appeal.

1. The appellant's first contention is that, conceding that the appellee, Mullinix, the trustee in bankruptcy, was a proper party to the suit, the verdict nevertheless was contrary to the evidence. The evidence is fully set forth above. It could serve no useful purpose to argue the issue. Our conclusion is that the issue as to whether or not appellee Wyse purchased the goods from the appellant upon fraudulent representations and with

intent to defraud the appellant was purely one of fact. The evidence was sufficient to sustain the verdict.

2. The issue as to whether or not appellee Wyse perpetrated a fraud upon the appellant in the purchase of the goods was submitted to the jury in instructions as favorable to the appellant as it was entitled to ask. *In re Morendo County Mercantile Co.,* D. C. Ala. 29 Amer. B. R. 46, 199 Fed. 447. The verdict of the jury, as we have seen, on that issue had substantial evidence to sustain it, and is therefore conclusive here. It having been determined by the jury, on this issue of fraud, that the purchase of the goods in controversy from the appellant was not fraudulent, and that the title to same was in Wyse at the time his assets were taken over by the trustee in bankruptcy, it follows that the appellee, Mullinix, as trustee in bankruptcy, also had title to the property. In other words, the trustee in bankruptcy was vested with such title in the property as the bankrupt had. National Bankruptcy Act, 1898, § 70. The court therefore correctly instructed the jury that, if they found there was no fraud in the purchase, and that the title to the property passed to Wyse, the bankrupt, they would return a verdict in favor of the appellee, Mullinix. The law is well settled that the trustee could exercise his own judgment with reference to defending a suit against the bankrupt at the time of the bankruptcy proceeding, and it is not necessarily his duty in such matters to follow the wishes of a majority in number and amount of the creditors. I Collier on Bankruptcy, p. 420, note 115. It may be said in this connection that the record does not show that the appellant objected to the trustee becoming a party to the action. Having become such party, it was his province and duty to "plead to the jurisdiction or make any defense which the bankrupt could have made, or even any defense which any creditor could have asserted affirmatively. Once the trustee is a party to such suit, he is bound by the judgment therein." I Collier on Bankruptcy, 13th ed., p. 421, note 121, 122, 123.

The crux of this lawsuit was the issue of fraud, which issue, as we have seen, was submitted under correct instructions and determined by the jury against the appellant, upon legally sufficient evidence.

3. On the issues raised by the intervention of the trustee and the answer to appellant's complaint, the court correctly directed the jury that, if they found that there was no fraud on the part of Wyse in the purchase of the goods in controversy, the verdict should be in favor of Mullinix, the trustee. The agreed statement of facts showed that Wyse had been adjudged a bankrupt and had received his discharge. Therefore the court properly overruled appellant's motion for a judgment in favor of appellant against Wyse and his sureties on the retention bond in the action of replevin. After the intervention of the trustee in bankruptcy it was not incumbent upon the appellee Wyse to answer appellant's complaint, and no judgment by default could be taken against him for failing to answer.

4. We find no prejudicial error to appellant in the ruling of the court in giving instruction No. 5. The concluding paragraph of this instruction is as follows: "The burden of proof is on the interpleader, and he has the opening, I suppose." Instruction No. 5 embraced two paragraphs, and certainly no objection could be raised to the first. That part of the language of the second paragraph which places the burden of proof upon the interpleader certainly was not prejudicial to the appellant, and if learned counsel conceived that appellant was prejudiced by the language, which told the jury that "the interpleader has the opening, I suppose," they should have drawn the attention of the trial court to this language by a specific objection. A general objection was not sufficient for that purpose.

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

MINOR v. STATE.

Opinion delivered January 21, 1924.

1. INDICTMENT AND INFORMATION—FAILURE TO NUMBER INDICTMENT.—Failure to number an indictment did not render it void.
2. CRIMINAL LAW—FAILURE TO INDORSE NAMES OF WITNESSES ON INDICTMENT.—Failure to indorse the names of witnesses on an indictment did not invalidate it or afford grounds for quashing it.
3. CRIMINAL LAW—CHANGE OF VENUE—RECOGNIZANCE OF ACCUSED.—Crawford & Moses' Dig., § 3091, requiring the accused, on a change of venue being granted, to enter into a recognizance for his appearance, is directory, so that the case will not be reversed because the transcript fails to show that accused had executed recognizance to appear in the circuit court of the county to which the venue was changed.
4. CRIMINAL LAW—JUDICIAL KNOWLEDGE.—The court judicially knows that Van Buren is in Crawford County.
5. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE.—Evidence *held* to support a finding that the illegal sales of intoxicating liquor were made in a town in the county of the venue.
6. CRIMINAL LAW—TESTIMONY BEFORE GRAND JURY.—Proof of what a witness testified before the grand jury is inadmissible as substantive testimony, but is admissible to contradict testimony given by the witness at the trial.
7. CRIMINAL LAW—HARMLESS ERROR.—The admission of incompetent testimony was harmless where accused admitted the truth of the fact as testified.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran*, Judge; affirmed.

W. B. Rhyne, W. H. Neal and *C. M. Wofford*, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie*, Assistants, for appellee.

SMITH, J. Appellant was indicted in the Crawford Circuit Court for selling intoxicating liquors, and, upon his petition, the venue was changed to the Ozark District of Franklin County. When the case was there called for trial, appellant moved to quash the transcript, as being incomplete and insufficient in the following particulars. The indictment, as copied in the transcript, was not num-

bered, nor were the names of the witnesses indorsed on the back thereof; and there was nothing in the transcript to show that appellant, or any of the witnesses, had been recognized to appear in the Ozark District of the Franklin Circuit Court.

The trial court overruled the motion to quash, and properly so. The original of the indictment may not have been numbered, but this would not have rendered it void. The failure to indorse the names of the witnesses on the indictment did not invalidate it. Appellant had the right to demand that the names of the witnesses be furnished him, and these names should have been indorsed on the original indictment, and should, of course, have been copied into the transcript as a part of the indictment. But this failure afforded no ground to quash the proceedings. *Cole* v. *State,* 156 Ark. 9; *Snow* v. *State,* 140 Ark. 7; *Thomas* v. *State,* 161 Ark. 644.

The statute (§ 3091, C. & M. Digest) provides that, when the order changing the venue is made, the defendant, if not in custody, shall, if the offense be bailable, enter into recognizance, with sufficient security, for his appearance in the court to which the cause is to be removed, on the first day of the next term thereof, and not depart such court without leave. This section has been held to be directory merely. *Beasley* v. *State,* 53 Ark. 67; *Havis* v. *State,* 62 Ark. 500. The statutory provision in regard to the recognizance of the witnesses is also directory.

It is insisted that the venue was not proved. The testimony was to the effect that appellant lived in Van Buren, and ran a restaurant and a cold drink stand in that city, and the sheriff and the chief of police testified that they raided appellant's restaurant, where, it is admitted, the drinks alleged to have been intoxicating were sold. We think this testimony supports the finding that the sales were made in Van Buren; and we judicially know that Van Buren is in Crawford County. *Hemmingway* v. *State,* 161 Ark. 139; *Bonner* v. *Jackson,* 158 Ark. 526; *Wells* v. *State,* 151 Ark. 221; *Guerin* v. *State,* 150 Ark. 295.

It is insisted that the testimony is not sufficient to support the verdict. It may be summarized as follows: F. O. Cole testified that he went into appellant's restaurant and ordered a drink. He did not specify what he wanted, nor did he ask its price. A hot drink, with a fiery taste, was served in a small glass, for which he paid fifty cents. He did not know that what he bought was whiskey, and did not buy it for whiskey. The evasive answers of the witness made it quite obvious that he was endeavoring to give as little information on the subject as possible, and he was ordered by the court to answer the questions asked. He was then asked if he had not testified before the grand jury that he had bought a drink of whiskey from appellant, and he answered that "it could have been that way."

He was asked: "Did you not state to the grand jury, and was it not written down and signed by you, that you and R. A. Hawkins were in there, and each bought a drink of whiskey?" The witness answered: "I meant to say each of us bought a drink." He was asked: "You said that is your statement?" and answered: "Yes sir." Witness was then shown the statement, and asked if it was his, and he answered that it was, and he was then asked if he had told the truth, and he answered that he had.

Upon his cross-examination he was asked: "Regardless of what you swore there (before the grand jury), can you tell this jury that it was not liquor?" and he answered, "It could have been, but I don't think it was."

He admitted that the statement which he had made to the grand jury was reduced to writing and was read to and signed by him.

A physician testified that he bought a drink from appellant, which tasted like "jake," and that "jake" is intoxicating. This witness was asked if he had not testified before the grand jury that he bought, in 1922, from appellant, a drink of whiskey. He admitted that he had so testified, and that the statement was true.

A witness, who had been chief of police, testified that he and the sheriff of the county raided appellant's restaurant, and that they saw appellant pouring some corn liquor in a sink in the rear of the restaurant.

The sheriff of the county testified about the raid, and stated that he saw appellant pouring some corn whiskey in the sink.

Appellant denied that he had sold any intoxicating liquors, and testified that the drink which he sold was called Irish malt, a quantity of which he kept on hand at all times for sale; and a chemist testified that he had made an analysis of a bottle of this malt, and that it contained no alcohol. He did not know whether the drink he analyzed was the same kind of liquor which appellant had sold Cole and the physician.

Dow McGehee was called by the State as a witness, and he testified that he was the clerk of the grand jury which returned the indictment against appellant, and he identified the minutes of the grand jury about which Cole had been asked, and he stated that he reduced the testimony of the different witnesses to writing, and that the statements were read to and signed by the witnesses, and that the statement of Cole had been read to and signed by Cole.

If the testimony of McGehee was inadmissible, we do not think that any prejudice resulted from its admission.

In *Davidson* v. *State*, 108 Ark. 191, a witness for the defendant was asked if he had not given certain testimony before the grand jury which was in conflict with the testimony he had just given at the trial, and he answered that he had, but that he was mistaken when he testified before the grand jury. Defendant's counsel asked the court to let this statement go to the jury for the purpose only of contradicting the witness, and not as substantive testimony of the facts related in the contradictory statement. The court overruled this request, and told the jury they might consider the testimony for all purposes. We held this ruling was erroneous, as the testimony was not admissible for any purpose except

to contradict the witness; but we also held that, while there was error, there was no prejudice, for the reason that the evidence at the trial was undisputed on that question.

It is not proper to admit, as substantive testimony at the trial, evidence heard before the grand jury. In other words, one cannot be convicted on evidence heard only by the grand jury, such evidence being admissible for the purpose only of contradicting the conflicting testimony given by the witness at the trial. *McElroy* v. *State,* 100 Ark. 344; *McElroy* v. *State,* 106 Ark. 131; *Davidson* v. *State,* 108 Ark. 191; *Carlton* v. *State,* 109 Ark. 516; *Derrick* v. *State,* 92 Ark. 237.

Here the testimony of McGehee was not prejudicial, because the witness Cole admitted the truth of all the facts about which McGehee testified.

The testimony is sufficient to support the verdict, and, as no error appears, the judgment must be affirmed.

NAILL v. KIRBY.

Opinion delivered January 28, 1924.

1. QUIETING TITLE—TITLES FROM COMMON SOURCE.—Where both parties to a suit to quiet title claim to hold under the same individual, it is unnecessary to go behind the latter's title.
2. VENDOR AND PURCHASER—INNOCENT PURCHASER.—One purchasing land with knowledge that the land is in possession of a neighbor claiming title is not an innocent purchaser.
3. DEEDS—SIGNATURE BY MARK—WITNESS.—A deed signed by the grantors' marks and acknowledged by them before a justice of the peace is not invalid because their marks were not attested as provided by statute, the method prescribed thereby not being exclusive, but only establishing *prima facie* the genuineness of the signature.
4. WITNESSES—IMPEACHMENT.—In a suit to quiet title, testimony of plaintiff's attorney that a justice of the peace, before whom a deed to one of defendant's predecessors in title was acknowledged, admitted to him that it was executed for money borrowed from the grantee or in aid of a settlement with him, was admis-

sible to impeach the credibility of such witness, but not as substantive evidence that it was intended as a mortgage or in settlement of any transaction between the grantor and grantee.

5. MORTGAGES—EFFECT OF ABSOLUTE DEED.—A deed absolute on its face can be shown to have been intended as a mortgage only by clear, unequivocal and convincing evidence.

6. DEEDS—DEED NOT SIGNED BY GRANTORS.—While a deed not signed by the grantors named therein conveys no title, the grantee acquires such an equitable interest as will protect the possession of one claiming under a deed from such grantee's heirs as against a subsequent purchaser from the latter, in view of the facts that the grantor, a negro lawyer, on whose advice the legal title had been conveyed to him for reconveyance to grantee, wrote the deed to the latter, and neither his grantors nor his grantee, who were also negroes, could read or write, the grantors and grantee being dead, and the latter's widow and heirs making no claim to the land.

7. EJECTMENT—EQUITABLE TITLE.—One holding land under an equitable title cannot be ejected therefrom.

8. ESTOPPEL—FAILURE OF HOLDER OF LEGAL TITLE TO MAKE DEFENSE.—The fact that the heirs of the holder of the legal title to land made no defense did not estop the owner of the equitable title in possession from setting up his title in defense to a suit by another to quiet title.

9. VENDOR AND PURCHASER—POSSESSION AS NOTICE OF TITLE.—One who acquires land while it is in the possession of another takes with notice of the latter's interest in the land.

Appeal from Prairie Chancery Court, Southern District; *Wilson W. Sharpe,* special chancellor; affirmed.

STATEMENT OF FACTS.

G. W. Naill and Mary Price brought this suit in equity against John Kirby and others to quiet the title of plaintiff, G. W. Naill, in the land described in the complaint, and to have a deed from James Hill and wife to G. W. Walker treated as a mortgage which has been fully satisfied.

The defendant, John Kirby, defended the suit on the ground that he had title to the land in controversy. The other defendants made no defense to the action.

It appears from the record that G. W. Naill and John Kirby, both of whom claim title to the land in contro-

versy, trace their title to a common source. Each claims title by mesne conveyances from James Hill, who, it is conceded, at one time owned the land and was in possession of it. No attempt is made by either party to go behind the title of James Hill or to show that his title to the land was not good. It appears from the record that James Hill and Phœbe Hill, his wife, had title to the land and lived on it.

The plaintiff, G. W. Naill, deraigned title as follows: In the record there is what purports to be a deed to the land in controversy, comprising 120 acres, from James Hill, a widower, to Mary Price. The consideration recited is $100, and the date of the deed is January 25, 1912. The signature is as follows: "James (his x mark) Hill, L. G." The deed purports to have been acknowledged before a notary public by James Hill on the 14th day of February, 1912. It was filed for record on the 10th day of April, 1912, and was duly recorded.

On the 19th day of October, 1914, Fred Harris executed a quitclaim deed to the land in controversy to Mary Price for the consideration of $1. The signature of Fred Harris was by his mark, and was duly attested by two witnesses. The deed was acknowledged by Fred Harris before a notary public on the 9th day of October, 1914, and filed for record on October 20, 1914. On September 20, 1918, Mary Price conveyed the land in controversy to G. W. Naill for the consideration of $300, and the deed was duly acknowledged and filed for record on the same day.

The defendant, John Kirby, deraigned title as follows: There is in the record what purports to be a deed to the land in controversy from James Hill and Phœbe Hill to G. W. Walker for the consideration of $600. The deed purports to be a warranty deed with relinquishment of dower, in common form. The signatures to the deed are as follows: "James (his x mark) Hill (seal), Phœbe (her x mark) Hill (seal)." There does not appear any attesting witnesses to the signatures. The certificate of acknowledgment recites that James Hill was

the grantor in the deed, and acknowledged it before J. D. Hall, a justice of the peace. The certificate of acknowledgment also recites that Phœbe Hill was the wife of James Hill, and signed her relinquishment of dower and homestead in said land under the laws of the State of Arkansas. The deed was filed for record on the 8th day of June, 1895, and was duly recorded.

There also appears in the record what purports to be a deed to the same land from G. W. Walker and Martha T. Walker, his wife, to Phœbe Hill, for the consideration of $625. This deed is dated May 9, 1895, and the signatures to it are the following: "James (his x mark) Hill and Phœbe (her x mark) Hill." This deed purports to have been acknowledged before J. D. Hall, justice of the peace, on May 9, 1895. The certificate of acknowledgment recites that G. W. Walker is the grantor in the deed, and stated that he had executed the same for the considerations and purposes mentioned therein. The certificate of acknowledgment also recites that Martha T. Walker, the wife of G. W. Walker, to the officer well known, in the absence of her husband appeared before him and signed and executed her relinquishment of dower and homestead to said lands. This deed was filed for record on the 13th day of May, 1895, and was duly recorded.

There also appears in the record a quitclaim deed to said land from Alice Hurdle, Lafayette Harris and other persons named therein to John Kirby. The deed is dated on the ..... day of September, 1913, and is signed by the grantors. The consideration recited in the deed is $1. The grantors duly acknowledged the deed before a notary public; and it was filed for record on the 21st day of March, 1918.

Mary Price was a witness for the plaintiffs. According to her testimony, James Hill was her father, and he could neither read nor write. She was living in Little Rock, Ark., when he deeded the land to her. At the time her father executed the deed to her, the land had been rented to G. W. Naill, and he lived on it with Pearl

Bundy, a daughter of the witness. Subsequently the husband of witness procured a deed to the land to her from Fred Harris, a brother of Phœbe Hill. Phœbe Hill was the stepmother of the witness, and was seventy-five years old when she died. James Hill died in 1912, soon after he executed the deed to the witness. Phœbe Hill had died before the deed from James Hill to Mary Price was executed. The witness sold the land to G. W. Naill for $400, and he paid her for it.

G. W. Naill was a witness for himself. He said that he paid Mary Price for the land at the time she executed the deed to him. He believed that she had title to the land when he bought it. He did not know anything about the purported deed from G. W. Walker and wife to Phœbe Hill, which was signed by James Hill and Phœbe Hill, when he purchased the land. He rented the land from Mary Price two years before he rented it from the defendant, Kirby. This was in 1914 and 1915. He rented the land from the defendant Kirby in 1917. On cross-examination he stated that he did not know who occupied the house on the land in 1913, 1914 and 1915, but that John Kirby occupied it in 1916, 1917, and 1918. He knew that the defendant Kirby was in possession of the land when he bought it from Mary Price. Fannie Nichols occupied one room of the house after James Hill died. She was in that room when the witness rented the land. John Kirby lived right in front of the house where the witness lived during the years 1916 and 1917. The witness paid Kirby $40 rent the first year and $30 the next. The witness refused to pay the rent to Kirby until he received a guaranty that Mary Price would not again collect the rent from him. As soon as the witness purchased the land from Mary Price in 1918, he brought suit for it.

Fannie Nichols was a witness for the defendant Kirby. According to her testimony, she lived on the place three years after James Hill died. John Kirby permitted her to live there, and claimed the place while she lived there. Mrs. G. W. Naill worked the place a part

of the time. John Kirby moved in a house on the place when she moved out, and has lived there ever since.

J. D. Hall was also a witness for the defendant, Kirby. According to his testimony, he was a justice of the peace on the 9th day of May, 1895, and took the acknowledgment to two deeds; one from James Hill and wife to G. W. Walker, and one from G. W. Walker and wife to Phœbe Hill. These deeds were prepared by G. W. Walker, a colored lawyer, who occupied the same office with the witness. James and Phœbe Hill were present and acknowledged the first deed. James Hill was an ignorant colored man, and stated that he had so much trouble with his children that he wanted to fix the land so that he would not lose it, and wanted to give the land to his wife. He asked Walker to fix the deed that way. Walker told him that it would be better to deed the land to him, that he and his wife would deed it to Phœbe Hill. The witness took the acknowledgment of James Hill and wife to the deed to Walker, and also took the acknowledgment of Walker and wife to Phœbe Hill. The witness did not understand why James Hill and Phœbe Hill signed both deeds. It must have been an oversight. There was nothing said about the deed being intended as a mortgage, and Walker had no money to lend. Both deeds were written and acknowledged at the same time.

According to the testimony of Jim Bundy, he married a daughter of Mary Price. Mary Price did not live on the land in question after James Hill died. James Hill left the place in November or December, 1911, and Mary Price went with him. G. W. Naill worked the land for several years after James Hill died. Fannie Nichols lived on the place four years after James Hill died, and left the place in 1916. John Kirby moved in when she left the place, and has lived there ever since.

According to the testimony of John Kirby, Phœbe Hill was his aunt. She had no children or parents at the time she died. She had one brother, Fred Harris, also known as Lafayette Harris, and one sister, and his wife, Eliza Kirby. The reason the heirs of Phœbe Hill did not

claim the land when she died was because they did not want to disturb James Hill in the possession of it as long as he lived. After James Hill died the witness bought the other heirs out and divided the land, giving Pearl Bundy sixty acres. Kirby rented the land to G. W. Naill in 1914 and 1916. He received a deed to the land from the other heirs of Phœbe Hill in 1913, and in 1914 took possession of the land by moving Fannie Nichols on the land to hold possession of it for him, and by renting the land to G. W. Naill. G. W. Walker and Phœbe Hill died some time before James Hill died. The mother of John Kirby inherited the land from Phœbe Hill.

In rebuttal it was shown by the attorney of the plaintiffs that he asked J. D. Hall about the circumstances under which he took the acknowledgment to the deed purporting to be from Walker and wife to Phœbe Hill, signed by James Hill, and Hall told him that the deed was given either for money or security in aid of a son of James Hill who was in trouble. That the deed was in settlement of a matter between Walker and James Hill.

The court made a specific finding of fact in favor of the defendant Kirby. He found that G. W. Naill purchased the land with full knowledge that the defendant, Kirby, was in possession of the land and was claiming it to be his own.

The court further found that the plaintiff, Naill, was not an innocent purchaser of the land, and that his bill was without equity, and it was thereupon decreed that the complaint be dismissed for want of equity.

The case is here on appeal.

Emmet Vaughan, for appellant.

The purported deed from Walker and wife to Phœbe Hill must fall for want of signatures by the grantors to the deed. Their appearance before a justice of the peace and making acknowledgment to the execution of the deed was not sufficient to supply the defect caused by the failure to sign it. C. & M. Digest, § 1515, 4862; 13 Cyc. 554, and note 34; 1 Ark. 108, the syllabus to which case is misleading; 116 Pac. 837; 44 Conn. 321; (103 Ky.)

46 S. W. 22; 61 Miss. 423; 107 Pa. 395; 25 W. Va. 127; 36 Ohio 584. A purchaser of land or any interest therein is not charged with constructive notice of any fact which is not connected with the course of his title. 103 Ark. 425; C. & M. Digest, § 1536. A deed for land situated in the Southern District of Prairie County, recorded in the Northern District, after the passage of the act creating the two districts, would not be notice to a subsequent purchaser.

Cooper Thweatt and *W. A. Leach,* for appellees.

1. Kirby's answer traverses every material allegation in the complaint, and that answer, even if the widow and heirs at law of Walker were asserting some right or interest in the land in controversy, would inure to their benefit as co-defendants with Kirby. 86 Ark. 304; 71 Ark. 1; 77 Ark. 103; *Id.* 299; 102 Ind. 301.

2. Parol testimony may be offered to show that a deed, absolute in form, was intended as a mortgage, but such evidence must be clear, unequivocal and convincing. 193 S. W. 264; 110 Ark. 632; 88 Ark. 336; *Id.* 299; 75 Ark. 551. In ascertaining the true intent of the parties, the court will not be limited to the terms of the written instrument, but will consider all the circumstances connected with it, the circumstances of the parties, the property conveyed, its value, the price paid, defeasances, verbal or written, as well as the acts and declarations of the parties. 13 Ark. 112. The test as to whether or not the instrument is a mortgage is the existence of an indebtedness. 103 Ark. 484.

3. As affecting the validity of the Walker deed to Phœbe Hill for want of signature, the cases cited by appellant, with the possible exception of one or two, are based on statutes peculiar to those States. Signature is not essential unless required by statute. At the time *Jeffrey* v. *Underwood,* 1 Ark. 108, cited by appellant, was decided, there was no statute requiring the grantor's name to be signed to a deed, sealing and delivery being all that was necessary. Our statute requires only that

the deed be executed, and that is nothing more than requiring some act on the part of the grantor evidencing his intention to give validity to the instrument. C. & M. Digest, §§ 1515, 1522, 1524; *Id.*, § 4862; Brewster on Conveyances, 233; 43 Am. Dec. 106; Century Dict., "Signature;" 33 Am. St. Rep. 805; 8 R. C. L. 938, § 15; 36 Am. Rep. 193; 36 Am. Rep. 418; 41 Am. Dec. 755. See also 36 Cyc. 449; 25 R. C. L. 667, § 303. It appears that Walker and his wife both appeared before a justice of the peace and acknowledged the execution of the deed. The recitals in the certificate of acknowledgment are conclusive, in the absence of fraud or duress, of the facts therein stated. 96 Ark. 564. And the burden of proof rests on him who attacks the certificate of acknowledgment showing such fraud or duress. 38 Ark. 77; 37 Ark. 145.

4. Appellee's possession was notice to the world of his claims. 33 Ark. 465; 76 Ark. 27; 66 Ark. 167; 55 Ark. 318; 54 Ark. 499; 47 Ark. 533; 41 Ark. 169; 82 Ark. 455; 39 Cyc. 1759.

HART, J., (after stating the facts). Both parties claim title under mesne conveyances from James Hill. Hence it is not necessary to go back of his title; for neither party would be allowed the inconsistency of claiming under and attacking the same title. The plaintiff, G. W. Naill, claims that he is entitled to maintain this action upon either of two theories. The first is that he has the paper title to the land in controversy, and the second is that, even if it be decreed that the defendant has the legal title to the land, or any equitable interest therein, he is an innocent purchaser for value.

Taking up these propositions in their inverse order, but little need be said to show that the plaintiff is not an innocent purchaser for value. Practically the undisputed facts are that the defendant, Kirby, was in the possession of the land in controversy at the time Mary Price conveyed it to G. W. Naill. Such possession was equivalent to actual notice of the title, rights or equities of Kirby. *Thalheimer* v. *Lockert*, 76 Ark. 25, and *Craw-*

ley v. *Neal*, 152 Ark. 232. Besides, Naill admits that he knew that Kirby was in possession of the land and claiming title to it at the time he purchased it. They lived in the same neighborhood, and an investigation of the source of Kirby's title would have led to a knowledge of the alleged defects in the title of Naill. The latter is bound by a knowledge of the defects in his title which an investigation would have disclosed. *Krow & Neumann* v. *Bernard*, 152 Ark. 99. It necessarily follows that the plaintiff was not an innocent purchaser of the land in controversy.

This brings us to a consideration of his title. The plaintiff, Naill, claims title by a warranty deed from Mary Price to himself and by a warranty deed from James Hill to her of the date of January 25, 1912.

The defendant claims that James Hill and Phœbe Hill, his wife, conveyed the land to G. W. Walker on the 29th day of December, 1894; that G. W. Walker and his wife conveyed the land to Phœbe Hill; that Phœbe Hill died owning the land, and that her heirs at law then conveyed it to the defendant, Kirby.

As we have already seen, the deed from James Hill to Mary Price was executed on the 25th day of January, 1912, and was duly filed for record on the 10th day of April, 1912. The deed from Mary Price to G. W. Naill was executed on the 20th day of September, 1918, and filed for record on the same day. The defendant received a deed from the heirs at law of Phœbe Hill, deceased, in September, 1913, and the undisputed facts show that he was in possession of the land at the time the plaintiff obtained his deed from Mary Price.

But it is contended by counsel for the plaintiff that the title to the land never passed into Phœbe Hill. It is first insisted that the deed from James Hill and Phœbe Hill of the date of December 29, 1894, conveying the land to G. W. Walker, is void and did not pass the title out of James Hill. This deed was signed by James Hill and Phœbe Hill, his wife, by marks, and acknowledged before J. D. Hall, a justice of the peace. The signatures

of James Hill and Phœbe Hill by marks do not appear to have been attested as provided by our statute. James Hill and Phœbe Hill could not read and write. The method provided by statute for attesting the signature of a person who cannot read or write is not exclusive, but only establishes *prima facie* the genuineness of the signature without other proof of signing. The grantors in this deed appeared before a justice of the peace and acknowledged the execution of the deed. Their signatures were signed to the deed, and, even if unauthorized, they were ratified by the grantors appearing before the justice of the peace and acknowledging the execution of the deed. *Ward* v. *Stark*, 91 Ark. 268. Therefore the deed of James Hill and Phœbe Hill, his wife, to G. W. Walker passed the title out of James Hill, unless it be treated as a mortgage, as contended by counsel for the plaintiff.

Counsel for the plaintiff testified that J. D. Hall, the justice of the peace before whom the deed was acknowledged, had admitted to him that the deed was executed either for money borrowed from Walker or security in aid of the son of James Hill, and that the deed was given in aid of a settlement between Hill and Walker.

At the trial J. D. Hall testified that the deed was executed pursuant to a plan whereby James Hill intended to convey the land to Phœbe Hill, his wife. The statement of Hall to the counsel of the plaintiff is not affirmative proof that the deed was intended as a mortgage or in settlement of any transaction between Hill and Walker. At most the testimony of the attorney for the plaintiff affected the credibility of Hall as a witness, and Hall's statements to him could in no manner prove as substantive evidence the effect of the transaction between Hill and Walker.

It is well settled in this State that a deed absolute on its face can only be shown that it was intended to be a mortgage by clear, unequivocal and convincing evidence. *Wimberly* v. *Scroggin,* 128 Ark. 67, and cases cited. We are therefore of the opinion that the deed from James

Hill and Phœbe Hill to G. W. Walker divested the title to the land out of James Hill.

It is next contended by counsel for the plaintiff that the deed of May 9, 1895, in which G. W. Walker and Martha T. Walker are named as the grantors and Phœbe Hill as the grantee, which was not signed by G. W. Walker and wife, but was signed by James Hill and Phœbe Hill, did not convey the legal title to Phœbe Hill. In this contention we think counsel for the plaintiff is correct, especially when we consider the chapters of our Digest on Conveyances and the Statute of Frauds. It has been frequently said that the clear weight of authority is to the effect that a deed which is not signed by the person named therein as the grantor is not effective to convey the interest of the person named as grantor. The reason is that a conveyance, to be effective, must contain not only the names of the parties, but also words indicative of an intent to transfer an interest in the described property from one to another. *Agricultural Bank of Mississippi* v. *Rice*, 4 How. (U. S.) 225; *Cordano* v. *Wright* (Cal.), 115 Pac. 227; Ann. Cas. 1912-C, 1044, and cases cited, and note to Ann. Cas. 1916-E at p. 521.

It does not follow, however, that the deed, although invalid to pass the legal title to Phœbe Hill, did not convey to her an equitable interest in the land. In the case of *Swindall* v. *Ford* (Ala.), 63 So. 651, it was held that, while a deed signed and acknowledged by a person when the body of the deed makes no mention of him, is void as a conveyance of his interest, it is, as a contract to convey, good and enforceable.

In *Stirman* v. *Cravens*, 29 Ark. 548, the court said that our statute of ejectment recognizes equitable titles, such as certificates of entry, preemption, etc., as sufficient evidence of title to maintain ejectment, and asked what reason there could be for holding that the same metal which would make a sword might not make a shield?

We think that case recognizes the principle that, under the facts of this case, while a complete legal

title may not have been conveyed to Phœbe Hill, she acquired such an equitable interest, which, being accompanied with possession by Kirby, protected his possession against Naill. As we have already seen; James Hill is the common source of title of both parties, and the legal title passed out of him by his conveyance to G. W. Walker. According to the testimony of Hall, it was intended by James Hill to convey the land in question to his wife, Phœbe Hill, and he was advised by G. W. Walker, a negro lawyer, to first make a deed to him and that he would then convey the land to Phœbe Hill. The conveyance to Walker invested him with the legal title, and, under the circumstances, we think the subsequent deed in which G. W. Walker and wife are named as the grantors and Phœbe Hill as the grantee, conveyed an equitable interest to her, although the deed was not signed by G. W. Walker and wife, but was signed by James Hill and Phœbe Hill. This is especially so when we remember that all the parties were negroes, and that James Hill and Phœbe Hill could not read and write, and that G. W. Walker wrote the deed. It is true that the testimony of J. D. Hall to this effect is greatly weakened on cross-examination, but it is not entirely overcome. This is especially true under the existing circumstances. James Hill, Phœbe Hill and G. W. Walker are all dead. The widow and heirs of G. W. Walker made no defense to the action, and are claiming no interest in the land. J. D. Hall is not shown to have any personal interest in the matter. His contradictory statements to plaintiff's attorney may have been the result of a faulty memory, but, whatever was the cause of it, his testimony of the main facts is not entirely overcome, but is only weakened by his contradictory statements and by his cross-examination.

The plaintiff does not in any way claim title from G. W. Walker. In this connection it may be said that the defendant is not asking affirmative relief, but is only seeking to protect his possession, which was taken after

acquiring the equitable interest of Phœbe Hill. It is well settled that one who holds land under an equitable title cannot be ejected therefrom. *Gates* v. *Gray,* 85 Ark. 25. Again, in the case of *Dobbs* v. *Gillett,* 119 Ark. 398, it was held that the owner of an equitable title cannot maintain ejectment, but that he may maintain his own possession under such title.

But it is insisted by counsel for the plaintiff that the widow and heirs of G. W. Walker, deceased, filed no answer and made no defense to the action, and that, on this account, the plaintiff was entitled to have whatever title they may have had to the land vested in him. We do not think so. Kirby was in possession of the land when Naill purchased it, and whatever equitable interest he had in the land could not be divested out of him by making the heirs of G. W. Walker, deceased, defendants to the action. He had a right to make his own defense to the suit, and his rights could not be prejudiced, or in any way affected, by the fact that the heirs of G. W. Walker, deceased, failed or refused to make any defense to the action, or failed to cooperate with him in making his own defense.

Finally, it is insisted by counsel for the plaintiff that, if the defendant succeeds at all, he cannot succeed in holding the entire tract, because the deed to him from Fred Harris, while executed prior to the deed the latter made to Mary Price, was not recorded until four years after the deed to Mary Price was recorded. Phœbe Hill died, leaving two heirs at law. One of them was the mother of John Kirby and the other was Fred Harris. The deed from Fred Harris to John Kirby was executed in September, 1913. The deed from Fred Harris to Mary Price was not executed until the 19th day of October, 1914. The evidence shows that John Kirby was in possession of the land, through his tenants, at the time the deed to Mary Price was executed. The parties lived in the same neighborhood, and were related to each other.

It is fairly and legally inferable from all the existing circumstances that Mary Price knew that John Kirby was in possession of the land at the time she received her quitclaim deed from Fred Harris. Therefore, under the authorities above cited, she will be deemed to have had notice of the equitable interest of the defendant Kirby in the land. It is only by admitting that Phœbe Hill had an equitable interest in the land that the deed from Fred Harris to Mary Price could convey any interest at all. The deed was a quitclaim deed, and, if Phœbe Hill had no equitable interest in the land, Fred Harris, who was her brother and one of her heirs at law, could acquire no interest by inheritance, and had no interest to convey.

It follows from the views we have expressed that John Kirby had an equitable interest in the land, which, coupled with his possession at the time the plaintiff acquired an interest by purchase from Mary Price, enabled him to protect his possession.

It follows that the chancellor was right in dismissing the complaint for want of equity, and the decree of the chancery court will be affirmed.

STONE v. STATE.

Opinion delivered January 28, 1924.

1. ROBBERY—EVIDENCE.—Evidence *held* to sustain a conviction of assault with intent to rob.
2. CRIMINAL LAW—HARMLESS ERROR.—The refusal to permit the accused to cross-examine a State's witness as to whether he had been promised immunity from punishment if he would testify for the State in the case at bar *held* error, but harmless, where the witness was permitted to state that there were indictments against him and that he had been convicted and paroled, and he denied that any express promise had been made that he would be released from prosecution if he testified against accused.
3. CRIMINAL LAW—ADMISSION OF TESTIMONY WITHOUT OBJECTION.—Where testimony was admitted without objection, it was within the court's discretion whether it should be withdrawn.

4. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.—To the general rule that evidence of a distinct offense is inadmissible, there is an exception where such evidence is necessary to fix the intent of the accused or to prove the motive for the offense charged against him.
5. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES.—It is no objection to the admission of evidence of a distinct offense to fix the intent or motive of the accused that such other offense is subject to indictment.
6. ROBBERY—INSTRUCTION.—In a prosecution for assault with intent to rob, an instruction that, if accused was present when the victim was assaulted, aiding, abetting, "or ready and consenting to aid and abet," the perpetrators or either of them, the jury should find him guilty, *held* not error, under Crawford & Moses' Dig., § 2412.
7. ROBBERY—INSTRUCTION.—In a prosecution for assault with intent to rob, an instruction that the mere presence of defendant at the time of the alleged assault would not be sufficient to authorize a conviction unless he in some manner aided or abetted in the alleged assault or, being present, was ready and consenting to aid and abet therein, *held* not erroneous as argumentative, but beneficial to defendant.

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

Duty & Duty, for appellant.

J. S. Utley, Attorney General, *John L. Carter*, Assistant, for appellee.

HART, J. Roy Stone prosecutes this appeal from a judgment of conviction against him for the crime of assault with intent to rob.

According to the evidence for the State, in March, 1921, Roy Stone, Slim West, Bill Cox and Luther Stacks made a trip in an automobile from Tulsa, Okla., to Siloam Springs, Benton County, Arkansas. After staying in Siloam Springs for a short time they started back towards Gentry, in Benton County, and stopped and robbed two buggies in each of which a boy and a girl were riding home from the meeting of a literary society.

Four persons in an automobile first held up a buggy in which Ralph Couch and Eunice Atkins were riding, and robbed them. Then Bert January and Ina Little,

who were riding in a buggy close by them, were held up by the same persons and robbed. The persons in the automobile then went on south about a quarter of a mile, and stopped the buggy in which Robert Harper was riding, and attempted to rob him. They did not find anything worth taking on his person, and let him go. Harper identified Luther Stacks and Roy Stone as being two of the persons who held him up and attempted to rob him. Ralph Couch also identified Roy Stone as one of the persons who attempted to rob him just before Robert Harper was held up.

William Cox was a witness for the State, and testified that he was in the party which committed the robberies described above, and which attempted to rob Robert Harper. Roy Stone helped them to attempt to rob Robert Harper. The robbery and the attempted robbery all occurred in Benton County, Arkansas. Roy Stone denied his guilt, but admitted being present when his companions committed the crimes. He said that he tried to prevent them from committing the robberies on the persons in the first two buggies, but could not do so. He admitted getting out of the car when Robert Harper was attempted to be robbed, but said that he got out for the purpose of holding Harper's horse, which had become frightened. He had nothing to do with holding up and robbing Ralph Couch and Bert January, and tried to prevent his companions from attempting to rob Robert Harper.

The evidence for the State was sufficient to warrant the jury in returning a verdict of guilty against the defendant.

Counsel for the defendant assign as error the action of the court in refusing to permit them to ask William Cox, on cross-examination, if he had not been indicted at the previous term of the court in Benton County, Arkansas, for having carnal knowledge of a female under sixteen years of age, and had been promised that he would not be tried for that offense if he testified for the State in the case against Roy Stone.

We are of the opinion that the defendant was entitled to an answer to this question. It was material to show the influence and inducements under which the witness testified. The witness had acknowledged complicity in the crime, and this, to a great extent, affected his credibility as a witness. The accused had the right to still further lessen the witness' credibility by showing an existing motive in the mind of the witness to give testimony against him, regardless of truth. If the witness was to be the gainer by testifying in the case, it might have affected his credibility before the jury. The defendant had the right to show to the jury, by cross-examination, if he could do so, that Cox had given testimony against him in order to prevent a prosecution against himself, or to lighten his own punishment. *Johnson* v. *State*, 161 Ark. 111, relied upon by the State, is not applicable to the facts in the present case. There, following our earlier decisions, it was held prejudicial error to permit the defendant in a criminal case to be asked whether or not he had been previously indicted for a felony. The question was asked and permitted to be answered as a matter affecting the credibility of the accused, who was a witness. It was held to be error for the reason that the indictment of itself afforded no presumption whatever of the guilt of the accused.

Here, as we have already seen, the question was asked, not for the purpose of showing that the witness had been indicted, and thereby affecting his credibility, but the gist of the question was to elicit an answer from the witness that he had been promised immunity from the indictment if he would testify for the State in the case at bar. This, for the reason stated above, was a proper question to be asked the witness on cross-examination, and it was error to refuse to allow the witness to answer it. But it does not follow, however, that the error was prejudicial and therefore calls for a reversal of the judgment. The attorneys for the defendant accomplished all the purpose that could have been gained from an answer

to this question by asking and obtaining answers from the witness to similar questions.

He was permitted to state that there were three or four indictments against him in the Benton Circuit Court, and that he had been told to be present at the court by the Governor of the State. He was asked if the Governor had not paroled him on condition that he would be at the court to testify in the case at bar, and answered: "Not exactly; he told me to make monthly reports to Mr. Nance, and to be over here at each term of the court." Nance was the prosecuting attorney. It appears that William Cox had been convicted of this robbery and sentenced to serve a term in the State Penitentiary. The Governor had paroled him and allowed him to return to his home at Tulsa upon his promise to report to the prosecuting attorney monthly and to be present at all terms of the circuit court in Benton County as long as requested. He denied having received any express promise that he would be released from prosecution if he testified against Roy Stone. He said that he did not know about that. He just knew that he was out on parole, and had promised to report, as above stated.

Thus it will be seen that the attorneys for the defendant were permitted to cross-examine the witness thoroughly as to whether he would receive immunity from the indictments pending against him upon the condition that he should testify for the State in the case against Roy Stone. In this state of the record, no prejudice resulted to the defendant in refusing to allow the witness to answer the particular question above stated. Hence this assignment of error is not well taken.

The next assignment of error is that the court erred in permitting William Cox to testify that they had stolen a casing from the automobile of a Mr. Berry while they were in the town of Siloam Springs, on the afternoon of the night of the robbery in question. It is insisted that, inasmuch as the defendant was not present when this casing was taken from Berry's car, it was not proper to allow the witness to testify about it. No objections

were made to this testimony at the time it was offered and given before the jury. After the testimony had been permitted to go to the jury, it was a matter of discretion of the court whether or not it would be withdrawn from the jury.

The next assignment of error is that the court erred in allowing the witness to testify that two young men riding in separate buggies were first robbed on the night in question. It is insisted that these were separate crimes and proof of them could not be introduced to establish the guilt of the accused in the case at bar. In this connection it may be stated that these robberies were committed by the same persons, and that the first two young men were robbed while they were riding in buggies only a quarter of a mile distant from the buggy in which Bob Harper was riding. As soon as Couch and January were robbed, the defendant and his companions rode south a quarter of a mile, in an automobile, and immediately attempted to rob Bob Harper.

It is true that the general rule is that evidence of a distinct offense cannot be admitted in support of another offense; but there are several exceptions to the general rule. One of the exceptions is that, when it is necessary to fix the intent of the accused, or to prove the motive for the offense charged against him such testimony is admissible. It is no objection to its admission that it discloses other offenses that are subject to indictment. The exceptions to the general rule as to the admission of evidence of collateral crimes, when the evidence of the extraneous crime tends to identify the accused as the perpetrator of the crime charged, or to show the intent with which the defendant committed it, is as well settled as the general rule itself. *Billings* v. *State,* 52 Ark. 303; *Davis and Thomas* v. *State,* 117 Ark. 296; *Setzer* v. *State,* 110 Ark. 226; *Cain* v. *State,* 149 Ark. 616; and *Hall* v. *State,* 161 Ark. 453. Hence this assignment of error is not well taken.

It is next insisted that the court erred in giving instruction No. 2, which is as follows: "If you find

from the evidence, beyond a reasonable doubt, that the defendant, Roy Stone, in Benton County, Arkansas, and at some time within three years before the indictment was filed in this court, did feloniously, wilfully, and with malice aforethought, commit an assault on one Bob Harper, with the felonious intent then and there the personal property of him, the said Bob Harper, forcibly and violently to take from the person of him, the said Bob Harper, forcibly and against his will; or if you find from the evidence, beyond a reasonable doubt, that, in Benton County, Arkansas, and at any time within three years before the indictment was returned herein, Luther Stacks, Bill Cox and Slim West, or either one or more of them, did feloniously, violently and of malice aforethought commit an assault on one Bob Harper, with the felonious intent then and there the personal property of him, the said Bob Harper, forcibly and against his will, and that the defendant, Roy Stone, was then and there present aiding, abetting, or ready and consenting to aid and abet said Cox, West and Stacks, or either of them, in making said assault, if you find the assault was made, then you should find the defendant guilty as charged in the indictment, and assess his punishment in the penitentiary for any period of time not less than one nor more than five years. If you fail to find the foregoing allegations proved beyond a reasonable doubt, you should find the defendant not guilty."

In this connection it may be stated that the defendant was indicted under § 2412 of Crawford & Moses' Digest. This section of the statute was read to the jury as instruction No. 1, and reads as follows: "Whoever shall, feloniously, wilfully and of malice aforethought, assault any person with intent to rob, and his counselors, aiders, and abetters shall, on conviction thereof, be imprisoned in the penitentiary not less than one nor more than five years."

It is contended that instruction No. 2 is broader than the statute, and should not have been given by the court. It is insisted that the statute does not make any one

guilty of assault with intent to rob who might be ready and consenting to aid and abet. The particular language in instruction No. 2 objected to is as follows: "or ready and consenting to aid and abet said Cox, West and Stacks." When the language just preceding that quoted is considered in connection with it, it is evident that the court submitted to the jury the question of whether or not the defendant was present when Bob Harper was assaulted with the intent to rob him, and was ready and consenting to aid and abet his companions in making the assault, with intent to rob, upon Harper. The language of the statute is that whoever shall assault any person with intent to rob, and his counselors, aiders and abetters, shall, on conviction thereof, be imprisoned in the penitentiary. Thus it will be seen that the statute in plain terms makes guilty the person committing the assault, and as well his counselors, aiders and abetters. Any one present, ready and consenting to aid and abet the person making the assault, will be deemed his counselor, and the jury would be warranted in convicting such person. Indeed, from the nature of the crime it is difficult to see how any one can be present, ready to aid and abet the person actually committing the assault, and yet not be aiding and abetting him. His very presence at the scene of the crime, standing ready to aid and abet the person actually making the assault, would show a participation in it. His presence for that purpose would have a tendency to awe the person assaulted, and, by the mere suggestion of numbers, prevent him from making resistance. Hence we hold that this assignment of error is not well taken.

It is next insisted that the court erred in giving instruction No. 5, which is as follows: "I charge you that the mere presence of defendant at the time of the alleged assault with intent to rob would not be sufficient to authorize a conviction, unless he, in some manner, aided or abetted in said alleged assault, or, being present, was ready and consenting to aid and abet therein."

It is claimed that this instruction is highly argumentative, and assumes that the facts necessary to prove the defendant's guilt had been made. We do not think that the instruction is open to that objection. It was the theory of the defendant, and he so testified, that he did not have anything whatever to do with committing the crime. He said that the horse of Bob Harper got scared, and that he took hold of him, to prevent his running away with the buggy. This instruction, then, would be beneficial rather than harmful to the defendant, on his theory of the case. His guilt, in the instruction, is made to depend upon whether he aided in committing the alleged assault, or, being present, was ready and consenting to aid and abet.

It is also urged that the latter part of the instruction is faulty because a person being present merely ready and consenting to aid and abet in the commission of the crime is not guilty, under the statute. As above stated, we think that the words "counselors, aiders and abetters" include not only those actually participating in the assault, but also those present standing ready to aid and abet in the assault. If they actively assisted in making the assault, they would come within the first part of the section that whoever shall assault any person with the intent to rob. Hence we deem this assignment of error not well taken.

We have carefully examined the record, and find no reversible errors in it. Therefore the judgment will be affirmed.

BURNS v. HARRINGTON.

Opinion delivered January 28, 1924.

1. APPEAL AND ERROR—ERROR APPEARING UPON RECORD.—Neither motion for new trial nor bill of exceptions is necessary where the error sought to be reviewed appears from the judgment record itself.
2. HIGHWAYS—ORDER LAYING OUT—RIGHT OF APPEAL.—Under Crawford & Moses' Dig., § 5249, employing the county court to lay out a road without notice and without the appointment of

viewers to locate the road, a landowner affected thereby has a right to appeal from such an order.

3. HIGHWAYS—DESIGNATION OF ROAD—INDEFINITENESS.—An order of the county court establishing a road, in which no reference is made to any survey, and the route is not marked or designated except in a general and indefinite way, without indicating how or where the lands of the respective owners would be crossed, except that one terminus would intersect the county road at a designated place, *held* void for indefiniteness.

4. APPEAL AND ERROR—ESTABLISHMENT OF ROAD—REVIEW.—Where, in the proceeding to establish a new road, an order of the county court, rendered after the cause was fully heard on the merits, became final, it was reviewable on appeal, and could not be set aside at a subsequent term of the county court.

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

Sam Williams, for appellants.

There is no bill of exceptions, hence the only errors of which the court can take cognizance must appear on the face of the record. 100 Ark. 515; 111 Ark. 468. C. & M. Digest, § 5249, has been upheld by this court. 134 Ark. 121. As also the landowners' right to appeal. 135 Ark. 83. Proceeding under the above statute, the route to be followed should be sufficiently described in the order of the court laying it out as to enable the overseer to locate the roadbed. 66 Ark. 292, 295-6. The record shows that that was not done in this case.

J. H. Black, for appellees.

The description is sufficiently definite to meet the requirements of the statute. C. & M. Digest, § 5229.

Sam Williams, for appellant, in reply.

Section 5229, C. & M. Digest, does not apply. This is a proceeding under § 5249, *Id.,* which does not provide for the appointment of viewers to lay out and mark the location of the road.

SMITH, J. On January 2, 1922, G. H. Harrington and other citizens filed in the county court of Marion County a petition for the establishment of a new road, described as follows: "Beginning at or near the NE corner of the NE¼ of the NW¼ section 19, township 17

north, range 17 west, known as the J. L. Smithee place, running thence in a northeasterly direction, following the ridge along the most practical road way, keeping on top of the ridge a distance of about three miles to the northwest corner of the Isom Stanley place; thence following said ridge running in a northeasterly direction along the most practical road way or route, crossing the lands of A. D. Morgan, G. A. Elton, D. W. Jackson, D. B. McNair, John Glenn, W. R. Jones, S. D. Glenn, Theo. Burns, B. F. Burns, Pink Kyles, G. W. Bogle, A. T. Bogle, Watson & Jones, and intersecting the county road at what is known as the Stone place." The petition was filed under § 5249, C. & M. Digest.

On the next day after the filing of the petition the court made an order establishing the road, the description set out in the petition being employed in the court order.

On January 27, 1922, B. F. Burns and other citizens filed a petition in the county court praying the court to set aside the order establishing the road. This petition was heard and denied. Thereafter Burns prayed an appeal from the order of the court establishing the road, and from the order overruling the petition to vacate the order establishing the road. These appeals were heard as presenting a single issue in the circuit court on October 12, 1922, when the order of the county court was affirmed, and this appeal is from that judgment.

There was no motion for a new trial, nor bill of exceptions filed, but these are not necessary where the error sought to be reviewed appears from the record itself. *Ford* v. *State*, 100 Ark. 515; *Independence County* v. *Tomlinson*, 95 Ark. 565; *Norman* v. *Fife*, 61 Ark. 33; *Ward* v. *Carlton*, 26 Ark. 662; *Anthony* v. *Sills*, 111 Ark. 468.

The error here sought to be reviewed is the alleged indefiniteness of the description of the road—a fact which appears from the record itself.

The section of the statutes under which this proceeding was had (§ 5249, C. & M. Digest) empowers the county

court to lay out a road without notice and without the appointment of viewers to locate the road. *Sloan* v. *Lawrence County,* 134 Ark. 121. But that section of the statute also gives a landowner affected thereby the right to appeal, as has been done here. *McMahan* v. *Ruble,* 135 Ark. 83.

In the case of *Beck* v. *Biggers,* 66 Ark. 292, an order of the county court laying out a road was held void because the road was not sufficiently described. It was there said: "Again, whether the route of the road was set forth in the report of the viewers as really fixed by them, it is impossible for us to determine from this record; but the description of the terminal and intermediate points of the route contained in said reports, and in the order of the court based thereon, is certainly indefinite enough, and a stranger, even with the aid of compass and chain, could with difficulty, if at all, certainly determine what was the true location of the road. This being true, the description is too indefinite to meet the requirements of the law."

The necessity for a description of a road sufficient to make its location certain is as great now as it was when that case was decided, for, under the law as it then existed, notice of the intended presentation of the petition was necessary, whereas this notice is not required by § 5249, C. & M. Digest.

Here, there is no reference to any survey, and it does not appear that the route of the new road has in any way been marked or designated, except in the general and indefinite language set out above. It begins at or near a corner of a forty-acre tract of land, and runs thence in a northeasterly direction, following the ridge, along the most practical road way, keeping on top of the ridge, a distance of about three miles, to a fixed point, from which point it follows the ridge in a northeasterly direction along the most practical road way or route (a fact which the court order makes no pretense of determining), across the lands of thirteen different landowners. The road crosses the land of these proprietors.

It does not appear whether they are coterminous owners, and, if so, what line forms their boundary; and, if they are not coterminous owners, there is nothing to indicate how or where the lands of the respective owners would be crossed, except that the northeastern terminus of the new road would intersect the county road at what is known as the Stone place.

We think the interested persons are entitled to more definite information than this order contains, and that it is therefore void for indefiniteness.

The judgment here appealed from was rendered by the circuit court on October 12, 1922, the same being an adjourned day of the August term of the court. This order recited the appearance of the petitioners and the remonstrators, and the hearing by the court of the cause on its merits, and a general finding in favor of the petitioners for the road, and an affirmance of the order of the county court, to which ruling exceptions were duly saved.

After thus hearing and adjudging the cause, it appears that, at the ensuing January term of the court, without additional pleadings of any character, or notice of any kind, the court entered an order that the remonstrators had failed to take and perfect their appeal as prayed for by them. The court thereupon renewed its finding that the road was required by the public, etc., and directed the clerk of the circuit court to remand the cause, with directions to the county court to open up the road as prayed for.

We think that the order and judgment rendered at the August term, at which the cause was fully heard on its merits, became final, and passed beyond the control of the court, upon the adjournment of that term, and appellants had the right to have that judgment reviewed, and, as it appears to be erroneous on its face, it will be quashed.

GRAVES v. MCCONNELL.

Opinion delivered January 28, 1924.

1. STATUTES—CONSTRUCTION—LEGISLATIVE PURPOSE.—A statute should be construed as a whole, giving some meaning to every word if possible, and, in order to effectuate the intent of the Legislature, the court may eliminate or correct errors or reject certain words and substitute others, in order to reconcile apparent inconsistencies.
2. ANIMALS—STOCK-LAW ELECTION.—Under Special Acts 1923, No. 534, providing for a special stock law in Howard County, but that it should not become effective until approved at a special election to be held on any date before the 1st day of August, 1923, and in § 6 that the act should take effect 90 days after its passage, an election held on any date between the date of the Governor's approval of the act and August 1, 1923, though before such 90-day period, was valid.
3. ANIMALS—STOCK-LAW ELECTION—MAJORITY DEFINED.—Special Acts 1923, No. 534, § 5, providing that such act should not become effective until approved by a majority of the qualified electors of the territory affected, requires a majority only of those voting on the question of its adoption.
4. ANIMALS—REVIEW OF RETURNS OF STOCK-LAW ELECTION.—Under Crawford & Moses' Digest, § 2237, giving circuit courts power to issue writs of certiorari to any officer or inferior tribunal to correct any erroneous or void proceeding, the writ does not lie to review the action of the board of election commissioners and county judge and clerk in canvassing the returns and proclaiming the result of a special stock election.
5. CERTIORARI—MINISTERIAL ACT.—Certiorari will not lie to correct a purely ministerial act, even though the performance of the act involves discretion.
6. MANDAMUS—WHEN WRIT DOES NOT LIE.—Mandamus will not lie to correct an erroneous statement in the election commissioners' proclamation of the result of a special stock law election that the law had not become effective, where the proclamation showed on its face that a majority of the votes cast were in favor of adopting the law, which put it in full force notwithstanding such statement.
7. CERTIORARI—AFFIRMANCE.—A judgment correctly quashing a writ of certiorari must be affirmed, though the trial court gave an erroneous reason for affirmance.

Appeal from Howard Circuit Court; *B. E. Isbell*, Judge; affirmed.

W. P. Feazel, for appellant.

1. The court erred in holding that, under § 6 of the act, no part of it went into effect until ninety days after its approval. Having the emergency clause attached, it became a valid law and effective for the purpose of holding the election from the time it was approved by the Governor. 109 Ark. 479. See § 5 of the act. On construction of statute, see 135 Ark. 462; 94 Ark. 422; 133 Ark. 491; *Summers* v. *Road Imp. Dist. 16,* 160 Ark. 371. The intent of the Legislature as to when an act shall become effective is controlling, and, when ascertained, it is the duty of the courts to give effect to it. *Miller* v. *Witcher,* 160 Ark. 479.

2. The county judge and board of election commissioners are estopped from defending on the ground that the election was held without authority. 76 Ark. 48.

3. The commissioners were ministerial officers merely, and had no discretion to take testimony as to the number of electors in the district. Their plain duty was to certify the results as shown by the returns. McCrary on Elections, § 81-5. The provision that the act should not become effective "until it has first been approved by a majority of the qualified electors residing in said district" does not mean a majority of those who actually reside in the district, but a majority of those voting on the question at the election. 45 Ark. 400; 153 Ark. 313.

4. Certiorari and mandamus the proper remedy. C. & M. Digest, § 2237; 126 Ark. 125; 153 Ark. 50; McCrary on Elections, § 331.

J. W. Bishop, for appellees.

1. The legislative intent was that the act as a whole should receive a majority of votes of the qualified electors residing in the district in its favor before it became operative. Sections 2, 5 and 6; 157 Ark. 186; 145 Ark. 144, 147.

2. Certiorari will not lie to correct ministerial acts. 158 Ark. 437; 157 Ark. 186; *Tilghman* v. *Russell,* 158 Ark. 593.

3. Mandamus will not lie to control the discretion of a court or judge or other functionary, but will be granted only to compel him to act when he refuses to do so. 103 Ark. 504; 26 Cyc. 159; 18 A. L. R. 233; 48 Ark. 384; 56 Ark. 113; 59 Ark. 330; 66 Ark. 579; 78 Ark. 462; 80 Ark. 337; 83 Ark. 598; 84 Ark. 394; 92 Ark. 4; 109 Ark. 491.

4. If the referendum governs, then no election could be held until ninety days after the adjournment of the Legislature. 103 Ark. 57.

WOOD, J. Act No. 534 of the Acts of 1923 provides for a special stock law in certain parts of Howard County, Arkansas, known as the "no-fence district." Sections 1, 2, 3 and 4 contain provisions as to the manner of creating the district and the duties of owners of stock with reference thereto, and the penalty for failure to comply with the provisions thereof.

Section 5 of the act, among other things, provides: "No provision of this act shall become effective until it has first been approved by a majority of the qualified electors residing in said described district, at a special election to be held and decide the question. Said election shall be called by the county judge of said county, by publishing proclamation, to be printed for four weeks in all newspapers which have a general circulation in said territory * * *. Such special election shall be held on any date before the first day of August, 1923, etc. * * *. Upon the county board of election commissioners issuing their proclamation, attested by the county judge and county clerk, that a majority of said qualified voters voted in favor of this act, then and thereupon it shall be in force and effect from date; otherwise it shall be null and void."

Section 6 provides: "That all laws and parts of laws in conflict herewith are hereby repealed, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force 90 days after its passage."

The county judge called the election provided for in § 5, fixing May 5, 1923, as the day the law should be voted upon. The election was held on that day; and, as shown by the certificates of the election commissioners, there were 1,450 votes cast, 760 of the qualified electors voting for the law and 688 voting against it. The proclamation was duly issued, attested by the county judge and the county clerk. The commissioners, upon evidence adduced before them tending to prove there were 2,250 qualified electors residing within the district, proclaimed that the law had not received a majority of such electors, and therefore the law had not become effective. The appellants, by certiorari issued out of the circuit court, sought to have the action of the election commissioners and the county judge reviewed, and, if they had erred, to compel them by mandamus to proclaim that the law had been put in effect by such election. The election officers joined issue on the allegations of the petition for certiorari, and, at the hearing, the trial court held that the election called on March 19, and held on May 25, 1923, was prematurely called and prematurely held, for the reason that what purports to be the emergency clause attached to said act provides that the same shall not take effect and be in force until ninety days after its passage, and that the law was not effective for any purpose until ninety days after March 21, 1923, or until June 21, 1923, and therefore said election was called and held before the law went into effect.

In construing a statute it is the duty of the court to construe it as a whole and give some meaning to every word, if possible, and, in order to effectuate the intent of the Legislature, the court may eliminate or correct errors in a statute, or reject certain words and substitute others, when, by so doing, it only reconciles apparent inconsistencies of language, and, on the whole, accomplishes the purpose which the Legislature had in mind in the enactment of the law. *Garland Power Co.* v. *State Board,* 94 Ark. 422; *Rayden* v. *Warrick,* 133 Ark. 491;

Kindricks v. *Machin,* 135 Ark. 460; *Summers* v. *Road Imp. Dist.,* 160 Ark. 371.

Now, the language, "such special election shall be held on any date before the first day of August, 1923," is so plain that it does not admit of any construction. The appellees contend that the only way this language can be reconciled with § 6 of the act and carry out the intention of the Legislature is to amend it so as to read as follows: "Such special election shall be held on any date (after ninety days) but before the first day of August, 1923," adding the words inclosed in the brackets. But it occurs to us that the Legislature did not intend to postpone the election to determine whether the act should become effective beyond the expiration of ninety days after the act was approved by the Governor. The act contains the emergency clause, and therefore was not subject to the referendum. *Ark. Tax Com.* v. *Moore,* 103 Ark. 48; *Hanson* v. *Hodges,* 109 Ark. 479. It was therefore clearly the intention of the Legislature that this law should become effective, so far as the holding of the election was concerned, before the expiration of ninety days after the final adjournment of the Legislature.

We think it is equally clear that the Legislature intended that the election to determine whether the act should become effective should be held before the first day of August, 1923, as the act plainly declares. The meaning of the act is simply this: The qualified electors, under the act, had the right to hold an election on any date between the time of the approval of the act by the Governor until the first day of August, 1923, to determine, by the election held in the manner prescribed by the act, whether the act should become effective, and, if the election were held and it was decided by the majority of the qualified electors residing within the district voting upon the subject that the provisions of the law should be put in force, then the remedial provisions of the act were in force, beginning at a period ninety days after the act was approved by the Governor.

The act under review here is not like the act that was under consideration in the case of *Gaster* v. *Dermott-Collins Road Dist.*, 156 Ark. 507, where we held that an act without an emergency clause does not become operative until ninety days after the adjournment of the Legislature. There the election could not be held at all until after the expiration of the ninety-day period from the adjournment of the Legislature, because there was no emergency clause. Here, there is an emergency clause, and the act takes effect, for the purpose of having the election held, after ninety days from its passage, provided the qualified electors have held an election before the first day of August, 1923, and determined by majority that the remedial provisions of the law shall become operative.

The case is controlled in this respect by the recent case of *Miller* v. *Witcher,* 160 Ark. 479. In that case, while there was no emergency clause, the act designated a fixed day when the election was to be held to determine whether the act should take effect, which day was before the expiration of ninety days for the law to become operative under the initiative and referendum of the Constitution. In that case we said: "The only way to give any effect to that part of the act providing for an election in the district is to say the Legislature intended to impose that condition before the act could be put in operation. * * * Until the expiration of the ninety-day period after the adjournment of the Legislature, the voters had the power to refer the act to the people as a whole, for approval or rejection, at the next general election." In the instant case the act was not referred to the people for approval or rejection under the initiative and referendum, and it became a law when it was approved by the Governor, authorizing the qualified electors to hold the election at the time and in the manner prescribed therein, but it was not to become operative, so far as its remedial provisions were concerned, until the election was held and a majority

of the qualified electors in the district had voted that its remedial provisions should go into operation and effect.

In *Gaster* v. *Dermott-Collins Road Imp. Dist., supra,* inasmuch as the Legislature did not specify any time for holding the election, and since there was no emergency clause, we held that it was the intention of the Legislature that the election should not be held until some time after the expiration of the referendum period. But here the Legislature has fixed a definite time for the election and has added the emergency clause. Construing all the provisions of the act together, we are convinced that it was the design of the Legislature to have the election held before the first day of August, 1923, and, if the result of that election was in favor of putting the remedial provisions of the act in force, then these provisions became effective as soon as the ninety days expired after the approval of the act by the Governor. We conclude therefore that the election to determine whether the remedial provisions of the act should become operative was not premature.

2. Section 5 of the act provides: "No provision of this act shall become effective until it has first been approved by a majority of the qualified electors residing in said district." In *Watts* v. *Bryan,* 153 Ark. 313, an amendment to the Constitution contained the following provision: "If a majority of the qualified electors of such county shall have voted public road tax, etc. * * *." In that case we held that this language requires a majority only of those voting on the question, and not a majority of the highest number of votes cast at the election, nor a majority of all persons in the county entitled to vote. See also *Banks* v. *Austell,* 45 Ark. 400, where we gave similar language a like construction. The canvass of the returns by the commissioners of the votes cast upon the subject showed a majority for making the law effective. It follows therefore that, under the above decisions, the commissioners should have proclaimed the law in effect.

3. Section 2237 of Crawford & Moses' Digest gives to circuit courts the power to issue writs of certiorari to any officer or board of officers, or any inferior tribunal of their respective counties, to correct any erroneous or void proceeding, and to hear and determine the same. The appellants contend that, under this section, certiorari is the proper remedy, since the act under review provides no method for reviewing the action of the board of election commissioners and the county judge and clerk, by appeal or otherwise. But an examination of the act will disclose that the appellants are not correct in this contention, for the authority conferred upon the board of election commissioners is simply to canvass the returns and declare the result and file a certificate of the same with the county clerk. They issue their proclamation, attested by the county judge and county clerk, that the majority of the voters voted in favor of or against the act. We cannot discover in any of these duties any *quasi*-judicial function. The acts of canvassing the returns and declaring the result of the election and filing the certificate thereof and issuing the proclamation are all purely ministerial acts. The law is well settled by numerous decisions of this court that certiorari will not lie to correct a purely ministerial act, even though the performance of the act involves discretion. *Patterson* v. *Adcock,* 157 Ark. 186, and cases there cited. Mandamus will not lie. The election officers did not refuse to act, but only, as appellants contend, did not make the correct proclamation. Mandamus cannot be invoked to correct an erroneous proclamation. The proclamation, on its face, shows that a majority of the votes cast were in favor of adoption of the law, and this put the law in force, notwithstanding the erroneous statement in the proclamation that the law had not become effective.

We are not called upon here to determine what court or tribunal would have jurisdiction to determine a contest of the result of the election. Suffice it to say, in response to the contention of the appellees, that certiorari

and mandamus are not the proper remedies to review the action of the election commissioners in canvassing the returns of the election and proclaiming the result thereof. While the trial court gave an erroneous reason for its judgment in quashing the writ, its judgment is nevertheless correct, and it therefore must be affirmed.

BROWN v. PEACH ORCHARD.

Opinion delivered January 28, 1924.

1. APPEAL AND ERROR—CONCLUSIVENESS OF COURT'S FINDING.—The finding of the circuit court sitting as a jury will not be disturbed on appeal if supported by any substantial evidence.
2. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—EVIDENCE.—In a proceeding by a municipality to annex territory, evidence *held* to sustain a finding that the territory was needed for town purposes.
3. SCHOOLS AND SCHOOL DISTRICTS.—Acts 1919, p. 177, creating county boards of education and vesting them with jurisdiction to change the boundaries of school districts, neither expressly nor impliedly repealed act No. 312 of 1909, which provided that "when the limits of the city or town are extended so as to include territory not before within the school district, all of said new territory in the city or town becomes a part of special district of said city or town."

Appeal from Clay Circuit Court, Western District; *W. W. Bandy,* Judge; affirmed.

F. G. Taylor, for appellants.

1. Under the evidence the petitioner has failed to make a showing sufficient to entitle it to annex the territory described in the petition, but the land sought to be annexed is shown to be farm and timber land, not necessary for any purpose to the town. 54 Ark. 321.

2. The court erred in holding that it had jurisdiction to change the boundaries of school districts by annexing territory to an incorporated town constituting a separate special school district, and which would necessarily change boundary lines of school districts. The act of

1919 places the jurisdiction to establish new districts and change the boundaries of school districts then existing exclusively in the county board of education. 153 Ark. 50; *Id.* 188; 159 Ark. 438.

C. T. Bloodworth, for appellee.

1. The evidence does not sustain appellant's contention that the land sought to be annexed is farm and timber land. Part of it, it is true, is farm and timber land, but Brown's own testimony shows that there are two additions laid out and platted in this territory; and all the witnesses agree that it will be a benefit even to the farm and timber land and to the entire community, to annex it. 54 Ark. 321.

2. An incorporated town or city has the right to annex contiguous territory, making same a part of the school district of the municipality. 111 Ark. 379.

HUMPHREYS, J. A petition was filed by appellee in the county court of Clay County for the Western District to annex certain adjoining territory to it and thereby extend its corporate limits. The proceeding was regular in form, and proper notice thereof was given.

Remonstrances were filed by certain landowners and patrons of Rural School Districts Nos. 12 and 90, upon the ground that a part of the territory sought to be annexed to the incorporated town was embraced in said districts, and that the effect would be to enlarge the Special School District No. 88, which embraced the incorporated town only, and to decrease the revenues and patrons of the other school districts; also that the territory sought to be annexed was agricultural land.

The petition was granted in the county court, and on appeal to and hearing *de novo* in the circuit court a verdict and judgment was rendered annexing the territory, from which is this appeal.

Appellant first contends for a reversal of the judgment upon the alleged ground that the undisputed evi-

dence shows that the land sought to be annexed was exclusively agricultural, and not needed for town purposes. After a careful reading of the testimony we cannot place that interpretation upon it. The testimony was in conflict upon this issue. We are not called upon to determine the weight thereof, for the court sat as a jury, and its finding cannot be disturbed upon appeal, if supported by any substantial evidence. The record contains testimony to the effect that two additions to the town had been laid off on the lands sought to be annexed and that some improvements had been made upon them; also that streets of the town extended to and over the lands, which are needed by the town, and which would be improved and made passable if the territory was annexed; also that the health of the inhabitants of the town would be greatly benefited if the lands were annexed, so that they might be drained; also that the lands are needed for the purpose of making improvements. This testimony is substantial, and sufficient to support the verdict and judgment.

The next and last contention of appellant for a reversal of the judgment is that it was unlawful to annex the territory because the effect was to change the boundary lines between school districts. The insistence is made that, under the act of the Legislature of 1919 creating a county board of education, the exclusive jurisdiction to change the boundary lines of school districts was transferred from the county court to the county board of education. This statute was passed subsequent to act No. 312 of the Acts of the General Assembly of 1909, and did not, in express terms, repeal the former act. We do not think it did so by implication. It was provided by the former act that "when the lands of a city or town are extended so as to include territory not before within the school district, all of said new territory in the city or town becomes a part of special district of said city or town." The purpose of the latter act was to substitute county boards of education for the county court as a tri-

bunal to form local school districts, change district boundary lines, etc., and not to change or modify the act of 1909 authorizing the extension of town and city limits so as to embrace a part or all of the outlying school districts.

No error appearing, the judgment is affirmed.

CORLEY v. STATE.

Opinion delivered January 28, 1924.

1. JURY—BIAS.—A juror is not disqualified because he had formed and expressed an opinion as to the guilt of accused based on rumor, where he stated that he could and would disregard such opinion and base his verdict on the testimony.
2. JURY—DISQUALIFICATION.—A juror who has contributed money to promote a law and order league for the purpose of suppressing lawlessness, but not for the purpose of prosecuting defendant, was not disqualified.
3. JURY—DISQUALIFICATION.—A juror's antipathy to the particular crime charged against defendant is not a disqualification where he stated that he would not convict one so charged unless he was shown to be guilty by the testimony.
4. JURY—MAYOR NOT DISQUALIFIED.—The mayor of a town is not subject to challenge under Crawford & Moses' Dig., § 6382, providing for a peremptory challenge of a justice of the peace, though a mayor exercises the same jurisdiction as a justice of the peace.
5. INTOXICATING LIQUORS—SALE—EVIDENCE.—In a prosecution for selling intoxicating liquors, testimony of a witness that he bought liquor from accused within three years before the return of the indictment on which accused was tried, furnishes a legally sufficient basis for conviction.
6. CRIMINAL LAW—JUROR—BIAS.—A remark by a juror, who was held competent on *voir dire* and accepted on the jury, that it was a dirty shame to admit defendant to bail on a charge of murder in another State, and that he should have his neck broken instead of being turned loose to come back and go to selling whiskey, was ground for new trial, where nothing appeared in the examination of the juror which indicated bias or prejudice against defendant, and the juror was not called on to explain or deny such remark, and there was no explanation or

denial thereof in the record, and defendant did not learn of the remark until after the trial.

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

G. A. Hillhouse, F. M. Pickens and *Gustave Jones*, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock* and *Darden Moose*, Assistants, for appellee.

SMITH, J. Appellant was convicted of selling intoxicating liquors, and has appealed.

A considerable part of the record consists of the examination of the jurors on their *voir dire*, and a number of the assignments of error relate to rulings made by the court on the competency of the jurors. Excerpts from the examination of the different veniremen would indicate that disqualified jurors were held competent; but a careful consideration of the questions and answers in their entirety leads us to the conclusion that no error was committed in this respect. There is much similarity in the questions and answers, and we treat them collectively, instead of reviewing the separate answers of the veniremen.

A number of jurors had formed an opinion and had expressed it; but the opinions were based on rumor, and in every case the juror stated that he could and would disregard the opinion thus formed, and base his verdict upon the testimony. Upon the authority of many decisions of this court, these jurors were properly held competent.

It appears that the citizens of Newport, where the trial occurred, had organized, and had contributed money to promote a law and order league, and a member of the veniremen had contributed money to this association. These veniremen testified that their contributions had been made for the purpose of suppressing lawlessness generally, and no juror held competent was shown to have made a contribution for the purpose of prosecuting appellant personally.

At § 94 of the chapter on "Jury," 16 R. C. L., page 277, it is said: "As a general rule the mere fact that certain persons are members of an association for the detection and suppression of crime, pay dues thereto, and are liable to assessments by the association, does not necessarily disqualify them as jurors, in the absence of a showing that the association to which they belong is in some manner connected with or interested in the prosecution of the particular case * * *."

In the notes to the section from which we have quoted several annotated cases are cited, which collect many cases on the subject. One of these is the case of *State* v. *Sultan,* 142 N. C. 569, 9 A. & E. Cases, 310. The annotator, in his note, says: "The mere fact that a person is a member of an organization which has for its purpose the detection or suppression of crime, but which is under no obligation or duty to prosecute criminals unduly, or to prosecute persons charged with a particular crime, is not *per se* a legal disqualification of such person to sit as juror in the trial of a criminal case."

The case-note recognizes that the authorities are not unanimous, but the rule as stated appears to be supported by the weight of authority as well as by the better reasoning.

Certain veniremen appeared to entertain a special antipathy to the crime of selling intoxicating liquors, but they stated that, notwithstanding this aversion to that crime, they would not convict one charged with its commission unless he was shown to be guilty by the testimony.

These veniremen were not disqualified by this bias. The rule is that a juror is not disqualified from trying a person accused of a particular crime because he has a prejudice against the crime charged, if such prejudice against a particular crime would not prevent the juror from impartially considering the question of the guilt of the accused. Section 80 of the chapter on "Jury," 16 R. C. L., page 263, and authorities cited in the notes to that text.

The court properly permitted the accused to inquire into these matters, because it was essential for the accused to be in possession of this information in order that he might intelligently exercise the peremptory challenges which the law gives him. But it does not follow, because he had the right to thus inform himself, that he had the right to have these jurors excused for cause.

Appellant sought to challenge juror Hutchins upon the ground that he was the mayor of the town of Tupelo; but the court held this was not ground for challenge. This ruling was correct. It is provided by statute (§ 6382, C. & M. Digest), that it shall be a ground of peremptory challenge that a juryman is a postmaster, justice of the peace, or county officer. It is true a mayor exercises a certain jurisdiction as *ex-officio* justice of the peace; but he is not a justice of the peace. His is an entirely different office. The right to challenge a justice of the peace peremptorily exists only because the statute confers it, and this right of challenge is limited by the language of the statute which confers it.

There are a number of questions about the competency and the sufficiency of the testimony which we do not review, as they involve no question of law which has not been settled adversely to appellant. A witness testified that he bought liquor from appellant within three years before the returning of the indictment on which appellant was tried, and this testimony furnishes a legally sufficient basis for the jury's verdict, whatever the contradictions in the testimony of the witnesses may have been.

Jeff Avera was held competent as a juror, and served as such. His *voir dire* examination disclosed no bias or prejudice against appellant, or other circumstances affecting his competency. In support of the motion for a new trial the following showing was made: Witness Ennis testified that, some time before the trial from which this appeal is prosecuted, appellant was granted bail in Missouri upon a charge of murder pending in that

State. Witness read from a newspaper the announcement that bail had been granted appellant on that charge, whereupon Mr. Avera said: "Well, that was a dirty shame. It is a dirty shame to grant a man bail like that; he ought to have his neck broken, instead of being turned loose to come back down here and go to selling whiskey."

William Caruthers testified that he was present and heard Avera make the remark quoted. Appellant was not advised of this until after his trial, and there was nothing in Avera's examination as a juror which indicated bias or prejudice against appellant. Avera was not called as a witness to explain or deny this remark, and there is no explanation or denial in the record, nor is there any inconsistency or contradiction in the testimony of Ennis and Caruthers which discredits their testimony or affords ground to disregard it.

The authorities dealing with this subject were recently reviewed in the case of *Pendergrass* v. *State,* 157 Ark. 364. In that case the competency of a juror was questioned. The trial court had held, on the hearing of the motion for a new trial, that the juror was competent, and we affirmed that holding, but we did so because, as we said, the trial court had exercised its discretion and judgment, and no abuse thereof was shown in considering the testimony relating to the juror's competency. We there reviewed the case of *Meyer* v. *State,* 19 Ark. 156, which, we said, was the leading case in our own reports on the subject under consideration, and, in distinguishing that case from the Meyer case on the facts, it was pointed out that in the Meyer case there was nothing in the record to discredit the affidavits tending to show prejudice on the part of the juror. The juror himself, in the Meyer case, whose conduct was impeached, was not examined, nor was his affidavit taken in rebuttal of the alleged fraud and misconduct practiced upon the court by the concealment of his prejudice. We reaffirmed the doctrine of the Meyer case, but held it did not apply because of the difference in the facts.

Here the record is identical with that in the Meyer case. No explanation is made of the alleged fraud practiced upon the court by the concealment of the prejudice of the juror. That the juror was prejudiced appears clear. The juror's remark, in the absence of explanation—and none was offered—indicated that he thought appellant should not be granted bail, but should be kept in custody and have his neck broken, and this was thought a proper thing to do as the means of preventing appellant's return to this State for the purpose of continuing to sell liquor, the offense charged in the indictment. The ruling of the court was erroneous in this respect, and the judgment must therefore be reversed. It is so ordered.

FISHER v. STATE.

Opinion delivered January 28, 1924.

ARSON—DISTINCTION BETWEEN PRINCIPAL AND ACCESSORY BEFORE THE FACT.—Crawford & Moses' Dig., § 2417, providing that any person who shall wilfully and maliciously burn, or "cause to be burned, any dwelling house," etc., shall be guilty of a felony, *held* not to abolish the common-law distinction between a principal and an accessory before the fact, so that one who directed another to burn a certain building, but was not present when his order was carried out, could not be convicted as a principal.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

Robert L. Rogers and *Floyd Terral,* for appellant.

J. S. Utley, Attorney General, *John L. Carter* and *Wm. T. Hammock,* Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted in the first division of the circuit court of Pulaski County for the offenses of accessory before the fact to arson and arson, in separate counts. At the conclusion of the testimony the State elected to rely upon the charge of arson, contained in the second count of the indictment, whereupon appellant requested the court to instruct the jury to find him

not guilty, and, upon refusal to do so, objected, and duly saved his exception.

The charge of arson against appellant was based upon § 2417 of Crawford & Moses' Digest, which is as follows:

"Any person who shall wilfully and maliciously burn or cause to be burned any dwelling house or other house, although not herein specifically named, the property of himself or of another person, shall be deemed guilty of a felony, and, upon conviction, shall be imprisoned in the State Penitentiary for a period of not less than two nor more than ten years."

The testimony introduced by the State showed that a store building in North Little Rock belonging to George Scott was burned on the night of July 1, 1921, by Joe Fisher, who had been instructed to do so by appellant, his father. According to the State's testimony, Joe Fisher, then over fifteen years of age, retired at 8 o'clock p. m., and was awakened by his father about midnight, who gave him a can of gasoline and some matches, directing him to go to the store, quite a distance from their residence, and burn it. Appellant did not accompany Joe, and was not present, aiding and encouraging the boy, at the time he set the house on fire.

Appellant testified in his own behalf, denying *in toto* the testimony detailed above. He attributed the testimony of the State to a conspiracy on the part of his daughter and son to send him to the penitentiary.

Other testimony was introduced by the State and appellant, which it is unnecessary to summarize. The court submitted the issue of the guilt or innocence of appellant, under the second count of the indictment, to the jury. A verdict of guilty was returned, and appellant was adjudged to serve a term of four years in the State Penitentiary as punishment therefor.

An appeal from the judgment of conviction has been duly prosecuted to this court.

Appellant was tried and convicted as a principal upon the charge of arson. While he was charged in a separate count with being accessory before the fact to arson, the State elected to rely upon the second count of the indictment, which charged him with being a principal in the crime of arson.

Appellant contends for a reversal of the judgment upon the ground that there is a fatal variance between the charge and proof. It is insisted that the proof is responsive to the charge of accessory before the fact to arson, but not responsive to the charge of principal in the crime. This is true, unless the distinction between principal and accessory was abolished by the Legislature.

Learned counsel for the State contend that the use of the words "or cause to be burned" in the arson statute abrogated the common-law distinction between a principal in the crime and an accessory before the fact to the crime.

If the distinction between the principal and accessory was abolished in the crime of arson by the use of said words, it follows that there was no variance between the charge and proof. We think the words used, however, were not intended to abolish this distinction. Long after the passage of the act this distinction was recognized by our court in the case of *Larimore* v. *State,* 84 Ark. 606. In that case the proof showed that Larimore paid another party $10 to burn Sutton's gin. He was convicted of being an accessory to the crime of arson. The judgment was affirmed by this court. Again, in the case of *Pritchett* v. *State,* 160 Ark. 233, this court took occasion to say, in an arson case, that one present, aiding and abetting in the commission of the crime, was admittedly a principal. This was tantamount to saying that an accused who was absent from the scene of the crime could not be convicted as a principal. It is true that these particular words in the statute were not called to the attention of the court in those cases, but this time-honored distinction was recognized in both cases. If

the Legislature had intended to abolish this distinction, it could have done so by the use of unambiguous words, or by use of words susceptible of only one meaning. We think the words "or cause to be burned" were included in the statute to reach persons who accomplished their purpose in burning any kind of house by the use of some inanimate agency, viz., by setting fire to something which will spread to and burn the house intended to be destroyed, and those present, aiding and abetting in the commission of the crime, and those present and compelling another by duress to commit the crime. In other words, the intention of the Legislature was to make the language broad enough to include every one as principals in the crime who could be charged and convicted as principals in the crime under the common law.

For the error indicated the judgment is reversed, and the cause is remanded for proceedings in accordance with law.

BRAY v. WOODLEY.

Opinion delivered February 4, 1924.

1. APPEAL AND ERROR—EFFECT OF SUSTAINING DEMURRER TO ANSWER.—In determining upon appeal whether a valid defense was stated in an answer, to which the trial court sustained a demurrer, the facts stated therein will be treated as true.
2. PLEADING—LEGAL CONCLUSION.—An allegation that a contract was framed in the language used through fraud and mistake amounted to no more than a legal conclusion, and was insufficient to secure a reformation of the contract.
3. EVIDENCE—PAROL EVIDENCE RULE.—A provision in a written oil and gas lease for a forfeiture unless a well was commenced or rental paid before a certain date could not be varied or contradicted by parol testimony that the actual agreement allowed a longer time, and an answer setting up such an oral agreement stated no defense.
4. MINES AND MINERALS—FORFEITURE OF LEASE—NOTICE.—Under an oil lease providing for its termination if no well was commenced

by a certain date, unless the lessee paid a stipulated rental, notice of forfeiture was unnecessary to terminate the contract, and execution of new lease to others gave them the right to have the prior lease canceled as a cloud on the title.

5. MINES AND MINERALS—OIL LEASE—WAIVER OF FORFEITURE.—Under an oil lease, which lessor had become entitled to forfeit because of failure of lessee to pay the stipulated rental in lieu of drilling a well, if thereafter the lessee deposited the stipulated rental and the lessor agreed to accept the same as payment therefor, there was an acceptance of the rental money and a waiver of the right to insist upon a forfeiture.

6. MINES AND MINERALS—RIGHTS OF PURCHASERS OF OIL LEASE.—Under an oil lease, a waiver of forfeiture would be ineffective against subsequent purchasers or lessees without notice.

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

Frank M. Betts, for appellant.

1. If the facts stated in the answer, and every reasonable inference that may be drawn therefrom, constitute a defense, the demurrer should have been overruled. 52 Ark. 378; 75 Ark. 64; 107 Ark. 142; 96 Ark. 163, and cases cited; 210 S. W. (Ark.) 143.

2. Contracts may be reformed on the ground of mutual mistake, misrepresentation, etc. They may be reformed where there is no mutual mistake, as when there is mistake on one side and misrepresentation of material fact on the other. 174 S. W. 1158; 2 Pomeroy, Eq. Jur. 847-870; 104 Ark. 475. Plaintiffs' remedy was by motion to make more definite and certain, not by demurrer, if the allegations in the answer were incomplete, ambiguous or defective. 91 Ark. 400; 96 Ark. 163.

3. Acceptance of rent for the alleged defaulted period was a waiver of appellees' right to declare a forfeiture. 180 Pac. 528; 175 Pac. 920; 180 Pac. 959; 79 Tex. 256, 15 S. W. 228; 220 S. W. 1078.

4. The third parties purchased the lease and assignment thereof with full knowledge of appellants' rights.

Patterson & Rector, for appellees.

1. Appellant cannot invoke reformation, because (a) the amended answer shows clearly that the terms of

the contract were agreed upon and reduced to writing at the time the purchase money was paid in escrow to the joint agent, or immediately thereafter, and, since the parties could not have known when the title would be approved, if at all, it would have been physically impossible for the forfeiture clause in the lease to have been written as appellant claims it should have been written; (b) because he does not definitely allege in his answer how the mistake occurred.

2. There was no waiver or other act upon the part of Lovett that would estop him from claiming a forfeiture under the lease to Bray. 54 Ark. 499; 70 S. C. 195; 36 Ark. 114; 100 Ark. 399; 96 Ark. 609.

McCULLOCH, C. J. This is an action instituted in the chancery court of Union County to cancel a gas and oil lease executed by Sam and Ella Lovett to appellant Bray. Appellees are subsequent lessees under the Lovetts, and allege that appellant had forfeited his lease prior to the execution of the lease of the Lovetts to appellees, on account of the failure to begin drilling or to pay the stipulated rental. The lease contract between the Lovetts and appellant is in the customary form, stipulating a time for the beginning of the term within which drilling may be begun and consummated, and the arrangement for paying rentals for delay. The contract was dated January 15, 1921, and it contained the following clause:

"If no well be commenced on said land on or before the 15th day of January, 1922, 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 First National Bank of El Dorado, Arkansas, or its successors, which shall continue as a 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 twelve months from said date."

It is alleged in the complaint that no well was commenced nor rentals paid on or before the 15th day of

January, 1922. It is also alleged in the complaint that the Lovetts notified appellant of the forfeiture, and on February 11, 1922, executed to appellees another oil and gas lease covering the same land. The Lovetts joined with the subsequent lessees as plaintiffs in this action.

The court sustained a demurrer to appellant's answer, and, upon the latter declining to plead further, rendered a final decree in favor of appellees, canceling the lease.

The case having been decided on demurrer, the facts must be ascertained from the face of the pleadings, and what we have to determine now is whether or not a valid defense was stated in the answer. The facts stated in the answer must, in determining that question, be treated as having been correctly stated.

It is, in substance, stated in the answer that the stipulation in the deed providing a forfeiture if no well be commenced, or rental paid, on or before the 15th day of January, 1922, does not correctly state the agreement of the parties, and that the insertion of the stipulation in that form was done by fraud and mistake—that the contract was to be prepared and placed in escrow, subject to delivery upon approval of title, and that appellant was to have one year from and after the date of the actual delivery of the contract, which was on February 2, 1921. The allegation as to fraud and mistake amounts to no more than mere conclusion; no facts are stated upon which the charge of fraud or mistake is based. The allegation merely is that the contract was framed in that language through fraud and mistake. This is not sufficient to constitute an allegation sufficient to entitle the party to a reformation of the contract. The remainder of the allegations in this regard constitute an attempt to vary the written contract by parol evidence. The stipulation in the lease with reference to time for operating under the lease was of the essence of the contract, and those terms cannot be varied or contradicted by parol testimony. The allegations are in conflict with the contract itself, which appellant admits

in his answer that he executed, and no valid defense is shown by alleging a contrary parol agreement.

Under the contract, the forfeiture operated automatically, without notice of an intention to declare a forfeiture, and the lease subsequently executed to appellees by the Lovetts, covering the same premises, was sufficient to entitle them to cancel the prior lease, which was a cloud on their title. *Harrell* v. *Saline Oil & Gas Co.*, 153 Ark. 104. Unless a well was commenced, or the rentals paid, within the time specified in the contract, or unless the forfeiture was waived by some act of the Lovetts prior to the execution of the second lease to appellees, or subsequently by appellees themselves, they had a right to cancel the lease.

In another paragraph in the answer it is stated that appellant resides in the State of Missouri, and that he mailed to the First National Bank of El Dorado, St. Louis exchange for $40, the amount of the rentals due, which was received by the bank on January 23, 1923, and placed to the credit of the Lovetts in accordance with the contract, and the next paragraph reads as follows:

"14. Defendant, answering further, says that plaintiffs are estopped from claiming any forfeiture of the lease in this: that immediately after placing the money to his credit in the First National Bank the defendant advised in person that the money was there, subject to his order, and plaintiff advised defendant, in the presence of disinterested witnesses, that he would accept of it, and did come to El Dorado for the purpose of accepting of it and withdrawing it from the bank, when he was over-persuaded by his co-plaintiffs to refuse same and demand a cancellation of the lease, which was more than fifteen or twenty days after plaintiff had stated he would accept of said money. He therefore expressly waived any right that he might have had to have insisted on a forfeiture, and, by reason thereof, plaintiffs, by his words and conduct, are estopped from seeking a cancellation of defendant's lease in this cause."

It will be noted that the two paragraphs, when considered together, allege, in substance, that the money was actually received by the designated depository, First National Bank of El Dorado, on January 23, 1923, and that immediately thereafter the lessor entered into an oral agreement with appellant to accept payment of the rental. If there was an actual acceptance of the rental after the expiration of the stipulated time for such payment, it constituted a waiver of the forfeiture. *Cordell* v. *Enis, ante* p. 41. The date of the alleged acceptance on the part of the lessor is not stated so as to expressly show that it was done before the subsequent lease to appellees, but it is fairly inferable, from the language used in the answer, that this acceptance was made prior to the execution of the second lease, for it says that it was done immediately after the money was placed by the bank to the credit of the lessor, which was on January 23, and the lease to appellees Woodley and others was not, according to the allegations of the complaint, executed until February 11. Of course, the waiver of the forfeiture would not be effectual against subsequent purchasers or lessees without notice. Is this language sufficient to show that there was an acceptance of the rental money? We think it is. The money was in the bank mentioned as the depository, and had been placed to the credit of the lessor, and the agreement to accept the money constituted a ratification of the act of the bank in placing the money to his credit. The effect was the same as if the money had been actually turned over to the lessor. It passed beyond the control of appellant, for he could not then have withdrawn the money from the bank. But, even if he did have the right to withdraw the money, he did not attempt to do so, and, on the contrary, relied on the promise of the lessor to accept it in payment of rental, thereby depriving appellant of the use of the money for a period of fifteen or twenty days, according to the allegations of the answer. Under the principles announced in *Cordell* v. *Enis, supra,* this constituted a waiver.

Appellees were entitled to have the complaint made more definite and certain by a statement of the exact time and place and circumstances under which the alleged acceptance of the money was made; but the allegations are sufficient, we think, to show, in an imperfect way, that there was an acceptance of the rental, which constituted a waiver of the forfeiture, and which was effective not only against the lessor, but also against subsequent lessees with notice.

The court erred therefore in sustaining a demurrer to the answer, and for this error the decree is reversed, and the cause remanded with directions to overrule the demurrer.

YANCEY v. PARNELL.

Opinion delivered February 4, 1924.

1. FRAUD—SUFFICIENCY OF EVIDENCE.—In an action for damages for misrepresentation in a contract for the sale of a farm, evidence *held* to sustain a finding of the chancellor that there was no misrepresentation by the vendor as to the acreage under cultivation.
2. FRAUD—SUFFICIENCY OF EVIDENCE.—In a purchaser's action for damages for misrepresentation as to the amount of land under cultivation in the farm sold, the fact that the written contract contained no stipulation as to the acreage under cultivation was a significant fact in determining the weight of evidence as to misrepresentation.

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

Golden & Golden, for appellant.

Plaintiff was not estopped by his settlement for the land taken up by the railroad, nor by his other acts. Under the facts in this case, he was entitled to hold to his contract, and to demand what he had purchased and paid for. 47 Ark. 168. Where a representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the party making it, the one receiving it has the absolute right to rely upon

its truthfulness, though the means of ascertaining its falsity were fully open to him. 47 Ark. 339; 97 Ark. 269; 96 Ark. 371; 99 Ark. 438, 442; 89 Ark. 325. It does not, therefore, lie with the defendants to say that plaintiff should not have believed the representations made. They were made as facts, backed with guaranties, and were, or should have been, within the knowledge of defendants or their agents. 71 Ark. 91, 97, 98; 82 Ark. 20, 23; 30 Ark. 535, 536; 142 Ark. 189; 218 S. W. 657, 659; 109 Ark. 109; 101 Ark. 95. See also 19 Ark. 102; 25 Ark. 541; 61 Ark. 120. The principle of laches cannot apply. Plaintiff had the right to take what he was offered and bring suit for what he purchased and failed to receive, within the three years' limitation. 139 Ark. 447.

Williamson & Williamson, for appellees.

The decision of the chancellor was reached on a hearing and consideration of conflicting testimony, and his findings upon the facts must be affirmed on appeal, unless contrary to a clear preponderance of the evidence. 129 Ark. 121; *Id.* 301; 130 Ark. 178. Had this been a very large tract of land, there might have been some excuse to presume that the appellant relied upon some other person's statements as to the amount of cleared acreage; but here the rule is applicable that, where a small tract of land is involved, the vendee must exercise reasonable prudence, and not rely upon the person with whom he is dealing to protect his interests. 147 Ark. 505. Fraud will not be presumed. One who alleges fraud must prove it by evidence which is clear, satisfactory and convincing. 82 Ark. 24; 20 Ark. 216; 18 Ark. 123; 6 Ark. 308; 31 Ark. 554; 25 Ark. 225; 33 Ark. 259; *Id.* 727; 17 Ark. 151; 37 Ark. 145; 99 Ark. 45; Am. Cas. 1913-A, 960. On the question of representations, see 95 Ark. 375; 82 Ark. 20; 71 Ark. 91, 97; 83 Ark. 403; 19 Ark. 522. If the means of information as to the subject of a misrepresentation are equally accessible to both parties, they will be presumed to have informed themselves, and, failing therein, must abide the consequences of their own carelessness. 95

Ark. 131; *Id.* 523; 47 Ark. 148; 46 Ark. 337; 31 Ark. 170; 16 Ark. 114; 11 Ark. 58. See also 74 Ark. 231.

McCULLOCH, C. J. Appellant purchased from appellee a tract of land in Chicot County, and a lot in the town of Dermott, in that county, aggregating in area about 100 acres, for the price of $100 per acre, making a total price of $10,000, payable partly in cash and the balance in installments, evidenced by promissory notes. Appellant instituted this action against appellee in the circuit court of Chicot County to recover damages alleged to have been sustained by reason of fraudulent misrepresentations of appellee and his agents in regard to the amount of land in cultivation. Appellant alleged in his complaint that appellee and his agents represented to him that there were ninety-three acres of land in cultivation, and thereby induced him to make the purchase, but that he ascertained by actual survey, after consummation of the purchase, that there were only sixty-eight and one-half acres cleared and in cultivation. Damages were laid in the sum of $2,450, the difference in the market value of the land as represented and as its condition was found to be in fact.

Appellee answered, denying all of the allegations of the complaint with respect to false representations, and also pleaded a settlement with appellant whereby he paid to appellant the sum of $100 in adjustment of differences in regard to shortage in acreage, as well as all other claims for reduction in the price.

The cause was transferred to the chancery court, without objection, and proceeded to trial in that court, which resulted in a decree in favor of appellee, dismissing appellant's complaint for want of equity.

Appellant testified, in substance, that he lived in Faulkner County at the time he entered into negotiations for the purchase of this land from appellant, and that he was induced to go down to Chicot County to look at the land by an advertisement issued and circulated by Bennett & Daniels, real estate agents, who were acting as agents for appellee in the sale of this land, represent-

ing the total area of the tract, and stating that there were ninety-three acres in cultivation. He testified that he went to Chicot County and looked at the land, being shown by Bennett & Daniel, and that the representation was made to him that the tract contained at least ninety acres in cultivation. He testified that those agents told him that, if he would purchase the land, they would guarantee that there was as much land as ninety acres in cultivation. He testified that appellee Parnell also made the same statement to him, and that these statements were relied on and constituted one of the inducing causes for making the purchase. Other witnesses corroborated appellant in his statement concerning the alleged representations. Appellant also introduced as a witness another real estate dealer in Chicot County, who testified that this land had been placed in his hands for sale by Bennett & Daniel, with authority to represent that the tract contained eighty-five acres in cultivation. On the other hand, Bennett & Daniel, as well as appellee Parnell himself, testified that they made no such representations to appellant concerning the amount of acreage. Bennett & Daniel testified that the advertisement which they circulated did not contain any representation as to the amount of acreage, as claimed by appellant. The advertisement was not introduced in evidence by either party, and appellant stated that he had lost or misplaced the copy of the advertisement which had come into his possession.

It also appears, from proof adduced by appellee, that a controversy arose between the parties as to a slight shortage in acreage, something less than an acre, and that they settled this controversy by appellee deducting $100 from the purchase price. Appellee and his witnesses testified that the agreement was that $100 credit was allowed in satisfaction of any claims for reduction in price, either by reason of shortage in amount of land or in the amount of cultivated lands.

The decision of the case comes down to a question of fact, and, after due consideration of all the evidence,

we are unable to discover that the finding of the chancellor is not supported by a preponderance of the evidence. There is a sharp conflict on both of the issues as to whether or not there was a misrepresentation as to the amount of land in cultivation, and also as to the substance of the settlement between the parties when the sum of $100 was credited. There was a written contract between the parties concerning the sale and purchase of the land, and it contains no statement with reference to the amount of land in cultivation, nor as to any guaranty by appellee as to the amount of acreage. The failure of the contract to contain such a stipulation, however, does not preclude appellant from recovering damages for appellee's misrepresentations, but it is a significant fact, in testing the weight of the evidence, that, notwithstanding appellant's testimony that there was a misrepresentation as to the amount of land in cultivation and a verbal guaranty concerning it, all reference to it was omitted from the written contract.

After reaching the conclusion that the finding of fact by the chancellor is not against the preponderance of the evidence, and there being no questions of law involved, it becomes our duty to affirm the decree, and it is so ordered.

GRIMES v. McKEE.

Opinion delivered February 4, 1924.

1. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where appellant's abstract does not contain the material parts of the decree, nor show the manner of giving testimony, or that the testimony as abstracted was all that was considered by the court, the decree will be affirmed for non-compliance with rule 9.
2. APPEAL AND ERROR—PRESUMPTION OF CORRECTNESS OF DECREE.—It will be presumed on appeal that the decree appealed from is correct until the contrary appears by compliance with rule 9.

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

Sullins & Ivie, J. Wythe Walker and *W. D. Mauck,* for appellants.

WOOD, J. The appellants, in their abstract, state that "the only issue in this case is the right of curtesy of John Grimes, appellant, the right of the court to order a sale of a portion of his land, and the principal contention in the whole matter is his establishing the validity of the deed said to be executed by John Grimes to his wife, Martha Grimes. In order to sustain the allegations of the separate answer and cross-complaint of the appellant, the following testimony is submitted for the consideration of the court." Then follows what purports to be the testimony of appellant, John Grimes, and also of the witnesses John C. Grimes, Dr. T. M. Rice, Munce Grimes, and the rebuttal testimony of John Grimes, followed by what purports to be the testimony of Ira Grimes in his own behalf. After setting out this testimony, the appellants state in their brief that there are three questions to be considered: First, the right of curtesy of appellant; second, the order of sale as to a certain parcel of land—200 acres; and third, the validity of the deed of appellant to his wife. Then follows a statement in the brief to the effect that the most important question is the validity of the conveyance of the appellant to his wife. We do not find that this deed, or the purported contents thereof, the validity of which appellants seem to be calling in question, and which the trial court held to be valid, has anywhere been set forth in the abstract. The only reference to the pleadings which made up the issue upon which the trial was had and the decree below rendered is as follows:

"The separate answer and cross-complaint of Ira Grimes, the separate answer and cross-complaint of John Grimes, cross-complaint against Ira Grimes, Myrtle Hudson, guardian of Levi Grimes, and the separate answer and cross-complaint of John C. Grimes, J. M. Grimes, Elizabeth Brown, Mae Grimes, cross-complainants, against Ira Grimes, Myrtle Hudson, guardian of Levi Grimes, a minor, contain the following allegations

and denials: Appellant, John Grimes, denies that Martha Grimes was the owner of the land mentioned in the cross-complaint of Ira Grimes, and alleges his physical condition during the fall and winter of the year 1914. Also alleges the condition in which the deed, if a deed was procured at all, or if a deed was executed by him to his wife, Martha Grimes, showing the manner of the execution of the deed, his condition at the time of the execution, and the allegation of the children of Grimes as to the execution of a deed by them to their father, John Grimes, appellant herein, and further allegation of the conduct of Ira Grimes, and alleging the amount of indebtedness, to whom paid, prior and since the death of his wife, and the prayer of the separate answer and cross-complaint of appellant."

The reference to the decree is as follows: "Said cause aforesaid, to-wit, cases 2341 and 2388, were consolidated by agreement and to proceed as case 2109. The further orders and proceedings appearing in Tr. 45 to 55, inc. Issues between the various parties to this suit are, by order of the court, set for hearing April 15, 1922, to be heard upon such depositions as may have been taken in the case and oral evidence produced by the parties in open court."

Now, it is impossible for this court to get at the merits of this lawsuit upon the above abstract. The only reference to the decree in the abstract shows that the cause was to be heard upon oral evidence, and, for aught the abstract shows, the decree itself may recite that it was heard upon oral testimony. The abstract recites that "in order to sustain the allegations of the separate answer and cross-complaint of appellant, the following testimony is submitted for the consideration of the court." But there is nothing in the abstract to show whether this was testimony by deposition or oral testimony, and nothing to show that the testimony as thus abstracted was all the testimony considered by the court upon which the decree was bottomed. We do not know what other testimony, oral, written, or document-

ary, the court might have considered. The abstract wholly fails to comply with rule 9 of this court, which requires that "the appellant shall file with the clerk of this court an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented in this court for decision."

In one of our late cases we said: "It is quite apparent that it would be necessary for each judge to take the transcript and explore it in order to fully understand the questions presented by this appeal to the court for decision. The business of this court could not be dispatched without the enforcement of this rule. It is a rule of long standing, and has been rigidly enforced by this court, as will be seen by reference to the following cases, covering a long period of time." (Citing numerous cases). *Hubbert* v. *Mo. Pac. Ry. Co.*, 136 Ark. 188. In order to conserve the time of this court, in the present congested condition of its docket, it is now more important, perhaps, than ever before in the history of the court that this rule be strictly enforced.

The presumption is that the decree of the trial court is in all things correct, until the appellants make the contrary appear by complying with rule 9, *supra*. This they have not done. The decree is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* WARREN.

Opinion delivered February 4, 1924.

1. ASSIGNMENTS—STATUTE REGULATING ASSIGNMENT OF WAGES.—Crawford & Moses' Dig., § 7133, relating to the assignment of wages to secure a loan, has no application to an assignment of a portion of an employee's wages to pay for a watch.
2. ASSIGNMENTS—BINDING EFFECT.—Where an employer accepted and paid an order of his employee to pay to another a certain part of his wages, the employee was bound by the order.

3. MASTER AND SERVANT—RIGHT TO RECOVER WAGES AND PENALTY.—In an action by a discharged employee for wages and for the penalty, under Crawford & Moses' Dig., § 7125, where the undisputed testimony showed that the money due him, less the amount of his order in favor of a creditor, which the defendant had paid, was ready for him within seven days after his discharge, and that when he called for his pay he failed to identify himself, it was error to direct a verdict for the whole amount of his wages and the statutory penalty, instead of a verdict for the balance due with interest.

Appeal from Cross Circuit Court; *W. W. Bandy,* Judge; reversed.

Thomas B. Pryor and *C. E. Daggett,* for appellant.

The evidence does not disclose a request by the plaintiff to have his money sent to a regular station, or that he applied at such station within seven days for payment. Hence, the verdict should have been directed for the appellant. 87 Ark. 574. The case does not fall within the rule announced in *Biggs* v. *Railway,* 91 Ark. 122. The verdict should have been directed for the defendant, because the evidence shows that the plaintiff obtained the benefit of the order given against his wages. 83 Ark. 445.

J. C. Brookfield, for appellee.

Appellant was liable for not paying the balance, even if the assignment was a good defense. 75 Ark. 137; 130 Ark. 266. But the assignment was no defense. C. & M. Digest, § 7133, 7134. As to the propriety of enforcing the penalty, see 86 Ark. 147.

WOOD, J. This action was instituted by the appellee against the appellant, before a justice of the peace, to recover the sum of $32.70 alleged to be due the appellee by the appellant as wages. The appellee alleged that he was in the employ of appellant as laborer, and that appellant was due him the above sum for his labor; that appellant discharged the appellee on August 16, 1922, without paying his wages as above, but agreed to pay him at Wynne Station; that appellee demanded of the agent at Wynne Station, each day for seven days, his wages, and same were not paid. Appellee prayed judg-

ment for his wages and for a penalty in the sum of $2.90 per day from the date of his discharge.

The trial before the justice resulted in a judgment against appellant, on the 15th day of September, 1922, for $32.77 as wages, and $52.77 penalty, and costs. The company appealed to the circuit court. There the appellee amended his complaint and set up the judgment in the justice court, alleged that it had not been paid, and prayed for judgment in the sum of $240.70 in addition to the judgment in the justice court, the same being the amount of the penalty, at the rate of $2.90 per day, which had accrued at that date, and for the sum of $2.90 per day until the amount of his wages and penalty for nonpayment had been paid.

According to the undisputed evidence, the appellee was in the employ of appellant as day laborer, and was discharged on August 16, 1922, at which time appellant was due him for wages the sum of $31.90, less seventy cents hospital fees. Before his discharge the appellee had purchased a watch, and had given an order on the appellant, directing it to pay to the party from whom he had purchased the watch the sum of $27 out of his wages, as same came due. The order contained a provision to the effect that, in the event the employee was discharged, the total amount of wages due at that time should be deducted from the amount of the order. The appellant accordingly deducted from the amount of wages due appellee the amount of the order, leaving a balance then due appellee of $4.20. The foreman, under whom appellee worked, issued to him at the time of his discharge the following:

"Missouri Pacific Railroad Co.
"Certificate of Identification.
"Pay Time Voucher.

"At Wynne Station. Wynne Station, August 16, 1922.

"That W. Warren was employed as laborer during the 1st period month of August, 1922, and is entitled to the amount reported in his favor on time-book for (B and B).

(Extra Gang).

"No. ——— Section No. 210, Memphis Division, for that month. (Signed) D. Sanders, foreman.

"W. Warren, workman.

"Notice: This certificate is not transferable, and will not be honored if presented by any other than the person to whom issued, who must sign the same in the presence of person issuing same and at time of issuance. Voucher payable at station indicated in upper left-hand corner of this form, unless forwarded, at the request of person in whose favor issued, to another station for delivery."

The appellee testified that, when the foreman handed him the above paper, he said: "Here is your time, boy; you will get your money at the depot." Appellee went over to the station on the third and fourth days thereafter, and did not get his money, and then went to see the timekeeper, who told him his time was not there, but that he would "get it out pretty soon." Appellee went back to the station on the eighth day, and the agent came up to the window, and he had about three one-dollar bills in his hand and some more change—appellee did not know how much—and said to appellee, "Where is your identity?" and appellee replied, "I have not got it," and the agent said, "You will have to get it," and appellee told him that he did not have it. Appellee further testified that they were to take twenty dollars out of his wages.

Upon the above testimony, appellant asked the court to instruct the jury to return a verdict in its favor, which request the court refused, but, on its own motion, instructed the jury to return the following verdict:

"We, the jury, find for the plaintiff in the sum of $32.77, actual wages due, and penalty in the sum of $182, total $234.90. F. S. Payne, foreman."

The appellant objected, and duly excepted to the instruction of the court. Judgment was rendered in

favor of appellee for the amount of the verdict, from which is this appeal.

Act 34 of the Acts of 1911, page 15, entitled "An act to regulate the assignment of wages," §§ 7133 and 7134 of C. & M. Digest, has no application to the facts of this record, for the order adduced in evidence by the appellant was not an assignment of wages to secure a loan. It was simply an order from the laborer to pay a certain amount of his wages to the one from whom he had purchased a watch. The appellant had accepted and taken up this order of the appellee, as shown from the indorsements of the payee on the back of same. Appellee admitted that he signed the order, and he is therefore bound by it. The undisputed testimony shows that the appellant's timekeeper, who had charge of the record of the time made by laborers, deducted from appellee's wages the amount of the above order and seventy cents hospital fee, and made out a check for $4.20, and delivered it to appellant's agent at Wynne within seven days, and the check for this amount of money was in the hands of the station agent at Wynne on August 21, 1921, less than seven days from the time of appellee's discharge on August 16, 1922. When the appellee was discharged he was given a certificate of identification, or pay-time voucher, naming Wynne as the station where he was to receive his pay. Appellee testified that, after three days, he went over to the station to get his money, and didn't get it, and went on the fourth day and didn't get it. He then went back to the timekeeper, then on the eighth day back to the window, and was asked where his identification card was, and replied that he did not have it. He also testified that the one making this inquiry had about three one-dollar bills in his hand, and more change—appellee didn't know how much.

The appellee was bound by his order which the company accepted and paid to the payee therein. This order was a valid contract between the appellee and the appellant, by which the appellee bound himself to pay the

latter the amount of the order out of his wages. The appellant therefore, at the time it discharged the appellee, was due him only the sum of $4.20. *Stewart* v. *Weaver,* 83 Ark. 445.

The burden was upon the appellee to prove that the appellant had not complied with the provisions of § 7125 of Crawford & Moses' Digest, and that he was therefore entitled to the penalty prescribed therein for the nonpayment of the wages due him. The proof upon the part of the appellee does not meet this burden. On the contrary, the undisputed testimony shows that the wages due the appellee at the time of his discharge were sent to appellant's station agent. But, if it be conceded that it was understood between the appellee and the foreman, at the time of his discharge, that the appellee was to receive his pay at the station of Wynne, nevertheless the undisputed testimony shows that the amount due appellee on his wages at the time of his discharge was sent to the station agent at Wynne within seven days after appellee's discharge, as above stated, and the appellee does not prove that within that time, or after, he called for his money and identified himself so as to justify the agent in paying him the amount. On the contrary, his testimony shows that, on the eighth day after his discharge, when he called at the station for his pay and was asked for his identification card, he replied that he didn't have it. The appellee does not prove that he called for his wages at Wynne within the seven days after his discharge and identified himself as the one who was entitled to it. He does not prove that he presented his identification card. See *Wisconsin-Arkansas Lumber Co.* v. *Thompson,* 87 Ark. 574. It occurs to us therefore that the court erred in instructing a verdict in favor of the appellee. The judgment will therefore be reversed, and, inasmuch as the case has been fully developed on the evidence, judgment will be entered here in favor of the appellee for the sum of $4.20, the amount due from the appellant to the appellee, with interest thereon at the rate of six per cent. from August 16, 1922.

COOK v. STATE.

Opinion delivered February 4, 1924.

1. CRIMINAL LAW—SPECIFIC OBJECTION TO LANGUAGE OF INSTRUCTION.—Where an instruction is not inherently erroneous, the attention of the court should be drawn to any objection which goes merely to the language of the instruction.
2. WITNESSES—CROSS-EXAMINATION OF STATE'S WITNESS.—In a prosecution for murder it was not error to refuse to permit defendant to ask a State's witness concerning a threat against defendant by deceased, where such matter was not relevant to the examination of the witness in chief, and defendant refused to make the witness his witness.
3. HOMICIDE—THREATS TO KILL DEFENDANT'S DAUGHTER.—It was not error in a murder case to exclude testimony of defendant's daughter that deceased had threatened to kill her.
4. HOMICIDE—ADMISSIBILITY OF THREATS.—Where it was a question as to who was the aggressor in a conflict resulting in a homicide, it was error to exclude evidence of threats to kill defendant, recently made by deceased.

Appeal from Baxter Circuit Court; *John C. Ashley*, Judge; reversed.

W. U. McCabe, for appellant.

J. S. Utley, Attorney General, *John L. Carter*, *Wm. T. Hammock*, *Darden Moose* and *J. S. Abercrombie*, Assistants, for appellee.

WOOD, J. F. M. Cook, appellant, hereafter called Cook, was indicted by the grand jury of Baxter County, Arkansas, for the crime of murder in the first degree in the killing of one Jasper Wilson, on or about the 24th of August, 1922, in Baxter County. He was tried on the 15th of September, 1923, and convicted of murder in the second degree, and sentenced, by judgment of the court, to imprisonment in the State Penitentiary for a period of fifteen years. He appealed from that judgment.

The facts are substantially as follows: One Jim Wilson was the tenant of Cook, on a farm in Baxter County. Jasper Wilson was his stepson. The Wilsons had the place rented for the year 1922. Their lease had not expired on the 24th of August, 1922. There were two

barns on the place that the Wilsons rented. Cook had taken possession of what is called, in the record, "the upper barn." This had aroused the animosity of the Wilsons against Cook. On the morning of the 24th of August, 1922, the elder Wilson was preparing to go bee-hunting, and took his gun along, as Mrs. Wilson testified, to kill a squirrel. Jasper Wilson was taking a cow to the dipping vat. Cook had brought a load of hay to put in the lower barn. Wilson forbade him, and Cook's wagon was stopped in the gate. Jim Wilson went back to his house for his gun, and Cook went back and called to one Celia Everidge, who was living with Cook, to bring his gun. After they secured their guns they returned to the lot where the wagon of hay was standing, and there the fatal rencounter occurred, in which Cook killed the two Wilsons. When Cook returned, Mrs. Mary Wilson, wife of Jim Wilson, stated that she was present. She had anticipated trouble, and had gone to the barn. She saw Cook returning, running down the hill as fast as he could. She hollered to him to stop and not have trouble, but when he got as close as he wanted to he threw his gun to his face and fired at her husband. When she saw him throw his gun to his face, she looked around to see where her husband was, and he was raising his gun to his face. They both fired about the same time. Then she looked and saw her stepson standing back of her. Another shot was fired. She was so addled she did not realize what was going on and didn't know who fired that shot, but, when she came to herself, she looked and saw her husband staggering down the hill, and falling. She went to him and commenced working with him. She didn't know that any more shots were fired. She remembered that she had seen Jasper, and called to him, but he didn't answer. Then she started back towards the barn, and saw him sitting against the fence, with blood running out of his mouth and nose, and she knew that he was killed, too, though he was not yet dead. After her husband fell, Cook came into the lot and walked by, and she told him that he had killed her husband. He replied, "I am shot,

too." He went on towards the barn, in the direction of where she found Jasper Wilson; didn't know whether he had shot the boy before or after he passed. Jasper Wilson was eighteen years old. They had had no trouble to speak of before. When she found the boy, there was a shotgun close by, sticking through a crack in the fence, two or three feet away from him. The lot was grown up in weeds, and the boy was standing by the path, and it was low there, so that the weeds hid him from his waist down to his feet. Witness' husband had a Winchester at the time he fired the shot. He had just one shell.

It was shown that two empty 12-gauge shotgun shells were found at the front end of the wagon, indicating where the party stood who did the shooting. Also there were two empty shells at the back end of the wagon. The weeds had been cut from the hind end of the wagon to the point where Jasper Wilson's body lay. His body was found at the back side of the lot, east of the barn, and no shells were found in that vicinity that indicated any shooting. It was found where one load of shot had gone through the weeds and cut them down; there was the sign of blood where Jasper Wilson was standing, and the sign of blood, showing that he went toward the trail way where he fell. Young Wilson was shot in the back, and also in the head. He was lying at the fence, with his head shot all to pieces, and his hat was shot off, and on the opposite side from him was a shotgun, loaded, with one shell in it. He was shot in the left side and in the back part of his head. It was thirty-six yards from where young Wilson was to the wagon where they found the two shotgun shells which had been fired. The shot found on top of the rail fence were in line with the place where the boy fell and the point where they found the shells at the wagon.

There was testimony on behalf of the State tending to prove that, on the morning of the killing, Cook was talking to a bunch of men, and said, "Me and the old man got into trouble, and he shot me and I shot them." He further said, "I have shot those people, and I want

you boys to go over there and take care of them." He didn't state who they were, but the witnesses knew that he had reference to the Wilsons, and went over there, and found the Wilsons dead. Cook further said, in the same conversation, "They come out on me with their guns, and the boy popped out of the weeds with a gun and shot me in the eye with a twenty-two, and I went back to the barn and hollered to Celia to bring my shotgun, and she damn sure brought it."

Another witness for the State testified to the effect that he saw Cook, on the day of the killing, after the same had occurred, and Cook told witness that he (Cook) went to put a load of hay in the barn, and Wilson said, "I will kill you before I let you put the hay in the barn," and dared him to put it in the barn, and he (Cook) went after his gun, and he "damn sure used it." This witness also said that he heard Cook tell Doctor Matthews, when the doctor was treating his wound, as follows: "Just as I come around and raised my gun he raised his gun, and we both shot at the same time, or we both fired about the same time." Cook was asked, in this conversation, how the boy came to shoot him, and he replied that the boy told him he had killed the old man, and not to shoot any more, and the boy started to shoot, and he shot the boy.

Dr. Smith testified that he treated Marion Cook and Celia Everidge for injuries about the 24th of August, 1922. He asked Cook what was the trouble, and Cook said, "I have been shot." He also said that he killed a couple of men, and that he had to do it. Witness found a gunshot wound just inside the left eye and one about his right eye. He took out a shot from one of the wounds, and it appeared to be a No. 4 squirrel shot. Witness stated that, from the nature of the shots and the direction from which they entered Cook's face or head, Cook could not have been looking directly at his assailant at the time the shot was fired that inflicted the wounds. Celia Everidge was also shot.

Celia Everidge, who lived on the place with Cook, testified to the effect that Cook and one Brewer, on the

morning of the killing, had taken a load of hay to the lower barn, and had been gone only a few minutes when Wilson came by their camp, muttering and growling. He looked at witness for a second and said, "I am getting tired of looking at that damn son of a b——, and I will settle with him this morning," and went on in the direction of where Cook and Brewer were. A few minutes later she heard Cook hollering, and supposed he was calling her to come on and go home, and she started and looked up, and saw his gun, and picked it up and started down the hill to where they were, and heard them talking, and knew from the way they were talking that there was going to be trouble. She hurried on to try to stop it. When she got to Cook, he grabbed the gun out of her hand, and stated that Wilson was going to kill him. She and Brewer and Mrs. Wilson begged Wilson not to kill Cook, and Wilson repeated the words just used. The first thing witness knew, the shotgun the young man had was right on her. He was over to the right of the wagon, and standing where no one could see him except witness. Cook could not see the boy from where he was. When the boy shot, she fell, and, as she got up, they shot from the weed thicket from the left of the wagon, and witness heard the gunshot and saw Cook falling, and he got up and wiped the blood out of his face, and Wilson came over to the back end of the wagon, and, as he came around, Cook was getting up, and, as Wilson got to the back end of the wagon and had his gun to his face, Cook brought his gun up and they both fired at once. Cook stood there, and Wilson ran around back of the wagon and fell. All at once Jasper raised up in the weed thicket and shot Cook, and then squatted down. As the witness went to assist Mrs. Wilson she saw the young man kicking and scrambling by the fence on the ground, and as she came back he was sitting or lying up against the fence, and holding his gun in his hand, with the muzzle pointing up.

Witness Mary Cook, the daughter of Cook, stated that she knew Jim and Jasper Wilson. Jasper Wilson

made some threats against the life of Cook. She went to see if the mules were wasting the crops, and could not find them, and she went to see Wilson to see if he had seen them, and he came out of the house and said, "I intend to kill old man Cook if powder and lead will burn," and Jasper Wilson said the same thing. She told Cook about this threat a short time before the killing.

Cook himself testified that, if he killed Jasper Wilson, he did not know it. His testimony was to the effect that he didn't see Jasper Wilson there that morning, and had not seen him since the day before. He stated that old man Wilson had threatened to kill him that morning, and his testimony substantially corroborates the testimony of Celia Everidge and Thad Brewer as to what occurred at the time of the fatal rencounter; that he and Wilson fired at each other about the same time, and, as the old man went down, he (Cook) was looking to see where he was, and a gun fired over in the weeds and hit him, and he looked and saw the muzzle of the gun sticking up out of the weeds, and he aimed low down, about where he thought the stock of the gun would be in the weeds, and shot twice, and then turned and ran up the hill.

Cook offered to prove by Green Treat the following: "I met two parties along about the last of July, 1922, near Marion Cook's place, who said they lived on Marion Cook's place; that the young man and the father were together. The young man stated they lived on Marion Cook's place and renting land from him, and stated that if Marion Cook fooled with him he would kill him, and that the older man, who was present with the boy, said to the boy for him to hush up—that, if he was going to do anything like that, it was best for him not to be talking that way. This conversation took place a few weeks before the killing of James and Jasper Wilson. Also that witness, a few days before the killing, saw Marion Cook in Big Flat, and told him that these parties had threatened to kill him, and further, that witness would state that he was near the Marion Cook place, doing some min-

ing work, and just passed through Marion Cook's field, where this killing occurred, and that he didn't know what these parties' names were, but that he met an old man about sixty years old and a boy whom he judged to be about twenty years old, and that the older man addressed the younger man as his son."

The court would not permit the offered testimony to be introduced. Cook duly excepted to the ruling of the court.

The court instructed the jury on the law of murder, manslaughter, and self-defense. Only a general objection was saved to the instructions. None of the instructions were inherently erroneous, and there was no reversible error in the giving of same. The attention of the court should have been drawn to any objection which goes merely to the language of the instructions. There was no reversible error in refusing to allow the witness, Mary Wilson, to testify that Jasper Wilson told her "to tell that red-headed son of a b——, Marion Cook," not to show himself on the place, or "we will kill him." The court would not allow this testimony to be introduced unless the defendant made Mary Wilson his own witness. The court ruled correctly that this was original testimony, not responsive to the examination of the witness in chief, and it was only proper for the appellant to elicit such testimony by making the witness his own, which he failed to do. To avail himself of this testimony, appellant did not have to reintroduce the witness, but appellant should have made the witness his own for the purpose indicated.

There was no error in excluding from the jury the testimony of Mary Cook, to the effect that Jim Wilson ran at her with a knife, and threatened to pull her off her mule and kill her. The appellant was on trial in this case for the killing of Jasper Wilson, and this testimony of Mary Cook was not relevant to the issue being tried.

The court erred, however, in refusing to allow the proposed testimony of Green Treat to be introduced. The court should have permitted the testimony of this wit-

ness, which the appellant offered as set forth in the record, to go to the jury. The foundation for its introduction was sufficiently laid. It was shown to the court that the threat which the appellant thus offered to prove was made by Jasper Wilson against the life of the appellant. The testimony was not susceptible of any other conclusion. The description of the parties was sufficiently accurate to identify the elder person as Jim Wilson and the younger one as his son, Jasper. Such being the case, the testimony was competent, because it was an issue in the case as to who was the aggressor in the fatal rencounter, and in all such cases threats are admissible when they tend to explain or palliate the conduct of the accused. They are "circumstantial facts which are a part of the *res gestae* whenever they are sufficiently connected with the acts and conduct of the parties so as to cast light on that darkest of all subjects, the motives of the human heart." *Palmore* v. *State,* 29 Ark. 248; *Burton* v. *State*, 82 Ark. 595, and other cases there cited.

The above proffered testimony was, at least, sufficient to go to the jury to determine whether Jasper Wilson made the alleged threat.

The alleged errors predicated upon the remarks of the prosecuting attorney in argument are not likely to occur again, and it is unnecessary to comment upon these. For the error indicated the judgment is reversed, and the cause remanded for a new trial.

SLUDER v. STATE.

Opinion delivered February 4, 1924.

1. CRIMINAL LAW—CREDIBILITY OF WITNESSES.—The credibility of witnesses and the weight of evidence are questions for the jury.
2. CRIMINAL LAW—CONCLUSIVENESS OF VERDICT.—On appeal from a conviction of selling intoxicating liquor, the evidence will be given its highest probative force in favor of the verdict.

3. INTOXICATING LIQUORS—SALE OF JAMAICA GINGER.—A conviction of selling intoxicating liquor *held* sustained by proof of selling Jamaica ginger of high alcoholic content.

Appeal from Johnson Circuit Court; *J. T. Bullock,* Judge; affirmed.

Jesse Reynolds, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

WOOD, J. Appellant was indicted under § 6160 of Crawford & Moses' Digest, which reads as follows: "It shall be unlawful for any person, firm or corporation to manufacture, sell, or give away, or be interested, directly or indirectly, in the manufacture, sale or giving away of any alcoholic, vinous, malt, spirituous or fermented liquors, or any compound or preparation thereof, commonly called tonics, bitters or medicated liquors, within the State of Arkansas."

The indictment followed substantially the language of the statute, charging that appellant did "wilfully, unlawfully and feloniously sell and give away, and was wilfully, unlawfully and feloniously interested, directly and indirectly, in the sale and giving away of ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits and a certain compound and preparation thereof commonly called tonics, bitters and medicated liquors," etc.

Charlie Crowder testified that about July, 1923, he saw Ward Love buy some extract of appellant at Knoxville. Love bought four or five bottles. He drank it—witness helped him to drink it. It was either lemon or vanilla extract. It was stamped on the bottle, "Ninety-five per cent. alcohol." It didn't intoxicate witness or Love—didn't taste like it was intoxicating—didn't taste good, and witness didn't drink much of it. This all occurred in Johnson County, Arkansas.

Witness Love testified, corroborating the testimony of Crowder. He stated that he bought of appellant and drank three, four or five bottles of extract. Witness,

among other things, was asked to tell the jury whether the extract had an intoxicating effect on him, and answered, "If it did it had mighty little—it might have had a little." Witness paid 25 cents a phial for it, and told appellant, when he bought it, that he was getting it for cooking purposes. Witness didn't remember what the brand was.

R. C. Temple testified that he was sheriff of Johnson County. He searched appellant's store, and found a large amount of the extract. Witness couldn't say how many bottles, but appellant had an unusually large amount of the extract. Part of his shelves were pretty well filled with the stuff. He had a tolerably large store building, and had quite a lot of extract on the shelves. Witness also searched the depot at Knoxville and found two boxes of extract shipped to appellant—found Jamaica ginger there. Witness arrested appellant, and he paid a fine for having that in his possession. He had the Jamaica ginger stored in his cash safe. Witness found a pile of empty bottles at appellant's house, two or three feet high and six or eight feet broad, containing one or two thousand bottles. Witness talked to appellant about the amount of alcohol there was in this extract. It wasn't labeled. It was labeled, but it didn't have any percentage label on it. There was nothing on the wrapper or bottle to indicate the percentage of alcohol, and Jamaica ginger was labeled ninety-three per cent. Appellant said: "Well, I sell that all the time for medical purposes. There is all that extract there; it's got alcohol in it, too." Witness believed he said about 85 per cent. Witness brought home three or four bottles of the extract, but didn't have it examined or analyzed to determine the amount of alcohol. Witness found at appellant's house a dozen or fifteen empty bottles that had contained Jamaica ginger. Most of them were two-ounce bottles. Most of the bottles he found at appellant's house were Jamaica ginger bottles and possibly a few extract bottles.

The appellant testified, in his own behalf, that it was not his purpose at any time to sell any extract which contained alcohol. Witness told Sheriff Temple that he had not handled the extract for several years before the Ashdown case or the Supreme Court's decision in this Jamaica ginger proposition. He had been selling it there for years, but hadn't sold a bottle since that decision and for several months before, waiting for the decision of the Supreme Court on the real issue in the case as to whether or not it was a violation of the law to sell it. Witness had not sold any extract containing alcohol, within his knowledge. The label didn't show any, and the revenue department didn't require that it be labeled. Witness denied that he sold any extract to Ward Love; said that he had never seen him before in his life. Witness kept pretty well posted on the government regulations concerning the sale of these things, as he didn't want to violate the law and go to the "pen." The government didn't require them to label the bottle any more, showing how much alcohol this extract contained. Witness didn't know whether it had alcohol in it or not. It didn't show any percentage, and all representatives were selling it all over Arkansas. Witness bought his extract by deals—two or three gross at a time; vanilla, lemon, and six or eight different kinds—all mixed up—some orange and some banana. Witness always doubled his shipments rather than ship them back; and the bottles the sheriff found at the depot may have been two gross. Witness never sold four or five bottles of the extract at a time. The extract cost $2.25 a dozen—about $25 or $30 a hundred. Before the decision of the Supreme Court witness had been selling "jake" about eighteen years, but hadn't sold a bottle since. Witness moved the old bottles down to his house simply to clean up. He never sold a bottle of Jamaica ginger, except for medical purposes. in his life. He would not have sold extract to any one, if he had known it contained alcohol, under any circumstances. He had not sold any of it as a beverage or for the purpose of intoxication. Witness exhibited to the

jury bottles of the Silver Moon extract. All the brands that he kept you can buy in Clarksville by the dozen. Vanilla is one of the leading brands appellant handles, but he didn't bring a sample of that, because he was out of it.

The jury returned a verdict finding the appellant guilty, and fixing his punishment at one year in the penitentiary. Judgment of sentence was rendered on the verdict, from which is this appeal.

The court correctly declared the law. At least appellant urges no objection to any of the instructions of the court. He only contends here that there was no evidence to sustain the verdict. The credibility of the witnesses—the weight of the evidence—was for the jury. *Field* v. *State,* 154 Ark. 191; *West* v. *State,* 154 Ark. 555; *Cox* v. *State,* 160 Ark. 283; *Meeks* v. *State,* 161 Ark. 489.

We must give the evidence its strongest probative force in favor of the verdict. *Holmes* v. *State,* 132 Ark. 135. Applying the law as announced by this court in *Leslie* v. *State,* 155 Ark. 530, to the facts of this record, the testimony as above set forth is sufficient to sustain the verdict. The judgment is therefore correct, and it is affirmed.

SHUE *v.* SHUE.

Opinion delivered February 4, 1924.

1. DIVORCE—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—In an action for divorce, a finding of the chancellor that plaintiff had no legal grounds for deserting defendant, and that, on this account, her complaint should be dismissed for want of equity, and a divorce be granted to defendant on his cross-complaint for desertion, *held* sustained by the evidence.
2. DIVORCE—FATHER'S DUTY TO SUPPORT CHILDREN.—The fact that a husband was granted a divorce from his wife does not relieve him from the obligation to support his minor children.
3. DIVORCE—ALLOWANCE FOR SUPPORT OF CHILDREN.—The chancery court, in its discretion, may increase the allowance made in favor

of minor children as they grow older and need more money for their support and education.

Appeal from Woodruff Chancery Court, Northern District; *A. L. Hutchins,* Chancellor; affirmed.

Harry M. Woods and *W. J. Dungan,* for appellant.

R. M. Hutchins, for appellee.

HART, J. Lula Shue brought this suit in equity against her husband, Charley Shue, to obtain a divorce on the ground of cruel treatment and indignities which rendered her condition in life intolerable.

Her husband denied the allegations of her complaint, and filed a cross-complaint asking for a divorce from her on the ground of desertion.

The parties were married in Woodruff County, Arkansas, in February, 1907, and lived in that county as husband and wife until they separated in February, 1919. The present suit was commenced by the wife on the 28th day of September, 1921. Some eight years ago she brought a suit for divorce against her husband, but dismissed it. They have two girl children, aged, respectively, eleven and fourteen years.

According to the testimony of the wife and her witnesses, her husband cursed and abused her until her condition in life became intolerable, and then commanded her to leave him, which she did in about two weeks thereafter, which was as soon as she could obtain another home.

On the other hand, according to the testimony of the husband and his witnesses, he treated his wife kindly, and only upbraided her on the occasion in question, because she refused to turn off a cook of questionable character. He claimed that he was annoyed by his wife's keeping in their hotel and restaurant women of lewd character.

The chancellor found that the allegations of the complaint as to cruel treatment were not sustained by the proof, and the complaint of the plaintiff was dismissed for want of equity. The chancellor further found that the allegations of the husband in the cross-complaint for

desertion were sustained by the proof, and he was awarded a decree of divorce. The two girls were placed in the custody of the mother, and the father was ordered to pay $7.50 per month toward the support of each of the children until the further orders of the court. The court retained jurisdiction of the cause to make any further orders that might become necessary. The plaintiff has duly prosecuted an appeal to this court.

On the whole case we are of the opinion that the decree of the chancellor cannot be said to be against the preponderance of the evidence, and it cannot therefore be disturbed upon appeal.

When the parties first married they lived on a farm of the husband, several miles from any town. Subsequently they moved to the town of McCrory, where the wife operated a restaurant and small grocery store. Later on there were rooms for lodgers in connection with the restaurant. The parties seemed to have got along very well together until after they moved to town.

According to the testimony of the wife, her husband often cursed and abused her, and on one occasion, after cursing her, grabbed her by the hair and hurt her until she had to scream for assistance. The town marshal came in and separated them. Her testimony in this respect is corroborated by the marshal, who testified that this occurrence was about a year and a half before their final separation.

The plaintiff admitted that, on the night her husband ordered her to leave, in February, 1919, he became angry because she would not turn off a cook. They went home from the restaurant separately that night, and slept in the same room, but in different beds. The wife did not leave for two weeks thereafter, because she could not secure a suitable home. She said that perhaps she would have continued to live with her husband after this if he had asked her to do so.

According to the evidence of the husband, he complained about the cook because she was of lewd character, and he did not want that kind of a person staying

with them. He said that his wife was in the habit of having women of questionable character working in the restaurant, and that he frequently complained about that, but otherwise treated his wife well.

Other witnesses for the defendant testified that the plaintiff kept lewd women working for her in the restaurant and hotel, and permitted lewd people to room there. The witnesses testified that they had frequently seen women sitting in the laps of men in the hotel, and had heard them cursing and using other bad language.

It seems to be pretty well established that both the husband and wife were accustomed to using profane language, and were of rather coarse temperament. We think that it is fairly inferable that the abuse and cursing done by the husband was for the most part attributable to the fact that his wife kept women of questionable character as servants in the restaurant and lodging-house. The last row that they had, which culminated in her leaving home, resulted from his demand that she turn off a cook whom he considered to be a woman of lewd character. The fact that she stayed in the same room that night, and that she did not leave for two weeks thereafter, tends to show that her condition in life had not become intolerable on account of the abuse and ill treatment of her husband; but that she, on the other hand, bore his complaints and abuse about the character of her servants with equanimity. No useful purpose could be served by setting out all of the testimony and reviewing it in this opinion. We deem it sufficient to say that we have considered carefully the evidence of the whole case, and do not think that the chancellor erred in finding that the plaintiff had no legal grounds for deserting the defendant, and that, on this account, her complaint should be dismissed for want of equity and a divorce granted to him upon his cross-complaint.

It is finally contended that the chancellor erred in directing the plaintiff to pay to the defendant the sum of $7.50 per month each for the support of the two children. This part of the decree is evidently a clerical misprision.

The court intended to direct the defendant to pay to the plaintiff the sum of $7.50 per month toward the support of each of the children. The decree might have been corrected in the court below, upon motion.

In this connection we deem it proper to say that the father is under a legal obligation to support and educate his minor children, and the granting of a divorce to him from his wife does not relieve the father of his obligations to support them. The father must continue to furnish them a maintenance out of his estate, regard being had to his means and condition in life. *Holt* v. *Holt,* 42 Ark. 495, and *Gulley* v. *Gulley* (Tex.), 15 A. L. R. p. 564.

In a case-note to 15 A. L. R., at p. 569, it is said that the rule, supported by the weight of authority, is that a father is not released from his obligation to support or contribute to the support of his infant children by reason of the fact that the mother has been granted an absolute decree of divorce from him, and has been awarded the custody of the children by a decree making no provision for their maintenance. Many decisions from numerous courts of last resort in the United States are cited in support of the rule. The principle is the same, whether the divorce is granted to the husband or wife.

The father has made no complaint in this case that the custody of the children has been awarded to the mother, and, as they grow older and need more money for their support and education, the chancery court may, in its discretion, increase the allowance made in their favor.

The case at bar was very close upon the facts, and the cost of this appeal will, in the exercise of our discretion, be taxed against the husband.

It follows that the decree will be affirmed.

GRAYLING LUMBER COMPANY v. TILLAR.

Opinion delivered February 4, 1924.

1. TAXATION—INVALIDITY OF TAX FORFEITURE.—As there was no legal assessment, advertisement or sale of land for the taxes of 1868, a forfeiture to the State for nonpayment of such taxes was void, and passed no title.
2. QUIETING TITLE—VALIDITY OF DECREE CONFIRMING TAX TITLE.—Under Crawford & Moses' Dig., §§ 8362-8373, a decree of confirmation of title to land was void as to a person who has paid the taxes within seven years preceding the filing of the petition for confirmation, where such person was not in any way made a party to the confirmation proceedings.
3. JUDGMENT—DIRECT ATTACK.—A suit brought for the purpose of quieting title in one claiming the land and to cancel and set aside outstanding claims of title, was a direct attack upon a decree confirming the title of another.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellants to quiet their title to certain lands in Desha County, Arkansas.

Appellants answered, setting up title in themselves and asking that the complaint of appellee be dismissed for want of equity, and, by way of cross-complaint, asked that the title to the lands be quieted in appellants as against appellee.

The case was tried upon an agreed statement of facts. Appellees deraigned title from the United States. On August 3, 1858, the United States issued a patent to said lands to John D. Kimball. On March 21, 1895, John D. Kimball and his wife conveyed said lands by deed to S. C. Roberson. On January 10, 1900, S. C. Roberson and wife conveyed said lands to Frank Tillar. On the 31st day of August, 1900, T. F. Tillar received a clerk's tax-deed to said lands. T. F. Tillar and Frank Tillar was the same person.

Appellants deraigned title from the State of Arkansas. On the 10th day of September, 1894, the State of

Arkansas conveyed said lands to the Red Fork Levee District. The Red Fork Levee District had the title to the lands confirmed in it by a decree of the chancery court, entered of record on November 7, 1901. The Red Fork Levee District then, by a deed, conveyed the lands either to appellants or to the grantors of appellants.

It is also agreed that the lands were forfeited to the State at a sale in 1869 for the taxes of 1868. The lands were advertised to be sold on October 18, 1869, and were actually sold and forfeited to the State for the nonpayment of taxes on October 28, 1869.

Other parts of the agreed statement of facts or reference to the assessment and sale of the lands will be referred to in the opinion.

At the time the Red Fork Levee District was created, in 1893, the lands in controversy were included within the boundaries of the district. From the year 1869 to 1894, inclusive, the record does not show the extension or collection of taxes against the lands. For the years 1895 and 1901, inclusive, the taxes were extended and paid by T. F. Tillar. From the year 1902 to the date of the agreed statement of facts, which was the 16th day of October, 1922, the taxes were paid both by appellants and appellees and those under whom they respectively hold title. Some years the appellees and other years the appellants first paid the taxes.

The chancellor made a specific finding of law and fact in favor of appellees, and the title to said lands was quieted in them as against appellants, and all the tax deeds under which appellants claim title are canceled and held for naught.

The case is here on appeal.

E. E. Hopson, for appellant.

The Legislature of 1893, by act 176, authorized the land in question to be conveyed to the levee district, confirmed title, and exempted the land from taxes for five years. An additional period of exemption for five years was authorized by the Legislature of 1899. Act of 1901 confirmed title in levee district and pointed out the pro-

cedure The conveyance made by the State to the levee district was *prima facie* evidence of title. 82 Ark. 31; 89 Ark. 296; 98 Ark. 367; 87 Ark. 185. In view of the acts of 1893 and 1899 exempting the land from taxation, there could have been no forfeiture during the prescribed period, and the clerk's deed to appellees could avail nothing. 128 Ark. 550; 159 Ark. 218. Appellees are bound by the confirmation decree of Nov. 7, 1901. 62 Ark. 421; 42 Ark. 330.

Williamson & Williamson, for appellee.

Appellees hold the original title which left the United States Government in 1858. Being the true owners, possession has always been in appellees, and appellant has never had any kind of possession. 57 Ark. 523; 74 Ark. 383; 75 Ark. 194; 81 Ark. 258; 102 Ark. 59. The purported sale of the land to the State for taxes of 1868 was void. 50 Ark. 390; 54 Ark. 665; 74 Ark. 383; and the State had no title to convey. Therefore the act of 1893 did not apply to this land. Appellee's tax title is valid, and the attempt to exempt this land from taxation was ineffective. Upon securing deed to this land the levee board recognized that no title was passed, and disclaimed title, and had taxes extended against the land for 1895, resulting in the sale under which appellees hold. There is a legal presumption, at least, that this occurred. 135 Ark. 353; 147 Ark. 247. Until there is an interference with possession, payment of taxes by another is not sufficient of itself to call for action. 70 Ark. 256. Lapse of time will not cure defects in an invalid tax title. 50 Ark. 390. The holder of a void tax deed, not in actual possession, has no such constructive possession as will cause the statute of limitation to run in his favor. 60 Ark. 163. Appellee had no notice of the adverse claim of appellant. 69 Ark. 95; 76 Ark. 525; 99 Ark. 446; 103 Ark. 425.

HART, J., (after stating the facts). As will be seen by reference to our statement of facts, the United States issued a patent to said lands to John D. Kimball on August 3, 1858. John D. Kimball and wife conveyed

the lands by deed to S. C. Roberson on March 21, 1895. S. C. Roberson and wife conveyed the lands by deed to Frank Tillar on January 10, 1900.

On the part of appellants it is claimed that the lands were forfeited to the State at a tax sale in 1869 for the nonpayment of the taxes of 1868.

Without going into a particular statement of the facts, it appears that there was no legal assessment, advertisement or sale of the lands for taxes for the year 1868. This court has frequently held that the forfeiture to the State for the nonpayment of taxes for the year 1868 was void and passed no title.

The facts in similar cases are stated with more particularity, and the reasons for holding such tax sales void are given in detail in *Parr v. Matthews,* 50 Ark. 390, and *Boehm* v. *Porter,* 54 Ark. 665. To the same effect see *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 383, and *Herget* v. *McLeod,* 102 Ark. 59.

The Red Fork Levee District was created by the Legislature of 1893, and the lands of the State within the boundaries of the district, except 16th section school lands, were granted to the levee district. It is not claimed, on this appeal, that the chancellor erred in holding that the forfeiture to the State at the tax sale in 1869 for the taxes for 1868 was illegal and void. The main reliance of appellants for a reversal of the decree is that the confirmation proceedings of the Red Fork Levee District gave them a valid title.

The confirmation proceedings were had pursuant to our statute regulating the procedure in confirming and quieting title to lands. Sections 8362-8373 inclusive. Section 8369, among other things, provides that the decree in the cause shall not bar or affect the rights of any person who, within seven years preceding, had paid the taxes on the lands, unless such person shall have been made a defendant in the petition and duly summoned to answer the same.

The decree in the confirmation proceedings brought by the Red Fork Levee District was entered of record on

November 7, 1901. It does not appear, from the record in the case at bar, that appellees were in any way made parties to the confirmation proceedings. It does appear that Frank Tillar had paid the taxes on said lands for the years 1895 to 1901 inclusive, and that the taxes were extended on the taxbooks in his name as the owner for said years.

Therefore the decree of confirmation in favor of the Red Fork Levee District, as far as the appellees are concerned, was absolutely null and void. *Quertermous v. Bilby,* 144 Ark. 98. In that case it was held that one who had paid the taxes within seven years preceding the filing by another of a petition for confirmation, and who was not made a party thereto, is entitled to have a decree rendered therein vacated in a direct action therefor, without proving that a fraud was practiced by the petitioner.

The present suit was commenced by appellees against appellants, and the object and purpose of the suit was to quiet the title in the appellees and to cancel and set aside all the outstanding claims of title in favor of appellants. Hence the suit was brought for the purpose of vacating the decree of confirmation of title in favor of the levee district, and is a direct attack thereon.

If the decree in favor of the Red Fork Levee District is illegal and void as against appellees, it follows that the grantees of the Red Fork Levee District could acquire no greater rights than those possessed by the levee district. Hence the decree of the chancery court canceling the outstanding title of appellants was right.

It is equally certain that, if the forfeiture to the State in 1869 for the nonpayment of taxes for the year 1868 was void, the appellees have a perfect paper title to the lands, and the chancery court properly quieted their title thereto.

It follows that the decree of the chancery court must be affirmed.

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

Opinion delivered February 4, 1924.

1. EVIDENCE—RES GESTAE—STATEMENT OF EMPLOYEE.—In an action against a railway company for the death of a child struck by a train, statement by the locomotive engineer to the mother, some time after the injury, as to the cause thereof, was inadmissible as not being part of *res gestae*, and because the engineer was not authorized to bind the company.
2. RAILROADS—FAILURE TO KEEP LOOKOUT—JURY QUESTION.—In an action for the death of a child struck by a train at a crossing, the question whether the railroad was negligent in failing to keep a constant lookout, *held*, under the evidence, to be for the jury.
3. RAILROADS—DUTY OF TRAINMEN TO KEEP LOOKOUT.—Under Crawford & Moses' Dig., § 8568, some one of the trainmen is required to keep a constant lookout to discover persons or property on the highway approaching the track.
4. DEATH—CONSCIOUS SUFFERING.—Evidence that an injured two-year-old child lived five days after the injury, took nourishment in liquid form, apparently recognizing her grandfather, had many convulsions, and on one occasion cried out, *held* to warrant the submission to the jury of the question whether she suffered conscious pain.

Appeal from Washington Circuit Court; *W. A. Dickson*, Judge; reversed.

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

1. The court erred in submitting to the jury the question of failure to maintain a lookout. Where there is no evidence tending to prove a failure to maintain such lookout, it is reversible error to submit the question to the jury. 151 Ark. 34; 111 Ark. 134, 139. The testimony of the engineer and fireman was consistent and reasonable, and there was no evidence that either directly or inferentially contradicted them. 101 Ark. 532; 80 Ark. 396; 89 Ark. 574.

2. The court erred in quoting literally the lookout statute, in instructing the jury, without explaining its application. 149 Ark. 270, 284. There was an issue here as to the interpretation to be placed upon the statute,

in the fact that, while it imposes, by its literal terms, an absolute duty to keep a lookout, this court has held that such duty is limited to the exercise of ordinary care to maintain a careful lookout. 136 Ark. 246, 256. Instructions requested correctly limited the duty of keeping a lookout in this respect, and amounted to a specific objection to the instruction given. 153 Ark. 454, 462.

3. It is error to assume facts, in instructing a jury, the existence of which is not proved. 71 Ark. 518; 152 Ark. 90; 87 Ark. 471.

4. It was error to submit, as an element of damage in this case, conscious pain and suffering on the part of the child, without proof of such suffering. 82 Ark. 499; 106 Ark. 177; 90 Ark. 278; 138 Ark. 175; 68 Ark. 1; 158 Ark. 271.

5. If, as the undisputed evidence shows, the defendant was not negligent in failing to keep a constant lookout, it was not negligent in failing to discover the child in a dangerous position near the track; and, if its presence could not and would not have been discovered in time to avert injuring it, by keeping a lookout, there can be no right of recovery. 113 Ark. 353, 358; 129 Ark. 80.

6. The duty with reference to keeping a lookout is not imposed on all members of a train crew, but may be discharged by a single person, if he is in a position to do so as effectively as any other member of the train crew, and the jury should have been so instructed. 111 Ark. 309, 313, cases cited; 82 Ark. 503; 96 Ark. 213; 131 Ark. 150.

Nance & Seamster, for appellee.

1. Unlike *Davis* v. *Scott,* 151 Ark. 34, relied on by appellant, the accident in this case occurred at a public crossing, which raised a presumption of negligence against the defendant, and the burden of proof was on it to show by a preponderance of the evidence that a constant lookout was kept. C. & M. Digest, § 8568; 74 Ark. 606; 107 Ark. 431. If the front brakeman was on his seat and looking ahead, the jury would have the right to infer

from the fact that he did not see the child that he was not keeping a constant lookout. 136 Ark. 246, 256. Merely looking ahead does not meet the requirements of the statute. It contemplates an efficient lookout. 78 Ark. 251; 63 Ark. 184; 62 Ark. 186; 57 Ark. 194.

2. The court was warranted by the evidence in giving the instruction submitting the question of conscious pain. 142 Ark. 593; 151 Ark. 549.

HUMPHREYS, J. As the judgment in this cause must be reversed and remanded for a new trial on account of admission of incompetent testimony, only such matters will be discussed in the opinion as may be necessary for the guidance of the parties and court in a retrial of the case. The action was commenced in the circuit court of Washington County by appellee against appellant to recover damages in the sum of $2,999.99 to the estate and next of kin of the deceased, Helen Vernon, a child two years of age, for fatally injuring her, through the alleged negligence of the employees of appellant in failing to give the statutory signals as the train operated by them approached the wagon-road crossing, where the child was injured, and by failing to keep a constant lookout required by § 8568 of Crawford & Moses' Digest. The child was struck by a freight train coming from the north, and fatally injured, at a public road crossing about three miles south of Springdale. The parents of the child resided about one-eighth of a mile east of the road crossing. Without their knowledge or consent she wandered down the road to the place of the tragedy. After striking the child, the train was stopped, and the employees, except the fireman, who remained in the engine, went to the child. They removed her to a spring about seventy-five yards from the track, where the conductor washed her face. He called to a man who was passing, and was informed by him that the little girl was the daughter of the Vernons. He went to their home, and told Mrs. Vernon what had happened to her child. Mrs. Vernon told her husband, and they went with the conductor to the

child. Mrs. Vernon testified, over the objections and exceptions of appellant, that, when they reached the child, the engineer said to her, "Lady, I should have stopped on the other side, but I put on the brakes and they didn't hold." This testimony was not admissible.

The proper foundation was not laid in order to admit it for contradictory purposes.

The engineer's employment did not carry with it authority to make declarations or admissions, subsequent to the injury, relative to the manner in which it happened, which would be binding upon the company. *Ry. Co.* v. *Sweet,* 57 Ark. 287; *Stecher Cooperage Co.* v. *Steadman,* 78 Ark. 381; *Caldwell* v. *Nichol,* 97 Ark. 420; *River, R. & H. Const. Co.* v. *Goodwin,* 105 Ark. 247.

The statement was a narrative of a past occurrence and not a part of the *res gestae. St. Louis, I. M. & S. Ry. Co.* v. *Kelley,* 61 Ark. 52; *St. Louis, I. M. & S. Ry. Co.* v. *Pape,* 100 Ark. 269; *Webb* v. *Kansas City So. R. Co.,* 137 Ark. 107.

Appellant also contends that the court erred in submitting to the jury the question of its negligence for failure to keep a constant lookout. Its contention is based upon the claim that the undisputed evidence shows that a constant lookout was kept by some one of the employees of appellant as the train approached the public road crossing. We do not so interpret the evidence. D. C. Blakelee, the engineer, admitted that his view of the crossing was cut off thirty rods north of it, on account of the curve in the track. A. M. Bean, the fireman, testified that, after passing the Stockdale farm, which was about one-fourth of a mile north of the road crossing where the child was struck, he observed that the crossing was clear; that he then went to the deck of the engine to put in fire; that he left a brakeman in the seat, looking ahead; that in a minute or two the brakeman informed them that the engine had struck a child. The brakeman was absent from court on account of sickness, and did not testify as to whether he kept a constant lookout, and, if so, why he did not discover the child

before the train struck her. The jury may have inferred that he had not kept a constant lookout, else he would have seen the child in time to have prevented the injury. Several witnesses testified that objects at or near the road crossing could have been seen from the fireman's seat far enough back to have stopped the train before reaching it. Again, a number of witnesses contradicted the testimony of the employees to the effect that the whistle was blown for the crossing and the bell was ringing as the train approached it. The jury may have concluded that the employees falsified about the signals, and, on that account, disbelieved their testimony relative to keeping a constant lookout. For these reasons it was proper to submit this question of negligence to the jury for determination. Appellant insists, however, that the instructions submitting this issue imposed a higher duty upon the employees than the law required. In support of this contention, the case of *Bush* v. *Brewer*, 136 Ark. 246, is cited. Learned counsel for appellant interpret the language used in that opinion to mean that employees of a railroad need not keep a constant lookout to discover travelers on the highway approaching a train operated by them. Such a construction would have the effect of abridging the lookout statute, which requires that a constant lookout be kept for travelers approaching the train at public road crossings. The exercise of ordinary care to discover travelers, as used in the Bush case, meant that some member of the crew operating a train, in position to do so, must keep a constant lookout to discover travelers or property on the highway approaching the train, whether upon the track or not.

Appellant also contends that it was entitled to a mandatory instruction, under the claim that the undisputed evidence showed that it was impossible to discover the child in time to have prevented an injury had a constant lookout been kept. As before stated, testimony was introduced by appellee tending to show that objects could be seen at the crossing from the train, as it turned the curve, for a long distance. The testimony

therefore was conflicting upon this point, which made a question for the jury.

Appellant also contends that, according to the undisputed testimony, the deceased suffered no conscious pain, and that the court erred in submitting to the jury, as an element of damage, any conscious pain suffered by her. Hypodermic injections were administered by the attending physician to quiet and ease the child. During her illness she smiled at and seemingly recognized her grandfather. He testified that, on one occasion, she cried out. During her illness she took nourishment in liquid form. She had many convulsions. Those who waited upon her said that when they changed her position it seemed to quiet and ease her. She lived five days after the injury. We think this evidence warranted the submission to the jury of whether she suffered conscious pain.

Objection is made to the use of language in several of the instructions given by the court, seemingly submitting an issue to the jury of whether the train ran over the child. The language was, perhaps, inapt, as the evidence tended to show that the child was struck by some part of the engine, and not run over by it. Statements of the law to the jury should relate to the facts. We deem it unnecessary to say more with reference to these objections, as inaccuracies of this nature will likely be corrected when the trial court's attention is specifically called to them. For the error indicated the judgment is reversed, and the cause remanded for a new trial.

GLOBE & RUTGERS FIRE INSURANCE COMPANY v. CHISENHALL.

Opinion delivered February 4, 1924.

1. INSURANCE—POLICY ON DWELLING AND BARN—ACCEPTANCE OF CHECK.—Where a fire insurance policy insured plaintiff's dwelling for $2,000, and his barn for the same amount, it in effect constituted two policies, and, where both buildings were destroyed by fire, acceptance by insured of a check for $2,000 which recited

that it was in full satisfaction of the loss by fire on a named date to property described in the policy, which was thereby canceled and surrendered, was a cancellation only of the portion of the policy covering the house.

2. APPEAL AND ERROR—OBJECTION NOT RAISED BELOW.—Objection to the allowance of an attorney's fee as being excessive in a suit on a fire insurance policy cannot be urged on appeal for the first time.

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

Hughes & Hughes, for appellant.

1. A policy of insurance may be canceled independent of its provisions, by mutual consent. 109 Ark. 17; 2 Clement on Fire Insurance, 409, and cases cited; 13 Lea (Tenn.) 340; 105 Fed. 286; 207 S. W. 922; 12 S. W. (Ark.) 155; 14 R. C. L. 1019, and cases cited. The court was in error in treating the writing in evidence as a mere receipt. By its terms it is a contract. 4 Wigmore on Evidence, § 2432; 96 Ark. 405; 102 Ark. 428; 115 Ark. 123.

2. The amount allowed as attorneys' fees is excessive. 158 Ark. 199.

Driver & Simpson, for appellee.

1. The attempted cancellation of the policy sued on here was not in contemplation of the parties, nor intended by either appellant or appellee, in the adjustment and payment of the first loss. But appellant relies upon a rescission by mutual consent. There is here an absence of that "concurrence of wills" to unmake the contract, and that "mutual release" from the old contract necessary to constitute the consideration therefor, that is recognized as necessary by the authorities cited by appellant. 105 Fed. 286, 287; 12 S. W. 155; 207 S. W. 922. See also 88 Ark. 371; 72 Ark. 234; 21 Ark. 357; 112 Ark. 169; *Id.* 223.

2. If the check given in this case was more than a receipt, if it is a contract, it is without consideration and void. 31 Ark. 728; 121 Ark. 194.

3. The policy sued on provided for cancellation upon five days' notice. 2 Black on Rescission and Cancellation, § 481; *Id.* § 483. An insurance company can exer-

cise the right to cancel a policy only as therein provided. 76 Ark. 180; 108 Ark. 131.

HUMPHREYS, J. Appellee instituted this suit against appellant in the circuit court of Mississippi County, Osceola District, to recover $2,000 on an insurance policy issued by appellant to him, insuring his barn against loss by fire.

Appellant interposed the defense that the policy had been canceled by written contract before the barn was destroyed by fire.

The cause was submitted to a jury on the pleadings, testimony introduced by the parties and the instructions of the court, which resulted in a verdict and consequent judgment for the amount claimed, including interest of $70, a statutory penalty, and an attorney's fee. An appeal has been duly prosecuted to this court from the judgment.

Appellant contends for a reversal of the judgment upon the alleged ground that the undisputed evidence shows an express cancellation of the policy sued upon.

The facts are that appellant issued a policy to appellee, insuring his dwelling-house against loss by fire in the sum of $2,000, and his barn, on the same farm, against loss by fire in the same amount. The farm was under mortgage to the Deming Investment Company, and the policy contained a mortgage clause protecting it according to its interest. The policy remained in the possession of said mortgagee. It covered a period of three years, the premium thereon being $165, which was paid in advance by appellee. The dwelling-house burned on February 12, 1921, and appellant paid appellee $2,000, the full amount of insurance carried upon it. The payment was made by check in the following form:

"$2,000.00 30486 No. 159832

"GLOBE & RUTGERS FIRE INSURANCE COMPANY.

"New York, Apr. 6-1921 192—

"Chemical National Bank.

"Pay to the order of R. A. Chisenhall and Deming Investment Company, mortgagee, the sum of $2,000 and 00 cts.

dollars, which payment, evidenced by proper indorsement hereof, constitutes full satisfaction of all claims and demands for loss and damage by fire which occurred on or about Feb. 12, 1921, to property described in policy No. 1537545, issued at the Osceola, Ark., agency, and said policy is hereby canceled and surrendered. Loss No. 108244.

"J. H. MULVEHILL, Secy. (Marsh)
"W. H. PAULISON, Vice-Prest."

The following indorsement appeared upon the check:

"In consideration of the sum hereby paid, all claims and demands whatsoever against the Globe & Rutgers Fire Insurance Company, connected with the within mentioned claim, for loss or damage, are released, compromised, settled and forever discharged.

"Amount of loss $2,000. Discount—— Expense——

"Amount of check, $2,000. Indorse here. For deposit in Birmingham Trust & Savings Co.

"R. A. Chisenhall.

"Pay to the order of R. A. Chisenhall, without recourse.

"The Deming Investment Co., per D. S. Waskey, mortgagee, vice-president.

"Paid by the Chemical National Bank of New York, June 8, 1921."

The amount collected was credited on the mortgage. The policy was not returned to appellant, nor did appellant refund the unearned premium thereon to appellee. In the month of May, 1922, the barn was destroyed by fire, and payment was refused, whereupon this suit was instituted.

Appellant contends for a reversal of the judgment upon the ground that it was released from further obligation on the policy by payment of $2,000 when the house burned. We do not so construe the check and indorsement thereon. The check recites that it was in "full satisfaction of all claims and demands for loss and damage by fire which occurred on, or about, February 12, 1921, to property described in policy No. 1537545, issued

at Osceola, Ark., agency, and said policy is hereby canceled and surrendered." The indorsement provided that the payment was in release, compromise and settlement of the loss or damage connected with the claim mentioned in the check. The claim mentioned in the check was for the destruction of the dwelling-house. The dwelling-house was the only building destroyed on February 12, 1921. The barn was not destroyed until May, 1922. The cancellation of the policy mentioned in the check necessarily related to that portion therein covering the house. While the policy was written upon one paper and bore one number, it covered two pieces of property, insuring each in separate amounts against loss by fire. In effect, the policy constituted two contracts of insurance embraced in one paper. The cancellation and surrender of the one did not affect the other. Under this interpretation of the contract the check and indorsement thereon was not a cancellation and surrender of the policy on the barn. It was only a cancellation and surrender of the policy on the dwelling-house.

Appellant also insists that the amount allowed as attorney's fee in the case is excessive. This question is raised here for the first time. No objection was made or exception saved to the allowance in the trial court. This should have been done, if appellant thought the amount was unreasonable.

No error appearing, the judgment is affirmed.

ARK-ASH LUMBER COMPANY v. PRIDE & FAIRLEY.

Opinion delivered January 21, 1924.

1. HIGHWAYS—CONSTRUCTION OF ACT.—In act No. 18, Ex. Sess. 1923, entitled "An act to enable certain road improvement districts to receive Federal aid," etc., and providing that it should apply only to counties having between 45,000 and 54,000 inhabitants, the restriction as to population must be deemed to relate to the last Federal census.
2. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—Where the language of a statute is ambiguous and open to two constructions,

one of which will render it valid and the other invalid, the court will adopt the former construction.

3. EVIDENCE—GOVERNOR'S PROCLAMATION—JUDICIAL NOTICE.—Judicial notice is taken of the Governor's proclamation calling an extraordinary session of the General Assembly.

4. STATUTES—SPECIAL ACT—NOTICE.—Where less than 30 days intervened between the Governor's proclamation for an extraordinary session of the Legislature and the introduction of a local bill, noncompliance with Const. 1874, art. 5, § 26, requiring 30 days notice of such a bill, affirmatively appears.

5. STATUTES—GENERAL AND SPECIAL ACTS.—The inquiry as to whether a statute is general or special is not restricted to its form, but reaches to its necessary effect, regardless of its form.

6. STATUTES—LOCAL ACT.—Acts Ex. Sess. 1923, No. 18, to enable road districts in counties between 45,000 and 54,000 population to receive Federal aid, *held* a local act, as it applied only to Mississippi County.

Appeal from Mississippi Chancery Court, Osceola District; *J. M. Futrell,* Chancellor; reversed.

E. E. Alexander, for appellants.

1. The bill applies to counties having a population of between 45,000 and 54,000, and to no others, a limitation which makes of it a special or local bill, and it is therefore unconstitutional and void. It is a special or local bill also for the further reason that it applies only to road districts in the particular counties having the requisite population to which Federal aid has heretofore been allotted, but which cannot receive such aid without additional legislation.

2. The act provides no means of determining the population. We think the Federal census is competent for that purpose, but certainly the school census taken annually for the purpose of ascertaining the school population is not competent evidence in an inquiry of this nature.

J. T. Coston, for appellees.

1. As to ascertainment of the population the act, we think, places that duty on the State Highway Engineer or the Board of Commissioners. See § 2 of the act. If an official is authorized to do a certain thing only in a certain contingency, it will be presumed, if he does that

thing, that the contingency happened or existed. 132 S. W. 224; 199 S. W. 120; 201 S. W. 514. It was not the intention of the Legislature to leave the question of population open for all time, so that any property owner could bring suit at any time in the future to cancel the bonds and thrust upon the bondholders the burden of showing that the population was between 45,000 and 54,000. Such a construction could not be given the act. 92 U. S. 488-489. The evidence on the question of population in this case was made as nearly conclusive as it could be made without taking an actual census, and it was not essential to take a census. 40 Ark. 296. As to competency of the evidence introduced, see 65 Ark. 284.

2. The act involved here is not a special or local bill. It is general in its application to all counties that come within its provisions. 86 S. W. 845, 846.

McCULLOCH, C. J. The questions involved in this case relate to the validity of a statute enacted by the General Assembly at the extraordinary session which convened on September 24, 1923 (Acts Special Session 1923, p. 126), the caption of which clearly states the purpose and scope of the statute, and reads as follows: "An act to enable certain road improvement districts to receive Federal aid, make additional assessments of benefits, issue and sell additional bonds, construct, improve and maintain the public roads and bridges in said districts, and applying only to counties having a population of between 45,000 and 54,000, and for other purposes."

Section 12 of the statute reads as follows:

"Section 12. Be it further enacted: That this act shall be construed as supplemental to and in aid of existing laws, and not as a repeal thereof, except in so far as the same conflict with this act; and, in case any section or clause of this act is held to be unconstitutional, it shall not invalidate any other part of the act. Provided, however, that this act shall apply only to counties having between 45,000 and 54,000 inhabitants."

The Osceola & Little River Road Improvement District No. 1, which was organized in Mississippi County under general statutes (Crawford & Moses' Digest, § 5399 *et seq.*), is seeking to proceed under the provisions of the statute above referred to, and the owners of certain real property in the district attempt in this action to prevent such proceeding, on the ground that the statute is unconstitutional.

It appears that the population of Mississippi County, according to the Federal census taken and promulgated during the year 1920, was 47,320, and, according to that census, the population of no other county in the State was between 45,000 and 54,000. In the trial of this case below, each party to the controversy introduced testimony tending to show what the population of Mississippi County was at the time of the enactment of this statute. Appellants undertook to show, by the opinion of witnesses who claimed to have information on the subject, that the population of the county had diminished since the taking of the Federal census in the year 1920 below 45,000; and the testimony introduced by appellees tended to show that the population of the county had not diminished, but was as high or higher in numbers than at the taking of the Federal census. Appellees also introduced a resolution passed by the board of commissioners of the road district, declaring a finding that the population of the county was between 45,000 and 54,000. Appellees also introduced a certificate from the State Highway Engineer authorizing the commissioners to proceed under the statute referred to.

It is the contention of appellants that the statute is void for uncertainty, in that it fails to provide any method of ascertaining the population of the county. The contention of appellees is that the act impliedly authorizes either the State Highway Engineer or the board of commissioners of a road district in any county to determine whether the population of the county is such as to authorize proceedings under this statute.

We do not agree with either of these contentions. Certainly there is nothing in the statute which, either expressly or by implication, authorizes the Highway Engineer to determine the population of a county. It is contended by counsel for appellees that the language of § 2 of the statute, which provides that, when the State Highway Engineer files with the board of commissioners a certificate stating that Federal aid was previously allotted to the district, but that said district would not receive Federal aid but for this act, "the board of such district shall then have jurisdiction and power to proceed under this act," necessarily confers authority upon the Highway Engineer or the board to determine the population of the county. We do not think that this is the correct interpretation of the language referred to, for the section does not deal, even remotely, with the question of the ascertainment of the particular locality where the terms of the statute apply. This language relates merely to a certificate of the Highway Engineer concerning a matter which comes strictly within his jurisdiction, *i. e.*, the question of allotment of Federal aid, and to the duty of the commissioners in the county where the population is such as to make the statute applicable to proceed upon the certificate of the Highway Engineer. Our conclusion, in the interpretation of the statute, is that, there being no provision made for the ascertainment of the population to determine the application of the statute, and, since the statute is obviously one to take immediate effect, the restriction in regard to population must be deemed to relate to the last Federal census, which is the only authoritative ascertainment of population. It is our duty, under well-known canons of construction, where the language of a statute is in doubt and it is reasonably open to two constructions, one of which will render it valid and the other will render it invalid, to adopt that construction which will make the statute valid; and, following this rule, we should assume that the Legislature intended, rather than to render the statute void for uncertainty, to adopt the one

and only definite means of ascertaining the population of the county to which the statute is to apply. This renders the statute definite and certain.

The next contention is that the statute is special and local in its application, and is void because notice of its introduction was not published in accordance with the requirement of the Constitution, which provides that no local or special bills shall be passed "unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill." Constitution 1874, art. 5, § 26. If the statute in question be held to be special, or local, within the meaning of the Constitution, then the enactment is void for the reason that the notice was not given, and we cannot, under the circumstances, indulge any presumption that the notice was given.

The Governor's proclamation (of which we take judicial notice), calling the extraordinary session of the General Assembly, was dated and filed with the Secretary of State on September 8, 1923, and the bill for the statute now under consideration was introduced in the Senate on October 5, 1923, which was less than thirty days after the session was called, and there was not sufficient time within which to publish the notice. There is therefore no presumption that notice was given under these circumstances, but, on the contrary, the time between the calling of the session and the introduction of the bill in question being less than thirty days, it affirmatively appears that the provision of the Constitution could not have been complied with and that the statute is void. *Booe* v. *Road Improvement District,* 141 Ark. 140.

We proceed, then, to determine the nature of this legislation—whether or not it is special or local within the meaning of the Constitution. The statute is general in form, otherwise than as to the designation that its application shall be limited to counties having a population between 45,000 and 54,000. It applies, in fact, only

to Mississippi County, for, from an examination of the census report published by authority, it is seen that Mississippi County is the only county in the State which has a population between 45,000 and 54,000. The act was not prospective in its nature, but applies only to road districts to which Federal aid had been allotted in counties which, at the time of the passage of the act, had a population within the prescribed limits. The rule announced by nearly all of the authorities is that, in a judicial determination of the question as to the nature of a statute, whether general or special, the inquiry is not restricted to the form of the statute, but it reaches to a consideration of the necessary effect of the statute, regardless of its form. This doctrine is stated in 25 R. C. L., p. 815, as follows:

"In determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation rather than to its title, form or phraseology, because otherwise prohibitions of the fundamental law against special legislation would be nugatory."

In another text-book the rule for determining the distinction between a special act and a general law is stated as follows:

" 'If its operation and effect must necessarily be special, the act is special, whatever may be its form. If, on the other hand, the act has room within its terms to operate upon all of a class of things, present and prospective, and not merely upon one particular thing, or upon a particular class of things existing at the time of its passage, the act is general. That the question is not one of form is expressly held as necessarily implied in all the cases, and, if this were not so, then the Constitution could be easily evaded 'by dressing up special laws in the garb and guise of general statutes'." I Lewis' Sutherland Statutory Construction, p. 359.

The same authority adds: "The question must be determined from the act itself and from the facts of which the court will take judicial notice."

There are many cases holding that a statute conferring powers upon sub-agencies of government, such as counties and municipalities, classifying them according to population, is general legislation and not special. Such a statute is necessarily prospective in its nature, and applies to all localities which come within the class. We have before us, however, a statute which, in its application, according to the test of which we may take knowledge, applies only to one county, and can never apply to any other, and the statute is necessarily local in its application. Nearly all of the authorities that we can find on the subject declare such legislation to be special rather than general. The authorities on this subject were reviewed by Chief Justice SHERWOOD in the case of *State* v. *Herrmann,* 75 Mo. 340, and a statute similar in effect to the one now before us was declared to be a special one, and void under the Constitution of Missouri. The Supreme Court of Illinois reached the same conclusion in regard to a similar statute which was construed in the case of *Devine* v. *Comrs. of Cook County,* 84 Ill. 590. Other authorities to the same effect are as follows: *Knopf* v. *People,* 185 Ill. 20; *Wheeler* v. *Philadelphia,* 77 Pa. St. 338; *State* v. *Mitchell,* 31 Ohio 592; *State* v. *Ellet,* 47 Ohio 90; *Topeka* v. *Gillett,* 32 Kas. 431; *State* v. *Hammer,* 42 N. J. L. 35; *State* v. *Des Moines,* 96 Iowa 521.

In the Kansas case cited above there was under consideration a statute which applied to cities of certain population, and the court said:

"Courts may take judicial notice of the census returns, of the general history of the country, of what the members of the Legislature ought to know when passing the statute which the courts are called upon to construe; and, indeed, of what all well-informed persons ought to know. And, taking judicial notice of all these things, we can say without hesitation that it was not possible for the said act of March 3, 1875, within the time which it was to have force and effect, to apply to any corporation except the three cities of Topeka, Lawrence

and Atchison. It would apply to just those three cities —no more and no less; and any person who would take the trouble to inform himself with regard to the matter would know it. Is such an act a general act, or is it merely a special act? It is our opinion that it is merely a special act."

Now, the language of this statute shows that it was not prospective so as to include any other counties which might come within that population in the future, for it related to such road districts only as were then in existence to which Federal aid had been alloted but not paid, and the test of population could only have related to the last census and not to any future census. In other words, this statute selected Mississippi County as its only field of operation as unerringly as if it had been made to apply to that county by name. The effect is therefore purely local, and, under the rule announced by the authorities, we must so treat it, and it follows that the statute is void because the notice of its introduction could not have been published for the length of time required by the Constitution. The decree of the chancery court was therefore erroneous, and it is reversed, and remanded with directions to enter a decree in favor of appellant, in accordance with the law herein stated.

HELTON v. HOWE.

Opinion delivered January 28, 1924.

1. APPEAL AND ERROR—APPEALABLE ORDER—RELEASE OF GARNISHMENT.—As a garnishment proceeding is ancillary to the main action, an order releasing the garnishee is final and appealable.
2. APPEAL AND ERROR—PRESUMPTION IN FAVOR OF JUDGMENT.—Where the plaintiff gave bond required by Crawford & Moses' Dig., § 4906, as a prerequisite for the issuance of garnishment before judgment, and subsequently released the surety on its application, but granted leave to plaintiff to file a new bond, which was not done, whereupon the garnishee was discharged, *held*, in the absence of a showing in the record to the contrary,

it will be presumed that the court acted upon evidence sufficient to sustain the order releasing the surety and discharging the garnishee.

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

Walter M. Purvis, for appellant.

1. The circuit court was without jurisdiction. The surety's remedy, if any, was in equity. 2 Chitty, 225; 40 Cent. Dig. Prohibition, §§ 35-56. For test of jurisdiction in this case see 17 Standard Proc., 660. The jurisdiction in the first instance must be determined by the allegations in the complaint. 7 Ark. 260; 123 Ark. 40; 184 S. W. 416. See also 99 N. W. 909; 121 Wis. 127; 2 How. (U. S.) 319, 11 Law. ed., 283; 101 Ark. 193; 141 S. W. 1167.

2. In an action at law, one is not entitled to have a bond vacated on the ground that he was induced to execute it by false representations. 8 Cent. Dig., 965, § 42.

3. There was no ground for equitable relief. 65 Hun 622; 20 N. Y. Supp. 152; 8 Cent. Dig., 45, § 33. See also 171 Pa. St. 632; 5 Wash. 584; 8 Cent. Dig., 53, § 39; *Id.* 65, § 42; 34 Pa. St. 365.

4. Two issues are presented here, one between the plaintiff and defendant, and one between the plaintiff and his surety. 34 Okla. 796, 127 Pa. 481. Garnishment is purely a statutory remedy in this country, and has no existence in the absence of statutory authority. 198 U. S. 215, 49 Law. ed. 1023; 130 Mass. 86; 40 Wash. 443, 82 Pa. 875; 2 L. R. A. (N. S.) 568. By these authorities it is obvious that the garnishment proceeding is an adversary proceeding. The service of the writ fixes a lien upon money or property in the possession of the garnishee. 3 Ark. 101; *Id.* 509; 6 Ark. 391; 18 Ark. 249; 72 Ark. 350; 91 Ark. 252; 101 Ark. 193.

5. Courts lose control of their judgments after the lapse of the term, and, in the absence of statutory authority, cannot alter or vacate them at a subsequent term. 144 Ark. 301; 222 S. W. 57.

Gus Fulk, Frank Pittard and *Martin K. Fulk,* for Southern Surety Company.

The order complained of in this case is not a final and appealable order within the meaning of the statute. C. & M. Digest, § 2129; 10 Ark. 633; 26 Ark. 51; 5 Ark. 399; 117 Ark. 36; Freeman on Judgments, 37; 99 Pac. 1000, 35 Utah 213.

McConnell & Henderson, for W. B. Worthen Company.

The order was not final. It has not yet been determined that the plaintiff is entitled to recover anything from the defendant. 91 Ark. 112; 70 Ark. 127. The supersedeas is a complete release and protection to the garnishee. 126 Ark. 7; 144 Ark. 149.

McCULLOCH, C. J. Appellant instituted an action below against W. T. Howe, one of the appellees, to recover damages on account of alleged wrongful act of said appellee, and, at the time of the commencement of the action, appellant sued out a writ of garnishment against appellee, W. B. Worthen Company, a domestic corporation. Appellant gave bond required by the statute as a prerequisite for the issuance of garnishment before judgment. Crawford & Moses' Digest, § 4906. The garnishee answered, admitting that it held funds belonging to Howe, defendant in the action. The surety on the bond originally filed by appellant appeared in court and moved to be released from the bond; the motion was sustained, and appellant was granted leave to file a substituted bond, which was done, with the Southern Surety Company as surety thereon. On a later day, during the pendency of the action, the Southern Surety Company filed its application in the action to be released from the bond, and, on hearing the application, the court granted it and ordered the said surety to be released, but granted leave to appellant to file a new bond within the time specified by the court—two days from the order releasing the surety. Appellant declined to file a new bond, but stood upon the order of the court releasing the surety

and discharging the garnishee, and has prosecuted an appeal to this court.

A motion has been filed by the appellees to dismiss the appeal on the ground that the order releasing the surety and discharging the garnishee was not final. We think that this contention is unsound. The garnishment is a proceeding which is ancillary to the main action between plaintiff and defendant, and the order releasing the garnishee finally disposes of that part of the action, and the order is appealable. *Hatheway* v. *Jones,* 20 Ark. 109. If this were not so, a plaintiff would be without a remedy to correct an erroneous order or judgment of the court discharging a garnishee, if the order of discharge was entered before the disposition of the main action. The injury sustained by the dismissal of the garnishment would be irreparable if the defendant should prove to be insolvent and the plaintiff should recover in the action against him. Our conclusion is that the case is properly here on appeal to review the action of the court in discharging the garnishee.

It is contended, in the first place, that the order discharging the garnishee was erroneous because it was rendered without notice. The record does not sustain this contention. The first entry made by the court of its order in this matter recited that appellant was present by his attorney, but there was a correction of this entry on a later day to show that appellant was not present, but that he had notice of the proceeding. This is borne out by the further fact that appellant filed his response to the application of the surety for release.

It is contended that the order of the court is not justified by the facts, and that it is void for want of jurisdiction of the court to make such an order. The statute authorizing and regulating garnishments before judgment confers no authority, in express terms, for a court to release the surety on the plaintiff's bond, nor to discharge the garnishee, prior to the final judgment in the case, except when the garnishee answers and surrenders the funds or other property alleged to be in his

hands. But an application by the surety for release from the bond raises an issue between the surety and the plaintiff in the case, and the court has power to grant relief to the surety upon proper showing that the signature of the surety was obtained by fraud. The rights of the defendant in the action and the garnishee can be protected by an order requiring a new bond, or, on failure to give a new bond, that the garnishee be discharged, as was done in the present case. In the absence of a showing in the record to the contrary, by bill of exceptions or otherwise, we must indulge the presumption that the court acted upon evidence sufficient to justify the petition, and sustain the order releasing the surety and discharging the garnishment. *Billingsley* v. *Adams,* 102 Ark. 511; *Armstrong* v. *Lawson,* 128 Ark. 39; *Heard* v. *McCabe,* 130 Ark. 185; *Laramore* v. *Radford,* 135 Ark. 494.

The judgment releasing the surety and discharging the garnishment is therefore affirmed.

BRAY v. TIMMS.

Opinion delivered January 28, 1924.

1. TRUSTS—EXPRESS TRUST—PAROL EVIDENCE.—Even if parol evidence were competent, under Crawford & Moses' Dig., § 4867, to establish an express trust in an oil and gas lease, the evidence herein was insufficient for that purpose.
2. TRUSTS—CONSTRUCTIVE TRUST.—Though evidence is inadmissible to establish an express trust, under Crawford & Moses' Dig., § 4867, it is competent under § 4868, *Id.,* to establish a resulting or a constructive trust.
3. TRUSTS—CREATION OF TRUST EX MALEFICIO.—Trusts *ex maleficio* will be declared whenever the legal title of property, real or personal, has been obtained through actual fraud, misrepresentation, concealment, or other undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest.

4. TRUSTS—SUFFICIENCY OF PAROL EVIDENCE.—While trusts resulting by operation of law may be proved by parol evidence, such evidence will be received with great caution, and must be full, free and convincing.
5. TRUSTS—DEED ABSOLUTE IN FORM—EVIDENCE.—In the case of a deed absolute in form there is a strong presumption against the existence of a trust, which must be overcome by a greater weight of evidence than a mere preponderance.
6. TRUSTS—SUFFICIENCY OF EVIDENCE.—In a suit to establish a trust *ex maleficio* in an oil and gas lease, evidence *held* insufficient to establish same.

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

John C. Leopard & Son, Randolph & Randolph and *Marsh & Marlin*, for appellant.

If any trust relation existed between Koch and Timms, it existed because of an express agreement or contract, and was an express trust. It could not have been a resulting trust, because no part of the consideration paid for the deeds of conveyance was paid by Timms. Crawford & Moses' Digest, § 4876. Parol evidence will not be heard to engraft an express trust upon a deed absolute in form. 103 Ark. 273; 104 Ark. 32; 110 Ark. 389; 100 Ark. 253. There is no implied trust relation existing between these parties, in respect to the royalty interest, neither can it be contended that a trust *ex maleficio* was created, since there is nothing in the record that raises even a suspicion that Koch practiced any fraud upon Timms. 113 Ark. 36; 73 Ark. 310. Appellee is estopped by the deed executed August 3, 1920, to Koch, as well as by his own conduct in holding his own assignment of same off the record, and procuring the conveyance to be made direct from Dail to Koch, and accepting the consideration from Koch that was paid for this one-half royalty described in the deeds. 10 R. C. L. 677; 8 Ark. 345. The testimony, even if parol evidence were admissible to establish a trust relationship here, does not meet the requirements of the law to the effect that such evidence must be full, clear and convincing. 89 Ark. 183; 11 Ark. 82; 19 Ark. 365; 44 Ark. 365; 45 Ark.

481; 48 Ark. 169; 64 Ark. 115; 1 Perry on Trusts, par. 137; 114 Ark. 128; 70 Ark. 145, 66 S. W. 658; 101 Ark. 451, 142 S. W. 848; 73 Ark. 313, 83 S W. 910; 3 Pomeroy, Eq. Jur., § 1056; 145 Ark. 161. See also 20 R. C. L. 1251, par. 98; 111 Ark. 45; 109 Ark. 335.

Mahony, Yocum & Saye and *McClintock, Quant & Ferguson,* for appellee.

1. A deed once executed and delivered cannot be revoked, nor the title reconveyed by cancellation or destruction of such. Devlin on Deeds, 3d ed., § 300; 8 R. C. L., § 70; 124 Va. 736; 92 Mo. 532; 166 Ind. 471; 225 Mass. 531; 44 N. D. 114; 107 Wash. 523; 188 Ky. 832; 242 S. W. (Ky.) 15; *Id.* 853; 21 Ark. 80; 34 Ark. 503; 52 Ark. 493; 53 Ark. 509; 60 Ark. 8; 108 Ark. 491; 245 S. W. (Ark.) 41.

2. A purchaser of land with notice of an unrecorded, delivered deed acquires no title, and purchases subject thereto, dependent upon the terms of the unrecorded conveyance. 14 Ark. 286; 48 Ark. 277; 57 Ark. 508-9; 77 Ark. 309; 95 Ark. 582; 108 Ark. 490; 127 Ark. 618; 132 Ark. 158; 135 Ark. 206; 138 Ark. 215; 238 S. W. (Ark.) 19.

3. The deed from Timms to Koch, dated August 3, 1920, never having been delivered, was void, and conveyed no interest in the Garrett Royalty. 14 Ark. 286; 24 Ark. 244; 74 Ark. 104; 77 Ark. 89; 80 Ark. 8; 97 Ark. 283; 98 Ark. 466; 100 Ark. 427; 123 Ark. 601; 132 Ark. 438; 140 Ark. 579; 142 Ark. 311.

4. The appellant cannot, on appeal, raise issues or defenses or present theories of the case for which he did not contend in the trial court. 74 Ark. 88; 74 Ark. 557; *Id.* 312; 81 Ark. 549; 82 Ark. 260; 83 Ark. 575; 101 Ark. 95; 108 Ark. 490; 131 Ark. 382; 132 Ark. 458; 149 Ark. 142.

5. Timms, while holding the legal title to the Garrett royalty by deed from Dail, with intent to convey part thereof for value, caused Dail to execute subsequent deed therefor to Koch, who transferred to Bray with notice. Timms, therefore, still holds the legal title to

the Garrett royalty, in part for himself, and in part as trustee for Bray, to the extent only of Bray's actual equitable interest in such royalty. 7 N. D. 335, 47 L. R. A. 637.

6. While clear and convincing proof of a resulting or constructive trust is required, it is not essential that such proof be undisputed. 246 S. W. (Ark.) 499.

7. If one purchases land with notice of a trust, he takes it impressed with such trust. 137 Ark. 14, 207 S. W. 436.

8. There are, in this country, two kinds of enforceable parol trusts: first, resulting trusts, and, second, constructive trusts. 100 Ark. 253.

9. An oral agreement between A and B that B shall purchase certain property, taking title in his own name, A furnishing part of the consideration, and B the remainder, and that A should have a definite interest in the property by reason of having furnished a specific portion of the consideration, does not fall within the statute of frauds. It is a resulting trust, and enforceable. Pomeroy, Eq. Jur., 4th ed., § 1038; 9 Ark. 518; 19 Ark. 39; 20 Ark. 272; 27 Ark. 77; 29 Ark. 612; 35 Ark. 548; 40 Ark. 62; 42 Ark. 503; 45 Ark. 481; 64 Ark. 155; 70 Ark. 145; 79 Ark. 69; 81 Ark. 478; 105 Ark. 318; 114 Ark. 128; 118 Ark. 146; 132 Ark. 402; 243 S. W. (Ark.) 811.

10. Where one in the course of a fiduciary or confidential relationship purchases real property for the benefit of the party toward whom he holds that relationship, he cannot, by taking title thereto in his own name, claim the property to the exclusion of the other. Equity would hold such a person as a constructive trustee. Pomeroy, Eq. Jur., 4th ed., § 1053; 19 Ark. 39; 20 Ark. 222; *Id.* 381; 26 Ark. 344; 39 Ark. 309; 73 Ark. 310; 101 Ark. 451; 103 Ark. 273; 113 Ark. 36; 136 Ark. 481; 151 Ark. 305.

WOOD, J. On the 18th of October, 1920, George B. Koch and wife executed and delivered to Rolla Bray the following deed:

"Know all men by these presents: That whereas, R. R. Garrett and Martha J. Garrett, his wife, did on the 5th day of June, 1919, execute and deliver to H. H. Neihaus, a trustee, a certain oil, gas and mineral lease on a tract of real estate then owned by them in Union County, State of Arkansas, described as 'the S½ of the NW¼ of section 4, township 19, range 15, containing 80 acres, more or less, which said lease is recorded in book 74 at page 164 of the deed records of said county; and

"Whereas, on the 5th day of February, 1920, said R. R. Garrett and Martha J. Garrett, his wife, still the owners of said real estate, did execute, acknowledge and deliver to H. L. Dail of Union County, State of Arkansas, their deed of conveyance, transferring and conveying to said H. L. Dail an undivided one-half interest in and to all the oil, gas and other minerals in, under and upon said real estate, subject to the aforesaid lease, and an undivided one-half interest in and to all royalties reserved by virtue of said lease, together with other rights and interests, which said deed of conveyance was recorded on the 5th day of February, 1920, in book 85, at page 90 of the deed records of said county;

"Now therefore, George B. Koch, the undersigned, of Jamesport, in Daviess County, Missouri, for and in consideration of the sum of five thousand dollars in cash and a note of $2,500, issued by the said George B. Koch to L. W. Timms, the cash paid and note delivered by Rolla Bray of Daviess County, State of Missouri, the receipt of which is hereby acknowledged, does hereby sell, assign, transfer, set over, and convey unto the said Rolla Bray and unto his heirs and assigns forever all of his right, title and interest, as obtained aforesaid, to and under the said deed of conveyance made, executed and delivered aforesaid to him by H. L. Dail on the 7th day of May, 1920, and recorded in deed records 89 at page 296 of the deed records of Union County, in the State of Arkansas, conveying the oil royalties and all oil interests conveyed to him on the S½ of the NW¼ of section 4, township 19, range 15, containing 80 acres, more or less, as shown by

lease records in book 74 at page 164 of the deed records of said county.

"To have and to hold the same unto the said Rolla Bray and unto his heirs and assigns forever, under the terms and conditions as in said deed of conveyance contained.

"In testimony whereof I have hereunto set my hand this the 18th day of October, 1921.

"GEORGE B. KOCH,
"ANNA KOCH."

This action was instituted by Lewis W. Timms, the appellee (hereafter called Timms), and Harvey C. McClary against Rolla Bray, appellant (hereafter called Bray), to have a trust declared in favor of Timms to a four-sixths interest in the royalties conveyed to Bray by the above instrument. McClary afterwards dismissed his complaint, and he passes out. The interest conveyed by the deed is referred to throughout the record as the "Garrett royalty," and will hereafter be called the "Garrett royalty."

Timms alleges in his amended complaint that Bray holds the Garrett royalty, the same being a one-sixteenth interest in all the oil, gas and other minerals produced upon the land, in the proportion of four-sixths thereof for Timms and two-sixths for Bray; Bray denies this, and alleges that he owns the entire interest in the royalty conveyed to him by the deed.

R. R. Garrett and wife were the owners of eighty acres of land in Union County, Arkansas, and in 1919 they executed an oil and gas lease in usual form to one H. H. Neihaus, trustee, reserving to themselves one-eighth of the oil, gas and other minerals produced on said land. In addition to the above deed from Koch to Bray, the record contains the following documentary evidence:

On February 5, 1920, Garrett and wife conveyed to H. L. Dail an undivided one-half interest in the oil, gas and other minerals in, under and upon the lands described, subject to the Neihaus lease, and also an undivided one-half of the royalty they were to receive under

the lease. This instrument was duly recorded on the day of its execution. On the back of the deed was indorsed an assignment from Dail to Timms of all Dail's interest conveyed by the deed. This assignment was dated February 27, 1920. The assignment was never recorded. On the 7th of May, 1920, Dail conveyed to George B. Koch, by deed absolute in form, the royalty which had been conveyed to him by Garrett, which deed was duly recorded May 20, 1920.

On the 3rd of August, 1920, Timms executed a deed absolute on its face, which, after reciting the former conveyances of the royalty from Garrett and wife to Dail and from Dail to Timms, purports to convey all the right, title and interest of Timms in the royalty to Koch. This deed was duly acknowledged on the day of its execution, but was never recorded. On the 12th of October, 1921, George B. Koch, Lewis Marlow and Gus Lent, parties of the first part, and Rolla Bray, party of the second part, entered into a "contract of sale" as follows:

"That the parties of the first part have this day sold to the party of the second part all their right and interest in a certain royalty executed by R. R. Garrett and Martha J. Garrett, his wife, by their instrument in writing executed on the 5th day of February, 1920, on the south half of the northwest quarter of section 4, township 19, range 15, Union County, in the State of Arkansas, and said instrument recorded in book 85, at page 90, in the records of Union County, said title of the parties of the first part obtained through a conveyance made by L. W. Timms to the said George B. Koch and his heirs and assigns forever, and on the 3rd day of August, 1920, which conveyance recites that whereas, on the 5th day of February, 1920, said R. R. Garrett and Martha J. Garrett, his wife, while still the owners of said real estate, did execute, acknowledge and deliver to H. L. Dail of Union County, State of Arkansas, their deed of conveyance, transfer and convey to the said H. C. Dail an undivided one-half interest in and to all the oil, gas and other minerals in and upon said real estate, subject to the

aforesaid lease, and an undivided one-half interest in and to all royalties reserved by said Garrett and wife, under and by virtue of said lease, together with other rights and interests, which said deed of conveyance was recorded on the 5th day of February, 1920, in book 85, page 90, of the deed records of said county, and the said H. L. Dail assigned the said property to L. W. Timms of Kansas City; and the L. W. Timms of Jackson County, in the State of Missouri, for the consideration of $1 and other valuable considerations, to him cash in hand paid by G. B. Koch of Daviess County, Missouri, did hereby sell, transfer, assign and set over and convey to the said George B. Koch and his heirs and assigns forever all his right, title and interest in and to and under the said deed of conveyance made, executed and delivered, as set forth to him by R. R. Garrett and Martha J. Garrett, his wife, on February 5, 1920, and recorded as aforesaid in book 85, at page 90, of the deed records of Union County, State of Arkansas, which said deed of assignment was executed by the said L. W. Timms, the interest as conveyed in said deed to be conveyed to the said Rolla Bray; and it is further contracted and agreed that whatever title the said first parties acquired heretofore under said deed of assignment from L. W. Timms shall be assigned and conveyed to the said Rolla Bray, by whatever conveyance necessary to properly assign said interest.

"It is further agreed that the said Rolla Bray shall pay $1,000 as earnest money to bind this contract, and within thirty days shall pay the balance as follows: $4,000 in cash, and deliver a note executed by George B. Koch to L. W. Timms, consideration $2,500, now held by F. C. Smith, as a part of the purchase price of the royalty herein sold to Rolla Bray."

On the 15th of October, 1921, H. L. Dail and his wife, Josephine Dail, executed a deed absolute in form, conveying to George B. Koch all of their interest in the royalty in controversy.

Besides the above documentary evidence, there is a vast volume of oral testimony which we have carefully considered.

Timms alleged, and he adduced testimony which tended to prove, that he and Dail were partners in the business of dealing in oil, gas and mineral leases and royalties until about the 23rd of February, 1920; that the Garrett royalty was conveyed by Garrett to Dail and by Dail to him; that he sold a one-half interest in this royalty to Koch, Marlow and Lent; that the consideration paid by them for this half interest was $7,500, and they were to divide it equally between them in the proportion of one-sixth each, for which each was to pay the sum of $2,500; that Koch executed his note for that sum, and Marlow and Lent paid for their respective interests in cash; that it was agreed between them that the entire title should appear in Koch, and that he should hold the same in trust for himself and the others according to their respective interests; that accordingly Timms, who owned the royalty, had Dail, in whom the record title yet appeared, to convey the title directly to Koch, and told Dail to make Koch trustee in the deed, but he failed to do so, and that Timms at the same time also delivered to Koch the deed which had been executed to him by Dail, but which had not been recorded; that it was understood between them that, in pursuance of the agreement that the record title should appear in Koch, a declaration of trust was prepared, covering the Garrett royalty and showing the respective interests of the four parties; that these four parties agreed to syndicate their interests under a common-law trust and subdivide the same into units to the amount of $50,000; that they would sell these units and issue certificates of interest signed by Koch, as trustee, until a sum was realized sufficient to reimburse themselves in proportion to the sums each had invested, and the residue of the royalty unsold was to be owned by them in proportion to their respective interests. However, before the trust was actually executed or any interest sold under it, this scheme was abandoned. The declaration of trust was never recorded, and the absolute record title remained in Koch.

Timms further alleged that Bray knew all of the above facts, and that Koch, Marlow and Lent held their interest in the royalty six months or more; that Timms and Bray entered into an agreement to purchase the interest of Koch, Marlow and Lent in the royalty, and that, after prolonged negotiations, the deal was consummated, by the terms of which he surrendered to Koch his promissory note for $2,500 as the consideration for the purchase of Koch's one-sixth interest, and that Bray paid to Marlow and Lent $5,000 for the purchase of their respective interests, and that one Harvey C. McClary had contributed $700 of the amount necessary for the purchase of the interest of Marlow and Lent.

Timms testified that Bray was advised, in the presence of Scott Miller, that Koch held the title to the Garrett royalty in trust for Timms and for Marlow, Koch and Lent; that he had told Bray of the interest that Koch, Marlow and Lent had in the Garrett royalty perhaps a dozen times before the 5th of October, 1921. He further testified that he had delivered to Koch the deed from Dail to Timms when he sold Koch an interest in the Garrett royalty, and he never saw it afterwards in Bray's hands, except that it was read to witness and Bray in Miller's office. On several occasions Bray was advised of the unexecuted declaration of trust; that about the first of October, 1921, Bray and Timms met in Scott Miller's office, where Bray was told of the deed of the Garrett royalty to Dail and that such deed was in the hands of Koch. Timms also testified that he informed Bray of the deed executed by Dail to him, which had not been recorded, prior to October 12, 1921, when the contract for the sale of the Garrett royalty between Koch, Marlow, Lent and Bray was entered into. Timms testified that he and Bray had handled other stuff together; at one time had bought a farm in Kansas for which Timms paid two-thirds and Bray paid one-third. Title was taken in Timms, and Timms afterwards executed to Bray a deed for his interest. He also testified to other facts showing that their business relations had been close and intimate;

that when they went on the first trip to El Dorado to examine the royalty, after the contract was entered into to purchase the interest of Koch, Marlow and Lent, they went together on the train, sharing equally the expenses of the trip, and that they always divided the expenses.

Scott J. Miller testified that he was the attorney for Koch, Marlow and Lent in the transaction for the sale of their interest in the Garrett royalty. His testimony is to the effect that, after Bray and Timms had concluded their negotiations with each other and with Koch, Marlow and Lent, looking to the purchase of their interests, these negotiations were evidenced by a written contract, which witness drew. Judge Alexander was the attorney representing Bray. A thousand dollars was paid down by Bray before the contract was finally completed. The balance of $4,000 was to be paid when Koch's note for $2,500 to Timms was returned and the $4,000 balance paid. Witness had sent the deed for Koch and his wife to execute. This deed is the same as that set out above of date October 18, 1921, except that the deed which he had prepared and Koch had executed had in it, at the end of the paragraph last preceding the paragraph "to have and to hold," the following: "This deed only conveys the interest of George B. Koch, Lewis Marlow and Gus Lent." At the suggestion of Koch this paragraph was inserted because otherwise it might be considered he was transferring title to all the Garrett royalty. The deed with this paragraph inserted was tendered to Bray, and witness told Bray that he didn't want him to accept it without knowing that the paragraph had been inserted. Bray submitted the deed to his attorney, Judge Alexander, and Bray and Alexander both objected to the inserted paragraph. Witness then insisted with Koch that it was in the contract that it should not be written in there; that the deed fully explained what he was deeding. Then the inserted paragraph was crossed out, and the deed was delivered to Bray, and likewise the deed from Dail to Koch, with the assurance that they would have nothing

further to do with it. Bray asked about the abstract, and was informed that Timms had it.

Witness further testified that, at the time arranged for the closing of the transaction in witness' office, Bray and Timms were present. He stated that something was said as to Timms' interest, and that Bray fully understood that Koch only owned or controlled a one-half of the Garrett royalty; that this was all that Koch owned, and in his deed he transferrred only the interest he had, representing himself, Lent and Marlow. Witness further testified that he told Bray, at the time he paid the remaining $4,000 and delivered to Koch his note for $2,500, that Koch, Marlow and Lent owned three-sixths of the Garrett royalty and that the other three-sixths belonged to Timms. Witness knew personally that a declaration of trust had been prepared, and had told them, prior to the closing of the transaction, in the presence of Bray, that the declaration of trust had not been executed, but that Koch held the title to the royalty as trustee, and only owned or controlled a half interest of the royalty for himself, Marlow and Lent. Witness didn't remember Bray's words exactly in answer to this statement, but did remember that Bray said that he was simply buying the interest of Marlow and Lent, his clients, and witness explained what their interests were. Witness also stated that George B. Koch had not executed a trust, and therefore the title being in him (Koch), any transfer by Koch would transfer the title that was put in Koch, and the parties' interest in the result would remain the same.

Other witnesses, attorneys representing Timms, testified that, in conferences had between Timms and Bray, at which Leopard, who is now Bray's attorney, was present, looking to the purchase of the Garrett royalty from Koch, Marlow and Lent, Bray and Timms seemed to be conversant with the facts as to the ownership of the Garrett royalty, and the explanation of each in those conferences was to the effect that Timms originally had

title which he acquired from Dail, and that he sold a half interest to Koch, Marlow and Lent, or a one-sixth to each of them, for the sum of $2,500, each, and that Timms and Bray were negotiating for the repurchase of this interest of Koch, Marlow and Lent upon the terms as stated by Timms and Miller. In other words, these witnesses corroborated the testimony of Miller and Timms to the effect that Timms had title to the Garrett royalty which he had acquired from Dail, and that he had sold a half to Marlow, Koch and Lent, and that, if the arrangements between Timms and Bray for the purchase of the Koch, Marlow and Lent interests were carried out, Timms would own four-sixths and Bray would own two-sixths of the Garrett royalty.

The testimony of Koch, Marlow and Lent was to the effect that they purchased of Timms a half interest of the Garrett royalty—that is, a half of one-sixteenth of production. The conveyance was made to Koch by Dail for the Garrett royalty, and Koch was to hold the interest of Marlow and Lent in trust for them, and also the one-half interest retained by Timms. Timms denied that he had ever delivered the deed to Koch of August 3, 1920, and Koch also testified that he received only the deeds from Dail purporting to convey the Garrett royalty to Koch.

There was testimony in the record tending to prove that Bray, before and after the written contract of October 12, 1921, by his conduct and conversation showed that he didn't have the entire interest in the Garrett royalty; that he (Bray) was a trustee, etc.; that he was endeavoring to raise money to purchase, in connection with Timms, the interest of Koch, Marlow and Lent in such Garrett royalty. This testimony was to the effect that, after this contract, Bray stated to several that he had $2,500 interest in it, and that Timms was the "lucky dog,"—that he, Timms, had the largest interest. There is much testimony of this character.

Both Timms and Mrs. Timms testified to the effect that Bray recognized Timms' interest, and promised to

issue to him a certificate showing that he held such interest in trust for Timms, but that afterwards he failed and refused to do so.

On the other hand, Bray, in his answer, denied that he purchased only an undivided interest in the Garrett royalty, as set up in Timms' complaint, and denied that he was to hold the Garrett royalty in trust for any one, but alleged that he purchased from Koch the entire Garrett royalty. The allegations of his answer concerning this are as follows:

"That prior to the purchase by this defendant of said royalty, plaintiff, Lewis W. Timms, had been arrested upon criminal charges preferred by said George B. Koch, L. C. Marlow and Gus Lent, charging plaintiff with fraud and obtaining money under false pretenses in connection with the sale of said Garrett royalty from said H. L. Dail to said Koch, Marlow and Lent; that such criminal prosecutions were pending in the circuit court of Daviess County, Missouri, at the time of the purchase of said royalty by defendant; that said Koch, Marlow and Lent were acting together and in concert in instituting such prosecutions, and, in order to obtain the consent of said parties to the dismissal of any or all of said charges, it was necessary to restore to said Marlow and Lent the $5,000 paid by them, as well as to said Koch the $2,500 note given by him; that plaintiff was without funds, and appealed to this defendant to purchase said royalty by paying to said Marlow and Lent the $5,000 paid by them, and agreed to return to said Koch the $2,500 note given by him; that at that time said $2,500 note had been transferred to a friend and business associate of plaintiff, who had instituted suit thereon against said Koch, which said suit was then pending and contested by said Koch on the ground that said note had been obtained by plaintiff through fraudulent means and pretenses; said note, being involved in doubtful litigation, was of little or no value, and plaintiff agreed with defendant that, if he would buy said royalty at the price of

$5,000, he, the plaintiff, would procure and surrender to said Koch the said note of $2,500, in order that defendant might be able to secure from said Koch a deed of conveyance covering the entire royalty; it was agreed between plaintiff, this defendant, and said Koch, Marlow and Lent, that this defendant should pay to said Marlow and Lent the said sum of $5,000, and that he should receive therefor a deed of conveyance for, and become the sole owner, legal and equitable, of the Garrett royalty; that the return of said $2,500 note was not made in consideration of any interest held by said George B. Koch, but was made to induce said Koch to execute to defendant a conveyance of the entire Garrett royalty and to abandon the prosecution of plaintiff on the criminal charge aforesaid; that plaintiff procured and delivered to this defendant an abstract of title to said property, purporting to show the title to said royalty interest, and which did show, by recorded conveyances, that H. L. Dail had purchased said royalty from Garrett, the landowner, and that said H. L. Dail had sold and conveyed the same to George B. Koch, and the said Lewis W. Timms advised this defendant that the title thereto was good and perfect, and that the conveyance of George B. Koch to this defendant would vest in this defendant a good title, and that the statements of said Lewis W. Timms were verified by said abstract and his examination thereof, and he was induced thereby to purchase the same; that, pursuant to said agreement, defendant did pay over to said Marlow and Lent the sum of $5,000, and a deed of conveyance was executed by said Koch and delivered to defendant, conveying to him the entire interest in the Garrett royalty, without reservation, and the same was accepted by defendant in the belief that it conveyed the apparent legal title of said Koch, and without any knowledge of any claim on the part of plaintiff to an equitable interest therein, and no such claim was ever made to him by plaintiff until said royalty promised to become valuable."

To sustain these allegations, in addition to the documentary evidence above referred to, Bray adduced, in substance, the following oral testimony: John C. Leopard testified that he was the attorney for the Pattonsburg Savings Bank, and that the bank had instituted suit against Koch on a $5,000 note executed by Koch to Timms for an interest in what is known as the Garrett royalty, which note had been indorsed by Timms to the bank. Timms had been arrested on the 22d of September, 1921, on a charge lodged against him by Koch, Marlow and Lent, the charge being that he had obtained $2,500 from Marlow by false representations in the sale of the Garrett royalty, and the sum of $5,000 from Gus Lent and also $5,000 from Koch by false representations in the sale of the Bridges royalty. On Sunday, the second of October, 1921, witness and Bray were in Kansas City to obtain evidence to be used in the suit of the bank against Koch. This suit had been set for trial on the 12th of October, 1921. They went to the office of Timms, and, at his request, they went to the office of Timms' attorney, McClintock, and were there introduced to him, Meyers and Quant. McClintock advised Timms to make arrangements to either resell these royalties or buy them back on his own account. Timms stated that he had recently spent $16,000 in drilling a dry well, but thought he could raise the money if he had some time. Timms asked Bray to see the people who bought the royalties and find out on what grounds they could be bought back. Timms said that he would come to Pattonsburg in a short time, and he and Bray would see what kind of a proposition they could get from Koch, Marlow and Lent, and in the meantime he would try to raise the money necessary to buy the royalties. There was no talk at that time as to what interest Koch, Marlow and Lent had in either of the royalties, and nothing was said about Timms having any interest whatever in either of them, and nothing said as to how or in whose name the title would be taken. There was some talk with reference to a conver-

sation with Scott Miller to the effect that the parties were claiming interest on the money, and that the royalties might be purchased for their face. Timms, in the conversation, stated, in regard to the note for the Garrett royalty, that he would take care of it or control it. He figured how much it would take to settle the $2,500 note for the Garrett royalty, and for the Bridges royalty it would take about $16,000; that the royalties were worth the money, and that the Garrett royalty was worth the most money. Witness and Bray left with the understanding that Timms was coming over into the Pattonsburg country within the next day or two, and he and Bray were going to try to sell the royalties. Witness further testified that one Emil Bleish, Robert E. Maupin and Rolla Bray, who were witness' clients, furnished a bond for Timms in the criminal prosecution. Witness appeared in connection with Timms' attorney, McClintock, to renew the bond which had been given before the justice of the peace. Timms and witness at that time had not made a contract of employment, but it was supposed that they would. Witness would have appeared for him at that time, as a favor, if he had never seen him before. After the difference came up between Timms and Bray and the other parties about the Arkansas royalties, witness informed McClintock that he represented these parties, and, in consequence, he never asked Timms for any agreement about an attorney's fee, and did not consider that the relation of attorney and client existed between him and Timms at the time he was representing him in the bond matter. What he did was more for McClintock, Timms' attorney, than it was for Timms.

Two witnesses testified that they were local real estate brokers at El Dorado, dealing in leases and oil royalties, on the 12th of October, 1921, and their testimony showed that the sum of $5,000 was a fair average value for the Garrett royalty. Appellant introduced a letter from Miller to Bray concerning the consumma-

tion of the contract of October 12, in which Miller stated that he was inclosing leases and assignments of Garrett and wife to Dail, of Dail to Timms, and Timms to Koch, being all the title that his clients had, and instructing Bray to have the deed prepared for Koch to sign, and he would see that such deed was executed; and also a letter afterward to the effect that he inclosed a copy of the deed which he had sent to Koch, to be executed as Bray and his attorney desired, and another letter advising Bray that everything was in readiness for him at the proper time.

The testimony of Bray, so far as it is necessary to set it out, is that he told Timms that, if he bought the Garrett royalty he would not go into any syndicate nor sell it out to anybody, and that was before he contracted for it with Miller. He had the abstract of title which showed the interest of Koch, Marlow and Lent in the Garrett royalty, and that Miller said nothing at all about any interest. Miller asked that Koch, Marlow and Lent have their money back, with interest, and that, if Bray got that, Miller was to convey the title to a one-sixteenth royalty. The (original) Garrett royalty was a one-eighth of all the oil, and witness was buying a one-sixteenth of all the oil. He offered $5,000 with no interest, and it was accepted. Miller afterwards told him that he had all the papers in the case from Koch, and witness had an abstract showing that the title was in Koch to the Garrett royalty. Nothing was said about anybody's interest. They talked of the royalty. He told Miller that he would give $5,000 for this royalty, and Miller replied that he was going to advise his clients to take it, and he was sure that Bray would get it. Timms told witness that he had sold the Garrett royalty and had got $5,000 in cash and a note for $2,500, and that he had sold one-half, and he showed witness the abstract showing title in Koch. Timms never told witness what interest in the Garrett royalty any of them was to get. He told witness that this royalty was deeded to Koch direct. He

never had any talk with any one about the fact that Koch held the title to the Garrett royalty as trustee. He was never advised of any declaration of trust, and there was none shown to him, either in McClintock's office or anywhere else, or any certificates of interest. Witness saw in the abstract, before he had paid $1,000 on the contract, that there was an assignment of an interest to Thompson, and the abstract showed that there was a deed from Dail to Koch, and the record showed that Timms had no interest whatever at that time, and he knew nothing of the assignment from Dail to Koch; found that later; had never seen the deed from Garrett to Dail until it was sent to him. At some discussion with Timms about the Thompson matter, Timms said he didn't know Thompson had a deed. Witness told Timms the abstract showed it, and Timms explained that it was never delivered. Witness had understood that Lent and Marlow had an interest in it, and that they would not sell any unless they sold it all. Timms had to give their money back, and he had to do it on all of it, Garrett and Bridges both. He knew that Koch had an interest in it. The abstract showed that he had the royalty. He never talked to Koch about it. Witness categorically denied that he had any conversation in the office of McClintock, on the Sunday evening referred to by the attorneys, to the effect that Lent, Marlow and Koch each had a one-sixth; that what was talked about there was the amount of money it would take to buy these royalties, $15,000 for the Bridges, and $5,000 to be paid in cash for the Garrett royalty. He had the abstract examined by his counsel, Leopard & Alexander. The abstract showed the interest that Koch held. Counsel advised that the title was in Koch, and that a deed from Koch would make Bray's title good. He denied that Timms told him that he had a half interest in the Garrett royalty, and denied that Mrs. Timms ever called him up and asked him to make conveyance to Timms or Mrs. Timms to any interest in the Garrett royalty. He

thought that Timms went down to sell McClary some of the Bridges royalty. He was not to sell any interest in the Garrett royalty. He told Timms all the time that he would not sell any of the Garrett royalty unless he sold it all. He positively denied that he had told any of the guests at Bramhall's of the interest he had in the Garrett royalty. He didn't tell them that he had $2,500 in it, because he had bought it for $5,000, and he denied that any such conversation took place there as the witnesses for Timms stated. Witness stated that he first agreed to buy the Garrett royalty from Timms on October 15, 1921. Timms said then that he didn't have any interest in it, and, according to the abstracts, he didn't have any interest in it. At the time he made the contract with Timms, Mr. Maupin was present. Timms stated that, if witness would buy the Garrett royalty, he (Timms) would go ahead and raise the money for the Bridges royalty and have it at Maysville on October 12 to take the Bridges royalty and stop these suits, and get from under it himself; that the Garrett royalty was the one that he was uneasy about; that he sold that himself direct. He was not uneasy about the Bridges royalty, because he never sold it. The contract was that he (Bray) was to put up $5,000 for the Garrett royalty and Timms was to procure Koch's note and turn it over to witness, free of cost, to turn back to Koch, which he did, and witness delivered the note to Koch's attorney, Scott Miller. Timms turned over to witness the abstract to look up the title. He said that he had sold the Garrett royalty direct to Koch, and didn't sell the Bridges royalty, and was not afraid of prosecution on the Bridges royalty, but he was on the Garrett royalty. Witness was to have the Garrett royalty—the full one-sixteenth of production.

Bleish, a merchant and farmer, who went on Timms' bond, testified that Timms wanted to sell him an interest in the Garrett royalty, and witness stated that he named Koch, Marlow and Lent as having an interest in

the Garrett royalty, and he understood from Timms that Koch had practically all of it. Timms didn't tell witness that he (Timms) owned any of it. He said that it would take $7,500 to handle it. Witness considered that that was to handle all of it. Timms didn't tell witness who held the title.

Another witness stated that he had heard of Bray buying, or trying to buy, the Garrett royalty, and witness asked Timms if he was a partner of Bray, and Timms said, "No," that he had no interest with Bray, that he (Bray) had made a good investment by getting in on the ground floor, and it would make him a rich man. Timms told witness that Bray had a half interest, or one-sixteenth royalty, or something to that effect. That was said at the October term of the court, 1921. Witness might be mistaken about his saying one-half, but he knows that Timms said Bray had a one-sixteenth.

Another witness, a farmer and director of the Pattonsburg Bank, stated that he had a conversation with Timms in 1921 in regard to the Garrett and Bridges royalties. Timms was talking about selling witness some royalty, and spoke about Bray having bought some in the Garrett royalty for $5,000, and about selling the Bridges royalty for $15,000, and stated that, if he could sell that, he could pay off his note to the Pattonsburg Bank. Witness understood that Bray had bought the Garrett royalty for $5,000. Witness understood that it was a one-sixteenth Bray had bought. He heard Timms say, in the presence of Bray, that he had sold to Bray a one-sixteenth interest for $5,000.

Another witness, vice president of the bank at Weatherby, testified that she had some talk with Timms about the Garrett royalty. She was to take some part of it, and went to Timms after his trip down to El Dorado, to see about getting it, and he said that he had sold it all and could not let witness have any. That was some time in December, 1921.

Another witness, who was president of the bank at Pattonsburg, stated that the bank had bought a note of Koch from Timms. Timms had been arrested for obtaining the note under false pretenses, and witness was called on by Bray to go on Timms' bond, and witness went on the bond with Bray. Koch was pleading fraud in obtaining the notes as defense to the bank's suit. Timms was anxious to get things adjusted in some way, and said, in his conversation, that he had sold the Garrett royalty himself, but had not had anything to do with selling the Bridges royalty; that he was not afraid of any prosecution on the Bridges royalty. On October 5 Timms' proposition was to let Bray take the Garrett royalty for $5,000 that Lent and Marlow had paid in, and that he (Timms) would procure the $2,500 note in litigation given by Koch to him. Timms said that that note really belonged to him anyhow at that time, and if Bray would take it he would secure the note and turn it in on the deal. This talk was about the time the case was set for trial at Maysville. Timms was to have no interest whatever in the Garrett royalty. The case was set for trial on October 12. Witness was informed that, if he would continue the case, the money for the payment of the note would come from some one in Arkansas. The contract of October 12 was signed that morning. Witness did not see Koch or Marlow sign it. Lent and Bray were there, and witness saw Bray sign the contract, and knew Koch's signature. The contract was read, and Timms was present at the time. Witness thought that, on the night of the 23rd of September, at the bank, or on the 5th of October, when Bray and Timms were present, Timms said that Koch, Marlow and Lent each had a one-third of a one-sixteenth in the Garrett royalty. Timms never told witness that he had a half interest in the Garrett royalty. He never had any discussion with Timms and Bray relative to the syndication of the Garrett royalty, and witness had no agreement with Bray that he was to obtain a part of the interest

in the purchase of the royalty. Neither witness, nor the bank of which he was president, loaned Bray any money on that account. Witness loaned Bray the money to purchase the interest McClary claimed to have in the Garrett royalty, which was to the amount of $750. Bray brought abstracts of the Bridges and Garrett royalties to the bank before he purchased the Garrett royalty. Witness saw the abstract, and it showed that the title was in Koch.

Timms, in rebuttal, testified that he never had any conversation with Maupin and Bray at Cameron in his life, and denied that he was present at Maysville at the time the contract of October 12 was signed between Bray, Koch, Marlow and Lent.

It was stipulated at the trial that Timms denied the testimony of the witness, Keeling, who had testified that he heard Timms say that he had no interest in the Garrett royalty, and had sold the same to Bray for $5,000, and had made a handsome profit.

There was testimony in the record to the effect that, when Bray was in El Dorado, after the purchase of the Garrett royalty, he sent telegrams to parties in Missouri, stating, in substance, that several wells had come in on the property, and that it looked like it was worth a million dollars.

While we have not stated *in haec verba* the testimony of the witnesses, we have endeavored to give the substance of the material testimony in the record, and believe that the above presents the salient facts upon which the trial court grounded its decree. The chancery court awarded Timms a half interest in the Garrett royalty, and directed Bray to execute a deed conveying to Timms an undivided one-half interest in the same. From that decree Bray appeals, and Timms also appeals from so much of the decree as awards him only an undivided half interest of the Garrett royalty instead of an undivided two-thirds interest.

1. The oral testimony in this case is in such radical and hopeless conflict we have found it most difficult to determine where the preponderance lies, but, after a painstaking consideration of the material testimony, the substance of which we have set forth above, we are convinced that, even if it were permissible to prove an express trust by parol testimony, the appellee has not shown by a preponderance of the evidence that Bray holds an undivided four-sixths interest of the Garrett royalty in trust. The facts of this record demonstrate most cogently the wisdom of the rule of law, declared by our statute, that "all declarations or creations of trust or confidences of any lands or tenements shall be manifested and proved by some writing, signed by the party who is, or shall be by law, enabled to declare such trusts, or by his last will in writing, or else they shall be void. * * *" Section 4867, Crawford & Moses' Digest. See original opinion in *Morris* v. *Nowlin Lumber Co.,* 100 Ark. 253; *Harbour* v. *Harbour,* 103 Ark. 273; *Carpenter* v. *Gibson,* 104 Ark. 32; *Veazy* v. *Veazy,* 110 Ark. 389.

This record discloses a controversy over a one-sixteenth royalty of the production of oil and gas in eighty acres of land in the El Dorado oil fields, which land is exceedingly valuable. Bray holds the absolute record title to this Garrett royalty. But, notwithstanding the fact that Bray holds the title by deed absolute in form, Timms alleges that he has title from the original owner which he has never placed of record; that, having such title, he sold a half interest in the Garrett royalty to three other parties, and the title was placed in one of them (Koch) as the trustee, to be held for himself and the other interested parties; that he entered into a contract with Bray by which he and Bray were to buy this half interest, and that he and Bray would then own the entire Garrett royalty, Timms owning a four-sixths of the entire royalty and Bray the remaining two-sixths. But none of these transactions, involving the ownership of

royalty in gas and oil lands worth, according to optimistic telegrams in the record, perhaps a million dollars, were evidenced by writing. Timms offers oral testimony tending strongly to prove these transactions as set up in his complaint, but Bray denied that there were any such transactions, and also offers testimony which tends strongly to sustain his contention. Therefore, if oral testimony were allowed in such cases, sharp conflict would arise, making it most difficult to determine who had title to lands and interests therein. Hence we say the wisdom of the rule of law requiring that all express agreements or declarations of trust or confidences in lands shall be evidenced only by writing.

2. But the statute also wisely provides that, where any conveyance shall be made of any lands or tenements by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by the above rule. See § 4868, C. & M. Digest Were the rule otherwise, a statute which was intended to prevent fraud would, in many cases, be a potent instrument of fraud. In *Morris* v. *Nowlin Lbr. Co., supra,* speaking of trusts which may arise or result by implication of law, we quoted from Mr. Pomeroy as follows: "The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies, so superior to mere recoveries of damages, embraces those which arise by operation of law from deeds, wills, contracts, acts or conduct of parties, without any *express* intention, and often without *any* intention, but always without any words of declaration or creation. They are of two species, 'resulting' and 'constructive,' which latter are sometimes called trusts *ex maleficio;* and both these species are properly described by the generic term 'implied trusts.' Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent, in theory of equity, appears or is inferred or assumed from

the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. In such case a trust results in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner. * * * If one party obtains the legal title to property not only by fraud, or by violation of confidence or of the fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." I Pomeroy's Equity Juris., § 155.

According to our statute, *supra,* and the above decisions and cases there cited, the parol testimony in this record was not admissible to establish an express trust, but it was competent and admissible to establish a resulting, or constructive, trust. According to Lord Chancellor Hardwick, in the case of *Lloyd* v. *Spillet,* 2 Atk. 148, trusts which arise by implication or operation of law are of three kinds: first, where the estate is purchased in the name of one person, but the money paid for it is the property of another; secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in certain cases of fraud where the transactions have been carried on *mala fide,* cited in *Trapnall* v. *Brown,* 19 Ark. 39, at page 48.

Applying the above familiar principles to the facts of this record, we do not discover anything in the evidence that would constitute Bray a trustee for Timms under the first or second of the above subdivisions. Timms did not furnish the money to pay for the Garrett royalty, the title to which was put in Bray, and the conveyance to Bray was not in trust declared only as to a

part, but it was an absolute conveyance of the entire Garrett royalty—that is, the entire one-sixteenth of the production. If Timms be correct in his contention, then this is a case where Bray, knowing that Timms had the title to an undivided half interest of the Garrett royalty and that Koch, Marlow and Lent, having title to the other undivided half, entered into an agreement with Timms whereby they were to purchase the undivided half owned by Koch, Marlow and Lent for the sum of $7,500, and that Timms should furnish the purchase money to pay for the interest of Koch in the sum of $2,500 and Bray should furnish the money to pay for the interest of Marlow and Lent in the sum of $5,000, and that title to the whole should be taken in Bray, but that he should hold the four-sixths undivided interest thereof in trust for Timms. But, on the other hand, if Bray be correct in his contention, he purchased the entire Garrett royalty of Koch, and, in order to enable him to effectuate the purchase, Timms agreed to procure and surrender to Koch, free of cost to Bray, the $2,500 note which Koch had executed to Timms, Bray paying the sum of $5,000, the residue of the entire consideration necessary to consummate the deal.

It was an entire transaction, and, if Timms be correct, Bray holds, not the entire Garrett royalty (a one-sixteenth of production), but an undivided four-sixths interest in trust for Timms; and Bray, in ignoring Timms' interest and in refusing to carry out the trust, should be declared a trustee *ex maleficio;* for, if such be the correct view of the facts of this record, Bray, in law, would be as to Timms' interest a trustee *ex maleficio.* So, in the final analysis of all the evidence, it occurs to us that the *crux* of this lawsuit is whether or not Bray should be declared a trustee *ex maleficio,* and required to convey to Timms an undivided four-sixths of the Garrett royalty—that is, a four-sixths of one-sixteenth, of the production. There is no middle ground. Bray, under the facts of this record, is a trustee, *ex maleficio,* of the entire four-sixths

interest claimed by Timms, or else he holds the entire Garrett royalty, a one-sixteenth of the production, absolutely in his own right and free from fraud.

Mr. Pomeroy says: "A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, as, for example, the promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like, and, having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement." 3 Pomeroy's Equity Jurisprudence (4 ed.), § 1055, quoted in *Moore* v. *Oates,* 143 Ark. 328, at page 335.

The law is well established that trusts *ex maleficio* will be declared "whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealment, or other undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests." See 3 Pomeroy's Eq. Jur. §. 1053; *Ussery* v. *Ussery,* 113 Ark. 36; *Barron* v *Stuart,* 136 Ark. 481; *Pharr* v. *Fink,* 151 Ark. 305. To reach a solution of the vexed question as to whether or not Bray is a trustee *ex maleficio* has given us great concern. It is more a question of fact than of law. In determining it, of course, we must apply the well-recognized rules for the production of evidence and the weighing of testimony. It is a well-settled principle that, while trusts resulting by operation of law may be

proved by parol evidence, yet the courts uniformly require that such evidence be received with great caution, and that it be full, free and convincing. *Colgrove* v. *Colgrove,* 89 Ark. 183; *Hunter* v. *Field,* 114 Ark. 128. See also *Nevill* v. *Union Trust Co.*, 111 Ark. 45.

In the comparatively recent case of *Barron* v. *Stuart, supra,* after citing numerous authorities relating to trusts arising *ex maleficio,* the court said, at page 489: "It is well settled by the above authorities that the parties seeking relief must establish the trust by clear and satisfactory evidence."

In the case of *Murchison* v. *Murchison,* 156 Ark. 403-407, we said: "While it is necessary that the proof to establish a resulting trust should be clear, satisfactory and convincing, it is not essential that it be undisputed."

Now, the deed to Bray being absolute in form, raises a strong presumption against the existence of a trust, and must be overcome, under the doctrine of our cases *supra,* by a greater weight of evidence than a mere preponderance. See also *Avery* v. *Stewart,* 136 N. C. 426. The parol testimony on behalf of Timms to establish a trust *ex maleficio* is met by parol testimony on behalf of Bray tending to controvert it in every particular essential to establish a trust in Bray *ex maleficio.* To say the least, there is a decided conflict in the parol testimony adduced on the issue as to whether or not there was a trust *ex maleficio.* Bray comes panoplied, not only with a deed absolute in form and with an abstract of title showing that his grantor, Koch, had the clear record title to the Garrett royalty—that is, to a one-sixteenth of production—but also with a contract of purchase upon which that deed was bottomed, which contract recites that the title Bray was obtaining was derived through a conveyance made by Timms to Koch, and that all the interest as conveyed in the deed from Timms to Koch should be conveyed to Bray, and also recites the assignment from Dail to Timms, and that Bray was to receive all the title which Garrett and wife conveyed to Dail by whatever conveyances necessary to properly assign said interest.

It is true that Timms denies that his deed of August 3, 1920, to George B. Koch, was delivered to Bray, and Koch also denied in his testimony that he received the same, but we do not understand that Timms denies in his testimony that this contract was entered into, nor does he deny that he was fully cognizant of its provisions, and there was testimony tending to show that he was present when this contract was entered into, and the only reason he didn't sign it was because the record title was in Koch. Timms does not deny that he executed the deed of August 3, 1920. He only says that the same was not delivered to Koch, and Koch says the same was not received. But the fact remains, and it is undisputed, that this deed, the day after the contract was signed, was sent to Bray in a letter, by Scott Miller, together with copies of the lease and assignment of Garrett and wife to Dail, and of Dail to Timms, and of Timms to Koch, with directions to Bray to prepare the deed that he wanted Koch to sign, and that it would be properly executed. There is no suggestion anywhere in the record that this deed was a forgery, or that it was surreptitiously placed among the other papers evidencing Bray's title and by mistake delivered with those papers to Bray.

Therefore, after reading through all this immense record, we feel bound to conclude that, amid the decided conflicts and inconsistencies in the parol testimony, the written documents upon which Bray bases his title must turn the scales in his favor. Certainly, it cannot be said that the oral testimony upon which Timms relies to engraft a trust upon Bray's deed is of that clear, satisfactory and convincing character exacted by the rules of evidence to establish a trust *ex maleficio*. If titles built upon documentary and record evidence could thus be overthrown, they would indeed rest upon very insecure foundations. The decree of the chancery court is therefore reversed, and the cause is remanded with directions to dismiss appellee's complaint for want of equity, and to quiet Bray's title in the Garrett royalty—that is, to an undivided one-sixteenth of the production of oil, gas, and

other minerals upon the eighty acres of land heretofore described, and for such other and further proceedings, according to law and not inconsistent with this opinion, as may be necessary to protect and preserve the rights of parties in interest.

MITCHELL v. WRIGHT HILL SPECIAL SCHOOL DISTRICT.

Opinion delivered January 28, 1924.

1. SCHOOLS AND SCHOOL DISTRICTS—REVIEW OF ACTION OF COUNTY BOARD OF EDUCATION.—Since the action of the county board of education in respect to changing the boundary lines of school districts are *quasi* judicial, and no remedy for review by appeal is provided by statute, certiorari is the proper remedy.
2. SCHOOLS AND SCHOOL DISTRICTS—CERTIORARI—TIME FOR APPLICATION.—In the absence of excuse for delay, a petition for certiorari to quash an order of the county board of education directing an election to determine whether certain territory should be created into a special school district, filed nearly twelve months after the order creating the district and six months after an ineffective appeal, was too late.
3. CERTIORARI—DISCRETION OF COURT.—Certiorari, especially where used to review acts and decisions of special boards created by statute, issues only in the discretion of the court upon special cause shown.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; affirmed.

STATEMENT OF FACTS.

This was a petition to the circuit court for a writ of certiorari to quash an order of the county board of education directing an election to be held for the purpose of submitting to the qualified electors the question of whether certain territory should be created into a special school district.

According to the allegations of the petition, appellants, who were the petitioners, are qualified electors and patrons of the public school in Common School District No. 3 of White County, Arkansas.

Appellees, who were respondents to the petition, are directors of Wright Hill Special School District No. 3 of White County, Arkansas, and said special school district is also made a defendant or respondent to the petition.

On April 1, 1922, a petition was filed and presented to the county board of education by W. F. Ray and twenty others, representing themselves to be legal voters of certain territory described in the petition, and said county board of education was requested to call a special election in said territory for the purpose of submitting to the electors the question of whether said territory should be created into a special school district. The county board of education on the same day issued its order calling a special election to be held at the Wright Hill Special School District, for the purpose named in the petition, on April 29, 1922. Notices of the election were duly posted on April 23, 1922. On June 5, 1922, B. F. Mitchell and forty other qualified electors of said Common School District No. 3 filed a remonstrance with the county board of education against the creation of Wright Hill Special School District No. 3.

A demurrer was filed to said remonstrance, and it was dismissed by the county board of education without hearing any proof on the allegations thereof. On June 13, 1922, the county board of education made and entered of record an order creating Wright Hill Special School District No. 3, embracing the territory described in the petition of the original petitioners, and declaring that said order was made upon the returns of said election held on April 29, 1922.

The county board of education, in calling said special election, acted upon the face of the original petition and without proof of the facts therein set forth. The original petition calling for the creation of said special school district does not contain the names of twenty qualified electors in said district. The above contains a recital of the allegations of the petition for the writ of certiorari filed in this case. It also appears that the

order of the county board of education recites that the board found that the original petition was signed by not less than twenty electors of the territory, and that there was filed with said petition a map showing the amount of territory to be embraced in the proposed district and a written description of the boundaries of the same.

It was therefore ordered that the special election should be held on the 29th day of April, 1922. The order also recites that due notice was given of the time and place of holding the election, and that the election was held as required by law.

The order further recites that nineteen votes "for the law" were cast at the special election held on the 29th day of April, 1922, and that none were cast against it. The order also contains a description of the boundaries to be designated as Wright Hill Special School District No. 3 of White County, Arkansas, and recites that it shall be entitled to all rights pertaining to rural special school districts under the laws of the State of Arkansas.

The order creating the district further recites that the remonstrance against the creation of said district was dismissed.

An appeal was taken from the order of the board of education to the circuit court. On January 19, 1923, the circuit court dismissed the appeal. On June 9, 1923, appellants, who were the remonstrants in the circuit court, filed their petition for a writ of certiorari, as above stated. On August 3, 1923, the cause came on for final hearing in the circuit court, and it was adjudged that the writ of certiorari should be dismissed.

The case is here on appeal.

Culbert L. Pearce, for appellants.

1. The petition does not contain the names of twenty qualified electors of the territory, and the board therefore did not acquire jurisdiction. C. & M. Digest, §§ 8827-8842. Section 8823 is mandatory in its provisions. 116 Ark. 417; 106 Ark. 306.

2. The returns of the election should have been delivered to the county clerk, as custodian, pending the canvass of the returns. C. & M. Digest, § 8833. That was never done, and for that reason alone the results of the election were vitiated.

3. In sustaining the demurrer interposed by the respondents to the testimony, the court erred in applying the law, and judgment should be entered here for the appellants. 99 S. E. 686, 5 A. L. R. 346; 26 R. C. L. 1060, 1061, 1062; *Id.* 1064; 2 R. C. L., Appeal and Error, 281; 4 L. R. A. 801; 113 Md. 603; 140 A. S. R. 445; 6 Am. & Eng. Encl. Pl. & Pr., 438-439.

John E. Miller, for appellees.

1. The petition for certiorari was filed nearly twelve months after the order creating the district was entered by the county board of education, and nearly six months after the dismissal of the appeal by the circuit court.

2. The county board of education had no authority to act upon the petition of appellants for the creation of the common school district, after an election had been ordered and held upon a petition asking that the same territory be formed into a special school district. 121 Ark. 581; 139 Ark. 1.

3. The finding by the county board of education that the petition contained the signatures of twenty qualified electors of the territory affected, was incorporated in the order made on June 13, 1922, and is in accordance with the testimony. In a proceeding by certiorari to review the proceedings, the hearing thereon is not a trial *de novo.* 126 Ark. 125; 153 Ark. 188.

4. The statute, C. & M. Digest, § 8833, providing that the returns of the election shall be filed with the county clerk, was enacted prior to the passage of act 234, Acts of 1919, creating the county board of education, and should be read in connection with the latter act. In any case, it is admitted that no fraud was committed and that the returns of the election were not changed in any way. Hence appellant's objection in this respect are without merit. 43 Ark. 66; 92 Ark. 70; 25 R. C. L. 772, § 9.

HART, J., (after stating the facts). It is conceded by counsel for appellants that the order of the circuit court dismissing their appeal was correct, under the ruling in *Mitchell* v. *Directors of School District No. 13,* 153 Ark. 50. In that case it was held that the acts of the county board of education in respect to changing the boundary lines of school districts are *quasi*-judicial, and that certiorari is the proper remedy to review such proceedings. The reason is that no appeal from the order of the board of education is given by statute. The order of the circuit court dismissing the appeal was made on January 19, 1923.

The petition for a writ of certiorari was not filed until the 9th of June, 1923. This was nearly twelve months after the order creating the special school district was made by the board of education. No excuse was offered for the delay. The creation of the special school district vitally affected the common school system, and those desiring to contest the legality of the formation of the district should have applied as soon as practicable to the circuit court to quash the order of the county board of education forming the special school district.

It is true that appellants first appealed to the circuit court, but the circuit court decided that appeal was not the proper remedy, and on the 19th day of January, 1923, dismissed their appeal. They make no excuse whatever for waiting until June before filing a petition for a writ of certiorari. Hence the circuit court properly exercised its discretion by dismissing the petition for writ of certiorari.

This holding is in accordance with the rule established in *Johnson* v. *West,* 89 Ark. 604, and several other later decisions of this court. In the case of *Johnson* v. *West, supra,* a writ of certiorari to quash proceedings in the county court for laying out a new public road was asked upon the ground that the record failed to show that ten freeholders of the county petitioned for the road. The applicant waited nearly a year before applying for the writ, and this court held that the writ of certiorari

should be denied. That case is peculiarly applicable here. It is not contended that the twenty persons who signed the original petition for the establishment of the special school district were not residents of the proposed district, but it is alleged that some of the petitioners were not qualified to sign the petition because they had not paid their poll taxes for that year, and therefore were not qualified electors in the sense that they were eligible to sign the petition asking for the special election.

So it will be seen that the writ of certiorari, especially in those cases where it is used for the purpose of reviewing the acts and decisions of special boards created by statute, does not issue as a matter of right, but only in the discretion of the court upon special cause shown. The reason is that bodies like county boards of education exercise powers in which the people at large are concerned, and great public inconvenience might result from interfering with their proceedings, unless such action is taken as soon as practicable.

It follows that the circuit court properly quashed the writ of certiorari and dismissed the petition therefor.

The judgment of the circuit court will therefore be affirmed.

MARTIN v. STATE.

Opinion delivered January 28, 1924.

1. CRIMINAL LAW—AUTHORITY TO COMMIT ACCUSED TO PENITENTIARY.—Neither circuit judges nor circuit courts are vested with authority to order or commit persons accused of crime, before conviction, to the State penitentiary for safe-keeping.
2. CONTEMPT—DISOBEDIENCE OF VOID ORDER.—One cannot be held in contempt for disregarding a void order or judgment.

Certiorari from Lee Circuit Court; *E. D. Robertson*, Judge; reversed.

J. S. Utley, Attorney General, *Darden Moose*, *John L. Carter* and *Wm. T. Hammock*, Assistants, for petitioner.

No one can be held in contempt of court for violating a void order. 43 Ark. 62; 91 Ark. 527; 100 Ark. 419. The court in term time cannot punish as for contempt disobedience of an order made by a judge out of court, unless such order is made in an action pending in the court. Rapalje on Contempts, par. 8; 45 Barbour (N. Y.) 344. The sheriff, and not the circuit judge or circuit court, has custody of county prisoners, except in the instances mentioned in the statutes. Crawford & Moses' Digest, chap. 100, §§ 6206, 6207, 6208, 6217, 6218, 6219, 6220, 6221, 6222. The penitentiary is a State institution for the confinement of persons convicted of felonies, and not for the detention or safe-keeping of county prisoners.

HUMPHREYS, J. On June 25, 1923, the circuit judge of the First Judicial Circuit of Arkansas ordered the sheriff of Lee County to convey Ed Ware, Alf Banks, John Martin, Joe Fox, Albert Giles and Will Wordlow, then confined in the county jail under indictment for murder in the first degree, to the State Penitentiary for safekeeping. When said prisoners were tendered by the sheriff to the warden of the penitentiary, Hamp Martin, he declined to receive them, and was cited to appear in the circuit court of Lee County for contempt in disregarding the order. On the return day of the citation the warden filed a response thereto, justifying his refusal to obey the order, upon the ground that it was issued without authority.

The question was submitted to the court upon the order, the citation, the response thereto, and the following agreed statement of facts in addition to the facts heretofore stated:

"(1). Ed Ware, Alf Banks, John Martin, Joe Fox, Albert Giles and Will Wordlow, the parties who were mentioned in order made on June 25, 1923, by the circuit judge of the First Judicial District of Arkansas, which order respondent is charged with disobeying, are the identical persons as the appellants in the case of *Ware et al.* v. *State,* which case was decided by the Supreme Court of the State of Arkansas on June 25,

1923, and which decision is shown in opinion delivered June 25, 1923, by the Supreme Court of the State of Arkansas [159 Ark. 540].

"(2). The decision shown at the last-mentioned citation was rendered prior to the issuance of the order which respondent is charged with disobeying.

"(3). There was no case pending against said Ware *et al.* in the Lee Circuit Court at the time of the issuance of the order which respondent is charged with disobeying, unless the above cited case shall be construed by the courts to be pending in the Lee Circuit Court to such an extent as to give that court, or the judge thereof in vacation, authority to issue the order which respondent is charged with violating.

"(4) At the time of the service on respondent by the sheriff of Lee County of the order which respondent is charged with disobeying, respondent knew of the above-mentioned decision of the Arkansas Supreme Court."

The court found the warden guilty of contempt, and assessed a fine of $500 against him as punishment therefor. The validity of this order is before us for determination.

The statutes of this State do not vest any authority in circuit judges or courts to order or commit persons accused of crime, before conviction, to the State Penitentiary for safekeeping. Circuit courts are empowered by statute to order and adjudge any one convicted of a felony to serve a term in the State Penitentiary for the time and in the manner provided by law. Sections 3204, 3234, 3235, 3241 and 3242 of Crawford & Moses' Digest. The sheriffs of the respective counties and their appointees are the proper custodians of those charged with crime, and remain so until after conviction, sentence, and transmission of those accused to the State Penitentiary. Sections 6206, 6207, 6208, 6217, 6218, 6219, 6220, 6221 and 6222 of Crawford & Moses' Digest.

The penitentiary is a State institution, designed for the confinement, care and supervision of felons. No provision was made for the reception, care or safekeeping of prisoners before conviction. Section 9654 of Crawford & Moses' Digest. If the warden were required to receive and care for prisoners charged with crime, before any provision was made in the law to care for them, it would interfere with the orderly administration of the institution.

The circuit judge having no inherent power or statutory authority to issue the order in question, it was a void order. This court is committed to the doctrine that one cannot he held in contempt for disregarding a void order or judgment. *Williford* v. *State,* 43 Ark. 62; *Pitcock* v. *State,* 91 Ark. 527.

The judgment is therefore reversed, and the cause is directed to be dismissed.

WILLIAMS v. STATE.

Opinion delivered February 4, 1924.

1. CRIMINAL LAW—CHANGE OF VENUE—CREDIBLE AFFIANTS.—On an application for change of venue in a criminal case, where supporting affiants, on examination, were shown to have only a limited knowledge of the condition of the popular mind, a finding that they were not credible persons will be sustained.
2. CRIMINAL LAW—HYPOTHETICAL QUESTIONS.—It was not error to permit hypothetical questions to be addressed to expert witnesses, though they failed to include facts subsequently established.
3. CRIMINAL LAW—HYPOTHETICAL QUESTIONS.—While all of the undisputed facts then in evidence were essential parts of hypothetical questions, the prosecuting attorney had a right to the opinion of expert witnesses upon such disputed issues of fact as he conceived the testimony to sustain.
4. HOMICIDE—INSTRUCTION—HARMLESS ERROR.—Where defendant was convicted of murder in the second degree, an objection to an instruction that it failed to incorporate the idea of a specific intent to kill as an element of murder in the first degree was without merit, as a specific intent to kill was not an element of the former offense.

5. HOMICIDE—EVIDENCE AS TO CAUSE OF DEATH.—In a murder trial where, after the injury, deceased contracted pneumonia, evidence as to the extent and nature of the injury *held* to sustain a finding that the injury inflicted by defendant was a contributing cause of death.

6. HOMICIDE—MURDER IN SECOND DEGREE.—Where a blow was inflicted by defendant with malice, and the weapon used was ordinarily calculated to produce death, and death did result, a verdict for murder in the second degree will be sustained.

Appeal from Howard Circuit Court; *B. E. Isbell,* Judge; affirmed.

James S. Steel and *Abe Collins,* for appellant.

1. The change of venue should have been granted. If it is fairly deducible from the affidavits of the supporting witnesses, taken in connection with the facts and circumstances detailed by them in their examination before the court, that the defendant could not obtain a fair and impartial trial in the county, it is an abuse of discretion to overrule the motion for change of venue. 98 Ark. 139, 142; 120 Ark. 307; 83 Ark. 86; 68 Ark. 466.

2. The blows struck by the defendant had no causal connection with the death, and did not so aggravate the pneumonia, from which he died, as to hasten his death. 50 Ark. 545; C. & M. Digest, § 5151.

3. It is error to permit a hypothetical question which does not embrace all the essential undisputed facts bearing upon the issue. 100 Ark. 518; 103 Ark. 196; 87 Ark. 243.

J. S. Utley. Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

1. The supporting witnesses were examined in the lower court, and it made its finding. That finding is conclusive unless an abuse of discretion appears. C. & M. Digest, § 3087; 120 Ark. 302, 308; 141 Ark. 509; 149 Ark. 646; 130 Ark. 457; 146 Ark. 328; 54 Ark. 343; 120 Ark. 390.

2. The cause of the death of the deceased was a question of fact for the jury, under proper instructions from the court, and the jury's verdict is conclusive. 133

Ark. 314; 150 Ark. 555; 45 Ark. 165; 49 Ark. 439; 114 Ark. 393; 92 Ark. 421; 109 Ark. 138.

3. Appellant cannot complain here of the hypothetical questions propounded by the State, first, because they contained all the essential undisputed facts, second, because the State's attorney offered to include any essential undisputed facts bearing upon the issue, if counsel would suggest any such facts, and counsel refused.

McCULLOCH, C. J. Appellant was tried under an indictment charging him with the crime of murder in the first degree, alleged to have been committed by striking one Charles Davis with a club and thereby inflicting a wound, as a result of which said Davis died within a year and a day. On the trial of the cause appellant was convicted of murder in the second degree.

It is admitted that appellant struck Davis twice over the head with a heavy hickory club, and that the blows were struck without legal justification.

It is also admitted that Davis died a few months after the blows were struck, but it is contended that his death resulted from intervening causes, and not from the wounds inflicted by appellant.

The striking of the blows occurred at a mule-barn in the city of Nashville, in Howard County, where appellant's father was engaged in the business of selling mules and horses, and the stick used by appellant was a heavy piece of hickory, about five and a half feet in length.

Appellant's father was showing a pair of mules to a prospective customer, and Davis, being present at the time, was asked by the customer to examine the mouths of the mules to ascertain their ages. Appellant was standing near by with the club in his hand. When Davis examined the mules, a question was asked of appellant's father concerning their age, and he made reply, stating the age of the mules, and when Davis examined the mouth of each mule he indicated his opinion either by a nod or shake of his head. Appellant and his father both testified that Davis shook his head. The customer in

question, Mr. Isgrig, testified that it appeared to him that Davis nodded his head and at the same time gave him a wink. At any rate, appellant's father took umbrage at what he claimed was an interference by Davis with the negotiations with the prospective customer, and, according to the testimony of numerous witnesses, appellant's father complained bitterly of such interference. He asked Davis, "What are you shaking your head about?" and remarked that he was getting damned tired of people meddling in his business; that Davis replied that he was not meddling, and about that time appellant walked up, and, without saying anything or being spoken to, struck Davis twice over the head, and felled him to the ground.

Davis was carried home in a semi-conscious condition, at times in a frenzy. He received surgical aid there at home, near Nashville, and was later carried to Texarkana and placed under the care of a surgeon there, where he was kept for some days, and thence taken to the State Hospital for Nervous Diseases at Little Rock.

The striking occurred on March 12, 1923, and Davis died at the hospital in Little Rock on April 30, 1923, having been brought to the hospital on April 4. The immediate cause of death was pneumonia, which developed about four days before his death.

Testimony was adduced by the State tending to show that there was a fracture of Davis' skull, from which he never fully recovered, and that his weakened condition was one of the causes of his death, together with the pneumonia which was contracted while he was at the hospital. Appellant introduced testimony of the physicians and others at the State Hospital tending to show that Davis was recovering at the time he contracted pneumonia—that he was convalescent at that time—and that pneumonia intervened, and was the sole cause of his death.

Hypothetical questions were propounded to all of the witnesses who testified in the case, and the respective opinions given were not harmonious.

Appellant filed a motion for a change of venue on the statutory ground, and presented, in support of his petition, the affidavits of six citizens of the county. The prosecuting attorney examined these affiants under oath, in the presence of the court, for the purpose of having the court pass upon their credibility. After hearing the affiants testify orally, the court overruled the motion, and appellant saved his exceptions. We are of the opinion that the examination of the supporting affiants, as it appears in the record, was sufficient to justify the court in the finding that the affiants were not credible persons within the meaning of the statute. *Dewein* v. *State,* 120 Ark. 302. None of the affiants showed in their testimony such knowledge of the condition of the minds of the inhabitants of the county as would justify affiants in making oath that appellant could not get a fair and impartial trial in the county. Each of the affiants showed only a limited knowledge of the condition of the popular mind; none of them pretended to be conversant with the sentiment all over the county, and none of them had ascertained the sentiment at a recent date prior to the trial. The offense was committed on March 12, and the examination of the affiants occurred on September 8, when the cause was called for trial. The knowledge of the affiants seemed to relate entirely to conversations which they heard about the time the offense was committed or immediately thereafter, when there was more or less excitement on account of what appeared to be the unjustified and brutal attack made by appellant, who was a young man, on Davis, who was much his elder. The testimony of neither of these affiants shows that he had such knowledge of the public sentiment, at the time that the case was called for trial, as to justify him in making oath that appellant could not obtain a fair and impartial trial. There was no error, therefore, in the court's refusing to accept the affiants as credible persons and in denying the petition for change of venue.

It is next contended that the court erred in permitting the prosecuting attorney to propound hypothetical

questions to expert witnesses, in the form in which the questions were framed, on the ground that undisputed facts were omitted. There were three physicians introduced by the State to whom the hypothetical questions were propounded, and to which objection was made by appellant's counsel. The questions propounded to the several physicians were not identical in form, and appeared not to have been prepared in advance, but were orally propounded in language selected at the time by the questioner. In each instance, when the question was propounded, objection was made on the ground that the question did not contain all the undisputed facts, and the prosecuting attorney replied that his desire was to include all undisputed facts, and asked appellant's counsel to point out any such fact that had been omitted, but the counsel declined to point it out, stating that he was "not running a law school." It was not disclosed at any time during the progress of the trial what particular fact was omitted from the hypothetical questions propounded by the prosecuting attorney, but it is now argued that the questions omitted the fact, said to be undisputed, that deceased was constantly improving after his admission to the hospital, and had practically recovered from the effects of the wound when he contracted pneumonia. Each of the hypothetical questions contained a recital that Davis had "good days and bad days" after being carried to the State Hospital, and was considered to be improving up to the time he contracted pneumonia. At the time these questions were propounded appellant had not introduced the testimony of the physicians at the State Hospital to show marked improvement in Davis' condition, and the questions were based upon the testimony adduced by the State tending to show the condition of deceased from the time he was struck by appellant until his death. Of course, all of the undisputed facts then in evidence were essential parts of the hypothetical questions, otherwise it was erroneous to propound them; but the prosecuting attorney had the right to take the opinion of the expert witnesses upon such disputed issues

of fact as he conceived the testimony tended to sustain. *Taylor* v. *McClintock,* 87 Ark. 243. If other facts were subsequently brought into the case by proper testimony, the issues should have been submitted upon appropriate instructions governing the consideration by the jury of the expert testimony. The questions, as before stated, contained references to the improvement thought to have taken place in the condition of the deceased at the time he contracted pneumonia, but, conceding that this feature did not conform to subsequent testimony introduced concerning the marked improvement, it was not error to permit the questions to be propounded at the time they were submitted. Nor can it be said that the testimony on this subject was undisputed, for it rested merely upon the opinion of expert witnesses, who differed from the conclusions of other experts who testified in the case. It is unnecessary to discuss the effect of that peculiar feature of the case in the examination of witnesses in which counsel for appellant refused to point out the undisputed facts claimed to have been omitted from the hypothetical questions. Our conclusion is that the court did not err on this subject, and that no grounds for reversal are presented in that feature of the case.

There are numerous assignments of error with respect to the court's charge and in refusing to give some of the instructions requested by appellant's counsel, but we find no error in either of the rulings upon which these assignments are based. For instance, the objection to one instruction given at the instance of the State was that it was misleading, in that it failed to incorporate the idea of a specific intent to kill as an element of the crime of murder in the first degree. The answer to that is that the jury did not find appellant guilty of murder in the first degree, and that degree of the offense was eliminated from the case. A specific intent to kill is not an essential element of the crime of murder in the second degree.

Finally, it is insisted that the evidence was not sufficient to sustain the verdict, in that it did not establish

the fact that the death of Davis resulted from the blows inflicted by appellant. We are of the opinion that the extent of the injury resulting from the blows inflicted by appellant, as described by the witnesses, some of them attending surgeons, was sufficient to sustain the finding that the death of Davis resulted, in part, from the blows —that the wounds inflicted by the blows constituted a contributing cause of Davis' death. The expert witnesses testified that the weakened condition of Davis, as the result of the wounds inflicted, made him more susceptible to germ diseases and made him less able to withstand the effects of such illness. We have recognized this theory as a tenable one and sufficient basis for a finding that the original injury was the indirect cause of death. *St. L. I. M. & S. Ry. Co.* v. *Hook*, 83 Ark. 584.

So far as concerns the question of the responsibility of appellant, it is clear, from his own testimony, that the assault upon Davis was unlawful and unjustified, and without sufficient provocation. The jury could readily have found from the evidence that the striking was done with malice, and that the weapon used was such as was ordinarily calculated to produce death. Thus, all the elements of murder in the second degree are found in the testimony, and justify the verdict of the jury convicting him of that crime. *Rosemond* v. *State,* 86 Ark. 160.

Our conclusion, upon the whole case, is that the record is free from error, and this calls for affirmance. It is so ordered.

CULP BROS. PIANO COMPANY *v.* MOORE.

Opinion delivered February 4, 1924.

1. GOOD WILL—SUFFICIENCY OF EVIDENCE.—In an action on notes given as purchase price of plaintiff's interest in musical instruments business, where the defense was that plaintiff broke his contract not to re-engage in the same business in the same territory, evidence *held* sufficient to sustain a verdict for plaintiff.

2. TRIAL—INSTRUCTION—SPECIFIC OBJECTION.—Objection to an instruction that it contains misleading phraseology should be specific.

3. INTERNAL REVENUE.—The Federal tax on the income of a corporation is primarily the debt of the corporation, and there is no legal obligation upon the stockholders, after selling their shares, to pay the accrued taxes of the corporation, in the absence of a special agreement.

4. TRIAL—INSTRUCTION.—Where the defense to notes was a breach of an alleged contract not to re-engage in the musical instrument business, an instruction that defendant must show that such contract was based upon a consideration and was not merely an agreement to stifle competition, *held* not intended to submit the question whether the contract, if made, was valid and binding.

5. CONTRACTS—RESTRAINT OF TRADE.—Contracts in partial restraint of trade with reference to a certain business, where ancillary to sale thereof with good will, are valid to an extent reasonably necessary for the purchaser's protection.

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

Holland & Holland, for appellant.

1. The verdict is contrary to the evidence. 114 Ark. 332; 118 Ark. 554.

2. The contract was definite and certain, and sufficiently so. 148 Ark. 226; 13 Corpus Juris, § 411; 112 Ark. 126.

3. Instruction 7 requested by the defendant correctly stated the law and should have been given. 148 Ark. 226; 127 Ark. 593.

4. The good will of a business is a valuable interest which the courts will protect. 20 Cyc. 1276. And agreements to refrain from entering into competition with the purchaser within specified limits and for a specified time are valid and will be upheld. 20 Cyc. 1280-1; 112 Ga. 498; 37 S. E. 758; 17 Corpus Juris, § 122; 13 *Id.,* § 520, and cases cited in note (a); 13 *Id.,* p. 557; 112 Ark. 130; 95 Ark. 387; 94 Ark. 461; 62 Ark. 101; 91 Ark. 367; 121 Ark. 45.

A. M. Dobbs, for appellee.

1. Counsel's contentions against the verdict are bottomed upon three hypotheses which are purely

assumptions, not supported by the record, viz; (1) that the jury returned a verdict for income tax only; (2) that it found the contract alleged was established and breached, and (3) that there was satisfactory proof of substantial damages. It cannot be determined from this record whether the amount returned by the jury and deducted from the undisputed amount was intended by the jury for income taxes paid, or damages for breach, or both. It is discretionary with the jury whether it will return special verdicts or a general verdict, unless required by the court to make special findings. C. & M. Digest, § 1303. None was required in this case.

2. Instruction 5, objected to by appellant, was correct. It set out the necessary elements to entitle defendant to recover on its alleged contract, and the phrase, "and not merely an agreement to stifle competition" was used to distinguish the difference between an agreement ancillary to the sale of a business, and a bare agreement to refrain from engaging in business. 127 Ark. 590.

3. Instruction 7, objected to, declares the law as recognized by this court. 157 Ark. 274.

WOOD, J. On October 1, 1919, Culp Bros. Piano Co., appellant, was a corporation of Arkansas engaged in the business of selling musical instruments, with its principal place of business at Fort Smith, Arkansas, and with a capital stock of $12,000, of which appellee owned one-fourth, $3,000, and Culp Bros. owned three-fourths, $9,000. The appellee was president of the company. In January, 1919, the stock of the company was authorized to be increased to the sum of $50,000, the increase representing what was supposed to be the profits of the business at that time. No additional money was paid in by the stockholders, but stock was issued to the appellant and the appellee, in the proportion of their respective interests, to absorb what was believed to be the book profits of the company. Several years prior to the first of October, 1919, appellee had been engaged in the business of selling musical instruments at Hartford, Sebastian County, Arkansas, and the surrounding

trade territory. The appellant contends that, on the first of October, 1919, the appellee agreed to sell his stock in the company to appellant, and also, as a part of the consideration for the sale of his stock, that he would not engage further in the music business at Hartford, nor would he engage in that business at Hartshorne, Oklahoma, nor at Fort Smith or Russellville, Arkansas; that, in consideration for this sale of stock and good will in the music business of the appellee at Hartford, the appellant executed and delivered to the appellee promissory notes, numbered respectively from one to twelve, for $1,000 each, dated October 1, 1919, bearing interest at the rate of eight per cent. per annum from date until paid, and with different due dates. Notes numbered 1, 2, 4, 5 and 6 and a part of No. 3 had been paid.

This action was instituted by appellee on August 4, 1922, to recover an alleged balance due on the unpaid notes in the sum of $6,356.35, with interest at eight per cent. The appellant, in its answer, admitted the execution of the notes, and set up that the consideration for which the notes were executed was as set forth above, and that such consideration had failed since January, 1922, because the appellee had not carried out his agreement with the appellant, but, on the contrary, that he was then, and had been for a time unknown to the appellant, engaged in selling and offering to sell musical instruments, in person and by agent, and had thereby hindered and injured the business of the appellant. The appellant also set up that, since appellant's purchase of appellee's stock and good will, it had been compelled to pay an additional income tax for the years 1916, 1917 and 1918, and during the year 1919 up to the time that appellant purchased appellee's stock and good will at Hartford. That appellee's proportion of this tax would amount to $1,203.17, and that the damages to appellant by the failure of the appellee to comply with his contract, together with the amount of the income tax due the appellant from the appellee, would equal the amount

claimed by the appellee on the notes. Appellant therefore prayed that it be allowed to recoup by way of abatement in the full sum claimed by the appellee.

The appellee demurred to the answer, which demurrer was overruled. He then replied, denying specifically the allegations of the answer, and setting up that he sold his capital stock in appellant to the appellant alone for the sum of $12,500, and alleged that the appellant received that value in actual assets and profits, exclusive of any good will in appellant's business at Hartford. The appellee also filed a supplemental complaint, in which he set up that, since the bringing of his suit, another note had matured in the sum of $1,259.60, and he prayed judgment in the total sum of $7,615.95.

The appellee testified that he owned stock of the value of $12,500 in the company when he sold to the appellant, and he stated that the notes in suit were executed as a part consideration for the purchase of his stock, and he exhibited the notes and testified that the amount due to date, with interest, was $7,117.56. The notes were given for his interest in the appellant. The Hartford Music Company was established at Hartford on November 30, 1920. It was a partnership. Appellee was not a member of the firm, and never had been. He signed pay checks in the name of Hartford Music Company by David Moore. Appellee worked for the company a while, and signed pay checks as above. The company paid him a salary, and he had an office in the back of the store. Appellee was manager for a while, beginning between November 10 and December 10. Appellee sold out his music business at Hartford to the company November 30, 1920. Appellee, at the time of the giving of his testimony, was not employed by the company. His employment ended February 10, 1922.

The appellant introduced testimony to the effect that certain parties had purchased pianos from L. I. Beavers, representing the Hartford Music Company at Hartford, Arkansas, and the purchasers had receipts for payments signed, "David Moore Music House, per L. I.

Beavers," and purchase money notes were executed in the name of David Moore Music Store. One of the witnesses for the appellant testified that the Chase-Hackley Piano Company of Muskegon, Michigan, had sold pianos to the David Moore Music House at Hartford, Arkansas, billing the same from the factory to Hartford, Arkansas, to the account of David Moore. Witness' correspondence was with David Moore. The pianos might have been billed to the Hartford Music Company, but witness' understanding was that Moore was behind it. At one time Moore wrote witness about billing to Hartford Music Company, as he had sold out his business. Witness refused to do business with the Hartford Music Company. It was witness' understanding that Moore had sold out, and he was not willing to do business with any one else in the territory on account of Culp Bros. working that territory. Witness exhibited sale bills to David Moore Music House at Hartford, Arkansas, in November, 1921.

J. H. Culp testified that he was a member of Culp Bros. Piano Company in October, 1919; that this corporation purchased the stock of the appellee in the corporation, and also his music business at Hartford, and the good will of that business. His testimony concerning the sale and purchase of appellee's stock and his business at Hartford was substantially as set up in the answer of the appellant. He testified that appellee promised, when appellant purchased his stock and music business, that he would never again go into the music business in this country if they would purchase his stock and business at Hartford, which appellant did, executing to him notes for $12,000 and paying him cash in the sum of $500. When they were closing the deal, witness called appellee's attention to the fact that the company would be owing an income tax, and that he would have to pay his proportion of such tax, and that appellee agreed to do so. At the time of the purchase, Culp Bros. had a small store at Russellville, Arkansas, and also one at Hartshorne, Oklahoma. The witness introduced checks

showing that the appellant had paid income taxes for the years 1916, 1917, 1918 and 1919, while the appellee was a stockholder, amounting to nearly $4,000, for which, he says, appellee agreed to pay his proportionate part. The witness knew that Hartford Music Company was operating in the territory of Hartford, before he knew that appellee had anything to do with it. Some of the notes had been paid before they ascertained that appellee was in business. This witness testified that he wrote a certain letter for the appellant to the appellee of October 3, 1919, in which the notes were transmitted for $11,500, and stating that the appellant supposed that the appellee had advised the different companies regarding the deal, and that he had requested them to send invoices, etc., to appellant, and stating that "any word you can speak for us to any of them or to the public in general will be greatly appreciated." Also, a letter of August 15, 1921, in response to a letter received by the appellant from the appellee, in which the appellee was demanding payment of the notes. In this letter appellant refers to the income tax, amounting to $4,099.40, that it had paid, and also mentions that "business and collections had been rotten," and concluded by saying "we can begin to send you some money and will get you up some within the next ten days, and trusting, in view of the above, you may continue your leniency," etc. Also a letter of February 17, 1922, in response to a letter from appellee demanding check for interest on notes, in which the appellant says: "We have just learned definitely that you are engaged in the music business at Hartford and that trade territory. Therefore, we must refuse payment of any sum whatever until you adjust and settle damages with us resulting from your breach of contract," and concluding by saying that the appellant had been damaged a great deal more than any alleged indebtedness to the appellee, and requesting appellee to call and adjust the damages. Witness stated that he learned about January, 1922, that the appellee had breached his contract.

B. D. Culp testified, corroborating substantially the testimony of his brother as to the sale and purchase of appellee's stock in the corporation and his business and good will at Hartford, and to the effect that, after the music company was established at Hartford, advertisements were published bearing the name of David Moore, music dealer, and he saw pianos there with Moore's name on them, consigned to him by the shippers. This witness also testified as to the amount of business that was done by appellant at Hartford before the Hartford Music Company was established, as to the effect that the establishment of the business of that company had on appellant's business, which was, substantially, that their profit before was around $3,000 per month, and that, after the Hartford Music Company was established, it ran down to nothing. This witness also testified to other facts tending to show that David Moore had continued in business with the Hartford Music Company after appellant had purchased his stock and good will, and after he had promised to go out of business at Hartford.

Another witness testified that he lived at Hartshorne, Oklahoma, and was working for Culp Bros. there, and that, after appellant purchased appellee's stock, the latter, in May or June, 1921, asked witness why he didn't go into the music business for himself, and told witness that he would let witness have as much as $2,000 in September if witness desired to engage in the music business. At that time there was no other competing music house in Hartshorne, Oklahoma.

Another witness, who resided at Mansfield and Hartford, a member of the school board, testified that he went to Hartford Music Company and asked about the price of a piano. He met appellee on the street, and he said that he was out of business, but would see what he could do for witness. Witness didn't know that he had sold out at the time. Later appellee met witness on the road, and made him a price.

The appellee, in rebuttal, introduced two witnesses who were members of the Hartford Music Company.

They both testified to the effect that appellee was never a partner in that business; that he worked for that partnership, and bought some instruments for the company. He might have ordered them in his own name, or in the name of David Moore Music House, and issued receipts for payment in the name of David Moore Music House. The Hartford Music Company used old receipt books formerly belonging to David Moore Music House. After appellee sold out to Culp Bros., appellee ran his jewelry business under the name of David Moore Music House until the Hartford Music Company bought him out. After the Hartford Music Company bought out the David Moore Music House the jewelry business was carried on in that name, and since was carried on under the name of Hartford Music Company, the company using blanks as the David Moore Music House. Appellee instructed the Hartford Music Company to strike out his name, but it didn't do it every time. It used receipts and notes of the old David Moore Music House. Moore advanced money to the company to buy a carload of Packard pianos. He loaned the company as much as $6,000 at a time, and took the notes of the company, but didn't take a mortgage on the instruments. The Chase-Hackley pianos were billed to the Hartford Music Company.

The appellee himself, in rebuttal, testified that he didn't know anything about the income tax until the appellant filed its answer in this case. He knew about the claim of the government for income tax against the appellant, but, when the trade was made, there was nothing said about it. He knew that the corporation was required to make an income tax report. After his sale to the appellant he never purchased any new stuff and sold it at Hartford or anywhere else. He had sold instruments on installments, and had some out at the time. These instruments were not included in the trade with appellant. Appellee had not engaged in business at any place.

The issues were submitted to the jury, under instructions which will be referred to hereafter, and the jury returned the following verdict: "We, the jury, find for the plaintiff, David Moore, in the sum of $6,417.43." Judgment was entered in favor of the appellee for that sum, from which is this appeal.

The court, in instructions given at the request of appellant, told the jury, in effect, that, if they found from a preponderance of the evidence that the appellee sold his interest and good will in the corporation to the appellant, and, as a part of the consideration, agreed with the appellant that he would not engage in the business of selling musical instruments at Fort Smith, Hartford, Russellville, Arkansas, and at Hartshorne, Oklahoma, and the trade territory surrounding these places, good faith required that he do nothing which tended directly to deprive the appellant of the benefits of the purchase; that if, at that time, it was agreed that if appellant was required to pay any sum as income tax on the stock purchased from appellee, appellee would reimburse appellant, then the jury should find for the appellant, upon that issue, such amount, if any, as appellant was compelled to pay income tax upon the stock purchased from the appellee; that the appellant set up in its answer that the appellee had breached his contract, by which the appellant was damaged; that the jury should determine this issue as any other fact in the case, and, if they found that appellee had breached his contract as alleged, which breach resulted in damage to the appellant, they should return a verdict in favor of the appellant for such damages as they found appellant had sustained by reason of such breach, and allow appellant an abatement of appellee's claim to the extent of such damages.

The court further told the jury that, if the appellee entered into the contract with the appellant as set up in the latter's answer, and the appellee thereafter, in person, by agent, or otherwise, engaged in the sale of musical instruments, this would be a violation of appellee's contract.

The appellant presented prayer for instruction No. 5, which the court modified and gave, as follows: "You are instructed that, if you find from a preponderance of the evidence that plaintiff contracted and agreed with defendant not to again engage in the music business, at the places mentioned in these instructions, and that afterwards the plaintiff did engage in said business at the places, in violation of his contract with defendant, either in person or by becoming interested in a rival or competitive concern at any of the places mentioned, whereby he was brought into actual competition with the defendant, then you will find for the defendant such sum as, from the evidence, will reasonably compensate it for the damages to its business by said plaintiff or competitive musical business in which plaintiff was interested, in violation of his contract, *if any,* with defendant." The modification made by the court, to which appellant objected, was the addition of the words "if any."

The appellant also presented prayer for instruction No 7, which the court refused, as follows: "You are instructed that, if plaintiff made such contract with the defendant, then it would be a violation of his contract to become interested in a rival and competitive concern to defendant, selling and offering for sale musical instruments in the towns of Fort Smith, Hartford and Russellville, in the State of Arkansas, and Hartshorne, Oklahoma."

The appellant contends here that the verdict was contrary to the evidence. It will be observed that the appellant did not ask the court to direct the jury to return a verdict in its favor, but, on the contrary, presented a prayer for instruction, which the court gave, in which it asked that the issue be submitted to the jury to determine whether the appellee sold his interest and good will in the appellant company, and, as a part consideration, agreed with the appellant that he would not thereafter engage in the business of selling musical instruments. The issues as to whether there was a con-

tract between the appellant and the appellee, as set up in the appellant's answer, and, if so, whether or not appellee breached such contract, and the amount of damages resulting therefrom, if any, were submitted to the jury under instructions asked by the appellant. They were correctly submitted, and we deem it unnecessary to discuss the evidence, the substance of which we have set forth, for it is clear there was substantial testimony to sustain the verdict.

The appellant contends that the court erred in modifying its prayer for instruction No 5 by adding the words "if any" to such prayer, as above set forth. The appellant argues that this instruction, as thus modified and given, when taken in connection with appellee's prayer for instruction No. 8, was prejudicial to the appellant. Appellee's prayer for instruction No 8, which the court gave, is as follows: "You are instructed that, if you find for the defendant upon its claim for damages by reason of a breach of contract by the plaintiff, if you find there was a contract and a breach, you will estimate from the evidence the difference between what the trade of the Culp Bros. Piano Company was actually worth in the place where the breach of contract was, if any, and what it would have probably been worth to them if the plaintiff had strictly complied with his agreement, if he made any such agreement, and the difference you will consider as damages." The appellant objects to the language "probably been worth" as used in this instruction. The word "probably" should not have been used in the instruction, but this word, as well as the words " if any," in instruction No 5, were only intended by the court to indicate to the jury that it was an issue for them to determine as to whether or not any damages had resulted to the appellant by a breach of the contract on the part of the appellee, if there was a contract, and if appellee violated the same. To say the least, if appellant conceived that this phraseology was calculated to mislead the jury to appellant's prejudice, it should have specifically objected to this language.

The appellant further contends that the court erred in giving appellee's prayer for instruction No 7, which is as follows: "You are instructed that, as to the defendant's claim for a recoupment by reason of having paid additional income taxes for the years mentioned in the cross-complaint, you must find by a preponderance of the evidence that plaintiff made an express agreement to pay a certain portion thereof, and that such agreement, if any, was a part of the contract to sell his stock in the company, and supported by a valuable consideration. In this connection you are instructed that the fact that the plaintiff was a member of the firm of the Culp Bros. Piano Company, and owned stock therein, would not impose any legal obligation upon the plaintiff to pay any additional income tax after he sold his stock, without an express contract to so do, as between the plaintiff and defendant in this case."

This instruction, taken in connection with the instruction given on the same subject at the instance of the appellant, correctly declared the law applicable to the facts adduced on this issue. See *Quinn* v. *McClendon,* 152 Ark. 271. The Federal income tax on the income of the corporation was primarily the debt of the corporation, and there is no legal obligation upon the stockholders, after they have sold their shares of stock in the corporation, to pay the income taxes that had accrued and had not been paid prior to the sale of such stock, and, in the absence of an express agreement on the part of the stockholder at the time of the sale of his stock to pay his proportionate share of such taxes, he would not be liable to the purchasers of his stock for such taxes. The taxes are not laid upon the stock, but on the corporate income.

The appellant contends that the court erred in giving appellee's prayer for instruction No 5 as follows: "You are instructed that, to enable the defendant to recover upon its claim for damages by reason of a breach of contract alleged to have been made by the

plaintiff to not engage or be interested in the music business in certain localities, the defendant must show, by a preponderance of the evidence, that such a contract was made, and it was made with reference to and in connection with the sale of a business or profession or interest therein, and the good will thereof, for a valuable consideration, and that such a sale and agreement was such as would give the defendant the legitimate use of something acquired by the purchase, *and not merely an agreement to stifle competition,* and that the plaintiff violated the terms of such an agreement.'' The appellant objects to the use of the words, ''and not merely an agreement to stifle competition,'' its contention being that there was no issue as to whether or not the contract, if made, was to stifle competition, the only issue being as to whether such agreement was made. We concur with appellant's counsel that there was nothing in the pleadings and nothing in the proof to warrant a submission to the jury of an issue as to whether or not the alleged contract to purchase the good will of appellee at Hartford was in total restraint of trade, or to stifle competition. But the instruction, when considered as a whole, is not susceptible of the interpretation which learned counsel for appellant place upon it. It occurs to us that the design of this instruction was not to submit to the jury the issue as to whether or not the alleged contract was made by the appellant and the appellee to suppress the business of the appellee and to stifle competition against the appellant. On the contrary, the manifest purpose of the court in giving the instruction was to submit the issue as to whether or not there was a contract between the appellant and the appellee by which the appellant purchased appellee's good will in the music business at Hartford, and acquired thereby the right to have the appellee desist from that business at Hartford and in the towns mentioned as the particular trade territory of that business.

This court has often held that ''contracts in partial restraint of trade with reference to a business or pro-

fession, where ancillary to the sale of the business or profession and the good will thereof, are valid and enforceable to the extent reasonably necessary for the protection of the purchaser." *Shapard* v. *Lesser,* 127 Ark. 590, and cases there cited. See aso *Patterson* v. *Rogers,* 128 Ark. 222; *Wakenight* v. *Spear & Rogers,* 147 Ark. 342; *Kimbro* v. *Wells,* 112 Ark. 126. We are convinced that the court did not intend by its instruction No. 5, given at the instance of the appellee, to submit or suggest to the jury that there was a question as to whether or not the contract, if made, was a valid one, and binding upon the parties. The instruction, properly construed, is in harmony with the doctrine of the above cases, and is not abstract. Certainly, learned counsel for the appellant, if they conceived that the use of the words "and not merely to stifle competition," had the effect which they now contend these words had, should have urged this specific objection in the court below.

Instruction No 1, given at the instance of the appellant, and also instruction No 5, as modified and given, show clearly that the court did not intend that its instruction No 5, given at the instance of the appellee, should have the meaning which counsel for appellant contend it had. Such interpretation would make the instructions conflict, but, when the instructions are considered together, there is no real conflict between them. The real issue was whether or not the appellee contracted with the appellant to go out of the music business at Hartford and the surrounding trade territory, and turn over the good will of such business to appellant, and whether or not he violated such contract, and, if so, the amount of damages, if any, growing out of such breach. These were all issues of fact. They were submitted to the jury, under instructions free from prejudicial error to the appellant, and the verdict of the jury on these issues is conclusive here.

The record, on the whole, presents no reversible error, and the judgment is therefore affirmed.

FOWLER v. HAMMETT.

Opinion delivered February 4, 1924.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—On appeal evidence must be viewed in the light most favorable to the verdict.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where a motion for new trial on the ground of insufficiency of the evidence to sustain the verdict has been overruled, the Supreme Court will not disturb the verdict if supported by substantial evidence.
3. APPEAL AND ERROR—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES.—The Supreme Court will not pass on the weight of evidence or the credibility of witnesses.
4. TRIAL—DUTY OF COURT TO DIRECT VERDICT.—Where the testimony is undisputed, and all reasonable minds must draw the same conclusion of fact from it, it is the duty of the court to declare as a matter of law the only conclusion to be reached, and to direct the jury to return a verdict accordingly.
5. DEATH—EVIDENCE.—In an action for the death of H., plaintiff's intestate, on the theory that F., defendant's intestate, induced H. to accompany him when he made a murderous assault on the mayor of the town, and that the constable, for the purpose of preventing the assault on the mayor, fired three shots at F., one of which killed H., without fault on H.'s part, evidence *held* to show that H was a voluntary participant, and had committed an assault on the mayor, and that the killing of H. was intentional.
6. ACTION—ILLEGAL ACT AS FOUNDATION.—No court will lend its aid to one who founds his cause of action on an immoral or illegal act.
7. DEATH—ILLEGAL ACT.—Where one makes an unprovoked, wilful and deliberate assault upon another and is killed because thereof, no action for such killing will lie.

Appeal from Crittenden Circuit Court; *W. W. Bandy,* Judge; reversed.

Gray, Burrow & McDonnell and *Hughes & Hughes,* for appellant.

1. The voluntary illegal conduct of Hammett himself was a concurring cause of his death, and bars recovery. 1 Cowper, 343; 107 Mass. 253; 1 Cooley on Torts, 3d ed., 223, 263; 38 Cyc. 529.

2. Under the uncontradicted facts, the question of proximate cause was one of law for the court, and should

not have been submitted to the jury. 86 Ark. 289; 87 Ark. 576; 91 Ark. 260.

Rudolph Isom and *L. C. Going,* for appellee.

1. The doctrine upon which this case is bottomed is clearly stated as follows: "If an injurious act is wanton, the doer of it is liable for all consequences, however remote, because the act is criminal, or *quasi*-criminal in character, and the law conclusively presumes that all consequences were foreseen and intended." 22 R. C. L. 123, § 10; 16 Am. & Eng. Enc. of L., 434; 70 Vt. 588; 41 Atl. 585; 135 N. C. 204; 102 A. S. R. 528; 106 Mass. 458; 118 S. W. 337; 133 Ky. 383; 59 S. E. 1044; 146 N. C. 385; 154 S. W. 1046; 127 Tenn. 312.

2. On the question of what constitutes proximate cause, see 24 Law. ed. (U. S.) 398, 399; *Id.* 259. The proximate cause in this case of the injury and death of Hammett was the felonious assault made by Fowler on Dickson. 129 Ark. 520; 197 S. W. 288; 130 Ark. 455, 197 S. W. 858; 99 Ark. 322, 139 S. W. 292.

WOOD, J. This is an action by the appellee, administratrix of the estate of J. H. Hammett, deceased, against the appellant, administrator of the estate of G. D. Fowler, deceased. The material allegations of the complaint are to the effect that R. A. Fowler, on the night of December 22, 1921, induced J. H. Hammett to accompany him into the presence of certain officers of Crittenden County, and that Fowler wilfully and deliberately made a murderous assault with an open knife on J. A. Dickson, the mayor of the town of Earle; that Jim Donnahoo, constable of that township, for the purpose of preventing the assault, and while Fowler had his knife raised to strike Dickson, fired three shots from his revolver at Fowler, one of which struck and killed Hammett; that Hammett was killed through no fault or carelessness on his part, but through the wilful and deliberate act of Fowler in making the murderous assault on Dickson. Damages compensatory were alleged in the sum of $50,000, and punitive damages in the sum of $25,000, by reason of the death of Hammett. There was a prayer for judgment in these sums.

The appellant answered, denying all the material allegations of the complaint, and alleged that Hammett and Fowler were close friends, and acted jointly and by agreement in what they did; that the shot that killed Hammett was fired by Donnahoo at Hammett himself at the moment when Hammett was trying to take Dickson's pistol from him, and that Donnahoo fired at Hammett for the deliberate purpose of killing or disabling him.

H. V. Dickson testified substantially as follows: He was mayor of the town of Earle, in Crittenden County, Arkansas; knew Jim Hammett and Bob Fowler. They were killed on the night of the 22d of December, 1921, in the town of Earle. He had seen Fowler, about an hour before the killing, about one hundred yards above the place where the killing occurred. Witness had started to town about seven o'clock, and passed Fowler and John Hudson. They were in the middle of the street, and witness was on the sidewalk. Witness watched them, and saw them go into Mr. Sproul's house and come out with a jug of whiskey. Witness followed them. When Fowler saw witness coming, he hid the whiskey under his coat. Witness reached and got the gallon fruit-jar of whiskey from under Fowler's coat, and asked him where he got it. He replied, "It is none of your business." Witness said, "You are drinking, Bob; go on home, and if I need you I will send for you." Witness sent the marshal to get a search warrant for Sproul's house, and witness remained where he was, to watch. Before the marshal got back with the warrant, Sproul gave the officers permission to search his house. They went in and searched it, and found a lot of whiskey. While they were standing talking, Fowler and Hammett came up. When witness took the liquor from Fowler he was mad, and very drunk. When witness took the whiskey it was about seven o'clock. Fowler went away, and returned once before Sproul's house was searched. Witness made him go back to town, and witness didn't see him any more until he returned with Hammett. They came back, and Hammett walked up in front of witness and said, "Hello,

boys," and witness said, "Hi, Jim," and Hammett said, "I understand some of you fellows are accusing Bob Fowler of selling whiskey," and witness replied, "No, we are not," and he grabbed witness' gun, and witness grabbed his arm, and about that time the shots fired—one, two, three, as fast as they could possibly shoot. Fowler grabbed witness with his left hand, and, at the time the shots were fired, he had his right hand drawn back (indicating position) with a little knife in it. After Fowler was killed, a little open knife was found where he was lying. When Fowler and Hammett came back they were going east on the street, which runs east and west. They were on the north side of the street. Fowler was south of Hammett. When they returned Fowler was still in a bad humor, and drunk. He opened his knife, after witness took the whiskey from him. Witness was not afraid of him at all—considered him a good friend. When Fowler and Hammett came back to where witness and the others were, that is the first time Hammett had been there. Before Hammett grabbed witness' gun, he said, "Any man that said Bob Fowler sold whiskey was a G—— d—— son of a b——." Witness replied that nobody accused Fowler of selling whiskey. Witness' pistol was in the waistband of his pants. Witness had on no vest, and Hammett grabbed witness' pistol. Witness stated he didn't know which one grabbed—Hammett or Fowler. Witness was not apprehensive that Fowler would take his pistol away from him unless witness was cut. Witness had his pistol by the cylinder, with his finger in the guard, and about that time Donnahoo began to shoot. Donnahoo was about ten feet down the sidewalk. To the best of witness' knowledge, he shot Fowler first. Fowler jumped about two feet off the ground, and fell. Witness didn't know whom the next two shots struck. Hammett went down easy. He didn't fall. Didn't turn witness loose until he was on the ground. Witness supposed that it was the shock of the gun that caused him to turn witness loose. The shots were all fired so quickly they sounded like they were together.

Hammett was sinking down when Fowler was falling. They both went down together. Witness had hold of Hammett, and Hammett had hold of witness, and witness didn't break him loose until he went down. Witness picked him up again. Witness and Hammett had never had any trouble—were on friendly terms. There was no personal difficulty between Donnahoo and Hammett at that time. Witness didn't know that Donnahoo was going to shoot until the shots were fired. Hammett was not armed in any way that witness knew. Witness didn't see the knife in Fowler's hand at the time he had witness by the arm. Hammett was in a pretty bad humor, and said that we were G—— d—— liars, and grabbed at witness' pistol. Witness was surprised when he exhibited so much malice or anger towards witness. Hammett was not drunk. He might have been drinking a little. Hammett was a well-made man, and would weigh about 175 pounds, and Fowler was a slender man, and would weigh about 160 or 165 pounds.

Witness McConnell testified that he was marshal of the town of Earle at the time of the killing, and was present when the shooting occurred. He described the positions of those present on the sidewalk, running north and south, when Hammett and Fowler approached, pointing out on a plat, as follows: Dickson was to the south, witness with his back to the west, a little north of Dickson; Donnahoo a little north of witness, and Sproul north of Donnahoo. As Fowler and Hammett approached them, Fowler was to the south and Hammett to the north of Fowler, both facing east, and facing all the officers except witness. Witness corroborated the testimony of the mayor as to the intoxicated condition of Fowler, and testified that he was using profane language against the mayor for taking his whiskey, when witness met him on the street some time before the fatal rencounter. Witness testified as to the killing as follows: When Fowler and Hammett walked up, Hammett or somebody said, "Howdy," and Dickson said, "Hi, Jim," and Hammett said "Dickson, I understand you have

accused Bob Fowler of selling whiskey," and Dickson said, "I have not accused Mr. Fowler of selling whiskey. He had been transporting whiskey." Hammett said, "Bob Fowler is my friend, and any one that says he has been bootlegging whiskey is a G—— d—— lying son of a b——," and about that time Mr. Hammett grabbed Mr. Dickson, and he (Fowler) said, "You are a G—— d—— lying son of a b——." I started in between them, and somebody pushed me back, and as I staggered back I saw Mr. Fowler with his right hand up this way (indicating), and his left hand on the mayor. At the moment the hand was up in the air there were three shots in rapid succession (indicating). Witness stated that he had had a good deal of practice in the use of fire-arms and, taking into consideration the rapidity with which those shots were fired, witness could not have changed his position and range and sight between the shots, and witness didn't think Donnahoo could, because it was too fast. Fowler and Hammett did not fall about the same time. Fowler whirled quickly and started off five or six feet, and fell, and Hammett sank down against the telephone pole.

On cross-examination this witness testified that Hammett grabbed Dickson's left hand with his right hand. They were struggling over the pistol, close together. They pushed witness back, and it happened so quickly witness could hardly tell what happened. Hammett was the man who pushed witness back. Witness was light, and ran up to stop the racket as they started together, and they pushed witness back. Hammett was the nearest to Donnahoo when the shots were fired. After Hammett had been shot down, witness told Donnahoo not to shoot any more, that he was down (meaning Hammett).

Donnahoo testified that he was deputy sheriff of Crittenden County, and constable of Toronto Township, in which Earle is located. He was acquainted with Fowler and Hammett. He had known Hammett since he was a little boy, and Fowler for several years. He hadn't seen Fowler that day until that night, when he

was called, about thirty minutes before the shooting. He saw him then, west of the shooting about twenty yards. He seemed intoxicated, and when witness arrived he was talking to Dickson, and was mad, and didn't want to go with Dickson, who was holding him there until witness and McConnell came. Witness never noticed any knife at that time. Witness stated that he had been sent by the mayor to find one Mr. Hudson and ask him to come down and show them where the whiskey was. Witness stated that he then saw Hammett and Fowler standing where they first left them, and that Fowler at that time came and grabbed witness by the coat. Then witness saw his knife, which looked to be a small knife. He had it in his hand at that time, and spoke to witness in such a rough way witness thought he was mad at him. He called witness "Jim," and said, "A d—— dirty lying son of a b—— took my whiskey," and further said, "I told him he was a G—— d—— son of a b——," and witness said, "Look here, Fowler, I don't blame you for getting a little whiskey, but if you get caught you will have to pay a fine." Witness told him that he ought not to do that, and witness then detailed what he did with reference to the search for the whiskey, and stated that, after they searched Sproul's house and came out, they met Dickson where the shooting commenced. About that time McConnell came up, and, as the officers were ready to leave, Hammett and Fowler came up. The backs of the officers were to the east, and Hammett and Fowler came up from the west. Witness then described the positions of the respective parties. Witness and Dickson were about five or six feet apart. When Hammett came up he was facing Dickson, and Fowler was to the south of Hammett. Just before the shooting Fowler gave it the damn lie, or G—— damn lie, and grabbed Dickson by his left arm with his left arm, and raised to strike with the knife. Then witness shot. Witness indicated how the pistol was fired, and stated he would not have used his pistol if Fowler had not raised his arm ready to strike.

On cross-examination witness was asked what he shot Hammett for, and replied, "Hammett was right there, a-hold of Mr. Dickson." He further stated that Hammett had hold of a gun by the handle, and it looked to witness as though he had the barrel pointed in Mr. Dickson's stomach. Witness was asked if he didn't shoot Hammett because he thought Hammett was going to shoot Dickson, and if that wasn't what he swore at his preliminary trial, and answered that at the time he made the shots, when he first shot he shot at Fowler. He was then asked if the next two shots were at Hammett, and answered, "The pistol—they were scuffling there some little bit; that is, they all had their legs together about the same time. Fowler gave it the damn lie, and they both grabbed Mr. Dickson, and Mr. Fowler raised his hand, and I went to shooting. Q. And you shot Mr. Fowler, and then shot Mr. Hammett because he was about to shoot Mr. Dickson, and didn't you swear that in your preliminary trial? A. Well, I shot. Q. Didn't you testify, Mr. Donnahoo—you were tried here on a preliminary trial for the murder of Mr. Hammett and Mr. Fowler both, weren't you? A. I suppose so; yes sir. * * * Q. And didn't you testify in that case that the first shot fired was at Bob Fowler? A. I testified that Bob Fowler was the man I was afraid was going to hurt somebody. Bob Fowler was the man I was watching. Q. Didn't you testify that the first shot you fired of the three, you fired at Bob Fowler, because you thought he was going to cut Mr. Dickson with his knife; isn't that what you said? A. Well, I still swear that when I commenced to shoot— Q. (Interrupting) Didn't you swear before— A. (Interrupting) I don't remember what that is, but I remember this. Bob Fowler is the man I was dreading. I was raised with Jim Hammett, and knew all about him, and never feared him at all. He never carried a gun. He was a fair-fisted fighter. Q. Didn't you testify in your preliminary trial that the first of the three shots fired was fired at Bob Fowler; and you shot him because you thought he was going to

cut Mr. Dickson? A. Yes sir. Q. And didn't you testify the next two shots you fired at Hammett because you thought Hammett was going to shoot Mr. Dickson with Mr. Dickson's pistol? A. Yes sir; the second shot I fired, I saw he had hold of Mr. Dickson's pistol. About the second or third shot is when I saw this gun, and it looked as though—I thought it was Jim's own gun at that time. Q. And you thought he was going to shoot Mr. Dickson, didn't you? When you shot Hammett didn't you think he was going to shoot Mr. Dickson; is that right? A. Yes sir."

The witness, after further questions along the same line, stated that he commenced shooting at Fowler, and wound up on Hammett. The questions and answers of witness on his preliminary trial were read to witness, in which, among other things, he stated that, when Fowler grabbed hold and raised his knife to strike, and witness saw the flash of the knife, he began to shoot. He shot Fowler first, and it seemed to witness there was a little intermission between the first and second shots, and after he shot at Fowler he fired at Jim Hammett. He was asked if he didn't make those answers at the preliminary hearing, and stated that he did, and that they were correct; that he shot Jim a second shot. Among the last questions asked this witness was the following: "Now, when you shot Mr. Hammett you weren't shooting at Mr. Fowler, were you, but you were shooting at Mr. Hammett?" Witness answered, "Yes sir."

The court, on its own motion, gave instruction No. 2 as follows: "You are instructed that, if you find from a preponderance of the evidence, that is, the greater weight of testimony, that, at the time this killing of Hammett occurred, the deceased, Fowler, induced him to go with him into the presence of Dickson and the other men who were present at the time of the shooting, and that there was no agreement or understanding between Hammett and Fowler, prior to the time they reached the presence of the people mentioned, under which they were to commit an unlawful act towards and about the mayor

and his friends, but that Hammett simply accompanied him for the purpose of showing for him a friendly act, that is, for Fowler, and that there was no understanding or agreement between them at that time that an unlawful act should be committed upon Dickson or others, and after they reached Dickson and the company of men that were with him, that Fowler, the deceased, without the consent of Hammett, and without any arrangements with him that what he did do should be done, assaulted Dickson with an open knife, and had it open and acting with it in a manner as if he intended to inflict upon Dickson great bodily harm, and Hammett was engaged in what he did only for the purpose of keeping down the difficulty, or doing what he could to prevent it, and while Fowler was standing, if you find he was so standing, with an open knife, in an attitude as if he intended to strike Dickson with that knife and inflict upon him a great bodily injury, Donnahoo observed the situation, and, honestly believing, under the circumstances and facts and conditions as he saw them, that, in order to protect the life of Dickson, or protect him from receiving great bodily harm, he pulled out his pistol and commenced shooting, and in that shooting accidentally struck and killed Hammett, and that the conduct of Fowler in drawing his knife was the direct and proximate cause of the death of Hammett, then your verdict should be for the plaintiff."

The other instructions present the converse of the proposition contained in instruction No. 2. Appellant only objected and excepted to the ruling of the court in giving instruction No. 2.

Appellant presented two prayers for instructions, as follows: "The jury are instructed to return a verdict for the defendant." And, "If you find that, at the time Hammett was killed, he was endeavoring to pull a pistol from Dickson's clothes at the time Fowler was attacking Dickson with a knife, you will find for the defendant." The court refused these prayers, and the appellant duly objected and excepted to the ruling of the court in so doing.

The jury returned a verdict in favor of the appellee in the sum of $15,000. Judgment was entered in that sum in favor of the appellee, from which is this appeal.

1. In testing whether the evidence be sufficient to sustain the verdict, this court must view the evidence in the light most favorable to the verdict. *Bennett* v. *Snyder,* 147 Ark. 206. Where a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict has been overruled by the circuit court, this court will not disturb the verdict if there be any substantial evidence to support it. *K. C. S. Ry. Co.* v. *Sparks,* 144 Ark. 227. This court will not pass on the weight of the evidence, or the credibility of witnesses, for this is peculiarly the province of the jury in the first place, and of the trial court, on motion for new trial, in the second place. When a cause reaches this court and the verdict is challenged, the only inquiry is whether there is any substantial evidence to sustain the verdict. *Twist* v. *Mullinix,* 126 Ark. 427; *Moore* v. *Thomas,* 132 Ark. 97. Where the testimony is undisputed, and all reasonable minds must draw the same conclusion of facts from it, then it is the duty of the trial court to declare, as a matter of law, the only conclusion or finding of fact to be reached from a consideration of such testimony, and to direct the jury to return a verdict accordingly. *Fraternal Aid Union* v. *High,* 132 Ark. 588.

2. Now, keeping these familiar rules to the fore, after carefully scrutinizing the testimony, we are convinced that the essential facts which it proves are undisputed. The only conclusions of fact which any reasonable mind can reach are, first, that Hammett was a voluntary participant in the rencounter which ended in his death; and, second, that the killing of Hammett was not accidental.

(a) The undisputed evidence shows that Hammett really precipitated the fight that was the immediate cause of the shooting. Learned counsel for appellee contend that Fowler induced Hammett to go with him

into the presence of Dickson as a peacemaker. While there is no proof to the contrary until they came face to face with the officers, yet the undisputed testimony shows that, when they reached the officers, instead of soft words to turn away the wrath of Fowler from Dickson, Hammett immediately began to use vile oaths and epithets. Thus, instead of pouring oil on the troubled waters, he lashed them into greater fury. "He rubbed the sore instead of bringing the plaster." His bitter denunciations and seizing of Dickson unquestionably caused the rencounter with Dickson, in which Fowler simultaneously joined, and which caused Donnahoo to fire when Fowler was in the attitude of striking Dickson with his open knife. It is unnecessary to argue these facts. The testimony is fully set forth, and the facts, trumpet tongued, argue themselves. They show conclusively that Hammett not only used the most offensive of epithets, which in themselves were well calculated to provoke an assault by Dickson, but he himself was guilty of the first act of violence in seizing Dickson's arm and in attempting to wrest his pistol from him.

The law applicable to these undisputed facts is all one way. Lord Mansfield, in the case of *Holman* v. *Johnson*, 1 Cowper 341-343, says: "The principle of public policy is *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa,* or a transgression of the positive law of the country, the court says he has no right to be assisted. It is upon that ground that the courts go, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

Our statute forbids an assault, or assault and battery, upon the person of another. Section 2330 *et seq.*, Crawford & Moses' Digest. When Hammett seized Dickson and grabbed at his pistol, he was guilty of an assault and battery upon him. The undisputed evidence

shows that Dickson was entirely blameless throughout the whole occurrence, and was only discharging his duty as an officer. The assault upon him by Hammett and Fowler was not only unprovoked but was wilful and deliberate on their part. "The general principle," says Judge GRAY, "is undoubted that courts of justice will not assist a person, who has participated in a transaction forbidden by statute, to assert rights growing out of it or to relieve himself of the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part." *Hall* v. *Corcoran,* 107 Mass. 253.

Our own court, in *Rogers* v. *Willard,* 144 Ark. 587-591, said: "It will be observed that, in the case of a wilful tort, the wrongdoer is responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury." See 1 Cooley on Torts (3rd ed.) p. 223, 263; 38 Cyc. 529, and cases cited in note; 22 R. C. L. 134, §§ 19 and 20, and cases cited in note.

(b) The killing was not accidental. While there is testimony to the effect that the shots were in as rapid succession as they could be fired, and while one witness testified that the shots were so fast that he didn't believe a man could change his position, range, and sight, between them, and that he could not have done so, nevertheless such testimony is not in substantial conflict with, and does not overcome, the testimony of Donnahoo himself, who fired the shots, to the effect that he first shot Fowler and then shot Hammett. To be sure, the testimony of Donnahoo manifested a reluctance to testify against the interest of the appellee, and was wobbling and halting in its delivery, yet he does positively assert that he fired at Hammett as well as at Fowler. The undisputed testimony therefore shows that the killing of Hammett was not accidental. Upon the whole record,

it seems to us a very plain case of a failure upon the part of the appellee to prove his alleged cause of action. Therefore the judgment must be reversed, and, as the evidence seems to have been fully developed, the cause will be dismissed.

CLARDY v. WINN.

Opinion delivered February 4, 1924.

1. SCHOOLS AND SCHOOL DISTRICTS—OVERLAPPING DISTRICTS.—Two separate districts could not embrace the same territory at the same time.
2. SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF RURAL SPECIAL DISTRICT.—Under Kirby's Dig., § 7668, as amended by Acts 1909, p. 931, relative to urban special districts, and Gen. Acts 1919, p. 6, repealing Acts 1909, p. 947, and requiring rural special districts to take all of a common school district when any part is annexed, the creation by a county board of education of a new rural special school district, embracing all that remained of a common school district after an urban district had taken a part thereof, was legal.

Appeal from Howard Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

J. G. Sain and *A. F. Auer,* for appellant.

The complaint stated a cause of action. The board of education acted without authority of law in creating Rural Special School District No. 26, and the appellees, directors, are without authority to act as directors thereof. 146 Ark. 32.

W. P. Feazel, for appellees.

1. Chancery will not act where there is a full and adequate remedy at law. In this case there was a full and adequate remedy by certiorari. 153 Ark. 50.

2. The directors, and not the taxpayers, were proper parties to sue. C. & M. Digest, § 8923; 128 Ark. 384.

3. The complaint does not state a cause of action. Act No. 15, approved March 11, 1919, has no application in this case, and as to the allegation with reference to board of education acting without authority in organ-

izing Rural Special School District No. 26, etc., the complaint states a mere conclusion. 105 Ark. 87; 139 Ark. 489.

SMITH, J. Appellants were the plaintiffs below, and for their cause of action filed the following complaint:

"Come the plaintiffs herein, and for their cause of action against the defendants herein state:

"That they are citizens, qualified electors and taxpayers within the territory embraced in Nashville Special School District, and are also taxpayers and patrons of Common School District No. 7, which is within Nashville Special School District.

"That the board of education of Howard County, on the 24th day of June, 1922, ordered and approved an organization of Rural Special School District No. 26 of Howard County, Arkansas, and the defendants, Q. W. Winn, Joe Green, C. P. Kelley, W. E. Kelley, J. L. Bearfield, Dave Graham, were named as directors of said school district, at an election ordered by the said board of education of Howard County, Arkansas.

"That the territory designated to the Rural Special District No. 26 of Howard County, Arkansas, is within the territory of Nashville Special School District, and was a part of Common School District No. 7 of Howard County, Arkansas.

"That, after the order approving the organization of said Rural Special School District No. 26, the directors of said school district attempted to qualify and elect teachers to teach in said district, and to collect taxes for said district, and have expended out of the funds of Common School District No. 7 the sum of ——— dollars.

"That the board of education of Howard County, Arkansas, acted without authority in approving the organization of the said Rural Special School District No. 26 of Howard County, Arkansas, and that the attempt in forming said district by the said board of education of Howard County, Arkansas, is in violation of law, and void.

"That the said defendant directors, if not enjoined, will proceed to spend money belonging to School District No. 7 in violation of law.

"That a temporary injunction should be issued, enjoining them from acting as school directors of Rural Special School District No. 26, and enjoining the said board of directors from expending any sum, or sums, of money until this cause can be heard."

The prayer of the complaint was that a temporary restraining order be issued enjoining the directors of Rural Special School District No. 26 from acting as directors of that district, and from expending any funds belonging to Common School District No. 7 in the hands of the treasurer of the county, and that the injunction be made perpetual on final hearing.

A demurrer was filed and sustained, and, as plaintiffs elected to stand on the complaint, it was dismissed as being without equity.

The complaint is somewhat ambiguous, but we interpret its allegations to be that plaintiffs were residents of Common School District No. 7 and patrons of the schools therein, and that a portion of the territory of that district was attached to Nashville Special School District, and the part remaining was absorbed by Rural Special School District No. 26 of Howard County. We do not know how otherwise to reconcile the allegations that plaintiffs are residents of Common School District No. 7 and are also residents of the Nashville Special School District. Two separate districts could not embrace the same territory at the same time. Plaintiffs might reside in one or the other, but they could not at the same time reside in both. We do not understand the complaint to allege that territory was taken from the Nashville Special School District to form the Rural Special School District No. 26; but we do understand the complaint to allege that the two special school districts are existent, and that each has taken territory from Common School District No. 7, and it is sought by this pro-

ceeding to restrain the directors of Rural Special School District No. 26 from using funds which would belong to Common School District No. 7, if that district is in existence.

On May 31, 1909, the General Assembly passed Act No. 312, found at page 931 of the Acts of 1909, which amended § 7668, Kirby's Digest. The section of the statutes amended allowed the incorporated cities and towns of the State, including territory annexed therefor for school purposes, to be organized into single school districts. The amendatory act provided that such school districts shall include all the territory of the city or town, and that, when the limits of the city or town are extended so as to include territory not before within the school district, all of said new territory should become a part of the special school district of said city or town.

On the same date on which this amendatory statute was passed, an original statute was passed, which became act 321 of the Acts of 1909, and is found at page 947 of the Acts of 1909. This act was entitled "An act to create special or single school districts in any county in the State of Arkansas, with same powers as are now granted to incorporated cities and towns for such purposes, and empowering the county judge to call said election."

Section 2 of act 321 provided that § 7669, Kirby's Digest, which prescribes the procedure for enlarging special school districts in cities and towns, should be followed in organizing rural special school districts provided for by act 321.

The case of *Special School District No. 2* v. *Special School District of Texarkana,* 111 Ark. 379, was a controversy between a rural and an urban special district, in which the urban district had annexed certain territory previously lying in the rural special district. It was insisted that, as these two acts were passed contemporaneously, their proper construction was that there was no legislative intent to authorize the urban special district to

annex the rural special district, once it had been formed. We held, however, that urban special districts might annex the territory of rural special districts, as well as the territory embraced in a common school district.

This court had previously held that act 312 authorized rural special school districts to annex the territory of common school districts by taking such portions of that territory as was included in the petitions therefor, but, in upholding this right, it was pointed out that injustice was frequently done to the residents of the unannexed portions of such common school districts by leaving them with inadequate territory to properly support their schools. *Common School District No. 13* v. *Oak Grove Special School District,* 102 Ark. 411; *Bonner* v. *Snipes,* 103 Ark. 298; *Bunch* v. *Chaffin,* 106 Ark. 306; *Eubanks* v. *Futrell,* 112 Ark. 437; *Crow* v. *Special School Dist. No. 2,* 102 Ark. 401.

The General Assembly, by act 15 of the Acts of 1919 (Acts 1919, page 6), repealed act 321 of the Acts of 1909. We so held in the case of *Common School District No. 52* v. *Rural Special School District No. 11,* 146 Ark. 32. By this act of 1919 it was provided that all of a common school district must be taken when any part thereof was annexed or organized into a rural special school district, and such districts cannot now be formed by taking any part of a common school district less than the whole thereof.

It appears therefore that an urban special or single school district may take a portion less than the whole of a common school district, but that a rural special school district cannot do so. We understand the complaint to allege that this is what was done here. The Nashville Special School District took a part of Common School District No. 7, and the Rural Special School District No. 26 took all of the remainder. As we have seen, the law permits this to be done, and the complaint does not therefore state a cause of action.

If we have not correctly interpreted the allegations of the complaint, then they are contradictory and meaningless, and allege an impossible condition, for, as we have said, a special school district and a common school district could not embrace the same territory at the same time.

If the board of education did, in fact, take a part of Common School District No. 7 less than the whole thereof, as it then existed, and attach it to Rural Special School District No. 26, it did a thing which was not authorized by law, and relief against that order might have been obtained by a proceeding instituted within a reasonable time to have the order quashed by the circuit court on certiorari. *Mitchell* v. *Wright Hill Special School Dist., ante* p. 277; *Mitchell* v. *Directors of School District No. 13,* 153 Ark. 50.

It might also be true that citizens and taxpayers of a common school district which has been unlawfully dismembered might, by injunction, prevent the improper use of the funds of such district; but we decide only the question presented by the allegations of the complaint, and, as we do not understand the allegations of the complaint to allege that the order of the board of education, in establishing Rural Special School District No. 26, exceeded the powers of the board under the law, the demurrer was properly sustained and the complaint was properly dismissed. The decree is therefore affirmed.

DENT v. FARMERS' & MERCHANTS' BANK.

Opinion delivered February 4, 1924.

1. ATTACHMENT—FORTHCOMING BOND—NOTICE TO SURETIES.—Sureties on a forthcoming bond in attachment proceedings, conditioned for the return of the property or payment of its value, on their failure to return the property within the time specified in the bond, were not entitled to notice before judgment was rendered against them on the bond.
2. JUDGMENT—REMEDY FOR IRREGULARITIES.—Sureties on a forthcoming bond in an attachment suit became parties to the suit

by signing such bond, and their remedy for any error in the judgment against them was by appeal, and not by motion to set aside the judgment.

3. APPEAL AND ERROR—TIME FOR APPEALING.—Parties to a judgment, by filing a motion to set aside a judgment for irregularity, instead of appealing therefrom as they should have done, did not extend the time in which to appeal.

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

Gautney & Dudley, for appellants.

The bondsmen ought not to be penalized when the property is delivered, sold, and the proceeds applied on the judgment. The bond is not conditioned to pay the judgment in favor of the plaintiff, but only in the event of a failure to deliver, to pay the value of the property. C. & M. Digest, § 543; 37 Ark. 206.

C. T. Carpenter, for appellee.

1. The decree of February 1, 1922, is valid, having been rendered on a regular adjourned day of the chancery court.

2. The motion, from the overruling of which comes this appeal, was to vacate the judgment of May 8, 1922. Since this was not the final decree, no appeal could be taken from it. The decree of February 1, 1922, awarded the plaintiff full relief, and that of May 8 contained nothing new, granted no relief. *Ashmore* v. *Hays,* 159 Ark. 234; 130 Ark. 308.

3. Appellants lost their right of appeal. Appeals must be taken in six months, and not thereafter. 134 Ark. 386. Filing of motion to vacate or modify a decree does not extend the time for appeal.

HUMPHREYS, J. This is an appeal from an order of the chancery court of Poinsett County, overruling a motion of appellants to set aside a judgment rendered against them as sureties on a forthcoming bond on February 1, 1922, a regular adjourned day of the December, 1921, term of said court, and the report of sale and confirmation thereof, made pursuant to said judgment, on

the 8th day of May, 1922, which was also a regular adjourned day of said court.

The judgment and proceedings thereunder, sought to be set aside, were entered in a foreclosure and specific attachment proceeding by appellee against A. W. Judkins, who had defaulted in the payment of an indebtedness secured by a chattel mortgage. After the property described in the mortgage had been attached, and before the trial, appellants gave a forthcoming bond in order that Judkins might retain the property for the purpose of cultivating his crop. The bond was conditioned for the return of the property on November 1, 1921, or the payment of the value thereof, as agreed upon and fixed in the bond. Default was made on the bond, and on February 1, 1922, the cause was heard, which resulted in a final judgment in favor of appellee against W. A. Judkins of $700 and costs, and against appellants on the bond for $431.25 and costs. In the decree it was ordered that the attached property, or so much thereof as could be recovered, be sold, and, after paying the costs incident to the sale, to apply the proceeds on the decree against appellants. On May 8, 1922, the sale of a portion of the attached property, which was recovered, was reported to the court, and confirmed. The net proceeds were credited on the decree against appellants, leaving an unpaid balance of $329.75. On July 31, 1922, appellants filed their motion to set aside the original judgment and proceedings thereunder upon two grounds, as follows:

First, that the judgment of May 8, 1922, was rendered against them without notice.

Second, that the property for which the bond was given had been returned to appellee. This motion was heard in vacation, and the decree overruling same was entered April 13, 1923. An appeal was prayed and granted, and appellants were allowed sixty days in which to prepare and file a bill of exceptions. Within the time allowed the bill of exceptions was filed. The oral evidence contained in the bill of exceptions was to the effect

that the original decree and orders made pursuant thereto were entered without notice to appellants, or either of them, and that the property described in the forthcoming bond was delivered to the officer after the rendition of the original decree and sold to satisfy the judgment.

Appellants' first contention for a reversal of the decree overruling their motion is that the original decree and subsequent proceedings thereunder were rendered without notice to them, and consequently void. There is no merit in their contention, for it was unnecessary to give them notice before rendering the original decree. They were sureties on a forthcoming bond in an attachment proceeding, and failed to return the property within the time specified in the bond, and were in default at the time the case was tried. This court said, in the case of *Fletcher* v *Menken,* 37 Ark. 206, that "by executing the bond the sureties became parties to the suit, and the statute provides for no process or notice to them before judgment." It was proper to render a summary judgment against them upon the bond.

Appellants' next and last contention for a reversal of the decree is that, after the rendition thereof, the attached property was returned to the officer and sold to satisfy the judgment. The sale of that part of the property returned was insufficient to satisfy the judgment. If any error was committed in rendering the judgment, the remedy to correct it was by appeal, and not by collateral attack. They were parties to the suit by virtue of having signed the bond, and could have appealed from the original decree and subsequent proceedings thereunder. They lost their right to appeal therefrom by delay. The first decree was rendered on February 1, 1922, and the subsequent proceedings thereunder were had on March 8, 1922, and no appeal was prosecuted therefrom. The motion filed to set the decree and subsequent proceedings aside did not have the effect of extending the time in which to appeal. *Oxford Tele-*

phone Mfg. Co. v. *Arkansas National Bank,* 134 Ark. 386; *Ashmore* v *Hays,* 159 Ark. 234.

The decree overruling the motion is therefore affirmed, and the appeal is dismissed.

LITTLE ROCK *v.* GALLOWAY.

Opinion delivered February 11, 1924.

1. ADVERSE POSSESSION—POSSESSION OF ALLEY.—Adverse possession of an alley in a city by the owner and his grantors for more that the statutory period prior to Acts 1885, p. 92, barred the city and public from asserting any right to open up and use it without condemnation, even if there was an original dedication.
2. MUNICIPAL CORPORATIONS—PRESCRIPTIVE RIGHT TO ALLEY.—Evidence *held* insufficient to show that the city acquired a right to an alley by prescription.

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

A. B. Cypert, for appellant.

A street or alley is not abandoned by delaying the opening of it, after acceptance and dedication. 88 Ark. 533. The fact that the owners inclosed and obstructed the property did not show adverse possession. 58 Ark. 142.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

Testimony that the owners were in possession and claimed title to the full 150-foot lot and expressly denied that there was an alley in the block was admissible and sufficient as showing boundaries and extended possessions. 77 Ark. 309; 101 Ark. 409. Property dedicated to public use may be accepted by the representatives of the public or by use by the public. 127 Ark. 364. The owners did not open the public alley, and the public acquired no right in the private way. 47 Ark. 431; 50 Ark. 53: 51 Ark. 270; 58 Ark. 494; 62 Ark. 415; 146 Ark. 300. Where there is a doubt as to the character of the use, the implication that it was adverse cannot be made.

59 Ark. 41; 105 Me. 529; 75 Atl. 51; 111 S. W. 977; 152 Ill. 561; 38 N. E. 768; 39 N. E. 1024; 72 Wash. 99; 129 Pac. 884; 54 N. E. 850; 2 Metcalf (Ky.) 98; 74 Am. Dec. 400; 169 N. W. 263; 101 Ind. 509; 11 N. E. 484; 241 Ill. 566; 89 N. E. 653.

McCULLOCH, C. J. Appellee, D. F. S. Galloway, is, and for many years has been, the owner of certain lots, all in the same block, in the city of Little Rock, and he instituted this action in the chancery court of Pulaski County against the city of Little Rock, alleging that there is a private alley through the middle of said block, that the alley is not public, and has never been dedicated to public use, but that the city claims that the alley is public, and asserts the right to throw it open for public use. The city answered, denying that the alley through the block in question is private, and alleging that, on the contrary, the alley in question was dedicated to the public by being shown on the recorded plat and lots sold with reference to the plat, and also that the public had obtained the prescriptive right to use the alley by reason of long and continued usage for more than the statutory period of limitation. The city therefore insisted on its asserted right to keep the alley open to the public. On the trial of the cause there was a decree in favor of appellee, and the city has appealed.

The lots owned by appellee are situated in block 7, according to the plat of the city of Little Rock, and the block is bounded on the west by Main Street, on the east by Scott, on the north by Sixth, and on the south by Seventh. Appellee owns the east half of the block, being six lots, numbered 7 to 12, inclusive, fronting on Scott Street, and lots 1 and 2, fronting on Main Street. These lots are next to Sixth Street, and the next two lots, which are numbered 3 and 4, are owned by the Fulk estate. George W. Donaghey owns the other two lots facing on Main Street, numbered 5 and 6. All of the lots fronting on Main Street are built up with business buildings, and there is a business building fronting south on Seventh Street, on the lot owned by appellee at the

corner of Seventh and Scott. The other portions of the lots owned by appellee, fronting on Scott Street, have been built up as residence property. There is now an alleyway running north and south through the center of the block, and the controversy in the case is whether or not this is a public or private alley.

It is the contention of the city that the alleyway along the route in question was dedicated to the public use by the filing of a plat in the early days of the city, showing an alley at that place, and by a ratification of the plat under a covenant executed by plaintiff's remote grantor, Roswell Beebe. The contention is that Beebe, by his covenant, executed at the time he received a patent from the United States, ratified the original dedication, and is bound by it under the law announced by this court in the case of *Beebe* v. *Little Rock,* 68 Ark. 39.

It is the contention of appellee, however, that there was no dedication by appellee's predecessors in title, for the reason that block 7 was not within the boundaries described in Beebe's covenant, and that the facts of this case do not fall within the decision in the case cited above. It is also contended by appellee that, even if there had been a formal dedication, the right of the city and of the public to use the alley has been barred by actual adverse possession for more than the statutory period of limitations.

We deem it unnecessary to discuss the question of original dedication, for it appears very clearly from the testimony, which is practically undisputed, that appellee and the other owners of lots in block 7 have obtained title to the alley in question by adverse possession of their respective grantors for more than seven years, and that the city and the public in general are barred by the statute of limitations from asserting the right to open up and use the alley.

Under the statute now in force, limitations do not run against the right of a city to open up a street or alley acquired by dedication or prescription. Crawford & Moses' Digest, § 7570. The first statute exempting

cities from the statute of limitation as to streets and other public places applied only to cities of the first class, and was approved March 21, 1885. Acts 1885, p. 92. The enactment of the statute was doubtless prompted by the decision of this court in *Fort Smith* v. *McKibbin,* 41 Ark. 35, where it was decided that a city of the first class was barred by adverse possession for the period of limitations from opening streets and alleys. That statute, however, acted prospectively, and did not affect the title completely acquired by adverse possession before the enactment of the statute. The evidence in the case shows that there was an actual adverse occupancy by appellee's predecessors in the title for more than seven years prior to the statute referred to above.

Appellee deraigns a clear title to his lots in block 7 to a patent issued by the United States to Roswell Beebe, on September 25, 1839. There were numerous witnesses introduced, whose testimony showed the condition of the property for a great many years prior to the enactment of the statute referred to above—one of the witnesses was conversant with its condition as far back as the year 1865. In those days the two lots now known as the Donaghey lots were owned by Mrs. Schader, and the two lots fronting on Main Street, in the west half of block 7, were owned by W. B. Wait. Mrs. Schader's dwelling-house was situated on the two lots owned by her, and she resided there. Her son, C. H. Schader, testified that his recollection ran back to 1865, when he was a small boy, and lived at the place with his mother. All of the lots in the block were 150 feet deep, and there was no alley between them. There was a fence built entirely through the block on the line between the lots facing on Main Street and those facing on Scott Street, which was along the center of the alley as it now exists. Mr. Schader testified that the fence was an old one at the time he first remembered it, in the year 1865, and was built solid of boards. Appellee's ancestor, Miss Elizabeth Shall, who devised the property to appellee, built a

residence on the lots fronting on Scott Street, about the year 1878, and occupied it until she died. There was another small building on the lot at the corner of Seventh and Scott Streets, which was rented to tenants by the owner; and there was another building on the Shall property, facing on Seventh Street, which was situated within a few inches of the division fence, and occupied a part of what is now the alley. The lots facing on Scott Street were fenced all round. Mrs. Schader also had a small building on the back part of her lot, near the division fence, and there were trees of considerable size along the division fence, in the center of what is now the alley. There was a lumber-yard on the Shall property, at the northeast corner, and this was also fenced in. The other lots facing on Main Street were covered by cheap business buildings. This condition existed until the year 1903, when Judge F. M. Fulk, who had purchased from W. B. Wait the two lots in the middle of the west half of the block, erected a building, which was known as the Jones House Furnishing Building, and which was the full width of the two lots and 140 feet deep. This left a space of ten feet between the rear end of the Fulk building and the center of the alley. There was no alley there at the time, and the occupant of that building secured a written agreement from Miss Shall, the then owner of the other property, permitting the private use of the space from the alley of the building out to the street. Mr. Claudius Jones, the president of the Jones House Furnishing Company, testified that there was a written agreement permitting him to use the space as ingress and egress for private purposes, and that it expressly stipulated that it was not to be used by any one else. Conspicuous signs were put up at the entrance of the way, showing that it was a private alley, and a portion of the time the space was closed by a gate and was not used by the public at all. In the year 1906 Mr. Donaghey bought the two Schader lots and erected a business building thereon, the full width of the two

lots and 140 feet deep, leaving a space of ten feet for an alley, the same as was done in regard to the Fulk property. At that time the old building on the rear of the Shall lot, facing on Seventh Street, was still standing, and Mr. Donaghey testified that it appeared to have been there thirty-five or forty years. This is the building that extended over to the fence, as before stated.

In the year 1908 Miss Shall caused to be erected a business building, fronting on Seventh Street, on the rear of her lots in the east half of the block, at the location of the old building referred to, which was then torn down. These buildings left a space of ten feet for an alley, which made the space between that building and the Donaghey building twenty feet. There was then a building owned by Miss Shall on lots 1 and 2, which ran back 140 feet, and left a space of ten feet. The alley was thus thrown open for private use entirely through the block, and it was not of a uniform width of twenty feet, for the reason that a brick stable on Miss Shall's home lot extended a part of the way out into the alley. All the witnesses testified that the alley was a private one, and that at each entrance there was continuously maintained a conspicuous sign showing that it was a private alley. The testimony is undisputed that these signs were maintained, that the alley was not used by any one except occupants of the buildings, and that it was not used at all for any public purpose, such as the laying of water mains.

All of this evidence establishes indisputably that the *locus in quo* was adversely occupied by the owners for more than seven years prior to the enactment of the statute exempting the city from the operation of the statute of limitations. Even if there had been a prior dedication, the adverse occupancy constituted a complete investiture of title under the statute of limitations. The statute enacted in 1885, *supra,* did not and could not operate as a divestiture of the title thus acquired. This evidence also establishes the fact that the public acquired no prescriptive right after the fence was torn away and

the alley opened, about 1903. It was opened as a private way and maintained solely as such, with conspicuous notices to the public that it was not a public alley, that it was only a private way. The undisputed evidence is that the city never attempted, during all the intervening years, to exercise any authority over the alley. The city engineers whose terms of office covered the period in question testified that there were no records in the engineer's office showing that it was a public alley, and witnesses testified that there was never any permission applied for at the engineer's office, when excavation was done in the alley, for any purpose. If there was ever any use of the alley at all by the public, it was of a fitful nature, and was clearly permissive, and was not sufficient to amount to a prescriptive right. *Howard* v. *State,* 47 Ark. 431; *Jones* v. *Phillips,* 59 Ark. 35. The city has the power, of course, to open the alley at any time, as a public way, by proper condemnation proceedings, but it has not seen fit to do so, and the alley is not a public one now.

The decree of the chancellor was therefore correct, and the same is affirmed.

WASHINGTON COUNTY *v.* DAVIS.

Opinion delivered February 11, 1924.

1. CLERKS OF COURTS—COMPENSATION.—Although the office of circuit clerk is created by the Constitution, the Legislature has power to fix the amount of compensation, within constitutional limitations, to be paid either by fees or salary.
2. CLERKS OF COURTS—EXTRA COMPENSATION—CONSTITUTIONAL LIMIT.—An extra allowance made by the Legislature to a clerk was not unconstitutional where it, added to his salary, did not exceed $5,000 per annum, the limit fixed by Const., art. 19 § 23.
3. CLERKS OF COURTS—CONSTRUCTION OF STATUTE.—Under the rule that the word "may" is construed to mean "shall" whenever the rights of the public or third persons depend on the exercise of the power or the performance of the duty to which it refers, Special Acts 1921, p. 111, § 2, providing that the county court

"may" refund to the circuit clerk of a certain county one-half of the fees received by him for oil leases, is mandatory.

4. EVIDENCE—JUDICIAL NOTICE.—Judicial notice is taken that Washington County is one of the largest counties in the State.
5. STATUTES—CONSTRUCTION OF "MAY."—It is a maxim of the law that where a statute directs the doing of a thing for the sake of justice, the word "may" means "shall."
6. STATUTES—CONSTRUCTION OF POWER GIVEN TO OFFICERS.—Where power is given to public officers for the benefit of individuals, the language used, though permissive in form, is in fact peremptory.

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

Nance & Seamster, for appellant.

To construe the act to be mandatory, and hold that the word "may" means "shall" constitutes an invasion of the jurisdiction of the county court and is in conflict with § 28, art. 7, of the Constitution. 114 Ark. 278; 25 L. R. A. 770.

J. V. Walker, for appellee.

The word "may" means "shall" when used in an act whenever third persons or the public have an interest in having something done or have a claim *de jure* that the power shall be exercised. 102 Tex. Rep. 304; 5 Ark. 82. 1 L. R. A. (N. S.) 656; 76 Am. Dec. 736. See also 68 Tex. 468; 95 Tex. 268; 94 Tex. 62; 9 Md. 174, 66 Am. Dec. 326; 4 Wall. 435, 18 L. ed. 419; 28 Ala. 28; 17 Ala. 527; 95 N. C. 68; 105 Mo. App. 98; 95 S. W. 98; 7 Fla. 13; 24 Sou. 589; 2 Sou. 400; 154 Mo. App. 540; 55 Wash. 1; 136 Iowa 573; 234 Ill. 583. Arkansas decisions are in accord with the above. See 77 Ark. 412; 85 Ark. 232. Where an office is created by the Constitution, but the compensation is left to the discretion of the Legislature, it may be increased or diminished so as to affect the incumbent. 40 Ark. 100.

HART, J. J. L. Davis filed a claim in the county court against Washington County for $1,200, which he claims to be due him as extra compensation for official services rendered as circuit clerk of Washington County.

His claim for compensation is based upon § 2 of act 83 of the Acts of 1921, which is as follows:

"Section 2. That the county court of Washington County may refund to J. L. Davis, late clerk of the circuit court of Washington County and recorder, twelve hundred dollars, one-half of the amount received by him and paid into the county treasury for recording 1,634 oil and gas leases during his term of office, less the county tax." Special Acts of Arkansas 1921, p. 111.

This act was amendatory of act 259 of the Acts of 1919, which fixed the salary of the circuit clerk at the sum of $3,420 per annum, together with the fees and allowances made to him as commissioner in chancery. Special Acts of 1919, p. 399.

The county court refused to make the allowance to J. L. Davis, as provided by the section of the act quoted above, and Davis duly prosecuted an appeal to the circuit court. The circuit court found that Washington County was indebted to J. L. Davis in the sum of $1,200, under the act of the Legislature above referred to, and judgment was rendered accordingly.

To reverse that judgment, Washington County has duly prosecuted an appeal to this court.

Although the office of circuit clerk is created by the Constitution, the Legislature has full power to fix the amount of compensation, of course observing all constitutional limitations, and it makes no difference whether the compensation is by fees or salary. *Humphrey* v. *Sadler,* 40 Ark. 100; *Powell* v. *Durden,* 61 Ark. 21, and *Bugg* v. *Sebastian County,* 64 Ark. 515.

It does not appear from the record that the extra allowance to the circuit clerk, under the act in question, together with the salary already allowed him, made his net profits more than $5,000 per annum, and was therefore violative of § 23, art. 19, of the Constitution, as construed in *Griffin* v. *Rhoton,* 85 Ark. 89, and *Williams* v. *Buchanan,* 86 Ark. 259.

In this connection it may be also stated that the bill under consideration was passed by two-thirds of the

members elected to each branch of the General Assembly. Therefore we need not decide whether the act under consideration falls within the provisions of art. 5, § 27, of the Constitution, which provides that no extra compensation shall be made to any officer after the services shall have been rendered, unless such compensation be allowed by a bill passed by two-thirds of the members elected to each branch of the General Assembly. There is no constitutional limitation against the passage of the act under consideration, and we hold it to be a valid act.

We do not think that the case of *Board of Education of Marion Township* v. *State* (Ohio), 25 L. R. A. 770, has any application to the facts in the case at bar. There the treasurer of the school funds of Marion Township, Ohio, lost a school warrant, which he paid to the person entitled to it, and was charged with the amount thereof in his settlement with the county auditor. Subsequently he found the warrant, and asked that the amount thereof be refunded to him. The board of education refused to do so, on the grounds that it had no power to go behind its previous settlements. Whereupon he secured the Legislature to pass an act allowing him the amount of said lost warrant and directing the board of education to levy taxes for the payment thereof. The court held that, because there was a dispute about the facts out of which the claim grew, between the township treasurer and the board of education, the contention fell within the province of the court under the distribution of governmental powers prescribed by the Constitution.

Here there was no contention between the parties as to the facts. Davis had made no claim in the county court or elsewhere that he was due extra compensation. The Legislature simply allowed J. L. Davis, as clerk of the circuit court, extra compensation for services which he had already rendered, and this it had the right to do, for the reasons stated above.

It is next contended that the allowance of the extra compensation, by the terms of the act, was in the discretion of the county court. In making this contention, reliance is placed by the county upon the language of § 2 of the act quoted above, which provides that the county court may refund to J. L. Davis $1,200. We think that the act is mandatory, notwithstanding the use of the word "may" instead of "shall."

In *Pirani* v. *Barden,* 5 Ark. 81, *Spratley* v. *La. & Ark. Ry. Co.,* 77 Ark. 412, and *C. R. I. & P. Ry. Co.* v. *Jaber,* 85 Ark. 232, this court has recognized that the word "may" is often interpreted to mean "shall." The general rule of construction is that the word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. *Wheeler* v. *Chicago* (Ill.), 76 Am. Dec. 736; *Smalley* v. *Paine,* 102 Tex. 304, 116 S. W. 38; *People* v. *Board of Supervisors,* 68 N. Y. 114; *People* v. *Board of Supervisors,* 51 N. Y. 401, and *Supervisors* v. *United States,* 4 Wall. (U. S.) 435.

All of these cases, and many more of like import, recognize that the word "may" is constantly used in statutes without intending that it shall be taken literally, and that, in its construction, the object evidently designed to be reached limits and controls the literal import of the word. They recognize that, in determining whether "may," as used in acts like the present one, is merely permissive or is mandatory, not only the language of the act but the circumstances surrounding its passage and the object had in view must be considered.

Davis, as circuit clerk, had a claim, based upon natural justice and equity, that a part of the fees derived from the recording of gas and oil leases during his term of office, and paid by him into the county treasury, should be refunded. This is shown by the surrounding circumstances. The court will take judicial notice that Washington County is one of the largest counties in the State.

The salary of the circuit clerk, fixed by the Legislature of 1921 and by the act of 1919 which it amended, was $3,420 per annum.

Section one of the act under consideration gives the circuit clerk, in addition to a salary of $3,420 per annum, all fees for recording oil and gas leases. In § 2 of the same act it was provided that the county court may refund to Davis $1,200, which is one-half of the amount received by him and paid into the county treasury for recording oil and gas leases. The Legislature recognized that Davis had a moral claim against the county for his services, and intended to provide for its allowance like other claims against the county. The purpose of the act, as well as natural justice to Davis, requires that it should be construed as mandatory. It is a maxim of the law that, where a statute directs the doing of a thing for the sake of justice, the word "may" means "shall." Where the power is given to public officers for the benefit of an individual, the language used, though permissive in form, is in fact peremptory. The substance of the holding in the case above cited is that what public officers are required to do for a third person the law requires shall be done.

It follows that the judgment of the circuit court is correct, and will be affirmed.

ROSSLOT v. STATE.

Opinion delivered February 11, 1924.

1. INTOXICATING LIQUORS—STILLWORM DEFINED.—The word "stillworm" means the tube or coil used for condensation of the vapor which is passed through it from the boiling mash for the purpose of being distilled into whiskey.
2. INTOXICATING LIQUORS—REGISTRATION OF STILLWORM—BURDEN OF PROOF.—In a prosecution for unlawfully possessing a stillworm, the burden was on the defendant to show that a stillworm found in his possession was registered.

3. INDICTMENT AND INFORMATION—SURPLUSAGE.—In a prosecution for having an unregistered stillworm in his possession, an indictment was not rendered invalid by charging that the stillworm was to be used in the manufacture of distilled spirits; such allegation being surplusage, since the statute makes it an offense to keep an unregistered stillworm, regardless of intention.
4. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—The trial court was not required to multiply instructions on the same point.
5. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Where the court instructed the jury as to reasonable doubt, remarks of the prosecuting attorney as to inferences to be drawn from defendant's attorney's harping on reasonable doubt, without stating any fact not in the record, *held* not prejudicial to defendant.
6. CRIMINAL LAW—ARGUMENT OF COUNSEL.—The argument of counsel is largely within the discretion of the trial court.
7. CRIMINAL LAW—ARGUMENT OF COUNSEL.—In a prosecution for possessing an unregistered stillworm, remarks of the prosecuting attorney on matters which were in evidence as to the duty of the jury to reward the efforts of the officers in locating the stillworm found in defendant's possession, and as to their duty as good citizens, *held* not prejudicial.

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

W. P. Smith and *Schoonover & Jackson,* for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

HART, J. Alfred Rosslot prosecutes this appeal to reverse a judgment of conviction against him for the crime of unlawfully having in his possession a certain stillworm.

The first assignment of error is that the evidence is not sufficient to have warranted the jury in returning a verdict of guilty.

Two deputy sheriffs were the witnesses for the State. According to their testimony, in March, 1923, in company with two other persons, they went out on Cache River to hunt for a still which they had been told was out there. While watching along the river bank, they heard the paddling of a boat about a hundred yards out in

the river from them. They called to the parties in the boat to come to the bank, and they did so. They found three or four barrels floating behind the boat. The parties had a stillworm in the boat, about a half bushel of meal and chops, about fifty pounds of sugar, and a 30-30 Winchester rifle. The defendant and a companion were in the boat, and the defendant had charge of it. When arrested, the defendant told the deputy sheriffs that, while hunting, they ran into a man making whiskey, and that they took possession of his outfit, including the stillworm, and were carrying it to town for the purpose of turning it over to the sheriff. The stillworm which they took from the possession of the defendant and his companion was designed for use in making whiskey. They poured something out of it that smelled like "white mule" whiskey. The boat also had some fruit jars in it. This all happened in the Eastern District of Lawrence County, Arkansas.

The evidence was sufficient to support the verdict. The word stillworm applies to the tube or coil used for the condensation of the vapor which is passed through it from the boiling mash for the purpose of being distilled into whiskey. *Hodgkiss* v. *State,* 156 Ark. 340. It was also decided in that case that it is unlawful, under our statute, to have in possession either a stillworm or a still, without registering the same, regardless of the purpose of having them in possession.

The burden was on the defendant to show that the stillworm was registered. *Clark* v. *State,* 155 Ark. 16.

It is true that the indictment in this case charged the defendant with having a stillworm in his possession for the purpose of using it in the manufacture of distilled spirits. The statute makes it an offense for any one to keep an unregistered stillworm in his possession, regardless of his intention as to its use. But the additional charge, that it was kept for the purpose of being used in the production of distilled spirits, was mere surplusage, and did not affect the validity of the

indictment for keeping an unregistered stillworm. *Earl* v. *State,* 155 Ark. 286.

It follows that the evidence for the State was sufficient to support the verdict.

The next assignment of error is that the court erred in refusing to instruct the jury, at the request of the defendant, that he would not be guilty if he had the stillworm in his possession for the purpose of turning it over to the officers.

We do not think this assignment of error is well taken. The court instructed the jury, in substance, that, if the defendant, in good faith, found the stillworm, and, not knowing its owner, was carrying it to the officers, he would not be guilty. This was all that the defendant was entitled to on this point, and the court was not required to multiply or repeat instructions on the same point.

The next assignment of error is that the court erred in allowing the prosecuting attorney, in his closing argument, to make certain prejudicial remarks to the jury. The court had correctly instructed the jury on the question of reasonable doubt, and defendant insists that the court erred in allowing the prosecuting attorney, in his closing argument, to say the following:

"When the jury heard Mr. Smith harping on a reasonable doubt, and when you hear a lawyer doing that, you know that his client is in the grips of guilt, and I submit to you, gentlemen of the jury, that that don't mean every doubt, it don't mean any doubt, it don't mean all doubt."

The argument of counsel is largely within the discretion of the trial court, and we can see nothing in the remarks quoted above calculated to prejudice the defendant in the minds of the jury. The prosecuting attorney was not stating to the jury any fact which was not in the record, but was merely expressing his opinion from facts which had been proved at the trial.

The next remarks objected to are the following:

"I say to you that these officers went out and watched for them, and spent their time and money, and I don't know how much energy, in trying to locate this contraption that is in this lawsuit. I say to you that when the effort is put forth in trying to do away with such transactions as that, they should be rewarded, because it strikes deep at the citizenship of the land. I say to you, gentlemen of the jury, that you are the judges of this situation; you are jurors who sit impartially upon this case; and when you go out to make up your verdict in this case, I say, I believe you will give this man a penalty that is commensurate with the crime he has committed."

We do not think any prejudicial error resulted from these remarks. Two deputy sheriffs had testified that they had gone down on Cache River to look for a still which had been reported to them. They secured two other persons to go with them. It is fairly inferable that this cost something, and, of course, they spent some time in going and returning. The rest of the argument was merely an admonition to the jury as to what their duties as good citizens required them to do, and remarks of a similar character have frequently been held not to call for a reversal of a judgment of conviction.

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

PEEL & COMPANY v. MOONEY.

Opinion delivered February 11, 1924.

JUSTICE OF THE PEACE—APPEAL BOND—LIABILITY OF SURETIES.—Where the circuit court, on defendant's appeal from an order of a justice of the peace dismissing the schedule of defendant claiming property levied on as exempt from execution, affirmed the judgment of the justice of the peace and directed defendant to restore the property levied on or to account for its value, plaintiff was not entitled to summary judgment for the amount of the judgment rendered for him on defendant's appeal bond, exe-

cuted under Crawford & Moses' Dig., § 6531, since the appeal was not from the money judgment of the justice of the peace, but was from the order of a justice allowing the claim of exemptions, and the sureties were liable only for the satisfaction which plaintiff would have obtained, had the bond not been executed and the property then released.

Appeal from Craighead Circuit Court, Lake City District; *W. W. Bandy,* Judge; affirmed.

J. F. Johnston and *Gautney & Dudley,* for appellant.

The court erred in refusing to render judgment against the sureties on the appeal bond. C. & M. Digest, § 6531.

Appellee pro se.

SMITH, J. Appellant recovered judgment in the court of a justice of the peace for $86.42 against appellee Mooney, on January 20, 1923. An execution was issued on the judgment, and, on February 17, 1923, Mooney filed a schedule, claiming the property levied on as exempt. A motion to dismiss the schedule, as having been filed without notice, was made and sustained. Thereupon Mooney filed an affidavit for appeal, and executed a bond conditioned as follows: "We, the undersigned, Jim Mooney and ....., acknowledge ourselves indebted to Hal H. Peel & Company in the sum of $200, to be void upon this condition: whereas Hal H. Peel & Company has obtained judgment against said Jim Mooney, in the sum of $86.42, before the above named justice of the peace, and whereas defendant filed his schedule of exemptions, which was by the court refused, and from which order defendant has appealed; now, if said appellant shall prosecute his appeal with due diligence to a decision, and if, upon such appeal, the order of the court rejecting said schedule be affirmed, or if his appeal be dismissed, he shall pay the judgment of the justice of the peace, together with the costs of the appeal, then this bond shall be null and void, otherwise to remain in full force and effect." Signed by John B. Walker and E. M. Stotts as sureties.

The cause came on for trial on the appeal in the circuit court, and the defendant made default, whereupon the court, on motion of the plaintiff, affirmed the judgment of the justice of the peace, but denied the plaintiff's motion for judgment against the sureties on the bond, and the plaintiff has appealed.

Plaintiff, the appellant here, insists that the judgment should have been rendered against the sureties, under the authority of § 6531, C. & M. Digest, which reads as follows: "Section 6531. In all cases of appeal from a justice of the peace, if the judgment of the justice be affirmed, or if, on trial anew in the circuit court, the judgment be against the appellant, such judgment shall be rendered against him and his securities in the appeal bond."

In the case of *Fultz* v. *Castleberry,* 81 Ark. 271, a judgment was recovered against Castleberry in the court of a justice of the peace, and a bale of cotton was levied on, which he undertook to claim as exempt from the levy of the execution. His claim of exemptions was not allowed by the justice of the peace, and he appealed from this order to the circuit court, but gave no appeal bond, and the cotton was sold under the execution. The excess which the cotton brought over the judgment was tendered Castleberry, but he declined to accept it, and, after the circuit court had sustained his claim to the cotton as exempt, which it did upon final hearing, he sued the officer for the value of the cotton. The court held that Castleberry could only hold the officer for the sum in excess of the judgment which the cotton brought, as he had given no supersedeas bond, and that only the plaintiff in the judgment was liable for the value of the cotton. In holding this the court pointed out that the statute regulating appeals from judgments of justices of the peace applied, and that the exemption laws permitted the debtor to execute a supersedeas bond in such cases (Kirby's Digest, § 3908), and that Castleberry could not stay an execution in such cases without giving the bond

which the statute requires one to give who wishes to stay the enforcement of a justice's judgment pending the appeal. Section 5551, C. & M. Digest.

There was statutory authority therefore for the execution of the bond set out above, and the sureties thereon are liable according to its terms. But it will be observed that the bond was not conditioned to perform or to pay the judgment of the justice. It was sought only by the appeal to perfect the claim of exemptions, and, as the claim of exemptions was not allowed, the sureties have become liable to the plaintiff in the judgment.

But for what are they liable? The purpose and effect of the bond was to secure the release of the property which the constable had taken into custody under the execution. The bond took the place of the property, and it is for the property, or its value, that they became liable upon the rendition of the judgment of the circuit court disallowing the claim of exemptions. There appears to have been no authority for the circuit court to render judgment for the original debt, as no appeal had been prosecuted from that judgment. But the judgment of the circuit court fixed the liability of the sureties on the bond, and that liability is to restore the property or to account for its value. Of course, this liability to the plaintiff cannot exceed the amount of the judgment, whatever the value of the released property may have been, as the plaintiff is entitled to nothing more than the satisfaction of the judgment.

As was said in the case cited, the judgment debtor might have appealed from the order of the justice refusing to allow his claim of exemptions without executing the bond, and, if this claim had been allowed by the circuit court, on appeal, he could have held the plaintiff in the judgment liable for the value of the property wrongfully sold. *Fultz* v *Castleberry, supra.* But he had the right to give bond, which operated to release the property from the officer's levy, and this is what the defendant in the instant case did, and the effect of this bond, under the circumstances of the case, is to make the sureties liable

for the property so released, or its value, not exceeding the amount of the judgment.

Plaintiff is not entitled, however, to a summary judgment against these sureties, for the reason that the statute does not so provide. In *Cook* v. *Cramer Cotton Co.,* 155 Ark. 549, the facts were as follows: The cotton company recovered judgment against Matkin in the circuit court, and an appeal was prayed to the Supreme Court, and a supersedeas bond, as provided by statute, was executed, with Cook as surety. The appeal was never perfected, and the plaintiff cotton company caused notice to be served on the sureties that a motion for summary judgment against them would be made at the next term of the court. Pursuant to this notice, judgment was rendered as prayed, and an appeal was prosecuted by the sureties to this court. We reversed this judgment, and, in doing so, said: "Proceedings for summary judgment are in derogation of the common law, and such judgments can be rendered in those cases only in which express authority therefor is found in the statute, and, as we have said, we know of no statute authorizing the judgment rendered herein. (Citing cases)." We there said that, if the plaintiffs had perfected an appeal but had thereafter failed to prosecute it, judgment could have been rendered here on the supersedeas bond for the failure to prosecute the appeal, but, as this was not done, the plaintiffs' only remedy was an ordinary suit at law on the bond.

So here, if an appeal had been prosecuted to the circuit court from the judgment of the justice for debt, the circuit court should and would have rendered judgment against the sureties on the bond upon dismissing the appeal; but the appeal was from the order of the justice disallowing the claim of exemptions, and the sureties are liable only for the satisfaction which the plaintiff would have obtained, had the bond not been executed and the property thus released. This satisfaction cannot be had summarily, for the statute has not so provided, and can only be obtained by an ordinary suit at law on the bond.

As plaintiff was not entitled to the judgment prayed for in the circuit court, the judgment of that court must be affirmed, and it is so ordered.

FERGUSON LUMBER COMPANY *v.* SCRIBER.

Opinion delivered February 11, 1924.

1. MECHANICS' LIEN—PRIORITY OVER MORTGAGE.—Where the owner of a 50-foot lot contracted for materials for improving a barn on the south 22 feet, the materialman filed an affidavit claiming a lien on the north 22 feet, which was unimproved, the misdescription was not misleading, and did not invalidate the lien.
2. MORTGAGES—PRIORITY OF MECHANICS' LIEN.—Under Crawford & Moses' Dig., § 6911, providing that a mechanic's or materialman's lien relates back to the commencement of the building or improvement, *held* that where plaintiff, under contract to furnish materials for a building, began to furnish such materials on March 24, its lien took precedence over a mortgage filed for record on March 26, though some of the materials were furnished later.
3. MECHANICS' LIENS—TIME OF FILING.—A lien for materials furnished for a building was filed within time under Crawford & Moses' Dig., § 6922, where the last item of materials was furnished within 90 days of the date of filing the sworn account with the circuit clerk.
4. MECHANICS' LIENS—TIME OF FILING.—The test to determine whether the last item debited for materials or labor is to be included in a lien for materials furnished for a building is whether it is embraced in the contract to furnish the materials for which the lien is claimed.

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

Duty & Duty, for appellant.

Appellant was entitled to a lien on the entire lot on which the building was located. C. & M. Digest, 6906. The description of the land in the affidavit was sufficient. 90 Ark. 340. A substantial compliance with the statute is sufficient. 119 Ark. 43; 56 Ark. 544; 90 Ark. 108; 107 Ark. 245; 116 Ark. 44; 124 Ky. 251; 14 Ann. Cas. 688; 24 Pa. St. 507; 14 Wyo. 455; 96 Ala. 346; 13 Ind. App. 432;

77 Neb. 833. The lien when filed dates back to the time of furnishing the material. 32 Ark. 59; 56 Ark. 640; 71 Ark. 35.

Sullins & Ivie, for appellee.

The mortgage was filed before any claim of lien was filed by appellant and is therefore prior to his claim. 178 S. W. 406; 244 S. W. 348. The purchase of a small amount is not sufficient to extend the time for filing the claim for lien. 235 S. W. 416.

SMITH, J. This is a suit to enforce a materialman's lien on a lot in the city of Rogers, Arkansas, which arose on the following facts: On March 15, 1920, Scriber purchased and received a deed from Hudspeth, conveying the south 22 feet of lot 3, block 12, in the original town of Rogers, and on March 17, 1920, he executed a mortgage thereon, which was filed for record March 26, 1920. At the time of the execution of the deed from Hudspeth to Scriber, Hudspeth owned the entire lot 3, which was an ordinary town lot 50 by 140 feet, and on April 16, 1920, Hudspeth conveyed to Scriber the remaining 28 feet of the lot.

On September 22, 1921, Scriber conveyed to Clouston, by warranty deed, 25 feet off the north side of the lot, and by subsequent deeds conveyed the remainder of the lot to Clouston, who himself subsequently conveyed to Cady the north 28 feet of the lot.

On March 24, 1920, Scriber contracted to purchase from the Ferguson Lumber Company lumber and material with which to improve and remodel a galvanized iron barn situated on said lot 3, to be used as a veterinary hospital. These materials were furnished over a period of time from March 24, 1920, to June 22, 1920, the last item being some cement furnished to put around a flue which was leaking, and this item of cement is the only item on the account which was furnished within ninety days of the time when the claim for a lien was filed with the clerk of the circuit court.

On September 9, 1920, which was within ninety days of the date of the last item furnished, the lumber com-

pany filed with the clerk of the circuit court a verified account of the articles furnished, as required by § 6922, C. & M. Digest, and a lien was claimed on the north 22 feet of the lot. On December 6, 1921, the lumber company filed a suit to foreclose the lien against the barn and the lot on which it was located.

It appears that the barn was not located on the north side of the lot, but was, in fact, located on the south side, and the court took the view that, inasmuch as Scriber had acquired title to the respective portions of the lot by separate conveyances, they should be treated as separate lots, and, as the notice described the barn as being on a portion of the lot which was, in fact, vacant, the court held that the land had not been correctly described.

Cady was made party defendant, and it appears that he had actual knowledge of the facts set out above, but he assumed there was no lien on the south part of the lot, because it was not described in the account and demand for a lien filed with the clerk, and the court so found, and refused to decree that the lumber company had a lien on the land on which the barn was located, but did render judgment against Scriber for the amount sued for, and the lumber company has appealed.

We think the court was in error in holding the description insufficient. It is true Scriber owned only the south 22 feet of the lot when he contracted for the purchase of the materials, but he became the owner of the entire lot, as shown above. The lot was only 50 by 140 feet, and there was no other barn or other building on the north part of it. There appears to be no reasonable doubt that the plaintiff lumber company was attempting to claim a lien on the land on which the building stood. The building appears to have extended from the east end to the west end of the lot, and to have occupied all of the south 22 feet thereof. It would, no doubt, have been better to have described the improvement as being on lot 3, without the unnecessary particularity employed. Sections 6906 and 6908, C. M. Digest. But we do not think the mistake made defeated the claim for a lien.

The question of the sufficiency of the description to be employed to perfect the claim of a materialman's lien has been several times considered by this court, a very recent case being that of *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445. There materials had been furnished to repair buildings on a plantation, and the land upon which it was asked that a lien be declared was described as consisting of 1,380 acres in Jefferson County, Arkansas. We held that this description did not describe any particular tract or acre on which the buildings were situated, nor any particular building or buildings upon which the lien was sought to be established. It was held—but not by a unanimous vote—that this description was not sufficient. In the opinion it was said: "The majority does not mean to say that either the acre of land on which the lien is sought, or the building thereon, must necessarily be described in any particular form. All that is essential is that the acre of land or the building be designated in such language as will afford information concerning the situation of the property to be charged with the lien. Of course, if the building be described so as to properly designate its location, this is sufficient, for the statute itself fixes the quantity of land to be charged."

The authorities were reviewed in the case of *Barnett Bros.* v. *Wright,* 116 Ark. 44, and we there said: "Mr. Phillips, in his work on Mechanics' Liens (3 ed. § 379), discussing the rules of law established by decisions of court with reference to the essential of a description of property sought to be charged with a mechanic's lien, says: 'Among those laid down, and probably the best rule to be adopted, is that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers; and it is not necessary that the description should be either full or precise. It is enough that

the description points out and indicates the premises, so that, by applying it to the land, it can be found and identified. A description that identifies is sufficient, though inaccurate. If the description identifies the property by reference to facts, that is, if it points clearly to a piece of property, and there is only one that will answer the description, it is sufficient.' "

The description of the land here employed was inaccurate, but it was not misleading. Its defect was that, in attempting to describe the land with exact but unnecessary particularity, a mistake was made, but no one could be, or was, misled by it. The barn was a large structure, and was the only building on the lot, and no one could have believed that the materialman was claiming a lien on the part of the lot only on which there was no building of any kind into the construction of which his material had gone, and was claiming no lien on the land on which the building itself stood.

In support of the finding of the court below, it is also insisted that the mortgage is superior to the materialman's lien, because it was, in fact, filed for record before all the material, or, for that matter, before most, of the material was furnished. But, as we have said, the plaintiff began to furnish the material on the 24th day of March, which was two days before the mortgage was filed for record, and by statute the right to a lien relates back to the commencement of the building or improvement.

Section 6911, C. & M. Digest, reads as follows: "Section 6911. The lien for work and materials as aforesaid shall be preferred to all other incumbrances which may be attached to or upon such buildings, bridges, boats or vessels or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements."

The section quoted is identical with § 4408, Mansfield's Digest, so far as the point now under consideration is concerned, although that section of Mansfield's Digest had been several times amended, and that section was construed in the case of *Apperson v. Farrell,* 56 Ark.

608. A mechanic and a mortgagee had liens on the same land, and the question involved was that of priority. The owner commenced the erection of a mill June 1, 1890, and employed a mechanic to perform work on the mill until about October 1, 1890, for all of which he was fully paid, when he quit the job and did no more work until the 19th of February, 1891. The owner executed a mortgage on the property on July 12, 1890, which was duly recorded, and the work for which the mechanic claimed a lien was done, as is stated in the opinion, nearly six months after the mortgage had been filed for record. The court held that the statute gave the mechanic a lien for the wages due him from the time his work commenced, and that his lien was superior to the mortgage.

Under the amended statute, quoted above, the materialman has the same lien as the mechanic, and, as he began to furnish the material before the mortgage was filed for record, his lien is superior to the mortgage, although a portion of the material for which that lien is claimed was furnished subsequently to the filing of the mortgage. See also *White* v. *Chaffin,* 32 Ark. 59.

We are of the opinion also that the date on which the cement was furnished is to be considered in determining whether the account was filed within the time required by § 6922, C. & M. Digest. This section requires that the lien claimant shall, within ninety days after the work has been done or the materials have been furnished, file with the clerk of the circuit court a just and true account of the demand due or owing to him, after allowing all credits. The statute contemplates that the items will bear different dates; in other words, that there will be items of debit and credit, and the requirement of the statute is that, within ninety days of the date of the last item debited, the account shall be filed. *Mitchell* v. *Schulte,* 142 Ark. 446; *Hill* v. *Imboden,* 146 Ark. 99; *Burel* v. *East Ark. Lbr. Co.,* 129 Ark. 58; *Cunningham* v. *Kimbro Lbr. Co.,* 151 Ark. 194.

Was the cement a part of the account? Mr Blackburn testified that he was the carpenter who finished the

job, and that Scriber told him, when he began work, to get what he needed from the lumber company, whose lumber yard was only a short distance away, and that he just went over there when he needed anything, and that two, three or four days after the job was apparently completed he was notified that a flue leaked, and that he went to the lumber company yard and got the cement to stop the leak. We think this item should be included in the bill for the materials. The amount of the item is not the test; the test is whether the item, large or small, is embraced in the contract to furnish the material for which the lien is claimed, and, as we think the cement should be so included, it follows that the account was filed within the time limited by law.

The decree of the court must therefore be reversed, and the cause will be remanded with directions to declare a lien in appellant's favor, as prayed for in the complaint.

CLIMER v. STATE.

Opinion delivered February 11, 1924.

WITNESSES—CARNAL ABUSE—IMPEACHMENT OF PROSECUTRIX.—In a prosecution for carnally knowing a female under the age of sixteen, where the State, to corroborate the prosecutrix, showed that a child was born to her 9 months after the alleged intercourse, it was error to exclude evidence tending to prove that another man had intercourse with her about the time of conception.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; reversed.

G. C. Carter and *Dave Partain,* for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Franklin County, Ozark District, for carnally knowing Vernie Yocum, a female

under the age of sixteen years, and adjudged to serve a term of one year in the State Penitentiary as punishment therefor. From that judgment he has duly prosecuted an appeal to this court.

The testimony introduced by the State showed that appellant had sexual intercourse with Vernie Yocum, in said district and county, on or about September 1, 1922, and thereafter. In corroboration of the testimony of the prosecutrix to that effect, the State showed that a child was born to her on June 3, 1923.

In order to break down the credibility of the prosecuting witness, appellant offered to prove that, on or about the time of conception, she had sexual intercourse with another man in the depot toilet at Alix. Over the objection and exception of appellant, the court ruled that such testimony was inadmissible. Learned counsel for the State contends that the exception to the ruling of the court was not properly preserved in the motion for a new trial, because no ground set out in the motion was responsive to this testimony. In this contention they are mistaken. The twelfth ground in the motion refers to this testimony and the exception by appellant to the ruling of the court on its inadmissibility. It is as follows:

"12. The court erred in refusing to permit the defendant to prove by the witnesses, J. D. Jackman and J. D. Brown, that, about the first of September, 1922, they saw the prosecuting witness, Vernie Yocum, go with a man into a toilet near the depot at Denning Yards, and stay for a few minutes, and then came out, fastening up their clothes, and that they engaged in sexual intercourse in the toilet."

This court said, in the case of *McDonald* v. *State,* 155 Ark. 151: "That where the State undertakes, on direct examination, as was done here, to corroborate the testimony of the prosecutrix by introducing a child which she testifies was the result of the sexual intercourse with the accused, then testimony introduced by him in rebuttal, tending to prove that another might have been the father of the child, is competent and relevant. The logical tend-

ency of such testimony would be to break down the credibility of the prosecuting witness on an issue which the State had elected to bring forward as material to the cause."

It was also said by this court, in the case of *Rowe* v. *State,* 155 Ark. 419, that: "If the State elects to attempt to corroborate the prosecuting witness by showing that a child was begotten by illicit intercourse charged in the indictment, then the defendant may show acts of sexual intercourse with other persons, about the time conception took place, for the purpose of rebutting this testimony. The State made that effort here, and the defendant should therefore have been allowed to rebut that testimony by showing that some other person was the father of the child." Under the rule of evidence announced in the cases cited above, it was error to exclude the testimony offered by appellant, tending to attribute the paternity of the child to another.

On account of the error pointed out the judgment is reversed, and the cause is remanded for a new trial.

WITT v. CHURCHWELL.

Opinion delivered February 18, 1924.

VENDOR AND PURCHASER—ESTOPPEL.—Where a vendee of land resold it to others and they paid him therefor, the fact that the vendor, holding notes for the purchase money, subsequently mentioned to some one that the vendee had agreed to give him a mortgage upon another tract of land to secure the purchase money notes, did not estop the vendor from enforcing his lien as against the purchasers of the land, where the vendee died without executing his agreement to give other security.

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

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

This case calls for the application of the doctrine of equitable estoppel. It was not necessary for the appellant to show actual fraud on the part of appellee, or to

show acts done by him with the actual intention of deceiving appellant. 2 Pomeroy, Eq. Jur., 4th ed., § 803, pp. 1639-1642; *Id.*, § 805, pp. 1643-1652; 97 Ark. 43; 125 Ark. 146; 131 Ark. 77. Appellee, with full knowledge, placed his father-in-law in a position to commit a fraud upon appellant. 27 Cyc., p. 1237, § 3; 19 R. C. L. 411, § 191. See also 27 Cyc., p. 1225, § H.

Brundidge & Neelly, for appellee.

The law cited by appellant has no application in this case. There is no contention, neither was there any attempt to prove, that there was any fraudulent design on the part of appellee to procure the purchase of the land by appellant from Pearson; and there was no conduct shown that was intended or calculated to cause appellant to alter his condition, or do any act, to his detriment. 150 Ark. 570.

McCULLOCH, C. J. This is an action instituted by appellee to foreclose the vendor's lien on a tract of land in White County. Appellee owned the tract of land in question, and sold it to F. W. Pearson for the total consideration of $1,600, of which the sum of $300 was to be paid in cash, and three promissory notes were executed by Pearson to appellee for the balance of the price, one note for $300 and two notes for $500 each. It is conceded that the note for $300 was paid, and this action is to recover on the other two notes, aggregating $1,000 and interest. Pearson sold and conveyed the land to appellant Witt and one Taylor. Taylor subsequently died, and appellant, who was one of the defendants below, claims that the land was purchased as the property of a copartnership between himself and Taylor, and that they bought the land primarily to get the timber, and had cut the timber and removed it. The consideration for the deed executed by Pearson to appellant and Taylor was paid partly in cash, and notes were executed for the remainder, which notes were subsequently paid.

Appellant defends against the right of appellee to foreclose the lien on the ground, first, that appellee's conduct estopped him to assert a lien on the land as against

the subsequent purchasers, and second, that he had actually released the lien by agreeing with Pearson, when the latter offered to pay the notes, to treat it as a payment and reloan the money to Pearson.

The issues of fact were tried before the court on oral testimony, which has been properly preserved in the record, and the chancellor found against appellant on the issues, and rendered a decree in favor of appellee, foreclosing the lien for the full amount claimed. Pearson was appellee's father-in-law, and died shortly before the commencement of this action.

Appellant's brother testified that, about a month before Pearson's death, he met appellee on the street, and that the latter stated to witness that Pearson offered to pay him the money on the notes, but that he had not actually received the money, and had loaned the money back to Pearson "in some way," and that Pearson was to give him a deed of trust on another tract of land to secure the debt. Witness testified further that he did not tell his brother about this conversation until after the commencement of the present action.

It is undisputed that appellant and Taylor paid off their notes to Pearson nearly two years before Pearson's death. Appellant testified that, when he paid the money to Pearson, the latter promised to pay it on the notes to appellee and discharge them, and he further stated that he "kept after" Pearson, but neglected to see that the money was thus paid and the notes of appellee discharged.

Pearson's widow testified that, shortly after her husband's death, she had a conversation with appellee, in which he stated to her that Pearson had offered to pay him the money on the notes, but that he did not take it, and also that appellee told her that Pearson had agreed to give him other security in the form of a mortgage on a tract of land.

Appellee testified in his own behalf, and denied that he had any conversation with appellant's brother, or that

he made the statements to Pearson's wife as testified to by her.

Even if we should treat the testimony of appellant's brother and Mrs. Pearson, concerning the statements of appellee, as preponderating evidence against the denial of appellee himself, we do not think that the testimony is sufficient to warrant a finding that appellee's conduct was sufficient to work an estoppel, or that it amounted to a payment of the notes by Pearson to appellee and a relending of the money by the latter back to Pearson. The testimony of appellant's brother on this subject is too vague. Here is his precise language in testifying on the subject: "I met Mr. Churchwell on the street at Bradford, and he came up to me and told me about Mr. Pearson owing a note on this land that my brother and Taylor had bought over there, and the way I understood it, Mr. Pearson had offered him the money, and he did not receive the money on this note, and he loaned it back to him some way, and he was to give him a deed of trust on eighty acres of land farther up in the bottom somewhere, and he came down that day to get this deed, and Mr. Pearson was in a condition that he could not make it." Further on in his testimony he made this statement: "Q. Did I understand you to say he said Mr. Pearson had offered him the money before? A. Yes, but he didn't take the money, or loaned it back to him. I didn't pay much attention to it." This conversation, according to the testimony, occurred about a month before Pearson died, which was long after the payment of the notes to Pearson by appellant and his partner, and they were not misled in any way, for the reason that the witness says he did not mention it to his brother until after Pearson's death and until after the present action was instituted. There was no injury resulting from the conversation, and therefore there could be no estoppel. Neither are the statements of the witness sufficient to prove that the money was paid and was re-lent to Pearson. There is no evidence in the case that the notes were ever surrendered or that any new notes or additional security was ever given.

The testimony of Mrs. Pearson as to appellee's admission to her merely tends to show that there was an unperformed agreement between appellee and Pearson, that appellee was to take other security from Pearson and release the liens on the land in controversy. There is no pretense that such an agreement, if made, was ever carried out; therefore the agreement did not constitute a release of the lien.

One of the notes sued on has been lost, and the action was originally instituted on the other note, but the complaint was subsequently amended so as to include the lost note. It is insisted that the court erred in decreeing recovery on the lost note as well as the other one.

Appellee explained his failure to inform his attorneys about the lost note and include it in the action as originally instituted, by stating that he did not think that he could recover on a lost note, and was afraid that he would not be able to find the note, but that later he mentioned the matter to his attorneys, and the lost note was included in the complaint.

Appellant's brother and Mrs. Pearson both testified that, in their conversations with appellee, he only mentioned having one note and only claimed a debt of $500 against the land. If there was any testimony tending to show that the lost note claimed by appellee was never, in fact, executed, or that the note had been paid, appellee's conduct in failing to inform his attorney about it and to include it in the suit, together with other testimony tending to show that he had made no mention to the witnesses of the lost note, would be cogent circumstances against appellee in his contention that he is the owner of the lost note and that it is unpaid. But it is undisputed that there were two notes for $500 each. The deed executed by appellee to Pearson recites the two notes, as well as the $300 note, which the evidence shows was paid. There is no testimony tending to show that the lost note was ever paid. Appellee himself testified positively that he lost or misplaced the note and had never been able to find it, and

that it was unpaid. We are of the opinion that the chancellor was justified in finding from the evidence that the note had been executed and had never been paid.

Decree affirmed.

WESTERN LAWRENCE COUNTY ROAD IMPROVEMENT DISTRICT v. FRIEDMAN-D'OENCH BOND COMPANY.

Opinion delivered December 17, 1923.

1. APPEAL AND ERROR—DIRECTION OF VERDICT—REVIEW.—Where the trial court directed a verdict for the plaintiff, the Supreme Court on appeal will give to the testimony in favor of the defendant its highest probative value in considering the correctness of such ruling.
2. HIGHWAYS—HOLDER OF DISTRICT'S WARRANT NOT INNOCENT PURCHASER.—Where a highway district issued a warrant reciting that it was issued "on account of advance on bond purchase of said district," and the holder of the warrant by purchase from the payee knew that the warrant was issued pursuant to the payee's agreement to purchase the bonds of the district in a large sum, which the payee failed to do, such payee was not an innocent purchaser.
3. HIGHWAYS—JURY QUESTION.—In an action against a highway district on a warrant by the transferee of the payee, in which the district counterclaimed for breach of the payee's agreement to purchase the district's bonds, the question whether the payee made the contract on his own behalf or as the transferee's agent *held* for the jury.
4. HIGHWAYS—CONTRACT—RATIFICATION.—A contract for the sale of its bonds made by a highway district before the assessment of benefits was not binding on either party, but such contract could be ratified by the parties, either expressly or impliedly, after the assessments were made.
5. HIGHWAYS—RATIFICATION OF CONTRACT FOR SALE OF BONDS.—A road improvement district, by insisting after assessment of benefits that a contract for the sale of its bonds, made before such assessment, should be performed by the buyer, will be *held* to have ratified such contract.
6. HIGHWAYS—RATIFICATION OF PREMATURE CONTRACT.—To effect ratification by a highway district of a contract prematurely made before assessment of benefits, it is not required that there should be a part performance or a re-execution of the contract, but

there is required a distinct recognition in some form of the existence and binding effect of such contract.

7. CONTRACTS—RATIFICATION—CONSIDERATION.—A ratification of a contract requires no new consideration if the voidable contract which is ratified was based upon a consideration.

8. PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO RATIFY.—An agent who entered into a contract to purchase the bonds of a road district on behalf of a bond dealer before the assessment of benefits was authorized to bind the dealer subsequent to the assessment of benefits by acts constituting ratification of the contract.

9. HIGHWAYS—BREACH OF CONTRACT TO PURCHASE BONDS—DAMAGES.—In an action on the warrant of a road district, in which the district counterclaimed damages for breach of a contract to purchase its bonds, and admitted its liability on the warrant, if the jury should find for the district, they should deduct the amount of the warrant from the amount of the district's damages.

Appeal from Lawrence Circuit Court, Western District; *Dene H. Coleman,* Judge; reversed.

Poindexter & Irby and *Ponder & Gibson,* for appellant.

1. The warrant sued on was not negotiable. 3 R. C. L. 849; 19 Wall. (U. S.) 468; 103 U. S. 74; 5 Am. St. Rep. 476; 11 Am. St. Rep. 227; 39 Am. Rep. 63; 104 Am. St. Rep. 225; 87 Am. Dec. 423; 97 Am. St. Rep. 383; 17 Am. St. Rep. 470; 26 Am. St. Rep. 604; 25 Ark. 266; 41 Ark. 245; act No. 293, Acts 1917, §§ 9 and 12.

2. Not being negotiable, the warrant was, in the hands of appellee bond company, subject to all defenses which might have been made against Turner; and, even if it should be considered as negotiable, the bond company, being interested as purchaser along with Turner, would be liable for damages for the breach of their contract of purchase of the bond issue of the district.

3. The court erred in holding that the contract entered into with Turner was void, and in instructing a verdict for the plaintiff. 106 Ark. 39; 119 Ark. 197; 149 Ark. 476; 145 Ark. 279; 115 Ark. 437; 151 Ark. 47.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

1. The instrument sued on is negotiable. Acts 1917, vol. 2, p. 1503, § 12; 152 Ark. 422; 15 N. Y. 337, 69 Am. Dec. 606; C. & M. Digest, § 7896; Brannan's Negotiable Instruments Law, 357, § 130; 8 Corpus Juris, 42, §§ 23-4. Since it is undisputed that the district has received full face value of the warrant, it is immaterial whether it is negotiable or not. 158 Ark. 58.

2. The contract was void because entered into before the plans for the improvement and the assessment of benefits were made. 108 Ark. 460; 111 Ark. 421; 119 Ark. 188; 149 Ark. 477; 150 Ark. 94; 151 Ark. 47, 55; 153 Ark. 582; 158 Ark. 284.

3. There can be no recovery because the bonds actually sold were different from those contracted for. 234 U. S. 36; 245 U. S. 337, 344; 197 N. Y. Suppl. 80; 217 S. W. 635.

4. Appellant cannot make the appellee pay for the consequences of its own folly in building the roads at a time when labor and materials were most expensive, and when bonds were selling at the minimum price. 134 Ark. 345-8; 137 Ark. 397-402; 123 Ark. 1-8; 102 Ark. 246, 251; 118 Ark. 13-16; 146 Ark. 585-592. The courts will take judicial notice of matters of public history. 150 Ark. 514-516; 144 Ark. 522, 526; 137 Ark. 600, 612.

SMITH, J. Appellee is a corporation, and will be hereinafter referred to as the company. It was the plaintiff below, and for its cause of action alleged that the defendant road improvement district, hereinafter referred to as the district, in consideration of $12,500 in money advanced to the district, executed to S. P. Turner the negotiable warrant of the district in the following form:

"Western Lawrence County Road Improvement District.

"Pay to the order of S. P. Turner, Hardy, Ark., the sum of twelve thousand five hundred no/100 dollars ($12,500) with 6 per cent. interest from date until paid.

"On account of advance on bond purchase of said district.

"Dated this 10th day of September, 1919.

(Signed) "Clay Sloan, Chairman.

"D. W. Kaiser, Secretary."

That plaintiff was the owner of said warrant; that same was overdue, and demand for payment had been refused, wherefore judgment was prayed.

The district, for its answer, alleged that it was created by special act No. 293 of the Acts of the General Assembly of 1917, and was given authority to construct certain roads, and in payment thereof to issue negotiable bonds of the district, and that, pursuant to this power, the district, on August 18, 1919, contracted with S. P. Turner, as the agent of the company, for the sale of $450,000, more or less, of the bonds of the district for the price of $439,065, or in that proportion, for the bonds issued to complete the work, payment to be made to meet the requirements of the district in constructing the improvement. That the sale to Turner, as agent of the company, was made pursuant to the terms of a written proposal to purchase, which writing concluded with the following paragraph: "In the event you should sell me these bonds, and your board should need a small fund to meet current and incidental expenses for your preliminary work, I would be glad to let you have, say, any amount up to twenty-five hundred dollars ($2,500) on your warrant, payable six (6) months, with six per cent. (6 per cent.) interest."

That, after the acceptance of this proposal to purchase, the district notified the company that $12,500 would be required for current and incidental expenses and preliminary work, and the company agreed to furnish the money, and did furnish it in the manner hereinafter set out, and received in payment, or as security, therefor, the warrant sued on.

There was an allegation in the cross-complaint filed by the district that the company had defaulted in its

contract for the purchase of the bonds, and that, to meet its obligations, the district had been compelled to resell the bonds sold to the company, at a price less than the contract price, and there was a prayer for judgment for the loss thus sustained.

At the conclusion of all the testimony the court directed the jury to return a verdict in favor of the company, upon the ground that the contract for the sale of the bonds was made before the assessment of benefits, and was therefore void, and that consequently the company was under no legal obligation to buy the bonds, and, as it was not denied that the district had received the $12,500, judgment was rendered therefor, and the district has appealed.

For the affirmance of the judgment the company insists that the court properly directed a verdict in its favor, upon the ground stated, and also for the reason that the writing sued on is the negotiable promissory note of the district, which the company acquired, for value, as an innocent purchaser.

Inasmuch as the verdict was directed in favor of the company by the court, we must, of course, give the testimony its highest probative value in favor of the district in considering the questions of fact involved.

We consider, first, the question whether the writing is in fact a negotiable instrument in the sense that the district may not interpose the defenses set up in its answer and cross-complaint.

It will be observed that it appears, from the face of the instrument itself, that it was issued by a governmental agency, and that it is unlike the instrument involved in the case of *Road Imp. Dist. No. 4* v. *Southern Trust Co.*, 152 Ark. 422, which was in the form of a promissory note. The writing here involved is not in form a promissory note, but is an order on the district for a sum of money, which, in the contemplation of the parties, could not be paid and was not intended to be paid until funds had been derived from the sale

of the bonds themselves with which to make the payment. It is such an instrument as is ordinarily designated as a warrant. The undisputed testimony is that Mr. Duhme, the company's secretary and its admitted representative, was present when the issuance of this warrant was authorized by the board of commissioners of the district, and knew all the circumstances attending its issuance. Duhme knew, as the warrant itself recites, that it was issued "on account of advance on bond purchase of said district," and was issued pursuant to the paragraph set out above, which is copied from Turner's proposal to purchase the bonds, in which it was agreed to make a preliminary advance, Turner having agreed, in Duhme's presence, to make an advance of $12,500, instead of $2,500, as at first proposed; and Duhme also knew that the warrant covered that advance. In other words, the company had full knowledge of the contract for the purchase of the bonds, and of the consideration for the warrant. This fact will more fully appear in a discussion of another feature of the case, and we conclude therefore that the verdict should not have been directed in favor of the company upon the theory that it was an innocent purchaser for value.

At the time the warrant was issued by the district and acquired by the company, there had been no assessment of the benefits, and the warrant was, on that account, a tentative obligation which might never acquire validity in the hands even of an innocent purchaser, for, as will hereafter be fully shown, the district had no power to make enforceable contracts, except for preliminary expenses, until the betterments to accrue from the proposed improvements had been assessed and the fact ascertained that the betterments would exceed the cost of the improvement.

The controlling questions of fact are these: (1) Did Turner contract for himself, or for the company, for the purchase of the bonds? (2) Was the tentative contract ratified after the assessments had been completed

and the power thus conferred on the district to make a valid enforceable contract?

Mr. Duhme testified, on behalf of the company, that the company was not a party to the contract for the purchase of the bonds, and that he was present, during the negotiations for the purchase of the bonds, in an advisory capacity only to Turner, who was acting solely for himself. Turner corroborates this statement. It appears, however, that Duhme was present during the negotiations, and actively participated in all the discussions relating thereto. The attorney for the district testified that, during these negotiations, Duhme stated what should be done in buying the bonds, so far as the purchasing side of it was concerned, and stated that the company was buying the bonds, but that the company wanted the contract taken in the name of Turner so as to help him get started as its agent in this State. The commissioners substantially corroborated this statement, and they all testified that Duhme was largely deferred to in matters of detail, such as the date of the bonds and the places of deposit of the proceeds, and, after all the terms had been agreed upon and the sale consummated, some one called over the telephone to inquire who had bought the bonds, and one of the commissioners, who answered the call, turned around and asked the name of the purchaser, and Mr. Duhme said, "Friedman-D'Oench Bond Company." The commissioner was not able to pronounce the name, and again asked the name of the purchaser, when Turner spoke up and said, "Why, say S. P. Turner bought the bonds," and Duhme said, "That's all right; let it go at that."

The question of the advance to be made was then discussed, and the district asked for $12,500, but Turner said he did not have that much money, whereupon Duhme said the company would take care of that. It is true that the check which the proposal to bidders required the successful bidder to deposit was deposited by Turner and signed by him, but this check was never cashed; and

was not intended to be cashed. Upon the contrary, the warrant was attached to a draft drawn on Turner, the draft being dated September 10, but the draft was forwarded to St. Louis, the *situs* of the company, and was paid by the company on presentation on September 13, so that Turner, in fact, never advanced any sum on account of the warrant. There are a few other circumstances, of more or less probative value, tending to show that the company was, in fact, the purchaser, but was acting in the name of its disclosed agent. These matters are all denied by Duhme and by Turner, but the truth of the evidence is, of course, for the jury, and we are of the opinion that, if the testimony on behalf of the district is accepted as true, it is legally sufficient to support the finding that Turner was acting as agent for the company, and that the company was the real purchaser of the bonds.

Counsel for the company quote from the case of *Gould* v. *Toland*, 149 Ark. 477, the following statement of the law: "Where there was no assessment of benefits in a road improvement district, and therefore no ascertainment that the cost of the improvement would come within the assessed benefits to the lands in the district, a contract with a bond dealer for the sale of the district's bonds is unenforceable, except as to advances made for preliminary expenses, which, with interest, may be recovered."

We reaffirm what we there said; but it must be remembered that there was never any final assessment of benefits in that case, so that the contract for the sale of the bonds never became an enforceable agreement; while here the betterments were assessed and the fact definitely ascertained that the cost of the improvement would not equal the betterments assessed.

We have frequently, and recently, discussed the power of improvement districts to make contracts prior to the assessment of benefits, and these cases need not be reviewed here. The law on the subject was sum-

marized and restated in the case of *Bowman Engineering Co.* v. *Ark. & Mo. Highway Dist.*, 151 Ark. 47, and it will suffice to quote from that case what we there said: "There was no separate contract with the engineers for the preliminary work, but the contract was one for the performance of all engineering work, both preliminary and permanent. We have decided in several cases that a contract for permanent work is premature and ineffective until it is determined, as a preliminary matter, what the estimated cost of the improvement will be and what the benefits will amount to, so that it can be seen that the cost will not exceed the benefits. *Cherry* v. *Bowman*, 106 Ark. 39; *Thibault* v. *McHaney*, 119 Ark. 188; *Gould* v. *Toland*, 149 Ark. 476. We said, in *Thibault* v. *McHaney, supra,* referring to *Cherry* v. *Bowman,* that, under authority of that case, a tentative contract might be entered into for permanent work in advance of the assessment of benefits, yet such contract would not be operative and binding on the district until there has been an assessment of benefits. In *Gould* v. *Toland* we said that the premature contract for permanent construction remained in abeyance and did not become effective until the assessment of benefits had been made for the purpose of ascertaining whether the cost of the improvement would exceed in value the assessment of benefits. None of the cases referred to decide whether or not it is within the power of the commissioners to withdraw from a tentative contract before it becomes effective, and it is unnecessary to do so in the present case, nor do those cases decide just what is necessary to make the contract effective. We think, however, that it follows necessarily from those decisions that there must be a distinct recognition in some form of the existence of the prematurely made contract, after the time comes for it to be made effective; in other words, when it is determined that the total cost of the improvement will not exceed the benefits. In the present case there was an assessment showing benefits in excess of the esti-

mated cost of the improvement, and therefore it was within the power of the commissioners to make the contract. The evidence shows that, after the assessments were completed and approved, the contract was treated as being in effect, and proceedings were taken thereunder looking to the construction of the permanent work. The engineers performed a substantial part of the contract in supervising the work of advertising and receiving bids for the letting of the contract. The case differs in this respect from *Thibault* v. *McHaney* and *Gould* v. *Toland, supra*, in that the facts in those cases were that there was never any assessments of benefits, and the time never came for the contract to become effective. The circumstances in this case bring it directly within the rule in *Morgan Engineering Co.* v. *Cache River Drainage Dist.*, 115 Ark. 437, where the contract for the whole of the engineering work was made in advance, as in the present case, and some of the permanent work was done thereunder. We decided in that case that the contract was valid, and that the obligations thereof could not be impaired by subsequent legislation, so far as concerned the payment of earned compensation for work done under the contract."

The assessments in the instant case were made both by proceedings in court, pursuant to the provisions of the act creating the district, and by a curative act, which was act No. 54 of the Acts of the Special Session of the General Assembly for the year 1920, approved February 5, 1920.

But the question remains, did the contracting parties ratify the contract after the assessments were made? It was essential that this should thereafter be done, because, prior to that time, the contract for the sale of the bonds was tentative and did not bind either party, and this ratification could be effected only by the concurring acts of the parties, as neither could ratify for the other. This ratification, however, might be implied

as well as express. *Pike* v. *Douglas,* 28 Ark. 59; *Lyon* v. *Tams,* 11 Ark. 189.

There is, of course, no question about a ratification by the district, as it has at all times insisted that the contract should be performed, and now so insists, and it has constantly maintained that the company was entitled to the bonds, and was required by the contract to take them, and the testimony shows that the district used every effort to perfect the details incident to the approval of the bonds by the attorneys selected for that purpose, and to hasten their issuance and delivery.

The contract of sale provided that the bond issue should be approved by the firm of Rose, Hemingway, Cantrell & Loughborough, and the opinion of that firm was made conclusive of the question of the validity of the bond issue, and the testimony shows without dispute that the attorney for the district, acting pursuant to the directions of the board of commissioners of the district, was continually urging action by the examining attorneys, as the district had let a contract for the construction of the improvement and was anxious to obtain the money to meet its obligations arising under the construction contract.

We are of the opinion that the case of *Bowman Engineering Co.* v. *Arkansas & Mo. Highway Dist., supra,* announces the correct rule whereby it may be determined whether there has been a ratification. On that subject we there said: "We think, however, that it follows necessarily from those decisions that there must be a distinct recognition in some form of the existence of the prematurely made contract after the time comes for it to be made effective."

To effect ratification it is not required that there should be a part performance, or a re-execution of the contract, but there is required a distinct recognition in some form of the existence and binding effect of the premature contract, and, if there is such recognition, the contract is ratified. This view accords with the law

of ratification applicable to any contract which requires ratification to acquire binding effect. For instance, in the very recent case of *Hardy* v. *New Rocky Grocery Co.*, 159 Ark. 109, we said: "If appellant, with knowledge that appellees had furnished supplies to the Hensleys on the faith of this note, ratified it by treating it as an existing liability on her part, it is unimportant that she supposed at the time that the note had been transferred to Gathright, instead of the name of appellees being substituted." On page 8 of the same volume of the reports, in the case of *Corning Roller Mills* v. *William Kelly Milling Co.*, we said: "Without reiterating and discussing the evidence, suffice it to say the correspondence between the appellant and the appellee shows that appellant, with full knowledge that the assignment had been made, ratified the same by recognizing the binding effect of the contract, and asking the appellee to cancel the same, or, if it would not cancel the same, to indulge appellant in the matter of extending the time for shipment."

See also, *Whitehead* v. *Wells*, 29 Ark. 99; *Dierks Lbr. Co.* v. *Coffman*, 96 Ark. 505; *Gunter* v. *Williams*, 137 Ark. 530; §§ 1765 and 1805, Page on Contracts.

At § 537 of Page on Contracts (2d ed.), it is said: "One who has entered into a contract which he might avoid because of personal incapacity, such as an infant, an insane person, a drunkard, and the like, has the election to affirm such contract, or to disaffirm it, and, when he has exercised his election, with full knowledge of the facts, such election is final. Accordingly, if such person elects to affirm the transaction, his election is final and conclusive, without any new consideration."

It thus appears that ratification is a form of contract which requires no new consideration, if the voidable contract, made valid by ratification, was itself based upon a consideration.

Now, it must be conceded that the testimony does not show a ratification by the company, unless it is

bound by Turner's actions, and further, that Turner's actions amounted to a ratification. We have said that it was a question of fact for the jury to determine whether Turner was acting for himself, or for the company, in the purchase of the bonds; and if the jury should find that Turner was acting for himself, and not for the company, there would then be no question of ratification in the case. However, if Turner was acting for the company in the matter, then it would be bound by his actions, for, as we said in the case of *Whitehead* v. *Wells, supra,* the principal is affected with notice of all his agent knows in the line of his duty and the scope of his powers, and it was there held, to quote in part from one of the headnotes, " * * * that the jury might well have inferred a ratification of the defendant's acts, if not from the conduct of the plaintiff in recovering the receipt, at least from that of the agent in assenting to the transaction." At § 1805, Page on Contracts, it is said: "The express approval of an unauthorized contract and the adoption of it by agents who have authority to enter into such contracts on behalf of the corporation, amounts to a ratification."

There is testimony to the effect that, after the assessments had been completed, Turner made numerous inquiries covering the time of the delivery of the bonds, and was insistent that the delivery be expedited, as the bond market was going to pieces and the bonds could not be sold to advantage if the delivery was postponed, and he is shown also to have discussed the rate of interest which the bonds should bear. Turner insists that he not only acted for himself alone, but that he did nothing after the assessment was made in recognition of the binding effect of his contract. But this is a question for the jury to pass upon.

The bonds were purchased on the basis of $439,065 for $450,000 worth of bonds, which were to bear interest at the rate of 5½ per cent, but the contract gave the company the right to have the bonds bear 5½ per cent.,

or a less rate, the price of the bonds being automatically adjusted to result in a payment by the district on the basis stated for whatever amount of bonds might be issued.

The district incurred a substantial expense in preparing the bonds for delivery, and in printing them, and, according to the testimony in its behalf, it was not until March 31 that Turner advised the district that the bonds would not be accepted, at which time the price of the bonds had fallen to such an extent that a large loss was sustained when the district was compelled to sell them at the then current market price, and it is this loss which the district seeks to recover in its cross-complaint.

If, upon the issues which we have discussed, the jury should find for the district, then the district would be entitled to recover the difference between the market price of the bonds on the date when the district was first advised that the bonds would not be accepted and the contract price which the company had agreed to pay, together with the expense connected with the preparation and issuance of the second bond issue, made necessary by reason of the company's default, after allowing the company credit for the advance of the $12,500.

In addition to what we have already said, two questions have arisen in our consultation which require some discusssion in view of the opinion of two members of the court. It is their view that these questions should be decided, inasmuch as the case is being remanded for a new trial.

One of these is that, if it be found by the jury that the contract for the purchase of the bonds was not in fact the company's contract, but the contract of Turner, the company would have no right to recover the advance made, because of its default in refusing to accept the bonds. In other words, it is their view that the contract was one for the sale of bonds, and the payment was made as an advance payment, and

the contract is one which would be performed in its entirety only by the delivery of the bonds by the district and the acceptance and payment thereof by the company. The $12,500 advance was to be repaid in bonds, and not in money. It was, in fact, an advance payment on the bonds, and the company cannot make default by refusing to accept the bonds contracted for and then profit by its own default by asking the return of the payment made under the contract.

It is the opinion of the majority, however, that the question does not arise for the consideration of the jury, for the following reasons: No such issue is raised by the pleadings, and is not discussed in the excellent briefs filed by eminent counsel in the case. It would, in the opinion of the majority, be a contradiction in terms to say that the company had made an advance payment under a contract, yet had made no contract. The district, by filing a counterclaim, has waived the question that the company defaulted by refusing to accept the bonds. There is no question now about the warrant having been prematurely issued, for the assessments have been made and completed, and the $12,500 was used by the district in the construction of the improvement, and that sum, by whatever name it may be called, has become a valid subsisting obligation of the district, and should be paid to the legal owner thereof, and no one questions the company's ownership. Indeed, as we understand the case, the district admits its liability to the plaintiff for the amount of this warrant and the interest thereon, and it seeks only to recoup damages for the alleged breach of the contract of purchase.

The second question which has arisen in our consultation is the effect of the decision in the case of *Hopson* v. *Hellums*, 111 Ark. 421. It is the view of the CHIEF JUSTICE and Mr. Justice HART, that the case cited holds that the directors of an improvement district, operating under a statute like the one there involved—or like the one which created the appellant road improve-

ment district—had no authority to make a binding executory contract for the sale of bonds, even though the assessments have been completed and have become final when such contract is made, and that the contract out of which the instant litigation arose is void for that reason.

The majority do not concur in that view, for two reasons. In the first place, we do not interpret the case cited as holding that the district had no authority to make an executory contract for the sale of its bonds. We do not understand that the question of the right of the commissioners to make an executory contract was either considered or involved.

In a prior appeal (*Hopson* v. *Hellums,* 108 Ark. 460), a contract for the construction of the proposed improvement had been held to be void as against public policy because the commissioners had, apparently, let a single contract for the construction of the improvement and the sale of the district's bonds. We held that there should have been separate contracts for the construction of the improvement and for the sale of the bonds. In other words, that the contract for the construction of the improvement should be let for a sum payable in money, and not in bonds, in order that competition might be encouraged, and that the bidding might not be limited to those contractors only who were able to accept bonds in payment for their work.

Upon the remand it was insisted that there was a separate letting of the contract for the construction of the improvement and for the sale of the bonds, although the same party was the successful bidder for both contracts. We held, on the second appeal, that there was no legal objection to the contractor for the construction of the improvement purchasing the bonds of the district when they were not purchased at the same time as the letting of the construction contract. *Hopson* v. *Hellums,* 111 Ark. 421.

It appears, however, from the facts stated in the opinion on the second appeal, that the General Assem-

bly, on March 8, 1913, passed an act whereby it was provided that the commissioners of the improvement distract were forbidden from issuing any bonds whatever without first being petitioned so to do by a majority in numbers, acreage and value of the landowners in the district, and it was insisted by those who opposed the construction of the improvement that this consent had not been obtained. In opposition to this view, it was contended that the district had already contracted for both the construction of the improvement and for the sale of the bonds, and that the act was invalid as impairing the obligation of those contracts. The court made a finding that, prior to the passage of the act of the General Assembly, valid contracts had been entered into, and that the act was void because it impaired the obligation thereof.

Without repeating here the facts there recited, it may be said that we reversed the finding and decree of the court below, not because of the lack of power on the part of the district to sell the bonds, but because, as a matter of fact, the district had not done so. We said the testimony of Hahn, the alleged purchaser, "shows that he had not in reality purchased the bonds himself, but was only attempting to have some one else purchase them," and that "the whole proceeding in regard to the borrowing of the money and the sale and purchase of the bonds was *in fieri*." In other words, Hahn had contracted to do the work and had agreed to find a buyer for the bonds at a stipulated price to the district, but had failed to do even that before the act of March 8, 1913, was passed.

But, if it should be held that the district has no power to make an executory contract for the sale of bonds, that holding would not affect the contract set out above, because it became a complete and binding contract, if the facts be found as the district contends they are. There has even been a part performance of it by a substantial payment to the district, to be applied in

partial discharge of the obligation assumed, according to its terms, by the purchaser.

For the error in directing the verdict the judgment is reversed, and the cause remanded for a new trial.

McCULLOCH, C. J., (dissenting). My conclusion is that the court erred in directing a verdict against the district for the recovery of the sum of money ($12,500) advanced on the purchase of bonds. If there was a valid contract for the sale and purchase of the bonds, as contended by the district, and as a majority of the judges now hold, then the district was entitled to submit its counterclaim for damages on account of the breach of the contract by appellee. On the other hand, if there was no valid contract for the sale of the bonds, as I believe to be the case, then appellee is not entitled to recover the amount mentioned, for the reason that it refused to comply with the agreement to purchase the bonds. And since the money was advanced, not as a loan, but as a mere advance on the purchase of bonds, appellee should not be permitted to demand the return of the money without complying with the agreement upon which the money was advanced.

It seems clear to me that, whether the contract for the purchase of the bonds was valid or not, appellee should not be permitted to repudiate its agreement and, at the same time, demand a return of the money advanced conditioned upon that agreement. I have failed to see any contradiction of terms involved in this feature of the controversy, as stated by the majority. It is a simple principle of justice that a party cannot repudiate his contract and at the same recover upon it, and, even if the contract was valid for any reason, and the money was advanced on the contract, the party who refuses to perform cannot recover it back. The party should not permitted to repudiate one part of the contract and claim the benefits under another part.

It is unimportant to determine from the evidence whether Turner was appellee's agent or not, for it is

undisputed that the money was advanced on the purchase of bonds, and, even if Turner acted for himself in the transaction, appellee knew that the money was not a loan, but was merely an advance on the purchase of bonds. In fact, the written instrument upon which appellee instituted this action shows on its face that it was for money advanced on the purchase of bonds.

I am further of the opinion that the majority reached the wrong conclusion in holding that there was a valid contract for the sale of the bonds, and that there was an issue to be submitted to the jury as to the right of the district to recover damages for the alleged breach of the contract by appellee.

My interpretation of the decision of this court in *Hopson* v. *Hellums,* 111 Ark. 421, is that, under the statute authorizing the commissioners of the district to borrow money and issue bonds, there was no authority to enter into an executory contract for the sale of bonds. The authority thus conferred is limited to the borrowing of money and the issuance of bonds as the evidences of the indebtedness. In the case referred to there had been a contract between a drainage district and Hahn & Carter for the construction of an improvement, which the court held, in the second opinion in the case, to be a valid contract, and there was also a contract for the sale of the bonds. The bonds had been prepared and signed and delivered to a bank in Pine Bluff for delivery. Subsequently the Legislature enacted a statute making it unlawful for the commissioners of the district to issue bonds except upon petition of a majority of the landowners, and it was contended (in fact the trial court so held) that the statute was void because it impaired the obligation of the contract. We held, however, that there was no impairment of the obligation of the contract, for the reason that the contract was not binding on the district until the money was actually loaned and the bonds delivered. We held, in effect, that there was no authority to create an obligation by making an executory

contract to borrow money and sell bonds. In disposing of the matter, we said:

"This testimony conclusively shows that Hahn & Carter, at the time of the passage of the act of March 8, 1913, had not entered into a completed contract with the board whereby it had sold to them for cash the bonds of the district. The whole proceeding, as we view the evidence, in regard to the borrowing of the money and the sale and purchase of the bonds, was *in fieri*. The commissioners, under the former opinion, on rehearing, were not prohibited from borrowing money from, and selling the bonds to, the contractors, but there can be no issuance and sale of bonds in the sense of the statute authorizing the board to issue and sell the same except when there has been a completed contract by which the money has been borrowed on such bonds. Section 15 of the act, under which the board was authorized to proceed, provides that, 'in order to hasten the work, the board may borrow money, * * * and may issue negotiable bonds therefor.' Under the plain terms of the statute, it does not appear from the evidence in this record that the board of commissioners had borrowed any money or issued and sold any bonds for money borrowed prior to the passage of the act of March 8, 1913."

After careful reconsideration of the matter with the other judges, I am unable to escape the conclusion that the plain and necessary effect of that decision was to hold that there was no binding obligation until there was an actual lending of money and issuance and delivery of bonds. I think that is the correct interpretation of the statute, for mere authority to borrow money and issue evidences of the debt does not authorize a preliminary executory contract to borrow money. In other words, there is no contract between the parties until the money is actually borrowed, and that is precisely what was said in the opinion in *Hopson* v. *Hellums, supra.*

My conclusion upon the whole case is that appellee was not entitled to recover for the money advanced, for

the reason that it refused to accept bonds which had been tendered, and that, on the other hand, appellee is not liable for damages for breach of the contract, which was invalid, and that the case should be disposed of here by reversing the judgment and dismissing both the original complaint of the district and the counterclaim of appellee.

Mr. Justice HART concurs in these views.

EX PARTE DAME.

Opinion delivered November 19, 1923.

COURTS—JURISDICTION OF SUPREME COURT—WRIT OF HABEAS CORPUS.—The Supreme Court has no authority to supervise or control the action of courts inferior to the circuit court, except by reaching back through the decisions of the latter court.

Certiorari to Jackson County Court.

Writ denied.

Pope & Bowers, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock* and *Darden Moose,* Assistants, for appellee.

McCULLOCH, C. J. The petitioner, Ben Dame, was, by the verdict of the coroner's jury in Randolph County, committed to jail on the charge of unlawful homicide, and he presented a petition to the county judge of that county for a writ of habeas corpus for the purpose of inquiring into his right to bail. On the return of the writ the county judge heard the evidence, and made an order denying bail. The petitioner now comes to this court with a petition for certiorari to bring up for review the proceedings before the county judge, and he is met at the outset by the contention of the Attorney General that the writ will not run from this court to the county court, or the judge thereof, and that this court has no jurisdiction to review the action of the county judge or the county court except through a decision of the circuit court.

We are of the opinion that the contention of the Attorney General is correct, and that this court has no jurisdiction in the matter as it now stands. The jurisdiction of this court, except in the single matter mentioned in the Constitution as to quo warranto proceedings, is limited to appellate and supervisory jurisdiction over the inferior courts of law and equity, meaning, of course, the circuit and chancery courts. Art. 7, § 4, Constitution of 1874. The Constitution expressly vests in the circuit courts of the State "a superintending control and appellate jurisdiction over county, probate, court of common pleas and corporation courts and justices of the peace, and shall have power to issue, hear and determine all the necessary writs to carry into effect their general and specific powers." Art 7, § 14. Other sections of the Constitution expressly confer the right of appeal to the circuit court from all such inferior courts. Art. 7, §§ 33-35. In construing these various provisions of the Constitution we have decided that this court has no power to supervise or control the action of courts inferior to the circuit court except by reaching back through the decisions of that court. *Featherstone* v. *Folbre,* 75 Ark. 510; *Jones* v. *Coffin,* 96 Ark. 332.

In *Featherstone* v. *Folbre, supra,* it was said: "Under our judicial system, appeals from all tribunals inferior to the circuit courts go to the circuit courts, and from the circuit courts to this court. This court has no original jurisdiction to control or supervise any proceedings of the probate court. That all belongs to the circuit court as matters of original jurisdiction, and to this court by appellate and supervisory jurisdiction over the circuit courts. This court supervises and controls all courts inferior to the circuit courts only through the latter courts. In no other way can the harmony of our judicial system, as at present constituted, be preserved. Construing the two sections of the Consti-

tution as above quoted, our conclusion is that the framers of the Constitution of 1874 did not intend to confer upon the Supreme Court concurrent jurisdiction with the circuit courts to issue writs of mandamus, etc., in aid of the appellate and supervisory jurisdiction of the circuit courts over inferior courts, but only in aid of its own appellate and supervisory jurisdiction, and its supervisory jurisdiction over the probate courts comes, not originally, but by way of appeal and supervision, through the circuit courts." The Constitution provides (art. 7, § 37) that a county judge "shall have power, in the absence of the circuit judge from the county, to issue, hear and determine writs of habeas corpus, under such regulations and restrictions as shall be provided by law," and it is contended by counsel for petitioner that this provision of the Constitution raises the county court to a place of equal dignity with the circuit court, with concurrent jurisdiction in issuing and hearing writs of habeas corpus, and brings it within the range of the appellate and supervisory control of this court. That contention is unsound, for the provision of the Constitution with reference to jurisdiction of a county judge to issue and hear writs of habeas corpus does not change the status or grade of the county court or of the county judge, when acting judicially, nor does it exempt it from the supervisory control of the circuit court. This provision is put into the Constitution as an additional protection to the citizens' right of liberty, but it fits into the Constitution as a part of the harmonious whole and is subject to the other provisions of the Constitution with reference to supervisory control of the various courts.

It is argued with special earnestness that the provision in § 37, art. 7, of the Constitution, conferring power on county judges to issue orders for injunctions and other provisional writs in the absence of circuit judges, subject to review in vacation by the circuit judge, demonstrates that the framers of the Constitution did

not intend to confer authority on circuit courts to review the orders of county judges in issuing, hearing and determining writs of habeas corpus. The obvious purpose was to authorize superior judges to review in vacation the orders of county judges granting injunctions or other provisional writs, so that such orders should not necessarily remain in force until the superior court should convene to review them in term time. The provision has no reference to writs of habeas corpus and does not affect the general authority of a circuit court to exercise superintending control over inferior courts. The authority of the county judges to issue and hear writs of habeas corpus is conferred upon them as a part of their duties as the presiding judge of the court, and the hearing is a judicial act subject to review under the superintending control of the circuit courts.

It is true, as urged by counsel, that courts of equal power and dignity have no power to review or control the decisions of each other, but it does not follow from that axiom that, merely because concurrent jurisdiction is conferred upon two courts, one is divested of jurisdiction to review the decisions of the other. That depends upon the Constitution, which confers the jurisdiction. As an illustration, attention may be called to the fact that our Constitution confers concurrent jurisdiction in certain civil and criminal matters upon justices of the peace and circuit courts, yet the superintending control of the circuit court over justices of the peace is expressly granted. So it is with the jurisdiction of the county judge in the matter of habeas corpus, and, as before stated, the fact that the county court, or county judge in vacation, has jurisdiction in such matters does not exempt the exercise of that jurisdiction from the superintending control of the circuit court.

The jurisdiction of each of the courts in our system is a matter of constitutional control, as each derives its several powers from the Constitution, or, at least, is controlled by constitutional limitation. The writ of

habeas corpus, with all of its ancient sacredness, does not rise above other constitutional provisions regulating the exercise of judicial power. It merely fits into our judicial system, along with other provisions. The reasoning of Mr. Justice SCOTT, in his dissenting opinion in the case of *Ex parte Hunt,* 10 Ark. 288, which was adopted in the later case of *Carnall* v. *Crawford County,* 11 Ark. 604, and other cases since that date, is applicable.

It is further contended that, even if the circuit court has appellate and supervisory control over the decisions of the county court or county judge in matters of habeas corpus, such control must be exercised by the circuit court, and not by the judge in vacation, and that, as there may be delay in waiting for the circuit court to convene so that the jurisdiction can be exercised, this presents a situation which compels the exercise of superintending control by this court. This contention is not sound, for the reason that the jurisdiction of this court cannot be affected, one way or the other, by the necessary delay in the exercise of the supervisory control by the circuit court of inferior courts and tribunals. The jurisdiction of the county court over habeas corpus is conferred, as we have already said, for the convenience and benefit of persons who are being deprived of their liberty, but, when that jurisdiction is invoked by a person, he must abide by the established provisions with reference to supervisory control over that court. He invokes the exercise of the jurisdiction with its limitations, and the fact that there may be possible delay in the exercise of supervisory control by the circuit court does not enlarge the power of this court. The same argument was made in *Featherstone* v. *Folbre, supra,* and was rejected by this court as unsound. This court has decided in several cases that a hearing on habeas corpus before a judge is the exercise of judicial power, which may be reviewed on certiorari (*Ex parte Jackson,* 45 Ark. 158; *State* v. *Neel,* 48 Ark. 283; *State* v. *Williams,* 97 Ark. 243), but in none of those decisions

is it intimated that this court can exercise a superintending control directly over the proceedings of courts inferior to the circuit court. The effect of the decisions in those cases is merely that the absence of the right of appeal, on account of the fact that the judicial power is exercised in vacation, does not prevent the exercise of superintending control on certiorari, which is thus made, *ex necessitate,* a substitute for appeal, but this does not work any change in the constitutional jurisdiction of the court in the exercise of such supervision. Those decisions, giving full effect to them, still leave the jurisdiction of this court limited to the control and supervision of chancery and circuit courts.

It follows that the petition for certiorari should be denied, and it is so ordered.

WOOD, J., (dissenting). In classifying the rights of persons, next to the right to enjoy life and to have one's body secure from injury, is the right of the personal liberty of individuals. 1 Blackstone's Comm., star pages 128-133. "This personal liberty," says Blackstone, "consists in the power of locomotion, of changing situations, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." I Blk. Comm., p. 134, § 2. This liberty of the individual—freedom of the person—is the bedrock of all the highest and best civilizations of the earth. Without it there can be no progress in the arts and sciences, no worthwhile development in government, no health, happiness or prosperity, and life itself would be an unendurable burden. The peculiar form of the writ or instrument, which has been devised and resorted to in times of peace through all the ages since its origin, to preserve this freedom of the person, is known in our law as habeas corpus—technically, "*habeas corpus ad subjiciendum et recipiendum.*" It is a high prerogative writ, a writ of right upon proper application, which existed at the common law independent of statute, and which is issued by a court, judge or tribunal

having authority to issue it, and "directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of capture and detention (*ad faciendum, subjiciendum, et recipiendum*) to do, submit to, and receive, whatsoever the judge, court, or tribunal awarding such writ, should consider in that behalf." 3 Blackstone, Comm. 131. By the common law it issued out of the Court of King's Bench, corresponding to our State courts of last resort, not only in term time, but also *during the vacation,* by a fiat from the Chief Justice or any other of the judges. When issued in vacation, it was usually returnable before the judge himself who awarded it, who proceeded thereon, unless the term intervened, when it was returned into court. 3 Blk. Comm., star page 131; 4 Bacon's Abr. 364.

So important has been this writ to the rights and happiness of individuals in particular and the civilization of mankind in general, commentators on the laws of England and this country have written of it at length. Several law writers have made it the exclusive subject of large volumes; historians and encyclopedists have made it the subject of special themes and given it the extensive treatment its place in history demands. Some of them, seemingly with crusader's zeal, have endeavored to trace the history of the writ to its origin, but, as yet, no one has been able to find it. It is treated by historians and law writers as a *primordial* fact of history, but its origin is hidden in the depths of antiquity. See "Story of Habeas Corpus," 18 Law Quarterly Review, p. 64; 29 C. J., p. 9, § 2. Since the love of freedom is a natural emotion deeply implanted in every sentient intelligent human being, it is safe to say that some peaceful legal method for securing the liberty of the individual, of the same purport as that of our present writ of habeas corpus, must have been coeval with organized society and established government. One writer says: "In the interdict *De libero homine ex habendo* the origin of the English habeas corpus may be traced. Such, in the Roman law, was the name of the writ founded on the

perpetual edict of the praetor: "*Ait praetor: quem liberum dolo malo retines exhibeas*—the praetor declares: Produce the freeman whom you unlawfully detain." This edict was compiled and is found in the Pandects of Justinian, and the comments of the celebrated Roman lawyers thereon show that the application of the edict and the writ involved the same principles as in our *habeas corpus ad subjiciendum* of the English law, and the latter most probably was therefore borrowed from the civil law. *Lane* v. *Cotton,* 12 Mod. R. 482; *Acton* v. *Blundell,* 12 Meeson & Welsby, 353; *Bechervaise* v. *Lewis,* L. R. 7 Common Pleas 372; *Agnew* v. *Belfast Banking Co.,* 2 Irish Reports 204, collated in Howe's Studies of the Civil Law, p. 128-129.

Glanvil, Coke and Blackstone all mention ancient writs which were in existence long before Magna Charta for liberating persons who had been unjustly imprisoned on criminal charges. Church on Habeas Corpus, p. 3, § 3; Coke's Institutes, 3rd Part, p. 209; 4th Part, p. 182; 2 Blk. Comm., star pp. 128-129. Mr. Blackstone says: "The great charter of liberties which was obtained, sword in hand, from King John, and afterwards, with some alteration, confirmed in Parliament by King Henry Third, his son, contained very few new grants, but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England." "The Great Charter," he says, "was afterwards confirmed by the statute of the 25th of Edward I and directed to be allowed as the common law, and sentence of excommunication was directed to be denounced against all those that by word, deed, or counsel act contrary thereto, or in any degree infringe it." I Blk. Comm., star pp. 127-129.

The 36th chapter of the Great Charter provides: "Nothing shall be given or taken for the future for the writ of inquisition of life or limb; but it shall be given without charge, and not denied."

The 39th chapter of the Great Charter declares: "No freeman's body shall be taken, nor imprisoned, nor

disseised, nor outlawed, nor banished, nor in any way be damaged, nor shall the King send him to prison by force, excepting by the legal judgment of his peers, and by the laws of the land." And chapter 40 declares: "To none will we sell, to none will we deny, to none will we delay right or justice." These declarations of the Great Charter were intended to conserve personal liberty, to protect the person of the individual against illegal imprisonment. They contained the most rigorous restraint upon arbitrary power that the world hitherto had known; they furnished the germ of that individual liberty protected by law which henceforth was to be the archetype for all written constitutions, especially of the English-speaking race, preserving the liberty of the individual and the freedom of the person against illegal restraint of every character and from the encroachments of arbitrary power in government. These declarations do not expressly mention the ancient writs, "*de odio et atia,*" "*de homine replegiando,*" spoken of by Glanvil, Coke and Blackstone, but they were intended to preserve and enlarge to Englishmen for all time all the rights that had obtained under these ancient writs, and more. *One of the most sacred of these rights was to prevent any person remaining in prison until the arrival of the justices in Eyre, when he should be tried.* See Richard Thompson's Essay on Magna Charta, p. 218. Therefore the above declarations of the Great Charter, it would seem, were sufficient of themselves, if duly enforced, to have forever guaranteed the personal liberty of Englishmen.

However, notwithstanding the Great Charter had been declared and put in force as the common law, and had been confirmed and enlarged in other charters, notably by those of Henry III and Edward I, and although it was corroborated by a multitude of subsequent statutes, which Sir Edward Coke reckons at thirty-two from the first Edward to Henry IV (2 Inst. Proem.), nevertheless the royal prerogative was still bold and strong. It continued so throughout the reigns of the

Plantagenets, the Tudors and the Stuarts. During this long period there was a constant struggle to advance arbitrary power in defiance of the rights and liberties secured to the people of England by the Great Charter. Although the charter of liberties was declared to be the common law, and had not been repealed, nevertheless a tribunal called the Star Chamber flourished, which did not proceed according to the common law. * This tribunal dispensed with trial by jury, proceeded on rumor, applied any torture, and inflicted any punishment short of death. It, with the "high commissioner" and the "privy council," were powerful auxiliaries of cruel and rapacious rulers to force the nobility, the gentry and the yeomanry alike to bow in servile obedience to the will of the crown. The cruel and unusual punishments, horrible tortures, excessive fines, and outrageous exactions inflicted and imposed, often without any opposition from, and with the warrant of, the judges themselves, during the reigns of such tyrannical rulers as Henry VII, Henry VIII, and Bloody Mary, of the Tudors, and James I, Charles I, Charles II, and James II of the Stuarts, finally brought forth from Parliament the Petition of Right of Charles I, the Habeas Corpus Act of Charles II, and the Bill of Rights of James II. These were indeed all fresh charters of liberty, and the most famous was the Habeas Corpus Act of the 31st of Charles II, which, Macaulay says, was "the most stringent curb that ever legislation imposed on tyranny." 2 Macaulay, Hist. England, 3.

Such is the history of the writ of habeas corpus, so far as it is necessary to trace it in England, an account of which may be found in any of the standard English histories, such as Hallam's Const. History, Hume, Macaulay, and Green. This history, as we shall now

*There needed but this one court in any government to put an end to all regular, legal, and exact plans of liberty, for who durst set himself in opposition to the crown and ministry, or aspire to the character of being a patron of freedom, while exposed to so arbitrary a jurisdiction. 2 Hume, 119.

see, enters into the very warp and woof of the fabric of the jurisprudence of our own country and judicial system. A knowledge of this history is absolutely necessary to the proper construction of our own Constitution and statutes concerning habeas corpus.

Our forefathers inherited all the ancient rights and liberties that had been guaranteed to Englishmen under the free Constitution of Great Britain, as declared in Magna Charta, the Petition of Right, and the Bill of Rights, which three, Lord Chatham, the great commoner of that day, pronounced the "Bible of the English Constitution." These were declaratory of, and intended to secure, personal rights which the freemen of Great Britain contended were a part of their birthright under the common law long before Magna Charta. In these great documents our ancestors, the American colonists, found the prototype for their Declaration of Independence from the mother country, and, after it had been achieved by Revolution, for the Constitution of the United States. "It was," says Judge Story, "under the consciousness of the full possession of the rights, liberties and immunities of British subjects, that the colonists, in almost all the early legislation of their respective assemblies, insisted upon a declaratory act acknowledging and confirming them." 1 Story's Const., § 165; Hurd on Habeas Corpus, chp. 5; *Ex parte Yerger,* 8 Wallace 85-95. See *Ex parte Holman,* 28 Ia. 125; *People ex rel. Tweed* v. *Liscombe,* 60 N. Y. 559; also "Magna Charta in America," 17 Columbia Law Review, p. 1; "Origin of Magna Charta," 1 Canada Law Journal, pp. 202-5.

The Constitution of the United States and of all the States of the Union recognize the privilege of the writ of habeas corpus as one which every person in the United States is entitled to as a co-heir of all the rights, liberties and immunities of the free and natural-born subjects of Great Britain, as those rights were declared and enforced under the free constitution of that realm. The right of personal liberty, after Magna Charta, was ever a favorite object of the English law, and the most celebrated of the

numerous acts of Parliament which were intended to protect and preserve that liberty is the statute of the 31st of Charles II, "which," Blackstone says, "is frequently considered as another Magna Charta of the Kingdom." 3 Blackstone, Comm., star p. 136. Mr. Hurd quotes an elegant philosophical writer as saying of the Habeas Corpus Act of the 31st of Chas. II, "we must admire it as the keystone of civil liberty, the statute which forces the secrets of every prison to be revealed, the cause of every commitment to be declared, and the person of the accused to be produced, that he may claim his enlargement, or his trial *within a limited time.* No wiser form was ever opposed to the abuses of power." Hurd on Habeas Corpus, 99.

Mr. Hallam says before the enactment of this Habeas Corpus Act "it was also a question whether a single judge of the Court of King's Bench could *issue the writ in vacation.* The statute therefore enacts that, where any person other than persons convicted, or in execution upon legal process, stands committed for any crime except for treason or felony plainly expressed in the warrant of commitment, he may, *during the vacation,* complain to the chancellor, or any of the twelve judges, who, upon sight of a copy of the warrant, or an affidavit that the warrant has been denied, shall award a habeas corpus." 3 Hallam's Const. Hist., p. 20. Hume says, "the Great Charter had laid the foundation for this valuable part of liberty; the Petition of Right had renewed and extended it, but some provisions were still wanting to render it complete and prevent *all evasion or delay from ministers and judges.*" 2 Hume's Hist. of England, 568. Those provisions were supplied by the Habeas Corpus Act, which has as *its dominant note the issuance of the writ in vacation.* "Every prisoner," says Green, "committed for any crime, save treason or forgery, was declared entitled to his writ, even *in the vacations of the court,* and heavy penalties were enforced on judges or jailers who refused him this right." 2 Green's England, p. 431.

"The Habeas Corpus Act," the statute of the 31st of Charles II, says Chancellor Kent, "restored the writ of habeas corpus to all the efficacy to which it was entitled at common law and which was requisite for the due protection of the liberty of the subject. That statute has been reenacted or adopted, if not in terms, yet in substance and effect, in all the United States. * * * The substance of the provisions on the subject of the writ of habeas corpus may be found in the statute of the 31st of Chas. II, chp. 2, which is the basis of all the American statutes on the subject." 2 Kent's Comm., p. 9, 43-44. Our habeas corpus act, as found in the Revised Statutes, p. 433 (ch. 79, Crawford & Moses' Digest), is referred to in a note to Judge Kent's text as being modeled after the statute of 31st of Chas. II. That statute, among other things, provides that it shall be the duty of any court of record, or the judge of any court of record, *in vacation,* to issue the writ of habeas corpus whenever "there is evidence, from any judicial proceeding had before them, that such person is illegally confined or restrained of his liberty within the jurisdiction of such court or judge." Sections 7 and 9, ch. 73, Revised Statutes, and §§ 5084 and 5090, Crawford & Moses' Digest.

The provisions of our Habeas Corpus Act, *supra,* were a part of the laws of the Territory of Arkansas, and were brought into the Revised Statutes of the State soon after the State was admitted into the Union under an act for a revision of the statute laws of the State, approved Oct. 6, 1836, which statutes, as revised, were adopted by the General Assembly of the State in the year 1837. In the Constitutions of the State of 1836, 1861, 1864 and 1868, it is expressly declared that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety will require," and the provision of our present Constitution is that "the privilege of the writ of habeas corpus shall not be suspended except by the General Assembly in case of rebellion, insurrection or invasion, as the public safety may require it." Article 2, § 11. Our

present Constitution also contains the following provision: "In the absence of the circuit judge from the county, the county judge shall have power to issue orders for injunctions and other provisional writs in their counties, returnable to the court having jurisdiction, provided that either party may have such order reviewed by any superior judge in vacation in such manner as shall be provided by law. The county judge shall have power, in the absence of the circuit judge from the county, to issue, hear and determine writs of habeas corpus under such regulations and restrictions as shall be provided by law." Article 7, § 37.

All the constitutions adopted from 1836 to 1874, inclusive, contained the following provisions: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory judisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs." Article 7, § 4, Const. of 1874.

Now, some of the members of the Convention of 1874 which framed our present Constitution were very able lawyers. They were familiar with the provisions of prior constitutions and with the provisions of the habeas corpus act as contained in the Revised Statutes, and, as some of them also were learned men and students of history, they had a thorough knowledge of the history of the writ of habeas corpus as I have traced it above and of the common law and statutes of Great Britain providing for the privileges of this writ and for their enlargement and enforcement. Having this history in mind, it

cannot be doubted that the framers of our present Constitution intended by the various provisions concerning the writ of habeas corpus, to which I have referred, to give this writ a unique and distinctive place in our jurisprudence and judicial system. They intended to give it that preeminent place commensurate with its glorious history in the civilization of mankind. For arbitrary power in government and personal liberty—the freedom of the person—have always been "deadly foes, ever at dagger's point in endless feud," and this great writ of right, through all the centuries, has been, in times of peace, the the most powerful instrument in the hands of the individual to thwart the will of cruel and despotic rulers in their efforts to repress and restrain personal freedom. It is the constitutional bulwark erected by the Anglo-Saxon race to protect the individual against illegal imprisonment and to guarantee the liberty of his person against unlawful restraint of every character.

Keeping in mind the history of this writ, as it comes to us from the remotest antiquity and as it obtained under the common law, and as it has been enforced since Magna Charta under the acts of Parliament in Great Britain for hundreds of years, especially since the enactment of what is known as the Habeas Corpus Act of the 31st of Chas. II, ch. 2, *supra,* I have not the slightest doubt that it was the intention of the framers of our organic law, Federal and State, to make it impossible in this country for an individual to be unlawfully restrained of his liberty for any longer time than is absolutely necessary to apply to some court, *or some judge in vacation,* having jurisdiction, for the writ of habeas corpus to have the cause of his imprisonment inquired into. It would be a travesty upon our jurisprudence and a reproach to our judicial system if it were otherwise. But it is not.

The purpose of the framers of our Constitution in article 7, § 37, *supra,* is to give the county judge precisely the same jurisdiction, in the absence of the circuit judge from the county, to issue, hear, and determine the

writ of habeas corpus, that the circuit judge has. In the absence of the circuit judge from the county, the county judge takes his place. He is, for the purpose named, in the absence of the circuit judge, a circuit judge in jurisdiction, and his order in the judicial proceeding before him is not to be reviewed by the circuit court or judge, but is to be reviewed by the only tribunal that has appellate and supervisory jurisdiction over the circuit court and circuit judge, to-wit, the Supreme Court, or one or more of its judges in vacation, in aid of the appellate jurisdiction of the Supreme Court.

According to the express language of article 7, § 37, *supra,* a county judge, in the absence of the circuit judge from the county, has the power to issue orders for injunctions and other provisional writs in their counties, returnable to the court having jurisdiction of those writs, and the order issuing such provisional writs (such as injunction, mandamus, etc), may be reviewed by any superior judge in vacation in such manner as may be provided by law. But not so with the order of the county judge, acting in the absence of the circuit judge, in the writ of habeas corpus proceeding. The orders of the county judge in habeas corpus proceedings, in the absence of the circuit judge, are not subject to review by the circuit judge or circuit court for the very reason that, for this time and this purpose, he is, by the Constitution, substituted for the circuit judge. He is *ad hoc* the circuit judge, with the same judicial power as the circuit judge, and there is no judge or court above him except the Supreme Court or the judges thereof. The statute, § 5084, C. & M. Digest, was passed in conformity with art. 7, § 37 of the Constitution, *supra,* and gives the county judge jurisdiction "coextensive with his county, in the absence of the circuit judge therefrom, to issue, hear and determine writs of habeas corpus on proper application of parties entitled thereto, in all cases *and with like powers* in which the circuit judge may issue and determine such writ." When the county judge has exercised these powers, under the Constitution and stat-

ute, his final order in the proceeding must be reviewed by the same method and in the same manner that the order of the circuit judge is reviewed, which manner and method are pointed out in *Ex parte Hart,* 39 Ark. 126; *Ex parte Goode,* 19 Ark. 410; *Ex parte Kittrell,* 20 Ark. 499; *Ex parte Jackson,* 45 Ark. 158; *State ex rel. Ark. Industrial Co.* v. *Neal,* 48 Ark. 283; *State ex rel. Attorney General* v. *Williams,* 97 Ark. 243.

It is quite certain that, if the framers of the Constitution had intended to give the circuit judge or the circuit court the power to review the order of the county judge in habeas corpus proceedings, in the absence of the circuit judge from the county, they would have expressly granted such jurisdiction to the circuit court, or circuit judge in vacation, just as they did in cases of injunctions and other provisional writs. The fact that they did not do so shows that it was their intention that the county judge, acting in the absence of the circuit judge from the county, in issuing, hearing and determining writs of habeas corpus, should be substituted for the circuit judge, and that his order in the proceeding should be subject to review only as the circuit judge's order could be reviewed. *Expressio unius est exclusio alterius* applies.

This court has often ruled that proceedings in habeas corpus before a circuit judge or chancellor at chambers is judicial, and subject to review by the Supreme Court on certiorari issued by this court, to bring up the record of such proceedings. *Ex parte Jackson,* 45 Ark. 158; *State* v. *Neal,* 48 Ark. 283; *State ex rel.* v. *Williams,* 97 Ark. 243, and cases there cited.

It is said in the majority opinion that the obvious purpose of § 27, art. 7, of the Constitution, conferring power on county judges to issue orders for injunctions and other provisional writs, in the absence of circuit judges, subject to review in vacation by circuit judges, "was to authorize superior judges to review in vacation the orders of county judges granting injunctions or other provisional writs, so that such orders should not neces-

sarily remain in force until the superior court should convene to review them in term time; but that there is no such authority, under the above constitutional provision, for reviewing habeas corpus proceedings before a county judge in the absence of a circuit judge, except by the circuit court. In other words, it is argued that habeas corpus proceedings before a county judge, in the absence of the circuit judge from the county, cannot be reviewed by the Supreme Court, nor even by a circuit judge or chancellor in vacation, but can only be reviewed by the circuit court. Such a construction gives these injunctions, and the other provisional writs which have reference merely to the protection of property rights, a greater importance and higher dignity, under our judicial system, than the writ of habeas corpus, which protects and preserves the freedom of the person—the personal liberty of the individual. It is unbelievable that the framers of our Constitution would have provided a method for reviewing the vacation orders of county judges granting injunctions or other provisional writs for the protection of property rights, in order that the same might not remain in force and the rights of property delayed until the superior court could review them in term time, and yet not have made some provision for the review of the orders of county judges in habeas corpus proceedings in order that the sacred rights of personal liberty might not be delayed until a superior court should convene to review them. In the minds of the framers of our Constitution, personal freedom—the liberty of the person—was of far greater importance than all other personal or property rights. Next to life itself, the right of personal liberty is sacrosanct; and the framers of the Constitution, instead of making the writ of habeas corpus, which is intended to preserve and protect the liberty of the person, subordinate and inferior to injunctions and other provisional writs designed to protect mere propety rights, have exalted it to a preeminent place, as we have seen, in our judicial system. In view of its ancient origin, its glorious history, and its sacred purpose to

preserve the personal liberty of individuals against illegal imprisonment, the framers of our Constitution intended, in art. 7, § 37, *supra,* that orders of the county judge, in the absence of the circuit judge from the county, in habeas corpus proceedings, should be reviewed by this court in the same manner as such proceedings by the circuit judge or chancellor in vacation are reviewed. The framers of the Constitution conferred upon county judges the power, in the absence of circuit judges from the county, to issue, hear, and determine writs of habeas corpus, under such regulations and restrictions as shall be provided by law. The framers of our habeas corpus act in conformity with both the spirit and letter of the Constitution, provided that "the county judge shall have power coextensive with his county, in the absence of the circuit judge therefrom, to issue, hear, and determine writs of habeas corpus, on proper application of parties entitled thereto, in all cases and with like powers in which the circuit judge may issue and determine such writs." Section 5084, C. & M. Digest. Writs of habeas corpus may be issued by a circuit judge in vacation, and his order may be reviewed by this court. Likewise, writs of habeas corpus may be issued by county judges, in the absence of circuit judges from the county, with like powers in which the circuit judge may issue and determine such writs, and the orders of the county judges in such cases are also reviewable by this court. Were it otherwise, it would be entirely possible to illegally imprison an individual, who was justly entitled to his liberty, for many days, and even months, awaiting a term of the circuit court, before the orders of the county judge refusing to allow him bail could be reviewed.

To illustrate: In most of the circuit courts of the State there is a period of at least six months between the terms of court. Section 2207, C. & M. Digest. The circuit judge, during vacation, is usually not present in any of the counties in the circuit except that one in which he resides. If one who is illegally imprisoned should apply to a county judge for writ of habeas corpus, and

the county judge, after hearing the writ, should make an order refusing to discharge him or to grant him bail, then the prisoner, under the construction which the majority has given the Constitution and habeas corpus act, would have to remain in prison until the circuit court convened before the order of the county judge could be reviewed. In such case the unfortunate victim of the erroneous order of the county judge would be unlawfully deprived of his liberty during all this time. If the county judge remanded him, and he should thereafter apply for a second writ to a circuit judge or chancellor, and it appeared that he had been once remanded for an offense not bailable, he would have to be again remanded without further proceedings. Section 5083, C. & M. Digest. In the language of Judge EAKIN, speaking for the court in *Ex parte Jackson,* 45 Ark. 158, at page 161: "It would be a disgrace to any government if the decision of such matters were left to the arbitrary will of one man, without appeal or means of correction."

With all due deference, it occurs to me that it is a deplorable misapprehension of our Constitution and habeas corpus act to so construe them as to make possible such results as I have indicated. I feel sure that such was not the intention of our lawmakers in framing our Constitution and habeas corpus act. There is certainly nothing in the language of either to justify such construction. Such an interpretation, instead of preserving the harmony of our judicial system, absolutely destroys it and thwarts the will, both of the framers of the Constitution and habeas corpus act, which were intended by them to embody in enduring form the sacred privileges of the writ of habeas corpus, and the procedure under it, which obtained in England hundreds of years before our forefathers transplanted them into the organic law of this great republic under the all-embracing provision, "The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

In reaching my conclusion I have not overlooked those decisions of our court to the effect that the Supreme Court has no power to supervise and control the action of courts inferior to the circuit court except by reaching back through the decisions of that court. I am well aware of the decisions of our court to the effect that, "under our judicial system, appeals from all tribunals inferior to the circuit courts go to the circuit courts, and from the circuit courts to this court;" and that "this court has no original jurisdiction to control or supervise any proceedings of courts inferior to the circuit courts, except through the circuit courts." See *Featherstone* v. *Folbre,* 75 Ark. 510; *Jones* v. *Coffin,* 96 Ark. 332-336. It was my lot to express the opinion of the court in those cases. The court did not have under consideration article 7, § 37, of the Constitution and our habeas corpus act, *supra,* and I did not consciously express anything in those cases that has the remotest connection, even by analogy, to the question now under consideration. Those cases are cited as authority for the argument made in the opinion of the majority to the effect that the county judge, in the absence of the circuit judge from the county, in issuing, hearing and determining habeas corpus proceedings under the Constitution and habeas corpus act, is an inferior court to the circuit judge or circuit court, and hence the decision of the county judge in such proceedings can only be reviewed by the circuit court. This argument begs the question, is based upon a false premise, and is wholly unsound. It assumes that the jurisdiction conferred upon the county judge under the Constitution and habeas corpus act is but the exercise of similar or equal jurisdiction as that of the county court, that the county judge, in habeas corpus proceedings, is as the county court. Such is not the case at all, as I have shown. The county court has no jurisdiction in habeas corpus proceedings. The framers of the Constitution could have vested this same judicial power in some other officer or tribunal than the county judge, and, if they had done so, could it be said that the

jurisdiction thus conferred was inferior to the jurisdiction conferred upon the circuit judge in habeas corpus proceedings? Certainly not. The jurisdiction conferred upon the county judge, under the above provision of the Constitution, is concurrent and equal in dignity to the jurisdiction of the circuit judge. In exercising this jurisdiction he is not the county court at all, but the specially designated tribunal to meet the exigencies of the situation caused by the absence of the circuit judge from the county and to prevent the delay that might be incident to waiting his return or in applying to other tribunals having power to issue the writ. If I am correct in my conclusion that the jurisdiction of the county judge under the Constitution and habeas corpus act is not inferior to, but the same as, that of the circuit judge, and that it was the intention to substitute him for the circuit judge in the absence of the latter from the county, then it is obvious that the doctrine of *Featherstone* v. *Folbre* and *Jones* v. *Coffin* have not the slightest application to the question. Certainly nothing that was said in the opinions in those cases conflicts with the views I am now expressing.

I am also aware of the decision of this court in *Carr* v. *State,* 93 Ark. 585. In that case Carr was accused of, arrested, and imprisoned for murder in the first degree. He applied to Judge Lea, during vacation, for bail, which was refused. He then applied to me during vacation of the Supreme Court, for certiorari to bring up the record before the circuit judge, and a writ of habeas corpus to admit him to bail until the Supreme Court, in term time, could review the action of the circuit judge denying him bail. Acting under what I conceived to be the power of the judges of the Supreme Court under art. 7, § 4, *supra,* I issued the writ of habeas corpus, and, on reviewing the record of the proceedings before Judge Lea, I was of the opinion that the prisoner was clearly entitled to bail, making my decision in the premises returnable to the Supreme Court for its review. The court held that I, as an associate justice, had no jurisdiction in the

premises, and that my action in admitting the prisoner to temporary bail until the decision of the Supreme Court could be had was of no authority or effect. I dissented in that case, and have always regretted that I did not write out my dissent. I am still dissenting. For it is my firm conviction that article 7, § 4, of the Constitution, conferring upon the judges of this court power to issue writs of habeas corpus in aid of the appellate and supervisory jurisdiction of the Supreme Court, was intended to cover just such cases as that presented to me as associate justice in the Carr case. It is well known that at that time the vacations of the Supreme Court lasted for a period of three months, and if an associate justice did not have the power to issue the writ of habeas corpus in aid of the appellate jurisdiction of the Supreme Court, and to admit to bail the prisoner until the order of the circuit judge in vacation could be reviewed by the highest court, then Carr, who, in my opinion, was justly entitled to bail (and who was afterwards either acquitted or convicted of only a lower grade of homicide than murder in the first degree), would have been compelled to remain in unlawful imprisonment until the vacation of the Supreme Court was over. If a judge of this court could not, in vacation, issue a writ of habeas corpus and admit to bail a prisoner who was entitled thereto, under the above circumstances, then the provision of art. 7, § 4, of the Constitution is rendered absolutely nugatory. The writ of habeas corpus is a writ whose only function is to inquire into the illegal imprisonment of a person, and if a judge of this court could not issue such a writ, under the above circumstances, then it could never be issued at all, for he has no original jurisdiction to issue it, and the constitutional provision would thus be wholly without effect.

By statute, § 1432, C. & M. Digest, the common law of England, so far as the same is applicable and of a general nature, not local to that Kingdom and not inconsistent with the Constitution and the laws of this State, shall be the rule of decision in this State. By act of

Parliament, as we have seen, Magna Charta was to be allowed as the common law. Mr. Hurd, in his excellent work on Habeas Corpus, pages 102 and 103, tells us that, about the year 1757, a bill was pending in the House of Lords to extend the power of granting writs of habeas corpus to all judges of His Majesty's courts *in vacation time,* in all cases not within the statute of the 31st of Chas. II. Lord Mansfield, he says, "spoke two and a half hours on the bill, and said, among other things, that 'the writ of habeas corpus at common law was a sufficient remedy against all those abuses the bill was supposed to rectify.' " A majority of judges of England, during the pendency of the bill, declared in favor of the exercise of the powers, regardless of the passage of the bill. The judges of the King's Bench, after the passage of the habeas corpus act, were accustomed to issue the writ, during the vacation, in all cases whatsoever. Lord Denman, Chief Justice of the Queen's Bench, in *Watson's Case,* 36 Com. L. Rep. at p. 261, shows that at that time the practice had prevailed for the judges to issue the writs *in vacation* for at least one hundred and sixty years.

We have the common law; we have Magna Charta; we have the Constitution of the United States; we have our own Constitution and our habeas corpus act—all recognizing and guaranteeing the privileges of the writ of habeas corpus to preserve and protect the liberty of the person against illegal imprisonment, with all the liberal procedure thereunder. With all these safeguards, as practiced in Great Britain for centuries, "to procure and complete to every individual that sense of independence which is the noblest advantage attending personal liberty," it is indeed unfortunate that our court should have so construed our Constitution and habeas corpus act as to make it possible for one to be unlawfully restrained of his liberty for a longer period than is absolutely required to make proper application to some judge or tribunal given, under our Constitution and laws, the jurisdiction to issue, hear and determine writs of habeas corpus.

My conclusion of the whole matter is that, under our Constitution and habeas corpus act, any one unlawfully deprived of his personal liberty may apply to the circuit judge or chancellor in vacation, and, in the absence of the circuit judge from the county, to the county judge, before indictment; and if any of these judges deny him the liberty to which he believes himself entitled, he may appeal directly from their decision to the Supreme Court, and, if the Supreme Court is in vacation, he may apply to one or more of its judges for certiorari and habeas corpus in aid of the appellate jurisdiction of the Supreme Court, to be granted bail, if entitled thereto, until the Supreme Court can review the ruling of the judge refusing him bail. Such was the doctrine intended to be announced in *State ex rel. Attorney General* v. *Williams, supra,* where we said: "This court has jurisdiction to review the proceedings of inferior courts and of judges and chancellors at chambers, upon application for writs of habeas corpus, and to review, revise and correct the action of the inferior court or judge. * * * Where there is no subordinate court competent to issue the writ, the Supreme Court will award it, as held in *Ex parte Robins, supra.* Thus it will be seen our law guards carefully the rights of the accused throughout, and provides an orderly administration of justice; the chancellors and judges named in the habeas corpus act to issue writs and grant bail in accordance with its terms, except after indictment for capital offenses not expressly made bailable; after such indictment the circuit court wherein the same is pending, or the judge thereof in vacation, to grant bail without interference from any other court or judge, with the Supreme Court over all to review, revise and correct the action of the lower court or judge, and grant relief itself where, because of unavoidable accident or casualty, no inferior court is competent to do so." See also *State ex rel.* v. *Neal, supra.*

If the Constitution and habeas corpus act be so construed, it makes a perfect system, complete and harmonious in every detail, relating to habeas corpus, which

is not in conflict with any other part of our judicial system. But the construction of the majority leaves a break in our judicial system and harks back, it seems to me, to those dark and cruel days when, by the word of the despot and the decree of the Star Chamber, men were thrown in jail and allowed to linger for months, and even years, because the King's judges suspended the sacred privileges of the writ of habeas corpus. 2 Hallam's Constitutional History, p. 39 *et seq.* 44; 3 Hallam's, p. 18; 3 Blk. Comm., star p. 136.

Mr. Justice HUMPHREYS authorizes me to say that he concurs fully in the above opinion.

DRUMMOND v. BATSON.

Opinion delivered February 4, 1924.

1. APPEAL AND ERROR—DECISION ON FORMER APPEAL.—Where it was held upon a former appeal that a partnership existed, such holding is the law of the case on a subsequent appeal.
2. PARTNERSHIP—EXCLUSION OF PARTNER—LIABILITY FOR PROFITS.—Where a partner, before expiration of the time limit of the partnership, wrongfully excluded his copartner from participation in the business, and, after such time limit, continued to use the partnership property in conducting the business, he will be liable to account to his copartner for the latter's share of the profits until the partnership is legally dissolved.
3. PARTNERSHIP—GOOD FAITH.—Partners are bound to conduct themselves with good faith towards each other, and the partnership property cannot be used for the private gain of one of the partners to the exclusion of the others.
4. PARTNERSHIP—EXCLUSION OF PARTNER—LIABILITY.—Where plaintiff and defendant operated a hotel under a lease not providing for its renewal, and defendant wrongfully excluded plaintiff from participating in the business, and thereafter, by reason of his exclusive possession, secured a renewal of the lease and continued to use the partnership property, plaintiff was entitled to participate in the profits of the business under the new lease until a legal dissolution.
5. LIS PENDENS—PURCHASER WITH ACTUAL NOTICE.—A purchaser of an interest in partnership property from one of the partners,

pending a suit for dissolution and accounting of which he had actual knowledge, is not an innocent purchaser, but is a constructive trustee, and liable to account to the other partner, notwithstanding no *lis pendens* was filed, as required by Crawford & Moses' Dig., § 6979.

6. PARTNERSHIP—PURCHASE OF PARTNER'S INTEREST.—One who, pending a suit between partners for an accounting, with actual notice, purchased an interest in the partnership property from one of the partners, *held* subject to the rule that a trustee cannot profit from the estate for which he acts.

7. EQUITY—PLAINTIFF MUST DO EQUITY.—Where a partner, wrongfully excluded by his copartner from participation in the operation of a hotel, elected to share in the profits until the partnership was legally dissolved, the other partner and one to whom he sold the business were entitled to compensation for managing the business, and the expenses of receivership and accounting should be divided, following the maxim that he who seeks equity must do equity.

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

STATEMENT OF FACTS.

This is an appeal from a decree of the chancery court winding up and settling the affairs of a partnership and distributing its assets to the persons entitled thereto.

The suit was commenced in the chancery court by N. W. Drummond against S. H. Batson on June 7, 1922. Drummond asked for a judgment against Batson upon certain promissory notes for the amount of $5,000, and for the foreclosure of a lien on Batson's half interest in the furniture and fixtures of the Garrett Hotel in El Dorado, Arkansas, to secure said indebtedness.

Batson filed an answer and cross-complaint against Drummond on June 19, 1922. He defended the suit on the ground that a partnership existed between himself and Drummond in operating the Garrett Hotel, and that his share of the profits of the partnership was more than sufficient to pay the notes sued on. By way of cross-complaint he alleged that Drummond had unlawfully prevented him from taking any part in running the partnership business, and had denied that he had any interest therein. He asked that the business of the partnership

be wound up and that an account be stated between them. He asked for the appointment of a master to state the account, and for a receiver to take charge of the partnership property and wind up its affairs and distribute the proceeds arising from the sale of the partnership property to the partners.

On the 11th day of April, 1922, N. W. Drummond and S. H. Batson entered into a written agreement whereby the former sold to the latter a half interest in all furniture, fixtures and other property used in operating the Garrett Hotel in El Dorado, Arkansas, and also a half interest in a lease on the Garrett Hotel, which Drummond had already secured, and which terminated on the first day of January, 1923.

According to the testimony of Batson, a partnership was formed between them for the purpose of operating the hotel, and both of them proceeded to discharge their respective duties in operating the hotel under the partnership. Subsequently Drummond denied that any partnership existed between them, and excluded Batson from any share in the management of the hotel.

On the other hand, Drummond denied that any partnership existed between them, and claimed that Batson owed him for the purchase price of a half interest in the furniture and fixtures of the hotel, and had given him a lien on said property to secure the payment thereof.

The chancery court refused to appoint either a receiver or a master, as prayed for in the cross-complaint of Batson. The chancellor, however, did undertake to state an account between the parties, and, after entering a decree in favor of Drummond for the balance found to be due upon the notes sued on, ordered a sale of Batson's interest in the property in satisfaction thereof. This decree was entered of record on the 22d day of June, 1922. To reverse that decree Batson appealed to this court.

Upon appeal it was held that, under the facts established in the chancery court, a partnership existed between Drummond and Batson for the operation of the

Garrett Hotel. The decree of the chancery court was reversed, and the cause remanded with directions to appoint a master to state an account between the parties, in accordance with the opinion, and to appoint a receiver to take charge of and wind up the partnership business. The opinion of the court was delivered by Judge SMITH on March 26, 1923. *Batson* v. *Drummond,* 158 Ark. 29.

Upon the remand of the case to the chancery court, a receiver and a master were appointed on the 26th day of April, 1923. The receiver was directed to take charge of the hotel and the partnership business, and to wind up the partnership affairs. The master was directed to state an account between the partners.

During the pendency of the former appeal to this court, N. W. Drummond secured from R. N. Garrett, the owner of the hotel, a new lease, in writing, on it. The lease is dated November 3, 1922, and runs from January 1, 1923, to December 31, 1923. On February 3, 1923, N. W. Drummond, by a contract in writing, assigned and transferred to R. E. Harland the new lease, and, in the same instrument, conveyed to him all of the furniture, fixtures, and other personal property forming a part of the Garrett Hotel as then maintained and operated by N. W. Drummond. N. W. Drummond had been operating the hotel during all of this time, and turned the same over to R. E. Harland on February 3, 1923. R. E. Harland then operated the hotel until May 1, 1923, when, by the orders of the chancery court, he turned it over to the receiver. The receiver continued to operate it until it was sold by him, under orders of the court, on June 30, 1923. During all of this time there was an oil boom in El Dorado, Arkansas, and the hotel was operated at a profit. There was a continued rise in the rental value of property, especially of good hotel property like that in question.

The court considered the new lease for the year 1923, which Drummond had secured in his own name, to be a part of the partnership's assets, and directed it to be sold, and it was sold by the receiver in connection with the other assets of the partnership.

The chancellor held that Batson was entitled to one-half of the net profits derived from the operation of the hotel from the time he was excluded from the partnership until the sale by the receiver of the partnership assets under directions of the court. This included the time that the hotel was operated by N. W. Drummond, by R. E. Harland, and by the receiver.

Other facts will be stated in the opinion.

A decree was entered in accordance with the findings of the chancellor, and the proceeds derived from the sale of the property were directed to be distributed to the parties found to be entitled to them.

N. W. Drummond and R. E. Harland have both appealed from the decree of the chancery court.

Geo. R. Haynie and *Goodwin & Goodwin,* for appellant Drummond.

1. Batson estopped himself from claiming any interest in the lease for the year 1923. 136 Ark. 405; 153 Ark. 432, 243 S. W. 811.

2. The partnership was dissolved as of the date of the filing of the cross-complaint by Batson, June 19, 1922, and thereafter, until the expiration of the then existing lease on the Garrett Hotel, Drummond was a trustee of the lease for Batson until its expiration on December 31, 1922. 72 S. E. 638; 153 N. W. 522; 45 Pa. Super. Ct. 575; 110 Miss. 553.

3. Since the contract which created the partnership was not a contract for any definite time, the relationship created was a partnership at will. 58 Mich. 476, 25 N. W. 472; 138 Pac. 544; 15 Ari. 280; 142 Pac. 194; 114 S. W. 260; 168 U. S. 328; 148 N. Y. S. 801, 85 Misc. Rep. 510; 81 Ark. 68, 98 S. W. 685.

U. L. Meade, W. H. Hawkins and *Marsh & Marlin,* for appellant Harland.

1. When, on February 3, 1923, Drummond sold to Harland the lease for the remainder of the year 1923 and the fixtures and furnishings, Harland thereby procured a good title to the lease for that year, and a good title to a one-half interest in the furnishings and fixtures. In

none of the cases relied on by appellee has it been held that, when partners fall out and a suit is filed for dissolution of the partnership, either of them from that time is precluded from dealing solely for himself with respect to any property not then a part of the partnership assets. The litigation at once ends the relation of trust and confidence. The relation is broken when one partner sues the other for an accounting and winding up the affairs of the partnership. 60 S. W. (Tenn.) 619.

2. Notice of *lis pendens* was never filed concerning this lease, or calling it into question. C. & M. Digest, § 6979. While it has been held that actual notice of the pendency of a suit involving certain property given to one who expects to deal in it is as effectual as would be the filing of a notice of *lis pendens,* yet that does not extend to the point of holding that notice so given that a thing was involved in a certain suit, which was not in fact involved or described in such suit, was of any effect. Notice of a fact that does not exist cannot bind any one. 27 L. R. A. 449; 31 S. C. 527. There was no express agreement as to the duration of the time the partnership should last. By implication it was to cease when the lease that was jointly owned by Batson and Drummond terminated. 227 U. S. 57 Law. ed. 608. The suit pending was notice to Harland that the lease for the year 1922 was jointly owned by Batson and Drummond, that they were partners in the operation of the hotel under that lease, and that Batson owned a half interest in the furniture and fixtures, etc. It could not have been construed as notice that Batson claimed any interest in a lease for 1923. 8 Barb. 122, 27 L. R. A. 467, note, 1st col.; 12 Jones & S. 116; Collyer on Partnership, par. 160; 27 L. R. A. 483, note, 1st col.; 50 Mich. 401; 27 L. R. A. 484, note, col. 2.

3. The procedure adopted against Harland amounted to depriving him of his property without due process of law. 47 L. R. A. 744. See also 42 Mich. 272; 124 Fed. 61; 84 Cal. 327; 103 Cal. 297; 113 Ky. 751; 64 Fed. 443; 83 Ill. App. 514; 16 How. Pr. 527. The

proceeding was summary, instead of a suit in equity wherein the issues between Harland and the receiver could be tried out apart from the rights of the other parties in the main proceeding. 107 Fed. 898, 899.

McKay & Smith, Mahony, Yocum & Saye, and *J. N. Saye,* for appellee.

1. The partnership owned the lease for 1923. All assets of the partnership which the plaintiff seized and converted to his own use remained partnership assets. Plaintiff held them as trustee for the use of the firm. The trust as to the use of the partnership property remained attached to the lease, as well as the other assets, since a part of the value of the lease was the expectation of renewal, a thing which is deemed so actual and vital that when a new lease is had it is considered to be a graft on the old. 63 How. pr. 401; 16 R. C. L., § 413; 20 R. C. L. 880, § 93; note 32 L. R. A. (N. S.) 869; 12 Jones & S. 116; 61 Barb. 310; 18 Pick. 68; 17 Ves. Jr. 299; 18 Deg. M. & G. 787; 2 Deg. M. & J. 173; 1 Macn. & G. 294; 51 N. Y. 357; *Id.* 274; 115 Pa. 129; 37 Pa. 360; 28 Am. Dec. 430; 3 Sandf. Ch. 131; 27 L. R. A. 483-4, note; 53 Ark. 152.

2. The alleged sale from the plaintiff to Harland was void as to the defendant. This was a non-trading partnership. All of the property was employed in the business, and the latter could not be run without the property. Hence, one partner could not sell it, even to an innocent purchaser, without the consent of the other. 1 Rowley, Modern Partnership Law, § 44; *Id.,* § 552; 20 R. C. L. 983. The intervener therefore was a trespasser when he took possession.

3. The intervener was not an innocent purchaser. He had actual knowledge of the pendency of the litigation between plaintiff and defendant, and purchased with knowledge thereof. He is bound by the subsequent orders and decrees of the court with reference thereto. Actual notice destroys the necessity of a *lis pendens.* 50 Ark. 305; 84 Ark. 282; 118 Ark. 144; 75 Ark. 228; 122 Ark. 449; 128 Ark. 403. The plaintiff and the intervener

should be treated as one in determining what defendant's rights are in the subject-matter of this litigation. 227 U. S. 489.

4. It was error to allow the plaintiff $2,500, and the intervener $750 as compensation for conducting the business while the litigation was pending. Defendant has a partner's lien upon the shares of plaintiff and intervener in the property, business, profits and surplus, to secure payment of his share of the profits and surplus, and that lien is superior to any right, title, interest or equity that the plaintiff and interest may have therein. 2 Rowley, Modern Partnership Law, § 669; 1 *Id.*, § 371; 20 R. C. L. 1030, § 273; *Id.* 1032, § 274; 26 U. S. 585.

5. The argument that intervener is being deprived of his property without due process of law is frivolous. If he had not voluntarily intervened, it would have become the duty of the court to bring him in. C. & M. Digest, § 1101.

HART, J., (after stating the facts). It is the contention of counsel for appellants, N. W. Drummond and R. E. Harland, that S. H. Batson is not entitled to share in the profits from operating the hotel after the 31st day of December, 1922; that he is not entitled to share in the new lease, secured by Drummond from Garrett for the hotel during the whole of the year 1923; and that he is not entitled to share in the profits made by R. E. Harland while he was operating the hotel from the 3d day of February, 1923, until the 1st day of May, 1923, when the receiver took charge of the hotel.

As we have already seen, it was held, upon the former appeal, that a partnership in the operation of the hotel existed between Drummond and Batson, and this is the law of the case.

It is first insisted that, inasmuch as the term of the original lease expired on the 31st day of December, 1922, this fixed a time for the termination of the partnership between Drummond and Batson, and that thereafter Batson is not entitled to receive any share in the profits derived from the continued operation of the hotel by

Drummond or Harland. Treating the 31st day of December, 1922, as the time limit for the termination of the partnership between Drummond and Batson, we cannot agree with the contention of appellants that, under the facts of the case at bar, Batson is not thereafter entitled to share in the profits derived from running the hotel by Drummond and Harland.

On the former appeal it was held that Drummond wrongfully excluded Batson from any participation in the partnership business, and it was found that he continued to operate the hotel, using the partnership property, after he had denied that Batson was a partner and had excluded him from any voice in running the business or sharing in the profits thereof.

In *Hartman* v. *Woehr*, 18 N. J. Eq., 383, it was held that a partner, excluded from the business of the firm by the illegal acts of his copartner, is entitled to an account of profits, and to his share of them, until the partnership is legally dissolved, and is entitled to a decree of dissolution on the ground of such illegal exclusion from the business.

This principle was approved in *Karrick* v. *Hannaman,* 168 U. S. 328, where it was said that, in a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property, is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances.

Again, in *Zimmerman* v. *Harding,* 227 U. S. 489, it was held that a partnership for a fixed duration can only be dissolved for sufficient cause shown to the court, and one attempting to dissolve the partnership before the fixed termination and to exclude the other from participation, must account to the latter for his share of the profits until the court decrees a dissolution in a suit brought to dissolve. The court further held that, where one party attempts to illegally dissolve a partnership without suit, and subsequently the other brings a suit for dissolution in accordance with the statute, the former

must account for all the profits until the final decree of dissolution.

That case is in many respects similar to the case at bar. There Harding made an agreement to lease a hotel upon the condition that he associate with himself another person satisfactory to the lessor. Harding then arranged with Mrs. Zimmerman to join in the lease and to form a partnership to operate the hotel. The agreement of partnership was never reduced to writing, and there was no express stipulation as to its duration. The partners obtained a lease of the hotel for the term of two years, with the right of renewal for another term of two years. Thereupon the partnership took possession of the hotel and began to operate it. The business ran along with a profit for about seven months, when Mrs. Zimmerman, during the absence of Harding upon a vacation, assumed to dissolve the partnership. She assumed entire possession of the business, and Harding was excluded from all possession and all benefits of the partnership. Harding first brought an action at law against Mrs. Zimmerman to recover damages for the breach of the partnership contract. Subsequently he dismissed his action at law, without prejudice, and filed a bill in chancery to obtain a decree of dissolution and an accounting of the partnership affairs. He asked for the appointment of a receiver, which was resisted by Mrs. Zimmerman and denied by the court. Mrs. Zimmerman remained in full control of the hotel business until the date of the final decree dissolving the partnership. The partnership property, including the unexpired term of the lease, was sold under orders of the court, and the final result was that Harding was allowed his share in the proceeds of the business, including the profits realized to the date of the sale. The court said that, whether the partnership had been effectually dissolved by the declaration of Mrs. Zimmerman to that effect or not, her action in excluding Harding from joint possession and control until the affairs had been wound up was, upon either hypothesis, wholly indefensible.

The reason given was that the partnership property continued to be partnership property after as well as before dissolution. The court, on this point, further said:

"When she assumed the right to take possession for herself and to carry on the business with the partnership property, Harding had a clear right to call her to account for his share in all of the joint property, and, at his election, to require her to account for the profits, by way of damages or otherwise, which he had been prevented from making by his wrongful exclusion from the business. *Ambler* v. *Whipple,* 20 Wall. 546; *Pearce* v. *Ham,* 113 U. S. 585, 593; *Karrick* v. *Hannaman,* 168 U. S. 328, 337; *Holmes* v. *Gilman,* 138 N. Y. 369."

Again, the court said that Harding had sought to have the business wound up by a receiver, which Mrs. Zimmerman prevented, and she was suffered to remain in sole possession. Therefore she could not complain because she had been held to account for the profits made during that time.

We think this principle is in accord with our own decisions bearing upon the subject. In *Bernie* v. *Vandever,* 16 Ark. 616, it was held (quoting from the fifth syllabus): "Where one of two partners dies, if the surviving partner, instead of settling the partnership property, uses it in carrying on the business, the representative of the deceased partner may, at his election, claim an interest, according to the principles of equity, in the subsequent profits, or take interest upon the amount due him, after a full settlement of the partnership debts, at the time of the dissolution."

The reason is that, while the partnership is, for most purposes, dissolved by the death of one of the partners, still a community of interest remains in the partnership effects on hand at that time until they are disposed of. The surviving partner has the right to wind up the affairs of the partnership and distribute its proceeds. He has no right, however, to continue to use the property and effects of the firm in carrying on the busi-

ness, and, if he does so, the representative of the deceased partner, at his option, may require him to account for the value of the deceased partner's interest in the partnership, or to account for the profits he has made by the wrongful continuation of the partnership by the use of the partnership effects after one of the partners had died.

Again, the principle was recognized in *Drake* v. *Thyng,* 37 Ark. 228. In that case the court held that one partner cannot, without the consent of the other, dispose of the partnership business and its effects, because such course would be contrary to the object and design of the partnership. The court further held (quoting from second syllabus): "When a partner, in the absence of his copartner, who has furnished the capital, sells the partnership effects and business at a sacrifice, to parties having knowledge of the interest of the copartner, and when there is no necessity for the sale, a constructive trust will attach to the property in the hands of the purchasers, and, as trustees, they and the vendor will be held to rigid accountability to the copartner."

There was no decree of dissolution of the partnership until the receiver was appointed on the first day of May, 1923. During the existence of the partnership between Drummond and Batson, Drummond took sole charge of the partnership business, and excluded Batson from any share in it. This was held to be wrongful, upon the former appeal in the case, and it would be contrary to the plainest principles of equity to allow Drummond to continue to use the property and effects of the partnership for his own benefit before making settlement of the partnership affairs. He wrongfully carried on the business by the use of the partnership property and effects. The profits made by such trading must be brought into account with the original firm, and Batson, at his option, may claim his share of the profits, instead of merely bringing suit for damages for a breach of the contract of partnership. Drummond, by wrongfully excluding Batson from participation in the partnership

business, and by continuing the business with the joint property of the firm, did so at his own risk, and cannot now complain of the result caused by his own wrongful act.

It is next insisted by counsel for appellants that, inasmuch as the original lease did not provide for a renewal for another term, Drummond had the right to take a new lease in his own name and for his own benefit, to begin at the expiration of the original lease.

In *Mitchell* v. *Reed,* 61 N. Y. 123, it was held that one member of a partnership cannot, during its existence, without the knowledge of his copartners, take a renewal lease for his own benefit, of premises leased by the firm, although the term of the renewal lease does not begin until after the copartnership has expired by its own limitation.

The court further held that a lease so taken by one partner in his own name inures to the benefit of the firm, and that the partner in whose name it is taken can be required to account to his copartners for its value.

Upon the second appeal in the same case, it was held that the fact that a lease of premises used by the firm for partnership purposes to one of the partners does not authorize him to take a renewal lease in his own name and for his own benefit; and that a renewal will inure to the benefit of the firm. *Mitchell* v. *Reid,* 84 N. Y. 556.

One of the reasons is that, where there is a lease of partnership property, the good will of the business enters into the value of the lease and affects the amount of the purchase price; and the new lease became a part of the good will of the business. Hence it was held that the partner who had been deprived of the benefit of the lease by the action of his copartner in taking a renewal lease in his own name could recover the value of his interest in the lease as a part of his damages.

In *Knapp* v. *Reed* (Neb.), 32 L. R. A. (N. S.), 869, it was held that, when a partnership is carrying on business in premises which it holds under a lease, neither partner can, without the consent of the other, take a

renewal of the lease in his own name, and so exclude the other partner and secure the good will of the business for himself.

It was further held that, if one partner takes such renewal, it will inure to the benefit of both partners, and each will have an interest in the new lease.

This case is also reported in Ann. Cas. 1912-B, p. 1095, and in the case-note, at page 1100, it is said that the earlier cases are very numerous in which courts of chancery have recognized the tenant's reasonable expectancy of renewal as a property or asset, and have laid down the rule that, if one standing in a fiduciary or *quasi*-fiduciary relation to a lessee secures a renewal of the lease to himself, the new lessee will be treated as holding the lease in trust for the original lessee. The rule is applicable to partners, managing officers of corporations, and other trustees. The reason is that one occupying a fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation. If one person becomes interested with another in a business, he is prohibited from using the common property for acquiring rights in other property antagonistic to his partner, except with the full knowledge and consent of the latter. See also *Robinson* v. *Jewett,* 116 N. Y. 40, 22 N. E. 224, and *McCourt* v. *Singers-Biggers,* 145 Fed. 103, 7 Ann. Cas. 287, and note at 297.

In *Pike's Peak Co.* v. *Pfuntner* (Mich.), 123 N. W. 19, the court held that, although a tenant, in the absence of an express agreement, has no enforceable right to a renewal of a lease, yet his expectancy of being permitted to renew is a valuable property right which will be recognized in law. Several well-considered cases are cited, which support the holding. The renewal of the lease, in equity, is regarded as a continuance of the original lease, so far as concerns the legal and equitable rights of those who had an interest in the old lease.

In *Johnson's Appeal,* 115 Penn. 129, it was said that, when a lease is held by a partnership, the chance or

opportunity of renewal is in itself a distinct asset of the partnership, in which all the partners have an interest. Therefore it was held that one partner cannot take a new lease, or a renewal of an existing one of the firm, in his own name, or for his own benefit, without being liable to account for it to the partnership.

It was further held that the dissolution of the partnership does not annul or change the relation of the former partners in relation to the right of the renewal of a partnership lease. The reason is that, even after dissolution, the original lease remains partnership property for the purpose of liquidation, and the obligation of each partner to deal with it for the joint interest of the other partners remains.

In all such cases this expectation of renewal is a part of the partnership assets, to be accounted for in winding up and settling the partnership affairs, just as other property of the partnership. Of course, where the elements of fiduciary relationship and concealment or bad faith are lacking, the rule has no application.

In *Sneed* v. *Deal*, 53 Ark. 152, this court held that, where two partners, without the knowledge or consent of the third partner, cancel a partnership lease and renew it in their names and for their individual benefit, and sell their name and interest in the firm's business and assets to such third partner, he becomes the owner of the lease.

Partners are bound to conduct themselves with good faith towards each other, and the partnership property cannot be used for the private gain of one of the partners to the exclusion of the other. This salutary rule applies with peculiar force to a case like the present one. Drummond took sole possession and control of the partnership business during the life of the original lease, and excluded Batson from any participation in the partnership affairs. This put him in the exclusive possession and control of the management of the hotel, which could only be run by the use of the partnership property. It was a large-sized hotel, and it cost a good deal to buy

furniture, fixtures, and other property with which to operate it. There was an oil boom in El Dorado at this time, and it is fairly inferable that the value of a lease of hotel property was increasing rapidly. This is evidenced from the increased rental which the owner of the hotel received from Drummond in the new lease. It is evident that Drummond secured the preference in getting the new lease because he was in sole control of the hotel and of the property used in running it. He wrongfully obtained this control during the term of the original lease and during the life of the partnership, and he cannot, by his wrongful acts in this respect, dispose of a valuable asset of the partnership without accounting to Batson. If the expectancy of a new lease was an asset of the partnership, and if Drummond was enabled to secure the new lease in his own name because he had sole control and possession of the partnership property, he must account to his copartner for his interest in the new lease. Therefore the court properly ordered this to be sold by the receiver as part of the partnership property in winding up the partnership affairs.

The decree in this respect is as binding upon Harland as upon Drummond. It will be remembered that Harland took possession of the hotel on the 3d day of February, 1923. He was allowed to file an intervention in this suit on the 25th day of April, 1923, in which he claimed an undivided one-half interest in the property used in operating the hotel, and also claimed to own the lease for the year 1923 by assignment and transfer from Drummond. Harland claims to be an innocent purchaser; but in this contention he is not sustained by the facts. It is shown by a preponderance of the evidence that he knew of the litigation between Drummond and Batson about the hotel property and the lease. He was expressly told about it by the attorneys for Batson, and purchased it with a full knowledge of the claim of Batson. This made him a constructive trustee of it as part of the partnership property, and he, as well as Drum-

mond, should be held to a rigid accountability to Batson. *Drake* v. *Thyng*, 37 Ark. 228.

It is true that no *lis pendens* was filed under the provisions of § 6979 of Crawford & Moses' Digest. This did not make any difference. That section of the Digest deals with the subject of constructive notice, and not actual notice. This court has held that the section in question does away with the common-law and equity rule of *lis pendens*, and provides that a suit affecting the title or a lien on real estate is not *lis pendens* until the notice of the pendency of the action is filed in accordance with the statute. *Henry Wrape Co.* v. *Cox*, 122 Ark. 445. One who purchases, having actual notice of the pendency of the suit, cannot avail himself of the failure to give the *lis pendens* notice required by the statute. *Jennings* v. *Bouldin*, 98 Ark. 105, and *Ziegler* v. *Daniel*, 128 Ark. 403.

But it is contended that there was no suit pending with regard to the new lease at the time Drummond transferred it to Harland. The suit between Drummond and Batson for an accounting and settlement of the partnership affairs was pending in the Supreme Court at that time, and, under our holding above, Drummond, in taking the new lease to himself, became a trustee to hold the same for the benefit of the partnership, and as an asset thereof, upon the dissolution of the partnership. Hence it was involved in the suit between Drummond and Batson, which had for its object the winding up of the partnership affairs and distributing the assets thereof.

As we have already seen, a clear preponderance of the evidence shows that the attorneys for Batson had fully explained to Harland Batson's claim in the matter, and Harland cannot, in any sense, be considered a *bona fide* purchaser. He is therefore held to the same accountability as a trustee as Drummond, and the facts bring him within the principle that a trustee cannot profit from the estate for which he acts.

The chancellor allowed Drummond and Harland a reasonable salary for managing the business while it was

in their hands. It is claimed that, because Batson was wrongfully excluded from any participation in the partnership, he should not be charged with this expense. We do not agree with counsel for appellees in this contention. Batson has elected to share in the profits up to the time of the sale of the partnership property. It was necessary for some one to manage the partnership affairs. No complaint is made that either Drummond or Harland mismanaged the business while it was in their hands. Their services inured to the benefit of the partnership, and were necessary to the successful operation of it. He who seeks equity must do equity. Therefore we are of the opinion that, under the circumstances of this case, the chancellor did not err in allowing Drummond and Harland a reasonable sum for their management of the partnership business.

The master made a detailed account of the partnership affairs from the time that Batson was excluded from any participation therein until the date of the sale thereof by the receiver. The receiver also filed a report of all his proceedings, including the sale of the property. After making all proper allowances, the chancellor made a division of the proceeds according to the respective interests of the parties as defined in this opinion. His order of distribution was practically made under the principles of law herein announced. No useful purpose could be served by setting out all of these amounts or the particular state of the account in detail in the opinion.

It follows that, under the views we have expressed herein, the decision of the chancellor was correct, and the decree of the chancery court will be affirmed.

REHEARING OPINION.

HART, J. Both parties have filed motions for a rehearing, and, in the main, have followed the line of argument made in their original briefs. We can see nothing in their arguments to cause us to change the rulings made in our original opinion.

Counsel for appellee, in their motion for a rehearing, lay special stress on the case of *Cole* v. *Cole*, 119

Ark. 48. They contend that, under the principles of law laid down in that case, the court erred in allowing compensation for running the hotel after Batson was ousted from any participation therein.

In the Cole case there were three partners, and the partnership became dissolved by the death of one and the insanity of another. There was no dispute whatever about the terms of the partnership or the compensation that each one was to receive. The third partner continued the partnership on his own motion without any claim of right to do so, and we held that, under the circumstances, he was not entitled to extra compensation.

In the case at bar the court recognized that the partners stand in a fiduciary relation to each other, and that, if one partner, instead of winding up the partnership affairs, at its dissolution, continues to use the partnership property in business and makes a profit thereon, he must account for it.

We further held that, under the peculiar facts of this case, in stating an account between the partners it was equitable to allow Drummond an allowance for his time and business ability, which largely contributed to the success of the business. This is a well known exception to the general rule and has been well stated in *Rowell* v. *Rowell*, 122 Wis. 1, as follows:

"The court recognized the principle that, while surviving partners, in closing up the affairs of the firm, are not entitled to compensation for services, yet, when those interested in the estate elected to demand not only the fair value of their interest, but also a share in the profits earned by the use of the whole property, a court of equity will inquire to what extent the profits of the business are attributable to the personal services of those conducting it, and, if some share or sum is proved so to be, with reasonable certainty, will allow that, on the theory that those who seek equity must accord it, also that profits due to such services are not due to the property. This is, of course, subject to the consideration that

they who have wrongfully appropriated property of another by mingling and confusing it with other things must bear the burden of proving with reasonable clearness and certainty what part of the ultimate general result is due to other sources than the misappropriated property."

Several decisions are cited to support the ruling.

In the present case there was a dispute between Drummond and Batson as to whether a partnership existed between them. It is true that we held that the relation existed, and that Drummond was a wrongdoer in ousting Batson from the partnership business. The testimony, however, was sufficient to warrant Drummond in testing his rights in the courts, and we are of the opinion that, under the circumstances of this case, Drummond and his vendee should be allowed a reasonable compensation for their successful management of the hotel.

In this connection it may be stated that the receiver continued to manage the property successfully during the time he had it in charge, and, for the reasons stated above, the cost of the receivership should be equally borne between Drummond and Batson. A master was appointed to state an account between the parties. It does not appear that Drummond in any manner undertook to conceal the state of the account between them. Drummond simply claimed that Batson was not entitled to share in the profits because he was no longer a partner. After the court held that Batson was his partner, it does not appear from the record that Drummond interposed any obstacles in the way of accounting. Therefore we believe that the cost of accounting was also a proper charge against the partnership profits, and that the costs thereof should be equally borne by the parties. No contest is made as to the amounts allowed the master or the receiver. As we understand the decree of the chancery court, the cost of the receivership and of the accounting was taken out of the partnership funds, and

the balance was ordered distributed under the principles of law announced in our original opinion.

It follows that the motion for a rehearing will be denied.

MULLINS & KYTE v. ROAD IMPROVEMENT DISTRICT NO. 5.

Opinion delivered February 4, 1924.

1. HIGHWAYS—ROAD IMPROVEMENT CONTRACT—CANCELLATION.—Where a contract for road construction was to be completed December 1, 1920, unless prevented by the district, by the act of God, strikes, or other causes beyond the control of the contractors," and there were no substantial differences between the original route and the route subsequently determined upon by the district, and on June 22, 1921, the contractors had put in place less than one-third of the earth required for the embankment, the commissioners were within their rights in taking over the job; the contract providing therefor in case the contractors failed to prosecute the work so as to complete it within the time specified.
2. HIGHWAYS—METHOD OF DETERMINING EXCAVATION.—Under a contract providing that the amount of material excavated will be measured in its original position by cross-sectioning, unless the engineer elects to cross-section the embankments after the material has been placed, in which event he shall provide for a shrinkage of ten per cent., *held*, where the engineer elected to cross-section the embankment, ten per cent. should be subtracted.
3. HIGHWAYS—COST OF COMPLETING CONSTRUCTION OF EMBANKMENT.—Where a road district took over a contract for road construction on account of the contractor's delay in completing the work, where the witnesses for the contractors testified that there was no substantial difference between the cost per yard of placing the earth to complete the improvement and the cost per yard of the earth which had been put in place, and the witnesses for the district testified that the expensive part of the dump consisted in putting the earth upon the higher part of the dump and finishing the work off, the latter view is more reasonable.
4. HIGHWAYS—IMPOUNDING FUNDS OF DISTRICT.—In a suit to enjoin a road improvement district from canceling a contract to construct a road and to impound the funds of the district, it was proper to refuse to impound such funds where the improvement was not completed when relief was asked.
5. HIGHWAYS—CANCELLATION OF CONTRACT—SAVING CREDITED TO CONTRACTORS.—Where, on the district taking over the construction of

a road because of the contractor's delay, a saving in the cost was properly credited to the contractors, in accordance with a provision in the contract.

6. HIGHWAYS—DELAY IN CONSTRUCTION—LIQUIDATED DAMAGES.—In a contractor's suit to enjoin a road district from canceling a contract for road construction, where defendant sought liquidated damages for delay in construction, it was not error to refuse to charge the contractors with such damages where most of the delay was caused by unprecedented rainfall and by changes in the plans.

7. COSTS—WHEN DIVIDED.—In a contractor's suit to enjoin a highway district from canceling a contract for road construction, the district having taken over the contract on account of delay in completing the road, the costs will be equally divided, in view of the fact that most of the delay was occasioned by unprecedented rainfall and by changes in the plans.

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

Coleman & Gantt, for appellant.

The record shows that the contract was breached by the district. Such being the case, appellants are entitled to recover the amount due them for the work they had done up to the time of the breach, and also the amount they would have earned on the remaining work, had the district carried out its contract. 158 Ark. 91; 80 Ark. 228; 9 C. J. 822. Even if appellants had been responsible for the delay, the district had waived the right to declare a forfeiture on that account. 158 Ark. 91. If the language of the contract is doubtful, that construction should be adopted which will impose the least hardship upon the parties. 78 Ark. 202. And all doubts should be resolved against the party who prepared the contract—in this instance, the district. 112 Ark. 1; 115 Ark. 166. See also 88 Ark. 363; 95 Ark. 449. If the engineer thought the work was being done improperly, it was his duty to reject it at once. 200 Mich. 453; 166 N. W. 904; 90 N. W. 700. Failure to reject an obvious defect is equivalent to approval. 35 Cyc. 229; 152 N. W. 1071. It was an abuse of discretion to tax the entire costs against the appellants. 148 Ark. 181; 125 Ark. 332; 132 Ark. 606; 158 Ark. 91. Plaintiffs were entitled to an equitable

garnishment. 143 Ark. 446; 146 Ark. 494; 148 Ark. 181; 152 Ark. 422. There was at least a substantial performance of the contract which entitled appellants to recover. 64 Ark. 34; 67 Ark. 219; 97 Ark. 278; 105 Ark. 353; 147 Ark. 203; 148 Ark. 181. Taking charge of the road and attempting to remedy the alleged defects constituted an acceptance of the work. 97 Ark. 278.

A. B. Shafer and *Mann & Mann,* for appellees.

The engineer was made the referee in this case, and, if he acted in good faith, his findings will not be disturbed. 175 U. S. 590; 44 Law. ed. 284; 137 Fed. 369; 114 S. W. (Ark.) 242. The evidence does not disclose that the engineer, at any time, so acted or ruled that his conduct amounted to fraud or bad faith.

SMITH, J. Road Improvement District No. 5 was organized under the Alexander road law, for the purpose of improving several short lines of road in St. Francis County, near Hughes. In May, 1920, it entered into a contract with appellants, Mullins & Kyte, for a part of the construction work which was planned. This contract embraced the building of the bridges and the culverts on the three lines of road designated as "A," "B," and "F," and the construction of the earth embankment on line "F," which begins about two miles north of Hughes and extends to the Crittenden County line near Chatfield, a distance of a little over three and one-half miles. The road for its entire length was along the right-of-way of the Missouri Pacific Railroad Company.

At the time the contract was entered into it was planned that the road should begin on the west side of the railroad, near Hughes, and should continue on that side for 1,622 feet, and then cross over to the east side, along which it ran for 7,512 feet, and then crossed back to the west side, where it continued to the Crittenden County line. After the contractors entered upon the job, it was decided by the commissioners of the district to change the location of the roads at two points, and the contractors were so notified on the 26th day of June.

The first change was in the property of J. M. Bush, between stations of the road numbered 16 and 41, where the road crosses a small slough, and it is insisted that this change put the road on lower land, which was wetter and required a higher fill of earth. It is alleged that the center line of the second change was not located until August 18, and that no profile for the new location was ever furnished to the contractors by the engineers for the district. These changes in the route of the road constitute the chief excuses for the admitted delay in the completion of the improvement. Another excuse is that the unfavorable weather delayed the work. At any rate, only 26.22 per cent. of the work had been completed on December 1, 1920, when, according to the contract, the work should have been entirely completed. Thereafter but little work was done until June 21, 1921, when the contractors were directed to discontinue the work. The contractors immediately brought suit to enjoin the commissioners from canceling the contract, and they prayed that the funds of the district be impounded and held subject to the order of the court, and that a master be appointed to determine the amount of work done and to be done, and to state an account between the parties, if they were not allowed to complete the work.

The commissioners filed an answer, in which they denied the allegations of the complaint, and alleged breaches of the contract by the contractors in many respects; and a cross-complaint was filed in which judgment was asked for liquidated damages for failure to complete the road in the time limited, for alleged overpayments, and for improper excavations of borrow-pits, and certain other items of damage, amounting, in the aggregate, to $27,700. There was a reply to the cross-complaint, denying the damages claimed.

The cause was heard on the 14th of April, 1922, and the court made the following findings:

(1) That the contractors were not in default in failing to complete the contract by December 1, 1920, as the changes in the location of the road produced a

material change in the contract, which entitled the contractors to an extension of time.

(2) That the district is not therefore entitled to recover liquidated damages for delay.

(3) That the delay of the contractors thereafter in completing the road, and their failure to place adequate equipment on the work, warranted the district in taking over the work in June, 1921, and proceeding to finish it under the terms of the contract.

(4) The contention of the district in regard to the measurement of the earth work was sustained.

(5) A finding was made in favor of the contractors covering the issue in regard to clearing and grubbing the right-of-way.

(6) A finding was made in favor of the contractors in regard to the retained percentage of the contract price held by the district.

(7) That the contractors should recover $462.61 erroneously charged to them in estimate No. 17, made by the engineer of the district.

(8) That the contractors should recover the difference between the contract price for doing the unfinished portion of the work and the reasonable cost to the district of completing the work.

(9) That the reasonable cost to the district of the earth work remaining to be done with drag-line machines is 35 cents per cubic yard, and the reasonable cost of finishing work in the Bush fill is $1 a cubic yard, which amounts to a total for said finishing work of $1,778.70.

(10) The court, not being sufficiently advised as to the quantities of the work remaining to be done, or as to the cost of the items thereof other than earth work as above set forth, ordered that a special master be appointed to state an account of the difference between the contract price for doing said work and the reasonable cost to the district of completing it and of the amount due them for work already done, based on the findings herein set forth.

Upon these findings the court ordered that F. H. Ford be appointed as a special master to determine the reasonable cost to the district of completing the work, and to state an account of the difference between such reasonable cost and the contract price for doing said work, and to make a finding as to the balance due the contractors.

The eighth finding of the court was based upon the 61st paragraph of the contract, which authorized the district, upon the failure of the contractors to prosecute the work with such materials and equipment as, in the opinion of the engineer, is necessary to complete the work within the time specified, to secure such additional labor, equipment and materials as may be necessary to properly proceed with the work. This section of the contract authorizes the commissioners to charge the expense thus incurred to the contractors, but further provides that, in case the expense so incurred shall be less than the sum which would have been payable under the contract, if it had been complied with by the contractors, the contractors shall be entitled to the difference; and, if more, the contractors and their sureties shall pay the excess.

On May 13, 1922, the master made a report, which was based upon testimony taken before the original submission and testimony taken by the master himself. According to the master's report, the net amount payable to the contractors was found to be $14,265.50. These figures were based upon a consideration and finding upon numerous controverted items.

The district filed fourteen exceptions to this report, which were heard and sustained by the court on the..... day of June, 1922. The report was disapproved, and leave was given to both the contractors and the district to take further evidence, and this was done.

The district employed the Morgan Engineering Company to make an estimate of the work done, and of that remaining to be done to complete the contract, and the cost thereof, and the representatives of that company

made an investigation, which was followed by an elaborate report, and the officers of that company gave testimony sustaining it in detail.

Thereafter the contractors also took additional testimony, and on November 7, 1922, the court rendered a final decree, finding that the district was indebted to the contractors in the sum of $2,015.66, with interest at six per cent. from July 18, 1921, and that plaintiffs should pay all costs of this action. Both parties excepted; the contractors perfected their appeal, and the district has cross-appealed.

It appears from the facts stated that the questions involved are chiefly questions of fact, and the testimony upon which the court made the finding appealed from is conflicting. The question is whether this finding is clearly against the preponderance of the testimony.

The contractors appear to be correct as to the time when and the circumstances under which the route was changed; but we do not think this change involved the damage, by way of delay, which the contractors claimed. A profile appears to have been furnished when the contract was originally let, and the last change was to restore this plan. Besides, the engineer for the district testified that there was no substantial difference between the two routes, as they were both parallel and adjacent to the railroad, and the proposed road ran through level country, the only difference being that the original route and the one last determined upon required, at one or two places, a slightly greater fill or embankment.

The court held, however, that because of this change in plan the contractors were not in default at the time the district notified the contractors to leave the job; but the court found that the contractors were thereafter in default, and that the directors were within their rights in taking over the job. We think the testimony supports this finding. On June 22, 1921, the contractors had put in place less than one-third the earth required in the embankment.

The testimony is quite voluminous and conflicting, and there were three hearings by the chancellor, the first on the original submission, the second on the exceptions to the master's report, and the last on the final submission, the second and third hearings being had on the additional testimony taken because of the uncertainty entertained by the chancellor about the facts. The case appears therefore to be one in which much consideration should be given to the findings of the court, and, upon a consideration of the testimony, we are unable to say that his findings, or any of them, are clearly against the preponderance of the testimony.

It is quite obvious that the finding of the court below was largely influenced by the report of the Morgan Engineering Company. This company made its examination and report after the court had heard the exceptions to the master's report, and by this time the issues of fact were sharply defined, and this report dealt directly with those issues. This report covered the amount of work remaining to be done, the condition of the completed work with respect to the specifications under which it was to be done, and, in particular, the work necessary to be done on the part of the job which the contractors claimed was complete, to bring it up to the specifications. The principal defects complained of were that the borrow-pits had been so excavated that they would not drain as the specifications required they should do, and that a sufficient berm was not left to hold the sides of the embankment.

One of the important questions of fact was how to measure the embankment or roadbed. This controversy grew out of the interpretation of paragraph 82 of the specifications, which reads as follows: "82. METHOD OF DETERMINING EXCAVATION QUANTITIES. The amount of material excavated will be measured in its original position by cross-sectioning, unless the engineer elects to cross-section the embankments after the material has been placed. In which event he shall provide for a shrinkage of ten (10%) per cent. Cross-sections will

include breakage or slides which are not due to the carelessness of the contractor and which have not been removed, also all masonry walls and stone fences. Buildings and other obstructions will not be measured, but will be included in the price bid for excavation."

Experts testified on both sides of the question. Those who testified for the contractors expressed the opinion that the language quoted meant that the ten per cent. should be added to the measurement of the roadbed, while the experts who testified for the district expressed the opinion that the ten per cent. should be subtracted. In other words, if an estimate showed that, say, a thousand yards of earth had been put in place, should a hundred yards be added or subtracted on account of shrinkage? The measurements were made while the earth was fresh and newly placed, and the court found that the ten per cent. should be subtracted. We think this finding consonant with common observation and experience that fresh earth packs and shrinks. Besides, we would so interpret the contract as a matter of law, as there appears to be no such ambiguity in the language employed as to make expert testimony necessary or competent to explain it.

The chancellor substantially accepted the report of the Morgan Engineering Company as to the amount of work done and the portion thereof remaining uncompleted. Without reciting the testimony—which would consist in setting out conflicting estimates—we announce our concurrence in the finding of the court below.

Some of the conflict in the testimony grows out of the difference of opinion as to the comparative cost of the completed and the uncompleted parts of the work. It was the theory of the witnesses for the contractors that there was no substantial difference between the cost per yard of placing the earth to complete the improvement and the cost per yard of the earth which had been put in place; whereas it was the opinion of the witnesses for the district that the expensive part of the dump con-

sisted in putting the earth upon the higher part of the dump and finishing the work off. This view appears to be the more reasonable one.

The court found—and we concur in the finding—that the contractors did not excavate the borrow-pits so that they would drain, and did not leave sufficient berm to protect the sides of the embankment, as required by the specifications. It was pointed out by the engineers who made the report for the Morgan Engineering Company that these defects could be remedied in only one of two ways, and that the cost of one method was prohibitive, and the cost of the cheaper method was given in detail. The contractors insist that they should not be charged with this cost, as they say it required them to do work not called for by the specifications. This appears to be true; but it also appears to be true that this additional work was made necessary by the failure of the contractors to observe the specifications as they proceeded with the work. Yet, as we understand the final decree, the court did not charge the contractors with the full amount of this estimate. In other words, while the court appears to have accepted, as the basis of the final decree, the report of the Morgan Engineering Company, this was not done without some exceptions, and, without further discussion of the testimony, which has been carefully considered, we announce our concurrence, at least we are unable to say that the finding is clearly against the preponderance of the evidence.

We think the court properly refused to impound the funds of the district, as the improvement had not been completed when that relief was asked. *Newell Contracting Co.* v. *Elkins,* 161 Ark. 625.

We are of the same opinion in regard to the finding on the matters involved in the cross-appeal. The commissioners took over the work under the authority of paragraph 61 of the contract, which provided, as has been stated, that, in case the expense incurred by the board should be less than the sum which would have been

payable under the contract, if it had been completed by the contractors, the contractors should be entitled to receive the difference; but, if such expense should exceed the sum which would have been payable under the contract, then the contractors and the sureties on their bond should be liable for the excess.

The court found there was a profit of ten cents per cubic yard in the unfinished embankment, and allowed the contractors credit therefor. Without setting out the conflicting testimony on this finding, we announce our conclusion that it was not clearly against the preponderance of the testimony.

The court also refused to charge any sum against the contractors by way of liquidated damages for delay. In support of the court's finding on that question it is pointed out that the contract provided for the work to be completed by December 1, "unless prevented by the district, by the act of God, strikes, or other causes beyond the control of the contractors." It is urged that the completion of the work was prevented by the district, and certainly by causes beyond the control of the contractors in the way of unprecedented rainfall, and the court found that the change in the plans excused most of the delay complained of.

The costs of the entire case were assessed against the contractors, and it is insisted that these costs should have been assessed against the district, as there was a recovery by the contractors.

Courts of equity have a discretion in the matter of taxing costs which courts of law do not have. But, upon a consideration of the whole case, we think it would be more in accord with equitable principles to divide these costs equally between the parties, and it will be so ordered. In all other respects the decree is affirmed.

SUTTON v. STATE.

Opinion delivered February 11, 1924.

1. CRIMINAL LAW—CREDIBILITY OF WITNESSES.—The jury are the judges of the credibility of the witnesses.
2. ROBBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution for robbery, evidence *held* sufficient to sustain a conviction.
3. ROBBERY—SUFFICIENCY OF FORCE.—Whenever the element of force or putting in fear enters into the taking of the property, and is the cause that induces the owner to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstances the taking may be accompanied.
4. CRIMINAL LAW—CONFESSION.—A confession of accused voluntarily made to the sheriff was admissible against him.
5. ROBBERY—LIABILITY FOR ACTS OF COMPANIONS.—In a prosecution for robbery, where testimony showed that the complaining witness was first put in fear of his life by accused, and then his property was taken by accused's companions, under his direction, it was immaterial that accused's companions also were not indicted.
6. ROBBERY—INSTRUCTION.—In a robbery case, an instruction which used the words "feloniously and violently" following immediately after the words "steal, take and carry away," *held* not misleading as calculated to lead the jury into believing that they were directed to find defendant guilty under circumstances which would make him guilty of larceny only.
7. ROBBERY—DEFINITION.—"Robbery" is larceny either by force or by intimidation, and it is sufficient to charge it in either form.
8. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—It was not error to refuse requested instructions fully covered by the court's charge.

Appeal from Saline Circuit Court; *Thomas E. Toler*, Judge; affirmed.

N. A. McDaniel, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie*, Assistants, for appellee.

HART, J. Dave Sutton prosecutes this appeal from a judgment of conviction against him for the crime of robbery.

We shall first direct our attention to the question of whether the evidence is sufficient to have warranted the jury in returning a verdict of guilty.

John Douglass, the person charged to have been robbed, is twenty-one years old, and lives in Saline County, Arkansas. According to his testimony, on the 28th day of July, 1922, he carried a family to their home, about fifteen miles away from his father's house, and started home with the car something after twelve o'clock at night. As he went down the road he noticed a car parked on the side of the road, and, when he came up with the car, Dave Sutton got out of it and stopped the witness. Sutton said that he was the "law," and wanted to search the car of John Douglass for whiskey. Sutton searched the car, and claimed that he found a pint of whiskey under the back seat. Douglass denied having any whiskey in the car, and then Sutton got into the car with Douglass and told him that he would have to take him to Little Rock. Sutton finally demanded three dollars from Douglass, and the latter replied that he had no money. There were other men in Sutton's car, and they asked Sutton if he had found any whiskey. Sutton replied that he had, and asked them to come over to the car. Sutton and Douglass were still talking about Douglass giving Sutton three dollars. Sutton finally said, "Here are some casings (referring to some casings on Douglass' car), and we will just take one of them." The casings were tied on the side of the car. They took one of the casings away with them, while Sutton was sitting on the front seat with Douglass. Sutton told Douglass that, if he had not stopped his car when ordered to do so, he would have shot him. Sutton and the men with him told Douglass to go on down the road, and not look back.

On cross-examination, Douglass said that he had known the defendant for more than fifteen years. He admitted that he did not see any gun on the defendant, but just thought that the defendant might shoot him, because he had said that he would do so. He saw Sutton's associates taking the casing off of his car, and never said a word to them. Douglass was asked what caused him to think that Sutton would rob him, or why

he had any fear of him. He answered, "Well, he said he was the 'law,' and I was afraid to say anything. I was afraid he would shoot me." This all happened in Saline County, Arkansas.

Ben Cox was also a witness for the State, and we quote the whole of his testimony as follows:

"My name is Ben Cox. I am the sheriff of Saline County, Arkansas, and I had a conversation with the defendant, Dave Sutton, just a few days ago; will say that he came to me and seemed to be trying to get advice as to what to do. Sutton told me they got the casing all right; he seemed to be trying to get advice as to whether he should tell on the others. Cross-examination: Mr. Cox, did Dave Sutton tell you that he robbed Mr. Douglass? A. I understood him to mean that they robbed him. That is what he said."

The defendant denied that he had robbed Douglass of the automobile casing, as testified to by him, and stated that he was at the home of a Mr. Grimmett on the night Douglass claimed that he was robbed. He admitted having in his possession the casing which Douglass testified about, but stated that he had found it, and sold it to another person for a dollar and a half. His testimony that he stayed all night with Mr. Grimmett on the night of the robbery and could not have been at the scene of the robbery, was corroborated by the evidence of Mr. and Mrs. Grimmett and two or three other persons.

The jury were the judges of the credibility of the witnesses, and the evidence for the State was sufficient to support the verdict.

Whenever the element of force or putting in fear enters into taking of the property and is the cause that induces the owner to part with it, the taking is robbery, no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstance the taking may be accompanied. It is sufficient that the putting in fear overcomes the resistance on the part of the person from whom the property is taken, and is the moving cause inducing him to part unwillingly with his

property. *Clary* v. *State,* 33 Ark. 561; *Young* v. *State,* 50 Ark. 501, and *Routt* v. *State,* 61 Ark. 594.

In addition to the testimony of Douglass, the sheriff was a witness for the State. On his direct examination he stated that Sutton told him that they got the casing all right. On cross-examination he was asked if Sutton had told him that he robbed Douglass, and answered: "I understood him to mean that they robbed him. That is what he said." This amounted to a confession on the part of the defendant. According to the testimony of the sheriff, it was voluntarily made, and was therefore admissible as evidence against him. *Young* v. *State, supra; Dewein* v. *State,* 114 Ark. 472, and *Jenkins* v. *State,* 131 Ark. 312.

It is next insisted that the court erred in giving instruction No. 1. The instruction is as follows:

"You are instructed that robbery is the felonious and violent taking of any goods, money or other valuable thing from the presence of another by force or intimidation, and that the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender; and if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant and his associates, in Saline County, Arkansas, and within three years next before the filing of the indictment in this case, did, as alleged in said indictment, by force or intimidation, steal, take and carry away, feloniously and violently, the said automobile casing, you will find the defendant guilty and fix his punishment in the State Penitentiary at a period of not less than three nor more than twenty-one years."

Counsel for the defendant made a specific objection to the instruction, because the defendant was not jointly indicted with any other persons, and therefore he insists that he had no associates. According to the testimony of Douglass, he was first put in fear of his life by Sutton, and then the casing was taken from the side of the car by the companions of Sutton, who acted under his direction. It is fairly and legally inferable from the testimony

of Douglass that he was put in fear of his life by the defendant, and that the other parties, who actually took the casing from the side of the car, acted under the directions of the defendant and jointly with him in taking it. Therefore it did not make any difference whether these other persons were indicted jointly with the defendant or not. The defendant could not have escaped punishment because of this fact, or because the persons associated with him might not have been indicted at all.

It is next insisted that the instruction is misleading because the words feloniously and violently, following immediately the words, "steal, take and carry away," were calculated to mislead the jury into believing that they were directed to find the defendant guilty of robbery under the circumstances which would only make him guilty of larceny of the casing.

We do not think the instruction is open to this objection. It tells the jury, in plain terms, that, before the defendant could be found guilty, it must find that he, by force or by intimidation, did steal, take and carry away the automobile casing. Robbery is larceny by force or by intimidation, and it is sufficient to charge it in either form. *Traver* v. *State*, 72 Ark. 524.

The instruction makes the guilt of the defendant depend upon whether he, by force or intimidation, did feloniously steal, take and carry away the automobile casing, and thus in all essential respects brought the acts of the defendant, as testified to by the witnesses for the State, within the definition of robbery given above.

The defendant also assigns as error the refusal of the court to give certain instructions asked by him, to the effect that, before it could convict him, it must find that there was a forcible taking of the automobile casing, in his presence, against his will, by violence, or by putting him in fear. We do not deem it necessary to set out these instructions, for they are fully covered by instructions Nos. two and three, given at the request of the defendant.

Instruction No. 2 reads as follows: "The jury are instructed that, to constitute robbery, the taking must be either directly from the presence or in the presence of the party robbed, and must be by force or putting in fear, and that if you believe, from the evidence in this case, that the defendant did not have the plaintiff under fear or violence at the time the automobile casing was taken, then you are instructed to find the defendant not guilty."

Instruction No. 3 is as follows: "You are instructed that, if you find from the evidence in this case that the defendant did get into the seat of the automobile, and was in there, and you further find that John Douglass was not still under fear of any dangerous weapon or of threats, and you further believe, from the evidence in this case, that other parties had got on the running board of the car and took the casing from the car, and, at the time of the taking, the owner of the casing did not know it was being taken, then this did not constitute robbery, and you are told to acquit the defendant."

These instructions fully covered the theory of the defendant, and we have repeatedly held that the court is not required to multiply instructions on the same point.

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

STATE EX REL. CRAIGHEAD COUNTY v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Opinion delivered February 11, 1924.

1. COURTS—STARE DECISIS.—Federal district courts are bound by decisions in other cases of the Circuit Court of Appeals for the circuit construing the State Constitution, though in conflict with subsequent decisions of the highest court of the State.
2. JUDGMENT—RES JUDICATA—ERRONEOUS JUDGMENT.—While the State Supreme Court is the final arbiter in construing the State Constitution and statutes, and a conflicting decision of a Federal court does not constitute a precedent for the State court, the

Federal court's judgment in a given proceeding constitutes a final adjudication of the subject-matter and is binding on the State courts, under the full faith and credit clause of the Federal Constitution.

3. JUDGMENT—RES JUDICATA—CONCLUSIVENESS.—A judgment of a Federal district court in a case within its jurisdiction, commanding the assessing officers of a county to assess property at its full valuation in order to pay a judgment rendered by such court against the county, is not void, though in conflict with the decision of the court of last resort in the State in the construction of the Constitution and laws of this State.

4. COURTS—UNITED STATES SUPREME COURT—CONCLUSIVENESS OF DECISIONS.—Decisions of the United States Supreme Court concerning the jurisdiction of Federal courts are conclusive on courts of the State.

5. JUDGMENT—FEDERAL JUDGMENT IN STATE COURT.—When the effect of the judgment of a Federal court is questioned in subsequent litigation in a State court having jurisdiction of the subject-matter and parties, the State court may determine for itself the scope and extent of that judgment, though that is a Federal question reviewable by the Supreme Court of the United States.

6. TAXATION—ASSESSMENT OF PROPERTY.—A judgment of the Federal court directing an assessment of all property in a county at its full valuation contemplates an assessment for all purposes, and an assessment of property at its full valuation for county purposes only is invalid.

7. JUDGMENT—RES JUDICATA—REPRESENTATION OF TAXPAYERS.—Taxpayers are bound by an assessment in accordance with the judgment of a court having jurisdiction in an action against the assessing officers, by whom they are represented in a matter in which they are necessarily interested, but are not bound by an assessment not authorized by such judgment or by the State laws.

8. TAXATION—ILLEGAL ASSESSMENT.—Taxpayers are not bound by an illegal assessment, though the effect is merely to relieve them from part of the assessment which otherwise would be imposed.

9. TAXATION—OVERDUE TAX ACT.—Crawford & Moses' Dig., § 10204 *et seq.*, authorizing suits against corporations for the collection of overdue taxes, empowers the courts of equity to adjudicate and enforce the collection of delinquent taxes which are authorized by the laws of the State.

10. TAXATION—SUFFICIENCY OF PLEA OF TENDER.—Where corporations, sued for delinquent taxes, pleaded tender of the proper amount due, which was refused, the court did not err in refusing to adjudge a penalty, interest and costs against defendants

because of their failure to make their tender good; such plea being in effect a continuing offer to pay.

Appeal from Craighead Chancery Court, Western District; *J. M. Futrell,* Chancellor; affirmed.

J. S. Utley, Attorney General, and *A. P. Patton* and *Horace Sloan,* for Craighead County.

Diversity of citizenship gives the Federal court jurisdiction to determine questions of State law. 42 Sup. Ct. Rep. 375; 213 U. S. 175; 29 Sup. Ct. Rep. 451; 53 L. ed. 753; 231 U. S. 294; 34 Sup. Ct. Rep. 48; 68 L. ed. 229; 43 Sup. Ct. Rep. 192; 43 Sup. Ct. Rep. 51. "Full faith and credit" due to a Federal court judgment constitutes a Federal question. 169 U. S. 465; 18 Sup. Ct. Rep. 415; 42 L. ed. 819; 120 U. S. 141; 7 S. Ct. 472; 191 U. S. 499; 24 S. Ct. 154; 48 L. ed. 276; 184 U. S. 497; 146 U. S. 657; 36 L. ed. 1123; 6 Wall. 166, 18 L. ed. 768; 7 How. 72; 237 U. S. 477; 153 U. S. 671; 107 U. S. 3; 27 L. ed. 346. Taxpayers are bound by an award of mandamus against officers of taxing district. 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. 619; 2 Van Fleet, Former Adjudication, p. 1153. A judgment at law must first be obtained before mandamus to enforce collection will issue. 106 U. S. 663; 102 U. S. 187; 105 U. S. 237; 129 U. S. 44. Mandamus, after judgment, is a substitute for the ordinary process of execution. 9 Wall. 415; 6 Wall. 166; 122 U. S. 306; 6 Wall. 210; 132 U. S. 210; 102 U. S. 472; 24 Hw. 376; 34 Ark. 291; 48 Ark. 331; 96 Ark. 465. Neither a State nor a Federal court can enjoin proceedings in the other. 61 W. Va. 183; 11 Ann. Cas. 741; 9 Wall. 409; 188 U. S. 537; 172 U. S. 148; 4 Dill. 224. A judgment of a Federal court cannot be assailed collaterally in a State court. 17 S. W. 502; 109 U. S. 162; 62 Calif. 40. The Federal court had jurisdiction to require the assessing officers to make a full value assessment. 222 Fed. 489; 239 U. S. 641. *Contra,* see 127 Ark. 349; 129 Ark. 41; 130 Ark. 259. In such case, the Federal courts may determine for themselves what the State law is. 263

Fed. 856; 107 U. S. 20; 215 U. S. 349; 275 Fed. 747; 119 U. S. 680; 120 U. S. 759; 190 U. S. 437; 193 U. S. 532; 215 U. S. 349. But, as to contracts made after a State court's decision, the Federal court will follow the State court. 18 Wall. 71; 101 U. S. 677. However, the court's decision must be on the precise point involved. 131 Fed. 705; 134 Fed. 423; 130 Fed. 251; 123 Fed. 480; 85 Fed. 180. Where a State court has decided a Federal question, its decision, though erroneous, is binding on collateral attack. 51 Fed. 858; 53 Fed. 411; 202 Fed. 82. A State court cannot challenge the jurisdiction of a Federal court to render a particular judgment. 67 Ark. 469; 213 U. S. 207; 152 U. S. 327; 198 U. S. 188; 151 Ky. 185, 151 S. W. 404; 63 S. C. 542, 41 S. E. 761. Where a court has jurisdiction, its judgment is binding until reversed in a proper proceeding. 7 How. 612; 107 Fed. 305; 199 Pac. 696. Though a State court's decision of a Federal question is erroneous, the Federal courts will not annul it on collateral attack. 132 U. S. 210; 20 Wash. 396; 72 Am. St. 110; 109 Tenn. 315; 70 S. W. 1031; 10 N. M. 416; 62 Pac. 987; 5 S. D. 539; 59 N. W. 833; 26 L. R. A. 493; 104 Fed. 113; 43 C. C. A. 429; 79 Fed. 567; 25 C. C. A. 87; 80 Fed. 686; 25 C. C. A. 469; 97 Fed. 435; 38 C. C. A. 250; 85 Fed. 189; 29 C. C. A. 106; 28 Fed. 407; 106 Fed. 459; 45 C. C. A. 429; 55 Ark. 398; 22 Ark. 550; 75 Ark. 415; 68 Ark. 83; 64 S. C. 374; 42 S. E. 180; 14 Wis. 180; 134 N. Y. 461; 31 N. E. 987; 30 Am. St. 685; 37 N. Y. 511; 43 N. Y. 184; 105 Ark. 450. A Federal court may compel an assessment on a full valuation for the payment of indebtedness. 97 U. S. 300; 99 U. S. 152. The assessment conformed to the order of the Federal court. *Hays* v. *Missouri Pac. Rd. Co.*, 159 Ark. 101; 62 Ark. 461; 92 Ark. 492; 127 Ark. 349. It is not necessary that the assessment for all purposes should be doubled. 57 Ark. 509.

Thomas B. Pryor and *Gordon Frierson*, for Missouri Pac. Rd. Co., and *W. F. Evans* and *W. J. Orr*, for St. Louis-San Francisco Ry. Co.; *Gautney & Dudley* and *E. L. Westbrooke*, of counsel.

The assessment was not made as the writ of mandamus commanded. 62 Ark. 461; 92 Ark. 492; 124 Ark. 569; 127 Ark. 349; 129 Ark. 41; 250 S. W. 879; 244 U. S. 499; 101 U. S. 153; 209 Fed. 380; 270 Fed. 369; 283 Fed. 318; 28 Atl. 523; 51 N. H. 455; 58 N. H. 38; 44 Ill. 229; 54 Kan. 781; 274 Fed. 630; 157 N. W. 731; 74 Atl. 67; 112 N. E. 700; 85 Fed. 302; 258 Fed. 458; 222 Fed. 568; 199 Fed. 237. Mandamus will not issue to compel the performance of an act not required by law. 127 Ark. 349; 77 Fed. 567; 23 C. C. A. 236; 95 U. S. 769; 99 U. S. 591; 155 U. S. 1; 30 Ark. 450; 46 Ark. 312; 47 Ark. 80; 104 Ark. 590. A writ which commands officers to violate the Constitution is void. 104 U. S. 604. This court is the final arbiter in the construction of the Constitution and laws of this State. 127 Ark. 349; 44 Sup. Ct. Rep. 40; *Id.* 50; *Id.* 62; 258 Fed. 458; 244 U. S. 499.

McCULLOCH, C. J. There are two consolidated actions involved in this appeal, one against the defendant, St. Louis-San Francisco Railway Company, and the other against the Missouri Pacific Railroad Company, each instituted in the chancery court of Craighead County by the Attorney General, in the name of the State of Arkansas, for the use and benefit of Craighead County, to recover delinquent county taxes due for the years 1921 and 1922.

It is alleged in the complaint that all property in Craighead County was assessed, for all purposes other than for county taxation, at fifty per centum of its actual value, so as to conform to the rate of assessment in other counties, but that there was a separate assessment for county purposes at one hundred per centum valuation, and that this was done under the requirement of a mandamus issued by the United States District Court, in a suit instituted by a creditor of the county to recover on past due indebtedness. It was also alleged that said defendants in each case had paid the taxes extended against its respective property for all purposes other than county taxation, but had each refused to pay the county taxes as extended, and had tendered the amount

of taxes due on a fifty per centum valuation. Each of the defendants, in its answer, challenged the validity of the assessment, on the ground that it was contrary to the laws of this State as interpreted by the court of last resort, and also denied that there had been any assessment of real property by the Tax Commission at a valuation of one hundred per centum.

The facts in the case are undisputed. On February 17, 1921, the United States District Court for the Western Division of the Eastern District of Arkansas, in an action in which an incorporated fraternal association, named the Maccabees, was plaintiff, and Craighead County was defendant, rendered a judgment in favor of said plaintiff and against said defendant for recovery of the sum of $77,680; and on March 2, 1921, said court, in an action instituted by said plaintiff, the Maccabees, against the assessing officers and clerk of Craighead County, and the members of the State Tax Commission, to compel said officers to assess the taxes to pay said judgment against the county, entered a judgment directing that a mandamus issue against the assessing officers and the State Tax Commission, requiring an assessment of property for taxes at full valuation. The particular language of this judgment was that "a mandamus issue requiring the defendant to assess, at its full value in money, all property in Craighead County, and to continue said assessment at its full value in money until the judgment of the plaintiff herein for $77,680 and costs shall have been paid in full."

It does not appear, from the record in this case, that the Tax Commission made any change in its assessment of railroad property for the year 1921, but let its assessment stand, as made throughout the State on railroad property, at a valuation of fifty per centum. The assessor of Craighead County, however, assessed all property in Craighead County at fifty per centum for all purposes other than county taxes, and made a separate assessment for county purposes at one hundred per

centum of the valuation, using an extra column on the assessment books for such separate assessment.

In the year 1922 the State Tax Commission, in compliance with the said mandamus issued by the United States District Court, adopted a resolution applicable to the taxable property of Craighead County, commanding the assessor of Craighead County to "double the amount of the assessment as shown by the certificates of this Commission, for the purpose of extending thereon the general county tax rate for Craighead County, Arkansas, and that he show in a separate column said fifty per centum assessment for the purpose of extending State, three-mill county road tax, school district tax and municipal corporation tax thereon." In each of the years the taxes were extended on the books for county purposes on the basis of one hundred per centum valuation, but for all other purposes on the basis of fifty per centum valuation. Each of the defendants in these actions paid the taxes for all other purposes, but refused to pay the taxes extended against its property for county purposes, and tendered the amount due on an extension based on a valuation of fifty per centum. The tender was refused, and this action was instituted to compel the payment.

The chancellor held that the assessment at full valuation for county purposes was void, and rendered a decree for the recovery by plaintiff of the amount of taxes tendered by each of the defendants; that is to say, the amount of taxes on a basis of fifty per centum valuation.

We are unable to agree with the learned chancellor in his view that the judgment of the United States District Court is void because it attempts to impose on the assessing officers a requirement contrary to the Constitution of the State, as interpreted by this court. It is true that the judgment of the court was not in accord with the Constitution, as interpreted by this court, with respect to the requirement of uniformity throughout the State in the assessment of property. *State* v.

Meek, 127 Ark. 349. In that case we held that there must be uniform valuation of property for taxation purposes throughout the State, and that the tax assessor of a given county could not be compelled by mandamus to assess property in his county at full valuation, so as to put the assessment out of conformity with other assessments in the State, as directed by the State Tax Commission. The decisions of the United States Circuit Court of Appeals for the Eighth Circuit are in conflict with the decision of this court on that subject (*United States* v. *Jimmerson,* 222 Fed. 489), and the district courts in this circuit are therefore bound by those decisions. *United States* v. *Cargill,* 263 Fed. 856. The court of last resort of the State is, of course, the final arbiter in the interpretation and construction of the Constitution and statutes of the State. A conflicting decision of the Federal court does not constitute a precedent to be followed by the State court, but the judgment itself in a given proceeding constitutes a final adjudication of the subject-matter of the litigation so as to bind the State courts, under the provision of the Constitution and statutes of the United States requiring full faith and credit to be given to the judgment of the Federal courts. That is to say, the Federal court has jurisdiction of the subject-matter to adjudicate the rights of the parties to the action and their privies. Any judgment rendered thereon will be binding on the State courts, even though the decision is found to be in conflict with the decision of the court of last resort of the State in the interpretation of the Constitution and laws of the State. There is just that distinction between the doctrine of *res judicata* and the doctrine of *stare decisis.* The Federal courts exercise an independent judgment in the construction of the Constitution and statutes of the State in which the cause of action arises, and they usually follow the interpretation adopted by the court of last resort in the State, but any error in that respect must be corrected by appeal, and does not render the judgment void. There are many announcements of this rule by

the Supreme Court of the United States, and the cases are so numerous that it is scarcely necessary to cite them. They are collected in the briefs of counsel in the case. As a late announcement on this subject, reference is made to the comparatively recent case of *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, and the still later case of *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447. In the application of this rule, it follows that the United States District Court, in the litigation between the Maccabees and Craighead County, involving the right to recover for debt and to enforce the judgment, had jurisdiction to compel the assessing officers to make an assessment of property for the purpose of raising funds to pay the judgment, and its decision in the interpretation of our Constitution with respect to the limitation upon the taxing power, though in conflict with the interpretation given by this court, was not void, for the reason that the jurisdiction of the court, based on the diversity of citizenship of the parties, in the decision of the rights of the parties to that action, drew to that court the jurisdiction to interpret the laws under which the cause of action, if any existed, arose. *Riggs* v. *Johnson,* 6 Wall. 195; *Proutt* v. *Starr,* 188 U. S. 537. There are decisions of this court holding that, even though a Federal court errs in its adjudication with respect to the taxing power of this State, the judgment of that court is binding upon the State court as to rights adjudicated in that particular action, even though in conflict with decisions of this court in the interpretation of the Constitution and laws of the State. *Vance* v. *Little Rock,* 30 Ark. 435; *Graham* v. *Parham,* 32 Ark. 676; *Gaines* v. *Springer,* 46 Ark. 502; *Garland County* v. *Hot Spring County,* 68 Ark. 83.

The decisions of the Supreme Court of the United States concerning the jurisdiction of Federal courts are conclusive upon the State courts, and that court has decided that it is within the jurisdiction of the Federal court to compel the assessing officers of a State to levy the full limit of taxes allowed by the laws of the State

for the purpose of enforcing its judgment. *Memphis* v. *Brown,* 97 U. S. 300; *United States* v. *Ft. Scott,* 99 U. S. 152.

Counsel for the defendants rely on the decision of the Supreme Court of the United States in *Ex parte Rowland,* 104 U. S. 604, but that case has no application. for the reason that it involved a mandamus against officers of a county who had no authority under the laws of the State to assess or levy taxes.

When the effect of the judgment of the Federal court is called in question in subsequent litigation in a State court in which the latter has jurisdiction of the subject-matter and of the parties, the State court may determine for itself the scope and extent of that judgment, though that is a Federal question, which may be reviewed by the Supreme Court of the United States, on proper application, by writ of error or certiorari. An error of the State court in a decision as to the effect of the Federal court judgment would have to be corrected in that way. It is therefore proper for us to consider, at this point of the controversy, what is the effect of the judgment of the Federal court, and this must be determined from an examination of the face of the record in the case in which the judgment was rendered.

The judgment directed that the assessing officers of the county "assess at its full value, in money, all property in Craighead County." This does not specify the mode of assessment, and that is left to the operation of the State laws as construed by this court. It does not direct that the assessment shall extend only to county taxation, but it applies to the whole assessment. This court has decided, in a recent case, that, under the Constitution of this State, there can only be one assessment of property for all purposes of taxation—State, county, municipal and school. *Hays* v. *Missouri Pac. Rd. Co.,* 159 Ark. 101. The effect of the judgment of the Federal court therefore was to compel the assessing officers to assess all the property in the county at full valuation, in the mode provided by the laws of the State; that is

to say, by a single valuation for all taxation purposes. It must be noted, then, that the valuation made by the assessing officers did not conform to the judgment of the Federal court in assessing at a full valuation, nor in conformity with the laws of the State, as declared by this court, in making such an assessment as would be in uniformity with the assessments of property in other counties. The assessing officers followed neither direction, but made two separate valuations for taxation purposes, which was, according to our decision in the Hays case, *supra,* unauthorized by law. Are the taxpayers bound by such an assessment? They are bound by an assessment made in accordance with the adjudication of a court having jurisdiction, in an action against the assessing officers, for the reason that they are held to be privies to the action, as being represented by the assessing officers in a matter in which the taxpayers are necessarily interested. *Ashton* v. *Rochester,* 133 N. Y. 187, 105 Am. St. Rep. (note) 213; 2 Vanfleet on Former Adjudication, 1153. They are not bound by an assessment not authorized either by the judgment of the court or by the laws of the State. The assessing officers may be held to be in contempt of court for failure to make the assessment in accordance with the judgment of the court, but the taxpayers cannot be held to compliance with the judgment unless the assessment be made in accordance therewith; they are only bound by an assessment made in accordance with the judgment. The taxpayers cannot be held to pay until there has been a valid assessment of taxes in accordance with law, or unless there is other statutory authority for collecting the tax without a previous valid assessment. It is contended by counsel for plaintiff that, if it be conceded that the assessment was not made in accordance with the direction of the Federal court judgment, the effect was merely to relieve the taxpayers from a portion of the tax which would have been imposed by a full valuation assessment by omitting the full valuation from the taxes for State, municipal and school purposes, and that they cannot complain of this

reduction. Counsel rely on the decision of this court in the recent case of *Summers* v. *Brown,* 157 Ark. 509. That decision does not, however, have the application here that counsel contend for. In that case there had been a valid assessment for all purposes, and the clerk, following the erroneous direction of the equalization board and the county court, reduced the taxes to one-half of the amount originally assessed. We held that the reduction was void, but that the taxpayer could not complain and escape payment of the amount of taxes extended against his property. In the present case there has been no valid assessment, either under the direction of the Federal court judgment or the laws of the State; therefore the taxpayers are not bound by the illegal assessment.

It is further contended by counsel for the plaintiff that these actions were brought under the statute (Crawford & Moses' Digest, § 10204 *et seq.*) authorizing suits in equity to be brought against corporations for the collection of overdue taxes, and that there should be a recovery in accordance with the valuation directed by the Federal court judgment, even though it be found that the assessment was not in accordance with the judgment. The courts of the State are not bound to that extent by the judgments of the Federal court. Under the statute referred to, the courts are authorized and empowered to adjudicate and enforce collection of delinquent taxes which are authorized by the laws of the State—not those merely directed by the judgment of another court.

Each of the defendants in these cases has offered to pay, at the outset, the amount due upon its property in accordance with the Constitution and laws of this State, and they cannot be compelled, under the statute referred to above, to pay more than that merely because there has been an adjudication of another court. The chancery court awarded the plaintiff a decree against each of the defendants for those amounts.

Courts of equity, under the statute referred to, are authorized to enforce only the taxation laws of this State

as interpreted by the Supreme Court of this State. The Federal court did not determine the amount that each taxpayer was to pay, but adjudged that there should be an assessment by the assessing officers at a full valuation, and, as before stated, this was not done.

Finally, it is contended that the court erred in refusing to adjudge a penalty, interest and costs on the defendants on account of their failure to make their tender good, but that contention is not sound, for the reason that the tender was refused. Each of the defendants pleaded a tender of the proper amount, which was, in effect, a continuing offer to pay that amount.

Before closing the discussion, reference should be made to the fact that the State Tax Commission did not, in fact, change its assessment of railroad property for the year 1921 and raise it to a full-value assessment. There was correspondence between the assessor and the secretary of the Tax Commission, in which the latter expressed his individual opinion as to what the assessor should do, but there does not appear in the record any order of the Tax Commission raising the assessment on railroad property to full valuation. This affords additional reason why there can be no recovery of taxes for the year 1921 on a full-valuation basis. It is unimportant, however, since we hold, for the reasons hereinbefore stated, that there can be no recovery for the taxes for either year on a full-valuation basis.

The decree is therefore affirmed.

HART, J., (dissenting). Judge HUMPHREYS and myself think that the opinion of the chancellor, that the judgment of the Federal court awarding the writ of mandamus was void, is correct, and for that reason the decree of the chancery court should be affirmed.

The full faith and credit clause of the Constitution of the United States was intended to give conclusive effect to judgments of all the States, so as to promote uniformity as well as certainty in the rule among them. 2 Story on the Constitution, 5 ed., § 1307.

The opinion of the majority tends to place assessing officers between two fires by subjecting them to contradictory orders, and impedes rather than promotes uniformity and certainty in judgments of courts sitting in the same State. The only excuse for levying and collecting the taxes in question is for the support of the State and county governments.

The confusion which might result from the majority opinion is calculated to interfere with the administration of the government of the State. To illustrate: The writ of mandamus was awarded in the Federal court on a judgment by default in favor of the holders of county warrants against the assessing officers. This might or might not have been the result of an agreement between the parties to the suit. Suppose a similar suit had been filed in the State court by the holders of other county warrants, and, upon the intervention of taxpayers, the case had been transferred to equity, and a decree obtained enjoining the assessing officers from making any such assessment. Then the order awarding the writ of mandamus in the Federal court would command the assessor to do the very thing which, by the injunction, he was forbidden to do. He would be guilty of contempt of court in failing to obey the order of whichever court he failed to obey. Thus we would have two courts sitting in the same State, deciding the same rights, arising in the same way, under the same provision of the Constitution, with directly opposite results. This court has already construed the clause of our Constitution in question directly opposite to the construction placed upon it by the Federal Court of Appeals, which was followed by the Federal District Court in awarding the writ of mandamus.

It is not pretended that the construction we have placed upon the sections of our Constitution is in conflict with the Constitution of the United States. It is well settled that to the highest court of a State belongs the right to construe its own statutes and Constitution, except

where they may conflict with the Constitution of the United States. Nor is it denied that, where such a construction has been given by a State court, the Supreme Court of the United States is bound to follow it.

The power to assess property for State and county purposes is derived solely from the Constitution and statutes of a State; and the authority is limited or restricted by the construction of the State Supreme Court of its own Constitution and statutes.

If the Federal courts can, under proper circumstances, issue their writs of mandamus for the purpose of compelling the assessor to assess property, it is evident that the State courts have as full and complete jurisdiction in the matter as the Federal courts possess. Suppose that a State court had issued its injunction, after due course of legal proceedings begun by holders of county warrants, and that the Federal court had issued its writ of mandamus at the instance of the holders of other warrants, the principle that, in cases of concurrent jurisdiction between State and Federal courts, the court which first acquires jurisdiction shall have the exclusive right to decide the matter in issue, could not apply. The reason is that, although the defendants in the two suits are the same, the plaintiffs would be different persons, seeking to enforce distinct and separate rights. They could in no sense be said to be in privity with each other because each of them was the holder of warrants of the same county.

Therefore we believe that the Federal court had no jurisdiction to issue a writ of mandamus to compel the assessing officers to assess property in defiance of a construction of this court of the Constitution and statute, under which alone they had power to act.

SMITH v. STATE.

Opinion delivered February 11, 1924.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—In a prosecution for larceny, evidence *held* to sustain a conviction.
2. CRIMINAL LAW—EVIDENCE.—In a prosecution for larceny of automobile casings, testimony of a police officer who arrested another person in possession of the alleged stolen property, that he found among the stolen articles a raincoat which had also been stolen, was admissible, though defendant was not present at the time of the arrest and discovery of the stolen property; all of the stolen articles being found together, and there being evidence to connect defendant with the theft of the articles described in the indictment.
3. WITNESSES—CROSS-EXAMINATION.—It was proper to permit a witness to be cross-examined as to whether he had been employed as a messenger to deliver a communication of an unlawful character, such testimony being admissible to show the moral character of the witness.
4. CRIMINAL LAW—IRRELEVANT EVIDENCE.—In a prosecution for larceny of automobile casings, where there was testimony that the defendant, at the time of the commission of the crime, was seen riding in a stolen automobile with a person who was subsequently arrested while in the possession of the stolen casings, and defendant testified that such person borrowed money from him for the purpose of buying some casings, exclusion of evidence that a certain person had cashed a check for the defendant on the date of the crime was not error.
5. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—In a prosecution for larceny, cross-examination of defendant as to whether he had not been convicted of making whiskey was proper, as it is competent to ask a witness touching his recent residence, occupation and associations, as bearing upon his credibility.
6. CRIMINAL LAW—INSTRUCTION SINGLING OUT DEFENDANT'S TESTIMONY.—It was not error to refuse an instruction on the weight of the testimony which singled out the defendant's testimony, other general instructions given having covered the general subject.
7. CRIMINAL LAW—DISCRETION AS TO REOPENING CASE.—In a prosecution for larceny, in which defendant, claiming an alibi, was permitted to prove by a witness that defendant had registered in his hotel the night of the larceny, and the prosecuting attorney argued that if the defendant had registered at such hotel a register showing that fact would have been produced, refusal of the court to recall the jury, while deliberating, to permit the defendant to introduce the register was not an abuse of discretion.

Appeal from Polk Circuit Court; *B. E. Isbell*, Judge; affirmed.

Norwood & Alley, for appellant.

J. S. Utley, Attorney General, and *John L. Carter*, Assistant, for appellee.

SMITH, J. Appellant was convicted under an indictment charging him with larceny of some automobile casings, and has appealed.

The first assignment of error is that the testimony is insufficient to support the verdict. The casings were owned by O. L. Lawrence, who testified that he was living near Mena, on the Big Fork road, in October, 1922, and that three casings, some inner tubes, some tools and a jack, of the value of $40, were stolen from his garage, and that, the next morning after they were stolen, he examined the tracks which were made by the parties who took them; that one of the persons wore tennis shoes, and that the other man made a large track. That he notified Mr. Hazel, the constable and deputy sheriff, who came to his house, and they together followed the tracks to the place where the thieves got in an automobile, and they tracked the car from there, through a lane, to the highway. The track of the car was examined, measured, and followed to Big Cedar, Oklahoma. They came to a place where the car passed through a gate, which was opened by the man wearing the tennis shoes, as that track led from the car to the gate. The track was compared with the first tracks seen, and was believed to be the same. The track of the car was followed to the home of a Mr. Anders, who is appellant's father-in-law, and the car which made the tracks was found at Anders' house. There they discovered the casings and the other stolen articles, and a pair of tennis shoes, which were found to fit the tracks made at the place where the casings were stolen, and, upon comparison with the tracks made by appellant after his arrest, appeared to be identical. The car was identified as one belonging to Dr. Hilton. The

larceny occurred about October 4. Hazel substantially corroborated this testimony. Appellant was not at the house when Lawrence and Hazel arrived there, but word was left for appellant to come to Mena, and this he voluntarily did. One Hughen was present when the stolen articles were found, and he was arrested by Hazel.

Hungate, a deputy sheriff and the chief of police of Mena, testified that he remembered the night the casings were stolen from Mr. Lawrence, and he saw Hughen and appellant the night the casings were stolen, that they had a flat casing, and asked if he knew where they could get a patch for it; that he furnished them a patch, and they repaired the casing, after which they drove out of Mena, going in the direction of Lawrence's home; that when he next saw the car they were driving he recognized it as Dr. Hilton's car, and he heard appellant say they had traded for it near Womble, but he did not hear appellant make any statement about the casings.

Two other witnesses saw appellant and Hughen in an automobile in Mena about 9 p. m. Dr. Hilton testified, and identified the car as being his. We think the testimony was sufficient to support the verdict.

Hazel was permitted to testify, over appellant's objection, that, when he arrested Hughen and took possession of the car, he found among other stolen articles a raincoat which had been stolen from Dr. Hilton in July, 1922. This testimony was objected to on the ground that appellant was not present at the time, and it is insisted that the admission of this testimony offends against the rule that the commission of the offense charged cannot be proved by evidence of the commission of another offense, unless the two offenses are so connected as to form parts of one entire transaction. We do not think the objection was well taken, for the stolen goods were found together, and it was a proper part of the officer's narrative to tell what he had found.

Appellant attempted to prove an alibi, and Fred Anderson gave testimony in support thereof. Upon his cross-examination Anderson was asked if he had not

been employed as a messenger in a communication of an unlawful character, but the court sustained an objection thereto. It is insisted that error was committed in asking the question, although the objection was sustained. We do not think so. The objection was sustained, but we think no error would have been committed, had the question been answered, as it tended to show the moral character of the witness.

It was proved by the testimony on the part of the State that Hughen had the stolen casings in his possession when appellant rode in the car with him from Mena to Anders' home, as a circumstance to show appellant's connection with the commission of the larceny of the casings. Appellant testified that Hughen had borrowed money from him for the purpose of buying some casings, and he offered to show that one Wood had cashed a check for him on the day the things were stolen. No error was committed in the exclusion of this testimony. It was self-serving, and was irrelevant, as appellant may not have loaned the money to Hughen, even though Wood cashed his check. Wood did not offer to testify that appellant loaned Hughen any part of the proceeds.

Error is assigned in permitting appellant to be asked about making whiskey, and he was asked if he had not been convicted of making whiskey. No error was committed in permitting this examination, as it is competent to ask a witness touching his recent residence, occupation and associations, as bearing upon his credibility.

Objection was made to instruction numbered 5, which dealt with the appellant's defense of an alibi. It is substantially the instruction which was first approved by this court in the case of *Ware* v. *State*, 59 Ark. 379, and which has since been several times held not to be prejudicial.

Appellant asked an instruction numbered 4, which told the jury how to weigh and consider his testimony, and an exception was saved to the refusal of the court to give it. It is substantially or, in effect, the instruction

which we have discussed in the cases of *Denton* v. *State,* 131 Ark. 1, and *Davis* v. *State,* 150 Ark. 500. In those cases the instruction was given over the objection and exception of the accused. We held the instruction was improper as tending to single out the testimony of the accused, but that it was not prejudicial error to give it. We said the testimony of the accused should be weighed and considered as that of other witnesses, it being proper, of course, for the jury to consider the interest of the accused in the result of the trial, but that the better practice would be not to call attention to the fact that appellant had a special interest in the case which might tend to color his testimony. Other instructions dealt with the manner of weighing testimony of the witnesses generally, and we think no error was committed in refusing to give this instruction numbered 4.

Witness Dickson testified that he ran a hotel at Mena, and that appellant registered at his hotel and was assigned a room on the night the larceny was committed. Objection was made to this question by the prosecuting attorney, upon the ground that the hotel register was the best evidence of the fact. The court overruled the objection, and counsel for appellant stated the register could and would be produced if this were required, but the court permitted Dickson to testify without producing the register. In his closing argument to the jury the prosecuting attorney argued that appellant was not registered at the hotel, and that, if he had in fact done so, the register showing that fact would have been produced. After the case had been submitted to the jury, and while the jury was considering its verdict, the register was produced, and appellant asked that the jury be recalled, and that he be allowed to introduce it. The objection made was not to the argument itself, but to the refusal of the court to recall the jury. We think no error was committed in the ruling made. It was a matter within the discretion of the court, and we think no abuse of the discretion appeared. If it was thought proper to corroborate the testimony of the landlord by the pro-

duction of the register, this could and should have been done as a part of the witness' original testimony.

Other errors are assigned, but they raise no question which we think requires discussion.

No error appears, and the judgment is affirmed.

BISH v. WOODS.

Opinion delivered February 11, 1924.

1. MALICIOUS PROSECUTION—ADVICE OF COUNSEL AS DEFENSE.—Where defendant told his attorneys that his tenants, the plaintiffs, had sold cotton belonging to him and indorsed his name with theirs to the checks received in payment, and prosecuted them for forgery on the advice of such attorneys, his failure to tell the attorneys that plaintiffs had deposited defendant's share of the proceeds to his account negatived the defense, in an action for malicious presecution, that he had acted on the advice of counsel.
2. APPEAL AND ERROR—INSUFFICIENCY OF ABSTRACT.—Where appellant failed to set out in his abstract all the instructions given and refused, the case will not be reversed for failure to give requested instructions.
3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Defendant's objection that in entering judgment against him the court disregarded verdicts in his favor on counterclaims could not be first raised on appeal.

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

R. A. Nelson, for appellant.

T. J. Crowder, for appellee.

HUMPHREYS, J. In stating this case the court will adopt the statement in the main furnished by learned counsel for appellant, making only slight changes therein and a few additions thereto.

During the year 1922 the appellees, Luther Owens and Clyde Woods, made share crops on the land of appellant, O. M. Bish. Some time in November, 1922, each tenant took his last bale of cotton to Manila, Arkansas, and sold it, receiving each two checks, made payable,

respectively, two to Wood & Bish and two to Owens & Bish, the checks being for the cotton and rebate upon the seed. Each tenant owed the landlord a balance for the money and supplies furnished them for making and gathering their crops. Woods owed $13.25, and Owens owed $12.30. Each of the above accounts were due the appellant, in addition to his half of the crop.

Woods and Owens each cashed the two checks received for their last load of cotton and rebate upon seed, by indorsing upon the back of each check the names "Wood & Bish" and "Owens & Bish," and each left in the Bank of Manila the half of each check belonging to Mr. Bish as landlord, but neither left the money in the bank nor paid to Mr. Bish the balance they owed him for the money and supplies. Mr. Bish denied that his half of the money was placed in the bank to his credit, or that he had any information that it was. Testimony was introduced by appellees tending to show that the bank immediately notified Mr. Bish that one-half of the amount had been placed to his credit, and that, before the prosecutions were begun, he was notified in person by a bank official of that fact. On November 14, 1922, John T. Batten, the regular deputy prosecuting attorney for the Chickasawba District of Mississippi County, filed information against Clyde Woods and Luther Owens, charging each of them with having committed a felony by forging the name "Bish" to the check, with the felonious intent to cheat and defraud said Bish out of the value of one-half of said checks. Upon the information filed by the deputy prosecuting attorney, warrants of arrest were issued by Ed Walker, justice of the peace, the appellees arrested, arraigned before the justice of the peace, and on November 23, 1922, each was dismissed.

On December 23, 1922, each filed a suit against O. M. Bish, asking damages in the sum of $5,000 each for malicious prosecution, alleging that Mr. Bish wilfully, maliciously and without probable cause procured and

caused their prosecution upon the information filed by the prosecuting attorney.

To each of the complaints the defendant filed his answer, denying that he wilfully, maliciously and without probable cause procured or caused the arrest or prosecution of the appellees, and offered the additional defense that he acted upon advice of counsel learned in the law, after laying all of the material facts before him. He also filed a cross-complaint, asking a judgment against appellees for the amount due him for money and supplies furnished.

On January 24, 1923, the causes being consolidated No. 1955, were submitted to a jury, upon the testimony of witnesses, instructions of the court and argument of counsel, which resulted in the following verdicts, to-wit: "We, the jury, find for the plaintiff, Clyde Woods, in the sum of one hundred dollars. R. L. Knight, foreman." "We, the jury, find for the plaintiff, Luther Owens, in the sum of one hundred dollars. R. L. Knight, foreman." "We, the jury, find for the defendant on his cross-complaint as against Woods in the sum of $13.25, with interest at ten per cent. from maturity. R. L. Knight, foreman." "We, the jury, find for the defendant on his cross-complaint as against Owens in the sum of $12.30. R. L. Knight, foreman."

Thereupon the court rendered separate judgments against the defendant for $100 each.

John T. Batten testified that he filed the affidavit and procured the warrants against appellees upon information received from appellant, to the effect that appellees had signed the checks without his authority, and had failed to pay him the one-half due for rent or the amount due for advances.

W. D. Gravette, an attorney from whom appellant sought advice, testified that he advised him that appellees were guilty of forgery, based upon the statement that they had signed checks without authority and had

deposited one-half the amount to his credit, but had failed to pay the advances he had made to them.

Appellant himself testified that he did not tell either Batten or Gravette that appellant had deposited one-half of the proceeds from the checks to his credit in the bank. He also testified that he never mentioned the matter to appellees, although they lived across the road from him.

Appellant contends for a reversal of the judgment upon the ground that he instituted the prosecution in good faith, under the advice of counsel, and for that reason was exempt from actions for malicious prosecution. In support of this contention he cites the case of *Price Mercantile Co.* v. *Cuilla,* 100 Ark. 316, and *Laster* v. *Bragg,* 107 Ark. 74, in which the following doctrine was announced: "When a party lays all the facts before counsel before beginning a prosecution, and acts *bona fide* upon the opinion given by such counsel, though that opinion is erroneous and unwarranted, he is not liable to an action for malicious prosecution." The answer to this contention is that the evidence did not show that appellant laid all the facts in his possession before the lawyers from whom he sought the advice he followed. The proof tended to show that he knew appellees had deposited one-half the proceeds of the checks to his credit, and he testified himself that he did not communicate this fact to either lawyer.

Appellant also contends for a reversal of the judgment because the court refused to give a number of instructions requested by him. He has failed to set out all the instructions given and refused in his abstract and brief, so we are unable to determine whether any material issue raised in the trial of the cause was not covered by correct instructions.

Appellant also contends for a reversal of the judgment because the undisputed facts conform to instruction No. 6, given by the court, and that the law as given, when applied to the undisputed facts, entitled him to a

verdict and judgment. Instruction No. 6 given by the court is as follows: "And in regard to this check, the court will further tell you that if, in consulting the attorneys about what crime had been committed, if any, by the plaintiffs in indorsing this check, if the defendant told the attorneys that this check had been written out in this way, payable to Wood & Bish, and the prosecuting attorney, or Mr. Gravette either one, advised the defendant that the signing or indorsing the check by Mr. Wood or Owens, under these circumstances, would be forgery, although in fact it was not forgery, still if the defendant was so advised by either one of these attorneys, that still would be a complete defense to this action."

This instruction was too favorable to appellant. It ignored the provision in the law requiring one to acquaint counsel from whom he seeks advice with all the facts in his possession before he can claim exemption from the action for malicious prosecution.

Lastly, appellant insists upon a reversal of the judgments because, in rendering them, no account was taken of the verdicts upon the counterclaim for advances. The judgments were entered without objection. The attention of the trial court should have been called to this fact at the time the judgments were rendered. This question cannot be raised upon appeal for the first time.

No error appearing, the judgments are affirmed.

MARVELL LIGHT & ICE COMPANY v. GENERAL ELECTRIC COMPANY.

Opinion delivered February 11, 1924.

DAMAGES—ANTICIPATED PROFITS OF A NEW BUSINESS.—The anticipated profits of a new business are too remote, speculative and uncertain to support a judgment for their loss.

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

Bevens & Mundt, for appellant.

The demurrer should have been overruled. It was a general demurrer raising only the question that the counterclaim did not state facts sufficient to constitute a cause of action. A complaint will not be set aside on demurrer, unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnished no cause of action whatever. 159 Ark. 31. If a cause of action can reasonably be inferred from the allegations of the complaint, it is not subject to general demurrer. 93 Ark. 371. The proper mode of correction is by motion to make more definite and certain. 91 Ark. 400; 75 Ark. 64; 6 Ency. Pl. & Pr. 350; 31 Cyc. 289; 122 Ark. 141; 96 Ark. 163. Loss of profits as an element of damage has been approved by this court. 72 Ark. 275; 104 Ark. 215; 74 Ark. 358. Full notice was given prior to the making of the contract that damages would result from delay. Where one is prevented from performing a contract by the fault of another, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the contract been carried out. 105 Ark. 421; 97 Ark. 522; 95 Ark. 363.

No brief for appellee.

HUMPHREYS, J. Appellee instituted suit in the circuit court of Phillips County against appellants, to recover $735.99 for machinery which it sold and delivered to them, to be used in the construction of an ice plant.

Appellants filed an answer, admitting the purchase of the machinery and the correctness of the claim, but, by way of counterclaim, alleged special damages of $1,000 in lost profits on account of delay in delivering said machinery. The counterclaim is as follows:

"Further answering, and by way of counterclaim, the defendants charge and allege that on the 28th day of August, 1919, they entered into a contract with the plaintiff for the purchase of the machinery for the purchase price of which the plaintiff now sues. That, under the terms of said contract, delivery of said machinery so

purchased was to be made to the defendants on or before December 1, 1919. That, prior to the time of making said contract, the plaintiff was notified by the defendants of the purposes for which said machinery was bought, to-wit, to run an ice factory, and the reason why delivery by the said contract date was necessary and of the special damages which would ensue to defendants in event plaintiff should breach said contract by failing to deliver said machinery on or before December 1, 1919, as aforesaid. That plaintiff, with full notice and knowledge, as aforesaid, of the special damages resulting to defendants for failure to deliver said machinery on the contract date aforesaid, and after an implied promise of plaintiff to defendants to assume liability for said special damages, the plaintiff wantonly, and without reason or valid excuse, breached said contract by delaying shipment of said machinery, so that the same, instead of reaching defendants on December 1, 1919, did not reach defendant until the 13th day of May, 1920. By reason of said breach of said contract the defendants were thus delayed in placing their ice factory in operation, and their loss in profits of said business by reason of plaintiff's said breach of contract was the sum of $1,000.

"Wherefore, defendant prays judgment for its said damages in the sum of $1,000, with interest thereon at the legal rate from December 1, 1919, until date of judgment."

A demurrer was filed and sustained to the counterclaim, and, upon refusal of appellants to plead further, a judgment was rendered against them, from which is this appeal.

Insistence is made by appellants that the counterclaim stated a cause of action, and the trial court committed reversible error in sustaining the demurrer thereto. Loss of expected profits in the ice business is made the basis of the counterclaim. It does not appear, by allegation or reasonable inference, that the manufacture

and sale of ice by appellants was an established business, so that proof of the amount lost on account of the delay in delivering the machinery might be made with reasonable certainty. The anticipated profits of the new business are too remote, speculative, and uncertain to support a judgment for their loss. In the case of *Midland Valley Rd. Co.* v. *Hoffman Coal Co.*, 91 Ark. 180, this court quoted with approval the following language from *Central Coal & Coke Co.* v. *Hartman*, 49 C. C. A. 244: "He who is prevented from embarking in a new business can recover no profits, because there are not provable data of past business from which the fact that anticipated profits might have been realized can be legally deduced."

The counterclaim was therefore defective and subject to demurrer, because it failed to contain the necessary allegation that the ice business, which was delayed, was an old or long established business.

No error appearing, the judgment is affirmed.

SOUTHERN LUMBER COMPANY v. HAMPTON.

Opinion delivered February 18, 1924.

1. REFORMATION OF INSTRUMENTS—BURDEN OF PROOF OF FRAUD.—To authorize the reformation of a deed for fraudulent representation or concealment, the fraud must be proved by evidence that is not merely preponderating, but is clear and convincing.
2. LOGS AND LOGGING—EXPEDITIOUS REMOVAL OF TIMBER.—A stipulation in a timber deed to one who could have removed the timber within a year or two, that the grantee shall cut and remove it as expeditiously as possible, requires expeditious removal of the timber, though the contract further provides "that, unless it (he) shall have removed all the same within a period of 21 years from the date hereof," he shall pay the taxes assessed against the land.

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

Fred L. Purcell, for appellant.

This court recognizes the principle that what was in the mind of the parties at the time the timber deed was executed will be considered in construing what is known as the "expeditious clause" of such a deed. 178 S. W. (Ark.) 304. A careful reading of appellant's testimony clearly indicates that she intended to convey the timber for a definite number of years, to-wit, 21 years; that Sharp would have to sell it to Southern Lumber Company, or one of the big companies, and that they would not take it for less than 21 years.

B. L. Beasley, for appellee.

For construction of timber deeds with reference to the expeditious clause, and the duty of the grantees thereunder, see 99 Ark. 112; 116 Ark. 393; 120 Ark. 105; 111 Ark. 253. The time for removing the timber under this clause must be determined by the facts and circumstances existing at the time of the purchase, and the ability and effort to remove on the part of the *original* purchaser, and not that of any subsequent grantee. 120 Ark. 105; 105 Ark. 455. The court's decree should stand, unless it is clearly against the preponderance of the evidence.

McCULLOCH, C. J. The plaintiffs, Nancy Hampton and Peter Rogers, are the owners of a tract of land in Bradley County, containing 120 acres, and on May 3, 1909, Nancy Hampton, being then the owner of the land, executed to T. J. Sharp a deed conveying to Sharp the pine timber on said land of certain maximum dimensions, $1,000 cash in hand paid being the consideration. The timber deed contained the following stipulation:

"The party of the second part shall cut and remove the timber as expeditiously as possible, and it is agreed that, unless it shall have removed all the same within a period of twenty-one years from the date hereof, he shall become responsible for and pay to the first party the full amount of taxes assessed against said land after the expiration of said period of twenty-one years from this date, until such time as said timber is removed and said possession returned to said first party."

On June 8, 1909, Sharp conveyed the timber to the defendant, Southern Lumber Company, a corporation, then, as now, being engaged in the lumber business and operating a mill in Bradley County. The timber deed from Sharp to the defendant was identical in form with the deed from Nancy Hampton to Sharp, the only difference being the amount of consideration paid. None of the timber had been cut or removed from the land, either by Sharp or the defendant, and this action was instituted by the plaintiffs against the defendant, in the chancery court of Bradley County, to cancel the timber deed as a cloud on the title, it being alleged and contended that defendant failed to expeditiously cut and remove the timber, as required by the terms of the conveyance. It is also alleged in the complaint that the execution of the deed was obtained from Nancy Hampton by fraud and misrepresentation and concealment concerning the stipulation in the deed as to the maximum time within which the timber might be cut. It is alleged that the agreement between the parties was that the timber should be removed within three years, and that it was surreptitiously written in the deed that the maximum time should be twenty-one years, and that this was concealed from Nancy Hampton when she signed the deed; that she was an ignorant colored woman, and could neither read nor write.

The case was heard upon testimony which was brought into the record, and the chancellor found in favor of the plaintiffs, and entered a decree canceling the timber deed, on the ground that the timber had not been removed in accordance with the stipulation in the conveyance. The defendant, Southern Lumber Company, has appealed.

The plaintiffs have failed to prove, to a satisfactory degree, that the deed was procured either by misrepresentation or concealment, and the cause of action in that regard must fail. The effect of the contention was to ask for a reformation of the deed on account of fraud,

and this must be proved by evidence which is not merely preponderating but which is clear and convincing. *Welch* v. *Welch,* 132 Ark. 227.

The rights of the parties must therefore be tested in accordance with the language of the timber deed.

This court has held in numerous cases that a stipulation in a timber deed identical in form and substance with the one now under consideration requires the expeditious removal of the timber, notwithstanding the maximum length of time mentioned for such removal. *Earl v. Harris,* 99 Ark. 112; *Yelvington* v. *Short,* 111 Ark. 253; *Newton* v. *Warren Vehicle Stock Co.,* 116 Ark. 393; *Burbridge* v. *Arkansas Lbr. Co.,* 118 Ark. 94; *Louis Werner Sawmill Co.* v. *Sessoms,* 120 Ark. 105; *Hampton Stave Co.* v. *Elliott,* 124 Ark. 574; *Polzin* v. *Beene,* 126 Ark. 46. Counsel for defendant concede that such is the settled construction of the terms of the deed in question, but invoke the rule announced in the case of *Burbridge* v. *Arkansas Lumber Co., supra,* that, in determining whether or not the purchaser under such deed has had time to expeditiously remove the timber, the fact should be taken into consideration that the purchaser was operating a mill, and owned large bodies of timber land, and was cutting and removing the timber in accordance with a settled plan of operation, and was proceeding to remove the timber as quickly as the practical operation of that plan would admit.

The evidence in the present case establishes, we think, the fact that the defendant, Southern Lumber Company, is operating its mill in accordance with settled plans which would not admit of taking this timber at an earlier period than the present time, and that, in this regard, the facts come within the decision in the Burbridge case, *supra.* But the distinction in the present case is that the plaintiff did not convey the timber to the Southern Lumber Company, and, on the other hand, conveyed it to Sharp, a single individual, who was not the owner of a mill, and whose circumstances did not

fall within the rule announced in the case just cited. In the Burbridge case we applied the same rule to the construction of timber deeds executed to individuals, but it was because of the fact that the proof showed that those conveyances were made to persons who were merely procuring them for the lumber company, and that it was understood at the time, by both parties to the conveyances, that the timber was to be removed by the lumber companies, according to their usual method of operation. The testimony in the present case fails to show that it was understood between the parties to the conveyance that the timber was to be taken by the defendant in accordance with its customary plan of operation. At least we cannot say that the testimony preponderates against the finding of the chancellor on that question. It is true that Sharp testified that, in purchasing the timber from Nancy Hampton, he stated to her that, in order for him to pay the price he was giving her for the timber, he must have a long period of time—twenty or twenty-one years—within which to remove the timber, for the reason that he would have to turn the lease over to the lumber company. In other words, his testimony was to the effect that there was an understanding that this timber was to be handled in accordance with the usual plan of operation of the Southern Lumber Company, but this testimony is disputed by the plaintiffs, and we cannot say that there is a preponderance against the finding of the chancellor. Defendant introduced another witness, Mr. Anders, who was conversant with the details of the trade between Sharp and Nancy Hampton—in fact, he states that he was interested in the purchase as a silent partner, and took the acknowledgment to the deed—and he testified as to those details, saying that there were no misrepresentations or concealment concerning the time, and, when asked the direct question whether or not Nancy Hampton was informed that the timber was to be taken over by the lumber company, he replied that the only understanding between Nancy Hampton and Sharp was that the latter was to do as he pleased with the timber.

Treating the purchase therefore as one by an individual or concern purchasing timber for general purposes, the evidence shows very plainly that the timber could have been removed at least within a year or two—perhaps in one season. The facts therefore fall, not within the doctrine announced in the Burbridge case, *supra*, but rather within the other cases cited above, and especially within the decision of this court in the case of *Polzin* v. *Beene, supra.*

Decree affirmed.

HART, J., dissents; HUMPHREYS, J., not participating.

FORD v. PLUM BAYOU ROAD IMPROVEMENT DISTRICT.

Opinion delivered February 18, 1924.

1. STATUTES—CLERICAL ERROR IN ENROLLED BILL.—Clerical mistakes in the enrolled copy of a bill signed by the Governor, by erroneous additions, omissions or misprisions, do not invalidate the act. So *held* where the enrolled bill signed by the Governor, by a clerical misprision, omitted three half sections of land described in the engrossed bill.
2. STATUTES—PRESUMPTION OF REGULARITY OF ENACTMENT.—The presumption of the correctness and regularity of the proceedings of the Legislature on file in the office of the Secretary of State may be overcome only by clear and decisive proof, and the mere fact that the engrossed copy of a bill bears evidence on its face of having been taken apart, was insufficient to impeach its integrity, even in connection with oral testimony as to changes having been made.
3. HIGHWAYS—REASONABLENESS OF ASSESSMENTS.—In a proceeding attacking the validity of an assessment for road improvement, where the testimony as to the reasonableness of the assessment was conflicting, the finding of the board of commissioners and the chancellor that the assessments were reasonable will not be disturbed, as the question of benefits is largely a matter of opinion.
4. HIGHWAYS—ZONE SYSTEM OF BENEFITS.—The adoption of the zone system in assessing the benefits from a road improvement district for construction of roads does not render the assessment invalid, unless it is shown in a direct attack that it is excessive or discriminatory.

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; affirmed.

H. T. Wooldridge, for appellants.

1. The enrolled bill, though not conclusive of what bill the Legislature passed, is, none the less, the best evidence. It is more authentic and should govern, unless it clearly appears that the wording of it is due to some mistake of the enrolling clerk; and the burden was on the district in this case to show such mistake. 142 Ark. 73. The district is void under the enrolled bill because of the gap in the district of half a mile in the south half of sections 1, 2 and 3, township 3 south, range 10 west. 130 Ark. 70; 139 Ark. 574; 143 Ark. 83. The testimony of a representative in the Legislature as to what was intended by an amendment to a bill is not admissible. 66 Ark. 466; 76 Ark. 197; 109 Ark. 556, 563. The courts have no power to legislate, but only to construe. If the language of an act is plain and unambiguous, no room is left for construction. 89 Ark. 513; 35 Ark. 56; 11 Ark. 44; 110 Ark. 99, 103. 2. The published act is void because it was never passed by the Legislature, nor signed by the Governor.

Coleman & Gantt, for appellees.

1. The act creating the district is valid. 142 Ark. 454; 135 Ark. 330. If the amendment made by the Senate related to lands in township 4 south, range 10 west, and that appears from the evidence to be true, it follows that the bill passed the Senate just as it has been published by the Secretary of State. On March 6 it was returned to the House, where the Senate amendment was concurred in. That completed the passage of the act. 130 Ark. 272; 110 Ark. 269; 61 Ark. 226.

2. With reference to the contention that the published act is void because the Governor did not sign it, which was due to an error of the enrolling clerk, the same is presented as in the case of *Rice* v. *Road Improvement District,* 142 Ark. 454, 459, which fully refutes that contention. See also 135 Ark. 330; 110 Ark. 269; 130 Ark. 503. This court has never followed the English rule that

the enrolled bill is conclusive. On the contrary, it adheres to the doctrine that the courts may look beyond the enrolled bill to the legislative journals, and that, where the intention of the Legislature is clear, errors may be disregarded. 19 Ark. 250; 103 Ark. 109; 34 Ark. 263, 269; 40 Ark. 200; 110 Ark. 274; 44 Ark. 536.

3. Under the act creating the district, the commissioners were required to assess the value of benefits to accrue to each tract of land by reason of the improvement. It was open to the assessors to adopt any method which, in their judgment, reached the true measure of benefits, *i. e.*, the effect of the proposed improvement upon the market value of the lands. 86 Ark. 1; 1 Page & Jones on Taxation by Assessment, § 11; 139 Ark. 322; 59 Ark. 536; 64 Ark. 258. The question is not the distribution of the cost over the lands in the district, but the extent to which the lands will be benefited by making the improvement. 86 Ark. 1; 122 Ark. 326. The cost of the proposed improvement was to be considered in fixing the total amount of benefits. If the assessors did not assess any land above the amount it would, in their judgment, be benefited, and made their assessment on an equitable basis, they were within the law; it was not necessary to assess the lands to the full extent they would be benefited, unless the cost of the improvement required that to be done. 134 Ark. 315; 122 Ark. 330. The zone system of assessment is not invalid, unless arbitrary and in disregard of actual benefits to accrue. 151 Ark. 484; 137 Ark. 568; 139 Ark. 322; 122 Ark. 326, 334.

McCULLOCH, C. J. The numerous appellants in this case are each owners of real property within the boundaries of appellee road improvement district, which was created by a special statute enacted by the General Assembly in 1923, Special Acts, 1923, p. 1062. The public road to be improved under the provisions of the statute, and described therein, runs from Sherrill, a town on the line of the St. Louis Southwestern Railway Company, nearly parallel with the railroad, to the town of Tucker, thence west and northwesterly to Plum Bayou,

thence northeasterly to the Lonoke County line. The statute also authorizes the improvement of two short laterals—one northward from the main road to Ferda, a station on the line of the railroad, and another southward from Plum Bayou, on the west end.

The commissioners of the district, after forming plans for the construction of the improvement, proceeded to appraise the benefits to the lands in the district, and, after the same were approved, appellants instituted this action in the chancery court of Jefferson County, attacking the validity of the statute, and also the correctness of the assessment of benefits.

The statute provides that the commissioners of the district, after publishing notices of the time and place of hearing, shall equalize and adjust the assessments, and that their determination shall be final, "unless suit is brought in the Jefferson Chancery Court, within thirty days thereafter, to set aside their finding." This action was instituted within that time, and therefore constitutes a direct attack upon the validity of the assessments.

The chancellor heard testimony as to the correctness and validity of the assessment of benefits, as well as on certain phases of the case which related to the validity of the statute itself, and rendered a final decree dismissing the complaint of appellants for want of equity. An appeal has been duly prosecuted to this court.

The validity of the statute is assailed on the ground that there is a material variance between the enrolled copy signed by the Governor and the bill which passed the two houses of the General Assembly, and that, according to the enrolled bill thus signed, there is omitted from the statute three half-sections of land situated in the heart of the district, two of which abut on the main road to be improved, and that this brings the case within the rule announced by this court concerning the omission of lands which would necessarily be benefited by a proposed improvement. *Heinemann* v. *Sweatt*, 130 Ark. 70; *Milwee* v. *Tribble*, 139 Ark. 574.

The facts with reference to the enactment and approval of the statute, as shown by the records on file in the office of the Secretary of State, are as follows: The bill for this statute originated in the House of Representatives, and, as introduced and passed by the House, the boundaries of the district included lands (three half-sections described as south half of sections 1 and 2; and, east of river, south half of section 3, in township 3 south, range 10 west), which were omitted from the enrolled bill signed by the Governor. When the bill reached the Senate, it was amended so as to shorten the lateral road running south from Plum Bayou by cutting off of it a distance of one mile, and lands described as the south half of sections 1 and 2, and, east of river, south half of section 3, township 4 south, range 10 west, were excluded from the district. The bill as amended was finally passed by the Senate, and returned to the House, where the amendments were concurred in, and the bill was engrossed. The engrossed bill now on file in the office of the Secretary of State includes the three tracts described as in township 3 south, range 10 west, and omits the tracts described by corresponding numbers in township 4 south, range 10 west. On the other hand, the enrolled bill signed by the Governor omits the half-sections mentioned as in township 3 south, range 10 west, but includes the half-sections with corresponding numbers in township 4 south, range 10 west. The Secretary of State published the statute in accordance with the boundary descriptions set forth in the engrossed bill, and not in accordance with the description in the enrolled bill. The description in the engrossed bill, which is on file, as before stated, corresponds with the Senate amendments to the original bill.

Appellants attempted to impeach the correctness of the engrossed bill by introducing a witness who testified that he compared the engrossed bill with the enrolled bill while the latter was in the hands of the Governor for his approval, and that the boundary descriptions in the

engrossed bill at that time corresponded with the descriptions in the enrolled bill.

There is also testimony to the effect that the engrossed bill in the office of the Secretary of State bears some evidence of having been taken apart, the marks showing that the brads had been removed and replaced. The effort is to show that the engrossed bill has been changed since it was filed in the office of the Secretary of State.

There is a conflict in the testimony as to the form in which the engrossed bill appeared at the time the enrolled bill was in the hands of the Governor, and as subsequently filed in the office of the Secretary of State.

If there was an error in the enrollment of the bill, it was a clerical one, which is obvious in comparing it with the engrossed bill, the original bill and the Senate amendments as concurred in by the House. This court is committed to the rule that clerical mistakes in the enrolled copy of a bill signed by the Governor, by erroneous additions, omissions or misprisions, do not defeat the validity of the statute. This was first decided in the case of *Athletic M. & S. Co.* v. *Sharp,* 135 Ark. 330, and, after full reconsideration of the subject, the court reaffirmed the rule in the case of *Rice* v. *Lonoke-Cabot Road Imp. Dist.,* 142 Ark. 454. We must therefore treat the question as settled.

The attempt to impeach the correctness and integrity of the engrossed copy of the bill is futile, for the evidence is, we think, insufficient to sustain the attack. There is a presumption in favor of the correctness of the records of the proceedings of the General Assembly remaining on file in the office of the Secretary of State, and alleged mutilation of the records must be shown by something more than a mere preponderance of the testimony. In order to overcome the presumption of the correctness and regularity, proof must be adduced which is clear and decisive. The mere fact that the engrossed copy now bears some evidence on its face of having been taken apart is not at all sufficient to impeach the correctness

of the document, even in connection with oral testimony as to changes having been made. In addition to the presumed regularity of the engrossed copy of the bill, there is the added fact that it corresponds with the original bill and the Senate amendments. Our conclusion is that the attack on the validity of the statute is not well founded.

This brings us to a consideration of the attack on the assessment. The commissioners adopted the zone system, and fixed a flat rate of eighteen dollars per acre on lands within one mile of the road to be improved, sixteen dollars per acre on lands one mile and not more than two miles distant, and fourteen dollars per acre on lands more than two miles distant. The territory embraced in the district extends from the east bank of the Arkansas River to the tier of half-sections on an average of two and one-half miles east of the St. Louis Southwestern Railway Company's line, and from the Lonoke County line south to the northern tier of sections in township 4 south. The area includes, mostly, alluvial lands in the Arkansas River bottoms, most of which are low and wet, but which have either been drained or are about to be drained by ditches, some of which are quite extensive. There are also bayous and brakes containing water. The lands are mostly in cultivation, the area containing many large farms, some of the largest of which are owned by some of the appellants.

The witnesses introduced on the question of anticipated benefits from the proposed improvement were quite numerous, and there is great contrariety of opinion. The witnesses introduced by appellants testified that the assessments are unequal, for various reasons given, and that all are in excess of the real anticipated benefits. On the other hand, the witnesses introduced by the district—they are more numerous than those introduced by appellants—all testified that the benefits which the lands in the district will derive from the improvements are considerably in excess of the assessments actually made by the commissioners, and that there is no discrimination

between the different classes of lands in the district. There is also the same contrariety of opinion with regard to the adoption of the zone system. The commissioners testified that, after careful consideration of all the elements which they thought might go to make up the question of benefits, they adopted the zone system as one that is fair and just and will bear equally upon all the property in proportion to benefits. In other words, they testified that, after consideration of all the elements, they reached the conclusion that distance from the road was a fair method of fixing the benefits. Appellants are more insistent, concerning the lack of uniformity of assessments, in the contention in regard to lands which are distant from the road, and that the road is inaccessible from these lands on account of the character of the soil and the intervention of bayous, drainage ditches, and other streams of water.

After giving full consideration to all the testimony in the case, we are unable to say that the assessments are erroneous. The question of benefits, like the question of market value, is largely a matter of opinion. All of the witnesses in the case are men who are familiar with the area in question and the character of the land, and appear to be equally intelligent. It is, after all, a question of difference of opinion between the witnesses, and those introduced by the district are more numerous —about double the number introduced by appellant— and they give as good reasons for their opinions as do the witnesses introduced by appellants. In addition to this, we have the findings of the board of commissioners, to whom the law has primarily committed the duty of appraising the benefits, likewise the finding of the chancellor on all of the testimony which is now before us. We have decided in many cases that the adoption of the zone system does not render an assessment invalid, unless it is shown, in a direct attack on the assessment, that it is excessive, erroneous or discriminatory. *Road Improvement Districts* v. *Crary,* 151 Ark. 484; *Davis* v. *Road Improvement District, ante* p. 98.

The following decisions of this court are especially applicable in the disposal of the contention of appellants with respect to the alleged excessiveness of the assessed benefits and discrimination therein; *Rogers* v. *Ark.-La. Highway Imp. Dist.*, 139 Ark. 322; *Wilkinson* v. *St. Francis Road Imp. Dist.*, 141 Ark. 164; *Reisinger* v. *Road Imp. Dist.*, 143 Ark. 341; *Hines* v. *Road Imp. Dist.*, 145 Ark. 382.

We find no error in the decree, and the same is therefore affirmed.

HART, J., (dissenting). This is a direct attack on the assessment of benefits made within the time prescribed by the statute, and, in the judgment of Judge WOOD and myself, practically the undisputed facts show that the zone system, or the frontage rule of assessing benefits, is discriminatory. This case should cause us to pause before a precedent becomes fixed, beyond judicial power to stop the zone system of assessments, where there is a direct attack upon it and the evidence shows that the assessment of benefits, when considered with reference to the configuration and topography of the earth's surface, makes even an approximation of equality impracticable.

Where the board assesses lands, shown beyond question not to be benefited, in the same proportion as other lands in the same zone, so that the matter could not be one of judgment or a difference of opinion, the inevitable inference is that they have acted upon a mistake of fact or upon an illegal principle of assessment. This is necessarily true, no matter what the commissioners may testify as to their opinion of the equality of the assessments.

The undisputed evidence in this case shows that some of the lands are separated from the roads to be improved by bayous, drainage ditches and buckshot lands impassable in wet weather, and that a wide detour, in order to avoid these obstructions, is necessary in going to and from the improved roads. Therefore it is obvious that this should be considered in making the assessments, and that the lands should not be assessed as high as those

which are the same distance in a direct line from the improved roads but which are not separated from the roads by obstructions to travel.

These physical facts are shown by the evidence in the record, which, in our judgment, is not disputed. It is true that witnesses for the defendant say that, in their judgment, the benefits are the same; but we think that their testimony in this regard is arbitrary. No fair and equal assessment of benefits can be made without taking into consideration the drainage ditches, bayous, and other obstructions which necessitate the landowners to go around them or to build a bridge across them before they can use the improved road. They are not required to build bridges, at a prohibitive cost, to cross these obstructions, or, if they should be required to do this, this fact should be considered in making the assessment of benefits. Therefore we respectfully dissent.

GATES v. RITCHIE.

Opinion delivered February 18, 1924.

1. BILLS AND NOTES—FAILURE OF CONSIDERATION—BURDEN OF PROOF.—Where the maker of notes admits their execution, the burden is on him to prove failure of consideration.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict sustained by substantial evidence will not be disturbed on appeal.
3. APPEAL AND ERROR—WEIGHT OF EVIDENCE.—The Supreme Court will not pass on the weight of the evidence or the credibility of witnesses; but where the testimony is undisputed, and all reasonable minds must read the same conclusions from it, the trial court should, and the Supreme Court will, declare as a matter of law what such conclusions of fact are.
4. APPEAL AND ERROR—EFFECT OF FINDINGS.—The Supreme Court must give the evidence its strongest probative force in favor of the trial court's findings.
5. CORPORATIONS—SALE OF STOCK—CONSIDERATION OF SUBSCRIPTION.—Where a note was given for an undivided one-third interest in a corporation under a contract whereby the payee agreed to pay the corporation's outstanding debts and take up all the outstanding stock before the maker should be required to pay for his

stock, the consideration was entire, and on the payee's failure to take up all the stock there was a failure of consideration for the note.

6. CONTRACTS—INTENT.—There must be a meeting of minds in every contract, and the intention of the parties must be gathered, not from what they mentally resolve, but from what they express.

7. BILLS AND NOTES—FAILURE OF CONSIDERATION.—A failure of consideration, either *in toto* or *pro tanto*, is a good defense to a suit on a note.

8. BILLS AND NOTES—FAILURE OF CONSIDERATION—RECOVERY.—Where the consideration of a note fails, but the maker is compelled to pay an innocent purchaser, he is entitled to recover from the payee.

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

Emerson & Donham, for appellant.

There was a total failure of consideration for the notes, and appellant is not liable thereon. 67 Ark. 962; 117 Ark. 552; 94 Ark. 282; 99 Ark. 458; 118 Ark. 548; 23 Ark. 196; 58 Ia. 656; 1 Randolph on Commercial Paper, No. 538; 3 R. C. L. No. 142 p. 946; 120 Cal. 511; 23 Ark. 546; 58 Me. 146; 96 Ind. 481; 197 Ill. 600; 49 Atl. 854. Appellant was entitled to recover the amount which he paid on his note, held by an innocent purchaser. 1 Randolph on Commercial Paper, p. 90 No. 551; 55 N. W. 580.

Gaughan & Sifford, for appellee.

A finding of fact by a trial court has the same sanctity as a finding by a jury, and will not be overturned if there is any substantial evidence to support it. 140 Ark. 360; 148 Ark. 156. In the absence of proof to the contrary, a party to a contract is presumed to have performed his part. 190 S. W. (Ark.) 113.

WOOD, J. This action was instituted by the appellee against the appellant on two promissory notes of $500 each, dated October 15, 1914, bearing interest at the rate of eight per cent. per annum from maturity until paid. The appellant, in his answer, admitted the execution of the notes, and set up in defense that, at the time he executed the two notes sued on, he also executed another note

to the appellee in the sum of $1,000. Appellant alleged that all of these notes were given for the purchase price of an undivided one-third interest in the telephone system at Hampton and Banks, Arkansas, and connecting lines; that the appellee represented to the appellant that this property was free and clear of all incumbrances and indebtedness, except certain items of indebtedness, which the appellee stated he would pay and discharge. The appellant alleged that there were certain debts and incumbrances against the property which the appellee failed to discharge, and that the property was finally sold under a judgment, which the appellee agreed to pay; that the appellee failed to discharge the obligations which he agreed to discharge at the time the appellant executed his notes, and that therefore the consideration for the notes had failed, and that he was not indebted to the appellee in any sum. He alleged that the appellee contracted to have all stock in the company taken up and owned by him and B. C. Powell, in order that the management might be entirely controlled by them and their associates, but that appellee failed to comply with his agreement in this respect. He set up, by way of cross-complaint, that the appellee had transferred the note of $1,000 for value before maturity, and that the appellant was sued on this note, and judgment was obtained against him, which he was compelled to pay. He therefore asked judgment against the appellee in the sum of $1,000, with interest.

The cause was, by consent, tried by the court sitting as a jury. When the testimony was concluded, the appellant asked the trial court to declare that, under the facts, the appellee was not entitled to recover on his complaint and that the appellant was entitled to recover on the counterclaim, and also asked the court to declare, in effect, that, if the appellee, as a consideration for the execution of the notes, was to deliver to the appellant one-third of the stock of the Hampton Company, unincumbered, and, if he failed to do so, they should find that the appellee was not entitled to recover on the notes; and

further that, if appellant paid the note of $1,000 and the stock was not delivered by the appellee to the appellant, and the debts existing against the Hampton Company at the time of the execution of the notes were not paid, appellant should have judgment on his counterclaim for $1,000, with interest at the rate of eight per cent. per annum from the time of the execution of that note.

The trial court refused to so declare the law, but, instead, rendered judgment in favor of the appellee. The appellant duly excepted to these rulings of the court, and brings this appeal.

1. The issues involved are mainly those of fact, and the correctness of the judgment of the trial court depends upon whether or not there is substantial testimony in the record to justify a finding that the notes in controversy were based upon a consideration which had not failed. The appellant having admitted the execution of the notes, the burden of proof was upon him to show a failure of consideration for the notes, which are the foundation of the action by appellee, and also a failure of consideration for the $1,000 note which the appellant paid, and upon which alleged failure of consideration he grounds his cross action against the appellee.

This court, in the case of *Fowler* v. *Hammett*, *ante* p. 307, re-announced familiar rules which govern here in determining whether or not the evidence was sufficient to sustain the findings of the trial court. Those rules are: That this court will not disturb the verdict where there is any substantial evidence to sustain it, and will not pass on the weight of the evidence nor the credibility of witnesses, which is the peculiar province of the jury; and, where the testimony is undisputed and all reasonable minds must reach the same conclusion from it, the trial court should, and this court will, declare as a matter of law what the conclusions of fact are which the undisputed testimony proves.

In *Thomas* v. *Thomas*, 150 Ark. 43, we said: "It has been uniformly and repeatedly held that the findings of fact by a circuit court are as conclusive as a verdict of a

jury, and will not be disturbed on appeal unless the evidence is legally insufficient to support them." In *International Harvester Co.* v. *Layton,* 148 Ark. 156, we held that, even though a finding of the trial court be against the decided preponderance of the evidence, it is not our province on appeal to determine where the preponderance lies. Under the often-announced rule of this court we must give the evidence its strongest probative force in favor of the court's findings. *Simms* v. *S. E. Mo. Trust Co.,* 140 Ark. 365.

2. Now, applying these very familiar rules to the facts of this record, we are convinced that the trial court erred in its findings and judgment. The appellant testified that the contract between him and the appellee was that he was to give the appellee $2,000, evidenced by the notes, for one-third of the stock in the Hampton Company. Appellee agreed that he would pay the outstanding debts of the Hampton Company before appellant should pay for the stock, and that one-third of all the stock should be procured and transferred to appellee and his associates. In a letter of January 5, 1915, a little more than two and a half months after the notes were executed, appellant wrote the appellee, restating his contract with the appellee, as follows: "You and Mr. Powell were to deliver to me one-third of the stock of the Hampton Telephone Company, free from all incumbrance. Not only was the stock to be free from all incumbrance, but the debts of the company were to be paid, and you and Mr. Powell were to take care of all of the debts of the company up to the time that I purchased the interest." Two other witnesses, one of whom stated he was present when the agreement was made, and another who stated that he heard appellee say what the agreement was, corroborated the testimony of the appellant as to what the contract was.

But the above testimony of the appellant and his witnesses would not be sufficient, under the above rules, to establish that such was the contract and overturn the finding of the trial court, if the appellee had testified to

the contrary. In answer to appellant's letter of January 15, 1915, the appellee wrote the appellant, saying, among other things: "Your explanation that you are to have a one-third interest, or one-third of the stock, free from all debt up to the time you come in, is exactly correct. This is the contract that we will carry out." And in his testimony the appellee stated that, as to the stock, appellant was to get one-third, and that, as to the debts of the Hampton Company at that time, they were to be paid by the appellee. True, in some places in his testimony appellee states that he was to take up all the outstanding shares of stock that were really issued and paid for—what he designates as the "valid" stock—but, when he was asked specifically whether or not his contract with appellant was that he should take up all the stock that was valid, he answered, "No sir; that I would take up all the stock that was issued." Therefore we conclude that the undisputed testimony shows that the consideration for the notes executed by the appellant to the appellee was that appellee should take up all the outstanding stock of the Hampton Company, and pay all debts of the Hampton Company in existence at the time the notes were executed, and deliver to appellant one-third of the stock of the Hampton Company.

Appellant further testified that the contract with the appellee was that appellee, after getting in the outstanding stock and paying the debts of the Hampton Company at that time, was to finance the company, that is, arrange for the money necessary to conduct the business until the then existing debts were paid and the outstanding stock taken up, and the plant built up and put in shape for consolidation with the Grant Company, which consolidation both parties contemplated, but, as to the terms of consolidation, no final agreement was reached. This testimony of the appellant is corroborated by the testimony of Bailey.

The preponderance of the evidence supports the appellant in his contention that appellee contracted to finance the Hampton Company until its debts existing

at that time were paid and the stock collected in and a third of it delivered to the appellant. It cannot be said, however, that the testimony of the appellant establishing this as a part of the consideration for the contract is undisputed, for the testimony of the appellee was to the effect that, after the notes were executed, until the outstanding debts were paid by appellee and the stock gathered in, and thereafter, the appellee, appellant, and Powell were to finance the Hampton Company, making such improvements as were necessary to keep it going. The testimony of the appellant himself shows that, after executing the notes in controversy, he signed other notes with appellee and Powell, attempting, for a while, to assist them in financing the operations of the Hampton Company.

But the testimony in the record, that appellee was to pay the debts of the Hampton Company existing at the time the notes in controversy were executed, and that he was to get in all the outstanding certificates of stock as a consideration for the notes, and deliver a third of the stock to the appellant, free from incumbrance, is absolutely undisputed. The appellant testified that such was the contract, and the testimony of the appellee, when scrutinized and analyzed, is to the same effect. It does not conflict with the testimony of appellant that such was the contract.

3. The next question is, were the certificates of stock all taken up by the appellee in compliance with his contract? The undisputed evidence shows that they were not. The testimony of Baxter shows that he held certificates of stock to the amount of about $300, and knew of at least $50 more that the appellee did not take up. Appellee, in his testimony, does not dispute this testimony of Baxter, but, on the contrary, in answer to Baxter's letter endeavoring to get appellee to take up this stock, the appellee concedes that Baxter's clients had the stock, and states that those who had paid for same would fare the same as he did. But he did not accept the offer of Baxter's clients to sell their stock at fifty cents

on the dollar. On the contrary, appellee, in his testimony, only says that he took up all the outstanding stock that was *valid*—all that had been paid for—and he contended that the outstanding shares of stock held by Baxter and others had not been paid for, and, when asked why the same were not valid, his only reply was that the stub-book turned over to him by Mason showed that it was not paid for, and that Mason and others told him that it was not paid for. In answer to questions, he stated that he never talked to any of the persons named in the certificates as owners of the stock, and could not swear whether or not they paid for it. While it was marked on the books that the stock was not paid for, he didn't know whether Mason received the money for it or not, and didn't know whether the stock-book was true or not. And, in answer to a direct question, he stated that his agreement with the appellee was *to take up all the stock that was issued.* He also stated, in answer to a direct question, *that he didn't give appellee the stock that he agreed to give him.* True, he qualified his answers and explanation by stating that what he meant was that he was to take up all the outstanding stock that was valid, but he still didn't dispute the testimony of the appellant and his witnesses to the effect that the contract was that he was to take up *all the outstanding stock.* Appellant's testimony concerning this is that they contemplated a consolidation of the Hampton and Grant companies, and that such consolidation could not be effected with any of the Hampton Company stock outstanding.

It occurs to us that the testimony of appellant is exceedingly reasonable, and his testimony, as well as the testimony of Savage, shows that the consolidation with the Grant company could not be effected until all of the outstanding stock of the Hampton company was taken up. As long as there was a considerable amount of outstanding stock in the hands of those claiming to be the owners thereof, these parties holding the certificates could not be ignored, in any effort at consolidation, without the

probability of lawsuits, which appellant doubtless, by his contract, intended to make impossible. At any rate, appellant testified that he would not have entered into the contract—"would not have touched it"—except upon the consideration mentioned, and this taking up of all outstanding stock entered into it. A close scrutiny and analysis of the appellee's testimony shows that such was the contract, and that he had not complied with it *because he meant, at the time, only to take up and deliver to the appellant stock which the appellee conceived to be valid.* But appellee's mental reservations could not change, or in any manner affect, the contract. There must be a meeting of minds in every contract, and the intention of the parties must be gathered not by what they reserve, but by what they express. Appellee confesses that such meaning was not expressed in the contract between him and the appellant.

Learned counsel for the appellee contend, in their brief, that, upon a reorganization, appellee would have been in a position to have issued appellant a sufficient amount of stock to cover his third interest in the company. But, even if this were conceded, it would not be, by any means, a compliance with the terms of the undisputed contract. We conclude therefore that the undisputed evidence shows that the appellee did not comply with the terms of the contract upon which the notes were executed, in regard to gathering in all of the outstanding stock of the Hampton Company and delivering a third of the stock of that company, free from incumbrance, to the appellant. Our conclusion in this particular makes it unnecessary to determine whether the appellee complied with his contract to pay all of the debts of the Hampton Company in existence at the time appellant executed his notes. For, as we view the contract, under the undisputed evidence the consideration was entire, and, unless appellee not only paid the debts, but also took up all of the outstanding certificates of stock, the entire consideration—the foundation upon which the notes were bottomed—falls, and there can be no recovery on the notes.

Here there was a total failure of consideration, because no stock was delivered by the appellee to the appellant, and, under the undisputed evidence, could not be delivered under the terms of the contract until all of the outstanding certificates of stock issued by the Hampton company were gathered in by the appellee, which the undisputed evidence shows he had not done. Appellant had the right, under his contract, to insist that this be done, and he could not have been compelled to accept a third of the stock of the Hampton company until it was done. The law is well settled that a failure of consideration *pro tanto* or *in toto* is a good defense to a suit on a note executed upon such consideration, to the extent of the failure of the consideration, whether in whole or in part. *Pettillo* v. *Hopson,* 23 Ark. 196; *Gale* v. *Harp,* 64 Ark. 462; *Cornish* v. *Friedman,* 94 Ark. 282; *Webster* v. *Carter,* 99 Ark. 458; *Ozark Diamond Mine* v. *Towne,* 117 Ark. 552-555.

The appellant executed his notes to the appellee in consideration that all of the things mentioned in the contract should be carried out before the notes, as between appellee and appellant, constituted any binding obligation upon the appellant. Therefore a failure upon the part of the appellee to perform any of the things specified for him to do under the contract constituted a total failure of consideration, which bars a recovery by the appellee. *Miller* v. *Wood,* 23 Ark. 546. See *Hedge* v. *Gibson,* 58 Iowa 656; 1 Randolph on Commercial Paper, § 538, and § 543, at p. 877, and § 551, at p. 888; 3 R. C. L. § 142, p. 946.

4. It follows also, from the above authorities cited in the appellant's brief, that the appellant is entitled to recover the amount of the note which the appellee had sold for value to an innocent purchaser, and which note the appellant was compelled to pay. This note and the other two were executed for a consideration which, under the undisputed evidence, as we have seen, has failed. 1 Randolph on Commercial Paper, § 551, p. 890; *Foley* v.

Machine Company., 55 N. W. 580. The judgment is therefore reversed, and, inasmuch as the cause seems to have been fully developed, judgment will be entered here dismissing the appellee's complaint, and in favor of the appellant on his cross-complaint against the appellee in the sum of $1,000, with eight per cent. interest from October 15, 1914.

WILSON v. STATE.

Opinion delivered February 18, 1924.

1. ASSAULT AND BATTERY—DEADLY WEAPON.—The shoes which a person wears as a part of his ordinary apparel are not "deadly weapons," within the meaning of the statute relative to aggravated assault.
2. ASSAULT AND BATTERY—REDUCTION OF PUNISHMENT.—In a prosecution for mayhem, a verdict finding accused guilty of an aggravated assault and assessing his punishment at a fine of $150 and imprisonment for 60 days, will be modified by remitting the imprisonment where there was no evidence that the battery was committed with a deadly weapon.

Appeal from Johnson Circuit Court; *J. T. Bullock*, Judge; modified.

G. O. Patterson, for appellant.

J. S. Utley, Attorney General, *John L. Carter*, *Wm. T. Hammock*, *Darden Moose* and *J. S. Abercrombie*, assistants, for appellee.

WOOD, J. The appellant was indicted by the grand jury of Johnson County for the crime of mayhem, as follows:

"The said Oscar Wilson, in the county and State aforesaid, on the 5th day of July, 1923, did wilfully, unlawfully, knowingly, maliciously, feloniously and of his malice aforethought and with premeditation, commit an assault upon one Dr. J. L. Post, and the ribs and nose of said Dr. J. L. Post did then and there break and disable * * * by striking, beating and stamping, with the unlawful and felonious intent then and there to disable and maim the said Dr. J. L. Post," etc.

There was testimony for the State tending to prove that appellant came up behind Dr. Post and struck him behind the ear, knocked him down, kicked him in the face and in the ribs, broke his nose and some of his ribs, and inflicted severe injuries on the side of his head and ear. Witnesses for the State testified that they did not see appellant with any weapon. He inflicted the injuries by striking and kicking Dr. Post.

The appellant testified that he met Dr. Post face to face, and Post rubbed against appellant with his shoulder, and at the same time shoved appellant and struck at him. Appellant then knocked Post down and hit him three or four licks, and some one walked up and told appellant not to hit him any more, and about that time Post raised up on his left hand and went with his right hand as though he was going into his pocket, and, when he did that, appellant kicked his hand. After appellant knocked Post down he desisted from further attack until Post turned over and reached for his hip pocket. Appellant had no weapon of any kind. He hit Post with his fist.

The court declared the law of the case in instructions to which the appellant here offers no objection. The jury returned a verdict finding appellant guilty of an aggravated assault, and assessed his punishment at a fine of $150 and sixty days in jail. Judgment was entered against appellant in accordance with the verdict, from which is this appeal.

The only contention of appellant is that the evidence was not sufficient to sustain the verdict. The undisputed testimony tends to show that the appellant inflicted the injuries by striking and beating Post with his fist, and by kicking him in the face and side. Appellant contends that this testimony does not sustain the verdict finding the appellant guilty of an aggravated assault, for the reason that no deadly weapon was used. Appellant is correct in this contention.

In the case of *Warren* v. *State*, 88 Ark. 322, the proof tended to show that Warren kicked a man by the name of Tardy while he was down, and a physician

who examined the wounds testified that one or two of the wounds could have been caused by a man's shoe. Warren was convicted of an aggravated assault, and his punishment assessed at $100 and imprisonment for one hour in jail. The court said: "There was no evidence to show that Warren assaulted Tardy with a deadly weapon, instrument, or other thing, and he therefore could not have been legally convicted of an aggravated assault. The evidence, however, was sufficient to convict Warren of an assault." That case rules this, and shows that, where one attacks another, using no other weapon than by striking with his fists, or kicking, he does not use a deadly weapon in the sense of the statute. The shoes which a man wears as part of his ordinary apparel, in the common acceptation of that term, are not deadly weapons within the meaning of the statute. At least, such is the interpretation of the above case. Evidently the court, in the above case, thought that the statute was leveled against assaults made by deadly weapons other than a man's feet or hands, or by the ordinary wearing apparel—that is, by such deadly weapon, instrument, or other thing as, in the ordinary acceptation, is calculated, or likely, to produce death or great bodily injury. Shoes, as articles of ordinary wearing apparel, according to the decision of *Warren* v. *State, supra,* do not come within that category. A powerful man—a Dempsey or Firpo—might kill one by striking with the fist or kicking with the foot, but a great bodily injury by this means would not be an assault with a deadly weapon, instrument, or other thing, in the sense of the aggravated assault statute. The indictment in this case, however, was sufficient to charge an assault and battery, the punishment for which is by fine in any sum not exceeding $200. The testimony was sufficient to justify a verdict finding appellant guilty of assault and battery and punishing him in the sum of $150 for that offense. The judgment therefore will be modified by remitting the imprisonment adjudged against the appellant, and, as thus modified, the judgment is affirmed.

SMITH, J. (dissenting). It is true appellant testified, and offered some testimony in corroboration of his own, that he struck Dr. Post in necessary self-defense, and did not kick him until the doctor attempted to draw a pistol. But, inasmuch as the jury did not believe this testimony, and found appellant guilty of an aggravated assault, we should, in accordance with the well-known rule which governs in such circumstances, test the sufficiency of the evidence to support the verdict by a consideration of the testimony which tends to support it.

Here the testimony of Dr. Post and that of a number of witnesses—men, women and a boy—was to the following effect: Appellant walked up behind Dr. Post and, without warning, struck and, while the doctor was lying helpless and unconscious, appellant jumped on the prostrate body and commenced kicking with his heel, and broke four of the doctor's ribs. Two women and some men, prompted by the dictates of humanity, seized hold of appellant and pulled him away, but he struggled loose from them and returned to his helpless victim, saying, as he did so, that the first round was not over, and resumed kicking him. With one kick he broke the bones of the doctor's nose and flattened it out on his face, and with another kick he burst the doctor's eardrum. Dr. Post testified that he did not know who hit him, as the first blow rendered him unconscious, and that he did not fully regain consciousness for three or four days later, when he found himself in the hospital at Fort Smith. He first knew that his nose was broken by applying his hand to it, thus dislocating some bones, which his act required to be reset. That he was in the hospital for sixteen days, and was disabled at his home for two weeks additional, and that it was six weeks before he was able to resume the active practice of his profession as a physician. He further testified that he had lost his hearing in the injured ear, and that one of his ribs had never healed, and still caused him pain.

This testimony may not be true, but this was, of course, a question for the jury, and, if it is true, who can

say that appellant might not actually have kicked or stamped his victim to death before he had spent his fury or had exhausted himself?

It is said in the majority opinion that the case of *Warren* v. *State,* 88 Ark. 322, affords the authority and imposes upon us the duty of holding that this testimony is not legally sufficient to support a conviction for an aggravated assault.

I shall not attempt to differentiate this case on the facts from the Warren case—which I think might be done—but content myself with saying that, if such is the purport of that case, it is wrong, and should be overruled, and we will never be afforded a better opportunity to overrule it, or at least to qualify it, than is now afforded. No rule of property is involved, and a decision which renders it impossible to mete out punishment in some measure commensurate with such an assault as the testimony recites shows was committed by appellant should not be permitted to stand.

This result is arrived at because a man's shoe is a part of his wearing apparel, and cannot therefore be called a deadly weapon. But the law does not read that an aggravated assault can be committed only with a deadly weapon. The statute reads as follows: "If any person assault another with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty nor exceeding one thousand dollars, and imprisoned not exceeding one year." Section 2334, C. & M. Digest.

Certainly this testimony lacks no element of being an aggravated assault except that it was not committed with a deadly weapon. According to this testimony, there was an intent to inflict a bodily injury upon the person of another, no considerable provocation appeared, and the

circumstances of the assault showed an abandoned and malignant disposition.

But, as appears from the statute which I have quoted, aggravated assaults are not limited to those only which are committed with a deadly weapon. They may be committed with a deadly weapon, instrument, or other thing. It may be conceded that the rule of *ejusdem generis* applies, and that, in its application, the words, "instrument or other thing," must be construed to mean some article or object which could be and was used as a weapon. To give these words, "instrument or other thing," less meaning would be to deprive them of any meaning. These words should therefore be construed to mean some object or article which, although not a weapon, was one which could be and was used as such. How much more injury could be inflicted with knucks on one's hands than with the toe and heel of one's shoe or boot?

The use of a deadly weapon ordinarily indicates that the user had a purpose to inflict a bodily injury, because the weapon was intended for that purpose and had no other use, but no court has ever held, so far as I am advised, that one cannot be guilty of murder even unless he used some weapon designed to produce death in the commission of the homicide. Death or bodily injury can be inflicted not only with weapons but with an infinite number of "instruments or other things," when properly used to accomplish that purpose. This is a matter of such common observation that the citation of any of the numerous authorities so holding is unnecessary, but, as typical of many other cases, I quote from the decision of the Supreme Court of Kansas in the case of *State* v. *Bloom,* 136 Pac. 951, the following statement of the law: "The definition given in 30 Am. & Eng. Enc. Law, 443, and in 2 Words and Phrases Judicially Defined, 1828, 13 Cyc. 257, and some other law writers, of a 'dangerous weapon,' being taken from the decisions of various courts, is one calculated or designed to inflict death or great bodily harm, or, by the manner in which it is used, is likely to produce death or great bodily

harm. Some courts, also, give practically the same definition to the word 'weapon.' All of the courts, however, recognize that a weapon may be dangerous from the very design of its make, as a gun or a sword, while any object that may be used to inflict injury upon another, offensively or defensively, may be a dangerous weapon in the manner in which it is used. For instance, one authority (*State* v. *Norwood,* 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498) holds that a pin thrust down the throat of an infant, causing death, constitutes a killing with a deadly weapon. It is said that where a weapon is in itself a dangerous weapon, it is province of the court to so tell a jury in a criminal trial, whereas, if the weapon is or is not dangerous according to the manner of its use, it is a question for the jury. It is evident that our Legislature, in defining the two crimes, wherein practically the only distinction is that the killing in the one should be by a *dangerous* weapon and in the other by a weapon, recognized the distinction that in one case the weapon should be dangerous in itself and in the other that it became dangerous only as used. The manner of the use is clearly to be determined as a fact by the jury."

With all deference to my associates, who probably feel that the rule of *stare decisis* binds them, I insist that, if the Warren case affords authority for the holding in the instant case, it is so fundamentally unsound that it should be overruled, as it involves no rule of property, and I submit that the rule of *stare decisis* does not require us to follow a previous decision which contravenes ordinary principles of justice and stands as an impediment in affording the citizens of the State adequate protection from assault of this character.

I therefore dissent.

EISENKRAMER v. ECK.

Opinion delivered February 18, 1924.

1. NEGLIGENCE—SETTING OUT FIRE.—In an action against an adjoining proprietor for destruction of a barn by fire, evidence *held* sufficient to warrant submission of the question of defendant's negligence in allowing weeds to grow and rubbish to accumulate in his back yard so close to the barn as to constitute a menace thereto in case the same should be set on fire, either accidentally or negligently.
2. MASTER AND SERVANT—ACT OF SERVANT IN CAUSING FIRE—JURY QUESTION.—In an action against an adjacent proprietor for causing the destruction of a barn by fire, evidence *held* sufficient to warrant submission of the question whether one alleged to have set fire to weeds and rubbish in defendant's yard was a servant of defendant and acting within the scope of his employment, and whether the fire was caused by his negligence.
3. TRIAL—REPETITION OF INSTRUCTIONS.—Where the court sufficiently covered an issue by its instructions, it was not error to refuse additional requests for instruction on the same issue.
4. TRIAL—REFUSAL OF PEREMPTORY INSTRUCTION.—In an action against an adjacent proprietor for destruction of a barn by fire, an instruction that, if one to whom defendant gave a contract to cut grass and clean up his yard, set fire to the grass, which ignited plaintiff's barn, such act was not that of the defendant, *held* properly refused, as being peremptory, and as ignoring issues which the testimony tended to prove.

Appeal from Jefferson Circuit Court, *John W. Wade,* on exchange Judge; affirmed.

Reimberger & Reimberger, for appellant.

There was no proof showing negligence on the part of appellant. Conjecture and speculation cannot supply the place of proof. 113 Ark. 353; 114 Ark. 112. The negro was an independent contractor. The burning of the trash was not within the scope of his employment. He was hired to haul the trash away. See 26 Cyc p. 1534; Instruction No. 21 requested by appellant should have been given, as it defined what an independent contractor was. 77 Ark. 551; 76 Ark. 227. Instruction No. 22, stating under what condition the independent contractor would be liable, should have been given. 53 Ark. 503.

Caldwell, Triplett & Ross, and *Powell & Alexander,* for appellees.

Appellant was negligent in the matter of setting out the fire, and is liable for the resulting damages. 81 Ark. 15; 80 Ark. 597; 99 Ark. 600; 64 Ark. 307; 81 Ark. 13; Cooley on Facts, p. 589. Where there is evidence to support a jury's finding, it will not be disturbed on appeal. 145 Ark. 273; 144 Ark. 402.

WOOD, J. Mr. and Mrs. F. W. Eck were the owners of a certain lot in the city of Pine Bluff, Arkansas, on which was situated a barn containing property of the value of $168.40. This barn, with its contents, was destroyed by fire on August 11, 1922. The barn was insured in the Fire Association Insurance Company (hereafter called company), and it paid to Mr. and Mrs. Eck the sum of $152.82 for the loss they sustained.

These actions were instituted by Mr. and Mrs. Eck and by Mrs. Kate Eck and by the company against William Eisenkramer. It is alleged in the complaint that Eisenkramer owned a home adjoining the property of Mr. and Mrs. Eck, and that he allowed a large amount of rubbish to accumulate in his back yard, on the property line next to the barn of plaintiffs; that they requested the defendant, several times, to remove the rubbish and weeds, informing him that same was liable to catch fire and burn plaintiff's barn; that the defendant was notified by the city authorities to remove the rubbish, weeds and trash from his premises; that, on the day of the fire, the plaintiffs were absent in the city of Monticello, which fact the defendant knew; that on that day the defendant caused the weeds and rubbish in his back yard to be set on fire, and the sparks therefrom ignited the barn of the plaintiffs and totally destroyed the same, with its contents; that the destruction of the plaintiff's property was thus caused through the negligence of the defendant; that the contents of the barn were worth $168.40, for which sum the plaintiffs prayed judgment.

The company, in its complaint, alleged that it had issued a policy to F. W. and Kate Eck, and had paid

the sum of $152.88 to them for their loss on account of the fire; that the company was subrogated to the rights of the Ecks in the damages caused by the burning of their barn through the negligence of the defendant. It prayed judgment in the sum of $152.88.

The defendant, in its answer, denied all the material allegations of the complaints.

The testimony on behalf of the plaintiffs tended to sustain the allegations of their complaints. Mrs. Eck testified that she was the owner of the barn mentioned in the complaint, and that it was destroyed by fire on the 11th of August, 1922, while she was in Monticello. The barn was close to defendant's fence, and some of the fence had burned. The barn was burned from the side next to the fence. She did not know how the barn caught on fire. The contents of the barn destroyed were worth $168.40. They were insured with the company, and the company settled with her for the destruction of the contents of the barn on the 19th of August, 1922, and she subrogated her rights to the company by agreement, which was introduced in evidence.

Mrs. W. M. Hardister testified that she lived in a house owned by Mr. and Mrs. F. W. Eck, and that there was a barn in the rear of the house, which was destroyed by fire from trash burning in the defendant's lot. She discovered the flames in the roof of the barn, and turned in the fire alarm. There was a fire in the defendant's yard at the time, and same had been burning there all morning. The barn burned about 1:30 p. m. There was a colored man in defendant's back yard, who was standing there, with his back to the barn, looking north, away from the barn. He made no effort to put out the flames. He had been in the back yard all the morning. It was shown that a reasonable market value of the contents of the barn destroyed was $168.40. An insurance agent estimated the loss of the barn at $189.85. The company paid to Mrs. Eck the sum of $152.88. The policy was introduced in evidence, and the subrogation agreement between Mrs. Eck and the company, which

showed that the company had paid her the sum of $152.88, as she testified. There was no insurance on the contents of the barn.

The defendant testified that he made a contract with an old negro man, named Smith, to clean his yard, for $2.50, and told him to pile the weeds and trash up and haul it away. He didn't exercise any authority over the negro as to the manner in which he should clean the yard, except that he was to clean it and haul the trash away; that it was not necessary for him to burn the trash. His contract was to haul the trash away, and beyond that the negro was to use his own judgment in cleaning the yard. The witness didn't authorize the negro to burn the trash, and didn't exercise any supervision over him. His yard was not in a bad condition. There was a small pile of trash, and some grass and weeds that had grown up. Witness was sure that he told the negro to haul the trash away. The negro had never worked for him before. He had paid the negro fifty cents on the job.

In rebuttal, Henry Smith testified, on behalf of the plaintiffs, that he was employed to clean defendant's garden, in the back of his house, in August, about the time the barn next door was burned. Defendant hired witness to clean the yard, and clean it good. Defendant did not tell witness to haul the trash away, but just told him to clean it up. Witness didn't have a horse and wagon. He had been cleaning yards for nineteen years. He did the job as he thought it ought to be done. Defendant did not tell witness to burn the trash. Witness did not burn the barn. The fire was there when witness got there—papers and stuff burning in the yard. Witness was in the garden, and not in the yard, at the time of the fire, and didn't set the trash on fire. Defendant had nothing to do with it, except he told witness to clean the yard good. Witness didn't know what caught the barn on fire. Didn't know it was on fire until a lady across the street hollered. The trash witness took out of the yard didn't catch on fire, and he didn't set the

trash on fire. There was a fire further over from where witness was, and the barn must have caught from that fire, but witness didn't know how it caught. There was some fire in papers and trash, and children playing around in the yard.

Mrs. Hardister testified that she didn't see a fire in the defendant's yard before the negro got there, but there was a fire there after he got there. She heard defendant say to his wife that she ought to have gone out and made the negro put the fire out. The pile of trash near defendant's fence was burning, and the negro kept piling trash on the same.

Mrs. Eck also testified, in rebuttal, that she heard defendant say that the negro ought to have put the fire out, and that there was a pretty good wind blowing that day—not a hard wind.

There was testimony to the effect that there was rubbish in the back yard of defendant at the time the fire occurred, which was dangerous if a fire started, but that the same condition existed in other yards.

The court, in prayers for instructions given at the instance of the plaintiffs, told the jury, in substance, that, if the defendant was negligent in the manner in which the fire started, or in failing to use reasonable care and diligence to prevent its spreading and doing injury to the barn of the Ecks, and that such negligence was the proximate cause of the destruction of the barn, they should find for the insurance company for the damage done to the barn, not exceeding the amount paid the Ecks by the company in settlement of the said damage; that, if the defendant had rubbish and trash on his premises in his back yard burned, it was his duty to use ordinary care to see that the fire did not spread, and that, if he failed to use such care, and, on account of his or his servant's negligence, the fire spread and burned the barn of plaintiffs, they should find for the plaintiffs; that the master was responsible for acts done by the servant in obedience to the master's express or implied orders and in execution of the master's business,

within the scope of his employment; that it was for the jury to say, under the evidence, whether or not Smith was the servant of the defendant, and whether or not the burning of the trash was within the scope of his employment, and, if so, the defendant was liable for the negligence of Smith, if any; that, if the defendant burned the rubbish in his back yard in such a careless and negligent manner that the fire ignited the barn of plaintiffs, destroying the contents thereof, the jury should find for the plaintiffs such damages as would compensate for the actual damages sustained, if any, as appears from the evidence.

The court, in prayer for instruction No. 16, given at the instance of the defendant, told the jury, in substance, that, if they believed from the evidence that the defendant employed a person to cut and clean up his yard, which required the setting out of a fire, or for a stipulated compensation, and didn't reserve control over the action of said party, then the party is an independent contractor, and the defendant was not liable to the plaintiffs for any fire that said contractor may have set out.

The appellant presented prayer for instruction No. 19, which told the jury to find for the defendant. Also, prayer for instruction No. 21, which was to the effect that, if the defendant employed a person to clean his premises, and said person undertook the work, using his own means and methods, and the defendant retained no right or power to control such person in his work, they should find for the defendant. Appellant presented prayer for instruction No. 22, which was to the effect that, if the defendant entered into an agreement with a person, for a stipulated sum, to clean his premises, but did not authorize the person to burn the rubbish, and that the cleaning of the premises was not necessarily dangerous, the jury should find for the defendant; and in prayer No. 23 that, if the party to whom the defendant gave the contract to cut the grass and clean up the yard lighted a match and set fire to the grass, which ignited the barn of plaintiffs, such act was not the act of the defendant.

The court refused to grant appellant's prayers for instructions Nos. 19, 21, 22 and 23. The appellant duly excepted to the rulings of the court as above set forth. The jury returned a verdict in favor of the Ecks in the sum of $168.40, and in favor of the insurance company against the defendant in the sum of $152.88. Judgments were rendered according to the verdict, from which are these appeals.

1. The appellant contends that there was no evidence to show negligence on his part, but we cannot concur in this view of the testimony. There was testimony from which the jury might have found that the appellant allowed weeds to grow up in his back yard and rubbish to accumulate therein in a large quantity. These were in such proximity to the appellees' barn as, of themselves, to constitute a menace thereto in case the same should be set on fire, either accidentally or negligently. There was testimony from which the jury might have found that the appellant was warned that, on account of this condition of his back yard, the appellees' barn was endangered thereby, and that they requested him to correct the same, but he failed to do so until the day the fire occurred. Also, there was testimony to warrant the finding that appellant had had a fire on his premises before which had threatened to destroy appellees' barn, and also testimony to warrant the finding that the appellees' barn was destroyed by fire about 1:30 p. m., and that fire had been burning in appellant's yard all the morning. These and other facts warranted the court in submitting the issue to the jury as to whether or not the appellees' property was destroyed through the negligence of appellant, as alleged in the complaint, regardless of whether the negro, Smith, in cleaning up the yard, set out the fire or not. The court's declarations correctly submitted the issue of negligence.

There was also testimony from which the jury might have found that the negro, Smith, was employed by the appellant to clean his yard; that Smith was the servant of appellant, in so doing, and was acting within the scope

of his employment, and that the fire was caused through his negligence in setting fire to the rubbish, and that this negligence was the negligence of the appellant. These issues were also submitted to the jury under correct declarations of law.

2. The appellant further contends that the negro, Smith, was an independent contractor, and that, if the fire was caused through his negligence, the appellant was not liable therefor. If it be conceded that the testimony warranted the submission to the jury of the issue as to whether or not the negro, Smith, was an independent contractor, the court gave appellant's prayer for instruction No. 16, which defined an independent contractor, couched in language chosen by the appellant, and submitted that issue to the jury. Having given this instruction, the court did not err in refusing appellant's prayers for instructions Nos. 21 and 22, which related to the same subject, and were sufficiently covered by instruction No. 16, already given.

Instruction No. 23 is peremptory in character, and ignored issues in the case which the testimony tended to prove. The court did not err in refusing same. Upon the whole, we find no error in the rulings of the trial court prejudicial to the appellant, and the judgments are therefore affirmed.

RAY v. ARKANSAS FERTILIZER COMPANY.

Opinion delivered February 18, 1924.

1. APPEAL AND ERROR—APPEAL FROM JUDGMENT ON DIRECTED VERDICT.—On appeal from a judgment on a directed verdict, the evidence must be given its strongest probative force in appellant's favor.
2. BILLS AND NOTES—JURY QUESTION.—In an action on a note given for fertilizer, as collateral security for which defendant was to transfer to plaintiff the notes or accounts of the farmers to whom defendant sold the fertilizer, evidence *held* insufficient to warrant submission of the question whether the parties subse-

quently entered into another contract, under which defendant claimed certain credits on the note.

Appeal from Grant Circuit Court; *Thomas E. Toler*, Judge; affirmed.

Isaac McClellan, for appellant.

The court ought not to have taken the case from the jury, as there was evidence to support the defendant's contention, and it is error to direct the verdict where there is conflict in the evidence. 35 Ark. 147; 36 Ark. 451; 37 Ark. 580; 62 Ark. 63; 63 Ark. 94; 71 Ark. 445; 76 Ark. 468; 77 Ark. 556; 84 Ark. 57; 96 Ark. 451; 99 Ark. 490. The evidence should be viewed in the light most favorable to the party against whom the verdict was directed. 73 Ark. 561; 89 Ark. 368.

R. R. Posey, for appellee.

Cases cited by appellant have no application here. If he had a contract, it was a written one. The alleged contract relied on was never signed and approved by the fertilizer company. The minds of the parties never met. 76 Ark. 237; 145 Ark. 394; 97 Ark. 613, 121 Ark. 150; 90 Ark. 131; 95 Ark. 421. The suit is based upon a promissory note, the execution of which is admitted. The contract set up by the defendant was no defense, as it was never executed. Moreover, it was no part of the note sued on and could not be set up as a counterclaim or set-off. 129 Ark. 354; 99 Ark. 224; 128 Ark. 433; 129 Ark. 346; 158 Ark. 75.

WOOD, J. This is an action by the appellee against the appellant on a promissory note in the sum of $612, bearing date of April 29, 1921, and due Nov. 1, 1921, with interest at the rate of 10 per cent. from maturity until paid. The appellee alleged that there was a credit of $115.61, and a balance due of $530.13, for which amount it prayed judgment.

The appellant, in his answer, admitted the execution of the note, and set up that he was entitled to two credits on the note, leaving a balance due the appellee of $283.39. Appellant alleged that for the year 1922 the appellee sold

appellant six tons of fertilizer, which it was to ship to appellant at Sheridan, Arkansas; that appellee failed and refused to ship such fertilizer, to appellant's damage in the sum of $600. Appellant prayed that he have the credits as alleged, and that he have damages in the sum of $600, and that these sums be offset against the note, and that appellant have judgment for the balance. The appellee attached to its complaint and introduced in evidence the note in controversy, which contains many provisions which it is unnecessary to set forth in detail, the effect of which was a contract between the appellee and the appellant by which the appellee sold to the appellant fertilizer for year 1921. As collateral security for the notes executed for this fertilizer, appellant was to transfer to the appellee the notes or accounts of the farmers to whom the appellant sold the fertilizer. After the note became due, the appellee and appellant had a lengthy correspondence concerning same, which is brought into the record, and is substantially as follows:

On December 23, 1921, the appellee wrote the appellant asking him when it could expect payment of the balance due on his note, and stating that it expected full payment. Appellant answered on December 28, giving at length the reasons why he could not pay, and concluding by saying that he could not pay the balance due until he made and sold another crop, unless appellee would let him sell fertilizer for it for the coming season, and stating that he would like to sell on a commission basis per ton, appellee to deliver f. o. b. cars at appellant's station, and appellant to sell and deliver to the customers and take notes in the name of the appellee, appellant's commission to be applied on what he owed appellee until payment was made in full. Appellee replied to this letter, December 30, asking appellant if he could not give security for the balance due, in form of the signature of some of "your friends or relatives who are willing to help you over this difficulty, or by mortgaging some of your chattels or crop," and stating, "give us a statement of your position in this regard, and we will be able to

write you fully as to what we can do relative to carrying this over for you."

On February 4, 1922, appellee wrote appellant, referring to a letter of appellant of the 2d, which is not in the record, but in which, from the appellee's letter, appellant evidently had told the appellee that some one else was offering him fertilizer at a cheaper price than the appellee. In the letter of February 4 appellee states the prices offered appellant by others were higher than appellee's prices. This letter concludes by saying: "Kindly sign the inclosed contract and return to us for our records, so that we can arrange to protect you, as we do all of our old customers at all times."

The contract referred to in this letter was brought into the record. It is too long to set forth at length, but it, in substance, provided that appellee agreed to sell to appellant fertilizer on the conditions therein named, attaching a full list of prices and the terms upon which the fertilizer was to be sold by the appellee to the appellant, which contract was substantially the same as that under which the note sued on was executed. This contract concludes as follows: "Not valid until approved at the office of the Arkansas Fertilizer Company. Approved, this the ..... day of ....., 192..... Signed this 7th day of February, 1922. J. J. Ray, buyer. Arkansas Fertilizer Company, by ....., vice president." The appellant signed the contract, as above stated, on the 7th of February, 1922, and returned it to the appellee. On February 16 appellee wrote appellant, inclosing some joint notes, and, referring to appellant's letter of December 28, 1921, stated: "You are not saying anything to me, Mr. Ray, about carrying you over for this, other than you are not able to pay it. Now, I am not satisfied with that kind of a statement. I want security, and, if I can get security, I am willing to furnish you additional fertilizer this season on another note, or on a note combining what you need this season with that we are having to carry you from last season, and give you the extended time and an opportunity to pay." And further, "with

reference to the order for fertilizer, which you have sent to us, I am not going to book it at all until I hear from you, and I want you to get your farmer friends to go on one note to cover this order. If they are not willing to do that, Mr. Ray, you certainly cannot afford to have them give you their individual notes. * * * In the meantime, you furnish us with some kind of security that will justify us in carrying the balance that you are due us, and we will be glad to give you an opportunity to pay up and get even; but I am not going to do it, Mr. Ray, on just a plain or a past-due note; so we may as well get together and get our affairs up."

The appellant wrote the appellee, February 20, 1922, in which letter he states, among other things: "In regard to my past-due note, will say that I have a pair of mules that cost me $800 about a year ago. There is a mortgage on them for $150, which is to be paid next fall. I can give you a second mortgage on them to secure that note." Appellant stated that, in regard to the season's business, he was giving his time, interest and energy in securing orders for tonnage, and getting the best men in the county, but that it would be useless to ask them to sign a joint note for the fertilizer they ordered. He concluded this letter by saying: "I am inclosing an additional order for 27 tons, and I leave it up to you to fill them, or say no. There is no time to lose, for the farmers are getting ready to begin for this season's crop, and I must fill these orders now or lose them."

Appellee wrote appellant, in answer to this letter, on February 25, stating: "We do not care to depart from our rule of having a joint note, properly approved, before shipment is made, and if you cannot get these parties to make up order in that way, we will be compelled to decline to fill the order which you have sent in." In this letter appellee inclosed a new note, and a mortgage to be executed on appellant's mules.

On March 21, 1922, appellant wrote appellee, inclosing a list of farmers who wanted fertilizer, and an order for the amount wanted by them, and stating, "I hope you

will be able to fill same, for it is very necessary in order for me to pay the note which you hold against me. I am very sorry indeed that you saw fit not to fill my orders. For I could easily have sold enough fertilizer to have paid my note which you hold." A postscript follows: "P. S. Order calls for 24 tons Standard Fertilizer No. 8." On April 10 appellee wrote appellant, stating that it had not received the new note and mortgage which appellant had agreed to sign, and asking appellant to give the matter prompt attention. On April 15 appellant wrote appellee, stating that he had not signed the note and mortgage for the reason that appellee had not furnished the fertilizer unless all the farmers would make and sign a joint note, which proposition was unreasonable, and beyond appellant's power to compel them to do, and further reminding appellee that appellant could not pay because appellee had cut off his only resource for obtaining revenue with which to pay, in not filling the orders he had sent in, and stating that the opportunity was then past and gone for the year, and he would have to leave the matter with the appellee to do the best it could.

On April 19 appellee wrote appellant, among other things, saying: "We would interpret your letter to mean that you refuse to consider that you owe us anything. We inclose stamped envelope for your reply." On April 22 appellant wrote the appellee, saying: "I do not refuse to pay you. I do not pay you because I cannot. I cannot because I have not got the money, and I cannot get it. I charge you for the profit on 71 tons, the actual amount that I have taken orders for and sent to you, and you refused to fill, making a total amount of $213, at $3 per ton." Appellee wrote the appellant, on April 24, stating, in substance, that it had not agreed to extend the appellant credit, and asking if appellant was willing to give the security he offered, and saying, "If you are, you will execute the note and mortgage as recently sent you, and return to us, and, unless we hear from you within the next very few days, we shall understand your silence to mean that you want us to resort to other means to collect."

On May 22 appellee wrote the appellant, demanding a settlement with either the money or a new note and the proper security, and requesting appellant to reply at once. May 27 appellant wrote the appellee, stating, among other things, "Now, gentlemen, the facts are these: You agreed to extend me credit for this year for fertilizer to sell and to use, and the profits were to be applied on my note, and on the strength of that agreement I was to give you security for the 1921 note and $501.39, which agreement I stood ready to execute, but you refused to furnish the fertilizer except under the conditions that was impossible for me to comply with. and those conditions were not mentioned until you refused to fill my orders, so I shall hold you responsible for my commission on 71 tons of fertilizer you refused to fill. With that credit I will renew the note, but I am not in a position to secure it without further protection to myself."

June 7 appellee wrote appellant, denying, in substance, that it had entered into the agreement referred to in appellant's last letter, and saying that appellant had not, under any form of contract, worked for appellee on a commission basis, and denying that it had agreed to pay the appellant the commission, and expressing willingness to adjust the matter, if it could be done, but stating that, if it could not be, appellee would immediately take it into court, and telling appellant, if he wanted to talk it over further, appellee would be glad to do so. The appellant did not reply to this letter.

The oral testimony for the appellee and the appellant was substantially the same as that set forth in the above correspondence. At the conclusion of the testimony the appellant asked that the issue of fact be submitted to the jury on proper instructions. This request the court refused, but instructed the jury to return a verdict in favor of the appellee. The appellant duly excepted to this ruling of the court. The jury returned a verdict in favor of the appellee in the sum of $530.13.

Judgment was entered accordingly, from which is this appeal.

1. Since the court directed a verdict against the appellant, the evidence must be given its strongest probative force in his favor. *Jones* v. *Lewis,* 89 Ark. 368. But, when this is done, we are unable to find any testimony in the record which would have justified the court in submitting to the jury the issue as to whether or not the appellant and the appellee had entered into a contract by which the appellee was to ship to the appellant fertilizer to be sold by the appellant on commission, or a profit of $3 per ton, as he claims. On the contrary, the undisputed evidence shows that there was no contract of this kind between the appellant and appellee. The trial court ruled correctly in so holding and in directing the jury to return a verdict in favor of the appellee. The oral testimony of appellant does not show that any different contract was entered into from that, the form of which was sent by the appellee to the appellant, as set out above. The testimony of the parties did not establish any facts different from those disclosed in the correspondence above set forth. There is nothing in the oral testimony, or in the letters, that would justify a finding that there was a meeting of the minds of the parties on the terms of the contract, such as appellant contends was entered into. The written form of contract inclosed by the appellee in a letter to the appellant, by its own express terms, did not become a valid and binding contract until it was approved at the office of the appellee. It was never signed by the appellee, and never so approved. After appellant had signed the proposed contract and returned the same to the appellee, the letters of the appellee advised the appellant promptly, and in unmistakable terms, that it would not book his orders until he had given security for the note in controversy and agreed to comply with the conditions specified for future sale—that is, until the purchasers had executed joint notes with the appellant for the fertilizer furnished appellant by the appellee. Appellant failed to comply

with these terms and conditions. He did not execute the mortgage, as additional security, and he refused to agree to have the parties who purchased fertilizer to sign joint notes, stating that it was impossible for him to obtain same. But the reasons given are immaterial. This testimony only goes to prove that there was no contract by the appellee with the appellant which would warrant the court in allowing the latter the credit which he claims on the note in controversy.

The judgment of the circuit court is therefore correct, and it is affirmed.

DARNELL v. LEA.

Opinion delivered February 18, 1924.

1. LIMITATION OF ACTIONS—SEDUCTION.—A civil action for seduction sounds in tort, and may be brought within five years, under Crawford & Moses' Dig., § 6960.
2. LIMITATION OF ACTIONS—SAVING IN FAVOR OF INFANT.—Under Crawford & Moses' Dig., § 6961, providing that persons entitled to bring an action who are under 21 years of age "shall be at liberty to bring such action within three years next after full age," *held*, where an action for seduction by a minor was dismissed for failure to prosecute, a subsequent action by such minor brought within three years after attaining her majority was not barred because not brought within one year after dismissal of the original suit.
3. JUDGMENT—RES JUDICATA.—Dismissal of an action for failure to prosecute is not a judgment on the merits, so as to bar a subsequent action.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann*, Judge; reversed.

X. O. Pindall and *Oscar H. Winn*, for appellant.

1. Plaintiff is not barred, even if she is held to have reached full age at eighteen years. C. & M. Digest, § 6961; 95 Ark. 74. The one-year statute of limitations does not apply. 125 Ark. 77.

2. The dismissal of the action brought by the next friend is no bar to this action. 96 Ark. 181; 47 Ark. 120; 121 Ark. 454.

WOOD, J. This action was instituted by the appellant against the appellee on January 5, 1921. The appellant alleged in her complaint that she was a minor at the time of the alleged injuries of which she complained; that she is now of age, and brings the suit in her own name; that appellant became sixteen years of age on the first of April, 1916; that before that time the appellee, who was a married man, and a man of wealth and influence, committed a tort upon the appellant; that the parents of appellant were tenants on the plantation of the appellee, and appellant was living with them at that time; that appellee took advantage of the fact that he was the landlord and employer of her father and mother, and, by his promise of love and affection, did entice and beguile her, and seduce her, to the damage of her reputation and to the impairment of her health to the extent that she had to be placed in a hospital; that, before the appellee debauched the appellant, she had the confidence and respect of her acquaintances and friends, and was held in high esteem by her neighbors and acquaintances, but that, since that time, by reason of such debauchery, she had lost same, and they had forsaken her; that thereby her mother had been deprived of her services and companionship, and that appellant had now become an object of charity; that the medical services, hospital bill and nurse hire in connection with the treatment of appellant, and the expenses incurred in providing her with a home at the house of friends, amounts to $500; that, on account of humiliation, mental anguish and suffering caused directly by the appellee's misconduct toward appellant, she had been damaged in the sum of $24,500. She prayed for judgment in the sum of $25,000.

The appellant alleged that the Twin City Bank has in its possession money, the property of the appellee, in the sum of $500, and filed interrogatories and asked for

a writ of garnishment against the bank, which was duly issued and served on the garnishee bank.

The appellee, in his answer, denied all the material allegations of the complaint, and set up that the statute of limitations barred the appellant's cause of action, if any existed. He alleged that the appellant was immoral from the time she first came into the neighborhood; that the appellee complained of her immorality to appellant's father, in an effort to maintain a quiet and peaceful neighborhood. He alleged that the suit was actuated for the purpose of blackmail; that several suits of various characters had been filed and dismissed by her, and the entire scheme of the appellant was one of blackmail, with no justification whatever. In an amended general answer the appellee alleged that, on March 29, 1917, the appellant, by her guardian, Thad Walker, and her mother, Mrs. Mattie Patterson, as her next friend, instituted a suit against the appellee on the same cause of action as set forth in the complaint herein; that said complaint was dismissed for failure to prosecute, on October 11, 1917; that on October 27 the appellant filed a motion to reinstate, which motion was, on November 3, 1917, overruled. A copy of the original complaint was attached and made an exhibit to the appellee's amended answer, the number of the original complaint being No. 11,628, and that, by reason of the filing of the present complaint on the same cause of action which had been theretofore dismissed, the dismissal of the original complaint was *res judicata* of the last action, which was No. 14,292. The amended answer concluded with a prayer that appellant's complaint be dismissed.

The appellant replied to the amended answer, in which, among other things, she set up that, since the dismissal of the original complaint, she had become of age, and that the suit she had instituted was a separate and distinct suit from the original complaint, filed in three years after her disability of nonage was removed; that she did not become eighteen years of age until April, 1918, and did not become twenty-one years of age until

April, 1921, and that she instituted the present action on January 5, 1921, within the statutory period from the time her disability of minority was removed by operation of law. Appellant denied that she was barred by the statute of limitations, and denied that the dismissal of the original action by her guardian and next friend was *res judicata* of her present action.

The court treated the amended answer of the appellee as a motion to dismiss the appellant's cause of action, and sustained the motion. Judgment was entered dismissing the appellant's cause of action, from which is this appeal.

The court, on motion, heard the testimony of the clerk of the court, which was to the effect that the dates of the filing of the pleadings as set forth in the amended answer were correct, and it was admitted as a fact that the appellant became sixteen years of age on the first of April, 1916, as alleged in her complaint. The court thereupon sustained the motion, and entered a judgment dismissing the appellant's complaint, assigning as a reason therefor that the original suit filed by appellant's guardian and next friend had been dismissed on the 11th of October, 1917, because of failure to prosecute the same, and the present action could not therefore be maintained, because it was not filed within one year from the date of the dismissal of the original cause of action. From that judgment is this appeal.

The present action by the appellant is one sounding in tort for personal injuries, to which the one-year statute of limitation does not apply, but is one governed by the five-year statute of limitation. See § 6960, Crawford & Moses' Digest; *Breiving* v. *Lippincott,* 125 Ark. 77. The bill of exceptions shows that the court dismissed appellant's action for failure to prosecute on the 11th of October, 1917, and held that the action could not be maintained because it was not filed within one year from the time the original suit was dismissed. In this ruling the court erred. Section 6961 of Crawford & Moses' Digest provides: "If any person entitled to bring an

action under any law of this State be, at the time of the cause of action, under twenty-one years of age, * * * such person shall be at liberty to bring such action within three years next after full age, or such disability may be removed." Females of the age of eighteen years shall be considered full age for all purposes. Section 4986, C. & M. Digest; *Brake* v. *Sides,* 95 Ark. 74.

Appellant's cause of action was instituted within three years after she became of age. She was therefore not barred from maintaining same. The cause of action was dismissed for a failure of appellant to prosecute the same. It was not heard on its merits. Therefore the dismissal of the original cause of action was not *res judicata* of the present action. Appellant was not bound by the action of her guardian and next friend in instituting the original action, which was dismissed, and she is entirely within her rights, under § 6961 of Crawford & Moses' Digest, in instituting the present action. *Floyd* v. *Skillern,* 121 Ark. 454, and cases there cited.

The judgment of the trial court is therefore reversed, and the cause is remanded with directions to reinstate the cause.

RINEHART v. STATE.

Opinion delivered February 18, 1924.

1. CRIMINAL LAW—REPETITION OF INSTRUCTIONS.—Where the court correctly charged upon the presumption of innocence, it was not error to refuse to give an additional instruction upon that subject.
2. INTOXICATING LIQUORS—INTENT IN MANUFACTURING.—To authorize conviction of making and fermenting mash, wort and wash fit for distillation or manufacture of alcoholic liquors, in violation of Gen. Acts 1921, p. 372, the State need not prove that defendant intended to use such mash, wort or wash for making intoxicating liquors for beverage purposes.
3. INTOXICATING LIQUORS—PROOF OF INTOXICATING STATE.—In a prosecution for making and fermenting mash, wort or wash fit for distillation, in violation of Gen. Acts 1921, p. 372, it is not neces-

sary to prove that the mash had reached the alcoholic or intoxicating state of its manufacture.

4. INTOXICATING LIQUORS.—Evidence *held* sufficient to sustain a conviction of making mash, wort or wash fit for distillation or the manufacture of alcoholic liquors.

Appeal from Hempstead Circuit Court; *James H. McCollum*, Judge; affirmed.

No brief for appellant.

J. S. Utley, Attorney General; *John L. Carter, W. T. Hammock, Darden Moore* and *J. S. Abercrombie*, for appellee.

WOOD, J. The appellant was convicted under an indictment which, in good form, charged him with the crime of making and fermenting mash, wort and wash fit for distillation or for the manufacture of alcoholic liquors, on the first of October, 1923, in Hempstead County, Arkansas, contrary to the provisions of act No. 324 of the Acts of 1921.

The testimony was to the effect that a deputy sheriff and others searched the premises of appellant, and found in his smokehouse a barrel full of sweetened water in a big goods-box, a washtub full of fermented mash or malt, a little over half a sack of sugar, and shorts, by the side of the box. They took up the floor, and there were two pits, about a foot apart and four feet deep, just large enough to set a barrel down in. They found some whiskey buried in his potato patch, about thirty or forty feet from the back door of his house. In the dining-room they found a five-gallon keg that had contained whiskey. It had about a quart of water in it then. The mash or malt was working. It contained bran, shorts and water, and could have been used for hog feed. The water found in the keg in the house had a whiskey taste. The appellant said that he put the water in the keg and also in the barrel to keep them from falling down.

One of the witnesses said that he never saw such a quantity of shorts and chops as he found there, mixed with water, for two pigs. The appellant said that it was hog feed. Witness called it mash. They asked appel-

lant how often he put his hog feed up, and he said every morning. In examining around the place where the whiskey was they found a trail leading directly by the whiskey and crossing the potato patch out into the field. They found three or four places, on the right of the trail, dug down in a furrow, and little trenches that looked like there had been fruit jars buried there. Beer or whiskey could be made from the stuff in the tub, which was fermented and ready for use. It was working, so that the sample they took with them had to be thrown away to keep it from bursting the jar. They also found a still northeast from appellant's house, about a quarter of a mile, just outside appellant's field, on a branch. This place had been vacated. There were six pits there, three of which contained barrels at that time. There were three empty barrels in appellant's barn which had contained mash.

One witness testified, on behalf of the appellant, to the effect that he lived at appellant's house about May 30, 1923, and was there the day the officers came and searched the premises. Witness helped appellant about the place, and fed his stock. Appellant used the tub of shorts and chops to feed his hogs. Witness went in the smokehouse and got shorts and water. Witness didn't know about the whiskey that they claimed to have found in the potato patch. Witness saw some barrels in the barn, which didn't look as if there had been any mash in them. There was some cotton seed in one, and witness didn't know what was in the other. He didn't see any keg of beer in the house, and didn't know of any whiskey being manufactured on the place during the six months witness lived with the appellant. Witness testified that, the next day after the search by the officers of the appellant's premises, he observed an unusually large track going down in the direction of the house—coming from appellant's house across the field. Witness measured the track, and it was a nine or ten shoe, about thirteen inches in length. Appellant's foot was much smaller than this track. Witness had seen the old still down there. The

pits looked like they were old ones—about three years old. Witness used some of the cotton seed in the barn for planting. Three other witnesses corroborated the testimony of this witness for the appellant.

The appellant has not favored us with a brief, but the Attorney General has made a full abstract of the record. The appellant, in his motion for a new trial, does not assign as error the rulings of the court in the instructions given, but only complains of the ruling of the court in refusing appellant's prayers for instructions. Nevertheless, we have examined the instructions that were given, and find that the court declared the law in conformity with the law as announced by this court in *Logan* v. *State,* 150 Ark. 486, and *Burns* v. *State*, 154 Ark. 215. The appellants, in those cases, had been convicted under the same statute now under review, and the statute was there construed.

The appellant complains because the court refused to give his prayer for instruction No. 4 on the presumption of innocence, but we find that the court correctly declared the law on that subject in an instruction which the court gave.

Appellant also complains because the court refused to give his prayer for instruction No. 5, as follows: "You are instructed that, if you find from the evidence that the mash, wort or wash testified about by the witnesses was manufactured by the defendant, still you cannot convict him unless you find from the evidence, beyond a reasonable doubt, that the defendant manufactured such mash, wort or wash with the intention of making alcoholic or intoxicating liquors therefrom for beverage purposes." The court modified this instruction by striking out the words "for beverage purposes," and gave it as thus modified. The appellant duly objected, and excepted to the modification.

This ruling of the court in striking out the words "for beverage purposes" was not erroneous. Under the statute it is not essential to conviction that the State prove that the accused manufactured the mash, wort or

wash with the intention that same be used in making alcoholic liquors for beverage purposes. It is only necessary for the State to prove that the accused made or manufactured a mash, wort or wash with the intention of making distilled alcoholic or intoxicating liquors, regardless of whether such liquors were for beverage purposes or for some other purpose. In the case of *Logan* v. *State, supra,* the court uses this language: "And, when thus viewed, the conclusion is reached that the legislative inhibition is against the making of a mash, wort or wash intended as preliminary processes in making distilled, alcoholic or fermented beverages." The word "beverages," as there used, is synonymous with the word "liquors," and should be construed as meaning liquors. Likewise, in the case of *Milliner* v. *State,* 154 Ark. 611, the word "beverages," as used in the sentence containing the words "distilled, alcoholic and fermented beverages," means liquors. For it was the intention of the lawmakers, by the act under review, to prohibit the making or manufacture of mash, wort or wash as preliminary processes in making distilled, alcoholic and fermented liquors. See *Burns* v. *State, supra*; *Neal* v. *State,* 154 Ark. 327; *Dickerson* v. *State,* 161 Ark. 60; *Williams* v. *State,* 161 Ark. 383.

The appellant also urges that the court erred in refusing to give his prayer for instruction No. 7, as follows: "You are instructed that, before convicting the defendant, you must find that, if the mash was made for an illicit purpose, it had, in fact, reached the alcoholic or intoxicating state of its manufacture." There was no error in the ruling of the court in refusing to grant appellant's prayer for instruction No. 7. In *Logan* v. *State, supra,* we said: "In the practical enforcement of the prohibition law it has been found difficult, in many cases, to prove that the mash, wort or wash, which was admittedly intended for an illegal use, had in fact reached, in the process of its manufacture, the alcoholic or intoxicating stage. * * * This act of the Legislature was obviously designed to relieve the State of the neces-

sity of making such proof, by making it illegal to make a mash, wort or wash fit for the distillation or manufacture of beer, wine, distilled spirits, or other alcoholic liquor." See also *Brown* v. *State,* 154 Ark. 604.

We find no error in the rulings of the court in admitting certain testimony of which appellant complains, and we deem it unnecessary to discuss this assignment. The testimony is fully set forth, *supra,* and it was sufficient to sustain the verdict. The judgment is affirmed.

BRACKETT v. QUEEN.

Opinion delivered February 18, 1924.

1. MASTER AND SERVANT—ASSUMED RISK.—In an action by a servant for personal injuries, if it appears to be clear that the servant had knowledge of and appreciated the danger incident to his work, or the danger is so obvious or apparent that the knowledge of the danger and appreciation thereof should be imputed to him, then the court should declare as a matter of law that the servant is not entitled to recover.
2. MASTER AND SERVANT—ASSUMED RISK.—Assumption of risk is not predicable upon knowledge alone of the conditions, but it must further appear that the danger was or should have been appreciated by the servant in order that it may be said that there was an intelligible consent on his part.
3. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Where an employee, 18 years old and wholly uneducated and inexperienced, was injured while operating the bull-wheel in a sawmill, the question whether he assumed the risk was properly left to the jury.

Appeal from Poinsett Circuit Court; *W. W. Bandy,* Judge; affirmed.

John W. Scobey, for appellant.

Plaintiff's injury was the direct result of his own contributory negligence. The court should have directed a verdict for the defendant. 147 Ark. 95; 135 Ark. 563; 125 Ark. 480; 107 Ark. 341. The injury occurred, not by reason of any defect in the machinery, nor by attending to the duties in the manner he was directed to do, but

by reason of plaintiff's adopting a plan different from the way in which the wheel was to be operated. 125 Ark. 480, 484.

J. J. Mardis, for appellee.

The cases relied on by appellant have reference to injured employees of intelligence and experience in the particular in which they were engaged; but here there is no evidence that the employee had experience, but on the contrary that he was only 18 years old when hurt, uneducated, illiterate and inexperienced, had worked at a sawmill only two weeks, and was not advised that it was dangerous to work about the bull-wheel. 147 Ark. 253. Appellee neither assumed the risk nor was guilty of contributory negligence. 158 Ark. 379; 157 Ark. 245; 86 Ark. 587; 82 Ark. 558; 79 Ark. 490; 61 Ark. 141.

HART, J. W. P. Queen sued J. M. Brackett to recover for personal injuries occasioned by the plaintiff's foot being caught and crushed by a bull-wheel which he was operating for the defendant, and which injuries were caused by the failure of the defendant to warn him of the dangers incident to the work.

The case was tried before a jury, which returned a verdict for the plaintiff, and from the judgment rendered in his favor the defendant has duly prosecuted an appeal to this court.

The only assignment of error relied upon for a reversal of the judgment is that the evidence is not sufficient to support the verdict. Therefore it is only necessary to abstract the evidence in favor of the plaintiff.

W. P. Queen, the plaintiff, was the principal witness for himself. According to his testimony, he was injured while in the employment of the defendant, J. M. Brackett, in August, 1918, and at that time he was eighteen years old. The plaintiff had been working at the sawmill of the defendant for about two weeks at the time he was injured. The defendant first put the plaintiff at work tailing the edger, and later at operating the cut-off saw. The man that was operating the bull-wheel became sick, and the defendant told the plaintiff to operate the bull-

wheel and do the best he could until he could get some one else. At first it was the duty of the plaintiff to operate the bull-wheel, and another man was down in the river whose duty it was to hook the cable attached to the bull-wheel to the logs floating in the river. When the cable was attached to a floating log, a signal would be given to the plaintiff, and he would turn the lever so that the bull-wheel revolved and pulled the log from the river up the incline to the place where it was to be unloaded. Then he would stop the bull-wheel, and roll the log over on the saw-carrier. On the day the plaintiff was injured there was no one to help him. The plaintiff went down to the river and fastened the cable to a log. A Mr. Smothers happened to be on the bank near the bull-wheel, and he ran the lever. The plaintiff came up with the log, and it passed the place where it ought to be stopped, about six inches. The plaintiff jumped over the log to reach the lever and stop it. In doing so he set his foot upon the bull-wheel, and one of the spokes of the wheel caught his toe and ground his leg up. The plaintiff did not procure Smothers to turn the lever of the bull-wheel. The plaintiff is unable to read and write, and is wholly uneducated. The defendant came to see him after he was hurt and after his leg had been amputated. The defendant told the plaintiff that he knew that the bull-wheel was unsafe; that he was pulling a log out of the river one day, and a fellow had his foot where the plaintiff got his caught, and it had pinched his foot. The defendant further stated that he had intended to fix the bull-wheel, but had not done so. The bull-wheel was about four feet in diameter, and about two and a half or three feet of it was above the floor of the mill.

On cross-examination the plaintiff stated that there was a little platform above the floor, and that he went around Smothers to get to the lever. In his hurry to get to the lever and stop the log, he set his foot up in the bull-wheel, and it was caught. No one had given the plaintiff any instructions about his duties in operating

the bull-wheel or told him of any danger attached to its operation. It was shown that, if any one stood in front of the bull-wheel to operate it, there was no danger of being caught in it.

In asking for a reversal of the judgment upon the evidence for the plaintiff, counsel for the defendant relies upon the doctrine laid down in *Hunt* v. *Dell,* 147 Ark. 95. In that case a young man twenty years of age brought suit for injuries received while helping to turn two fly-wheels to be used in starting an engine. The two fly-wheels were attached to the engine, and were about three and a half feet apart. The engine was a sixty-horse-power gasoline engine, and it was started by turning the fly-wheels by hand. It was dangerous to stand between the fly-wheels, because they were so close together that if the person who was turning them slipped there was no way to get out. It was held in that case that the plaintiff, as a matter of law, assumed the dangers incident to his work. The court said that the danger in going between the fly-wheels to assist in turning them was an obvious and patent danger, under the circumstances. The master had not instructed the servant in that case of the danger in going between the wheels to turn them, but the servant himself had often gone between the wheels to assist in starting the engine in the same position he was in at the time the injury occurred. Hence it was said that the law attributed to him a knowledge and appreciation of the danger incident to the work in which he was engaged.

The rule is well settled in this State that, when it appears to be clear that the servant has knowledge of and appreciates the danger incident to his work, or that the danger is so obvious or apparent that knowledge of the danger and appreciation thereof should be imputed to him, then the court should declare, as a matter of law, that the servant is not entitled to recover.

It is equally well settled that assumption of risk is not predicable from knowledge of the conditions alone. It must further appear that the danger was or should

have been appreciated by the servant in order that it may be said that there was an intelligent consent on his part. While the appreciation of the danger is often inferred from complete knowledge on the part of the servant, yet, if the knowledge possessed by the servant is not such as to necessarily make him appreciate the danger of his work, his action for injuries will not be barred.

In the application of the rule stated to the facts in the case at bar, with all legal and reasonable deductions therefrom, it cannot be said, as a matter of law, that the plaintiff was not entitled to go to the jury in this case. He was required to do the work which was usually done by two men. He was only eighteen years of age, and was wholly uneducated. He had only been at work at the mill for about two weeks, and had been operating the bull-wheel for a much less period of time. He was not warned about the dangers incident to his work. We do not think that it can be said, as a matter of law, that he knew and fully appreciated the dangers incident to operating the bull-wheel. It is one thing to say that he knew that he would be hurt if any part of his body was caught in the revolving wheel, and another to say that he was bound to know that it was dangerous to work near the bull-wheel. He had been told to do the best he could, by the defendant, who had employed him. As we have just seen, he was trying to do the work of two men, and, when the log was carried beyond the point where it should have been stopped and unloaded, it was the natural impulse of the plaintiff to try to get to the lever and stop the passage of the log. He had hurriedly run around Smothers in order to do this, and we do not think it should be said, as a matter of law, that he knew and fully appreciated the danger. He had a right to rely, to some extent, upon the advice of his master, who told him to go ahead and do the work as best he could until he could get some one else. This view is strengthened when we consider that the defendant went to see the plaintiff, after he was injured, and told him that he knew

the bull-wheel was unsafe, because, some time before that, another man had got his foot pinched in it while running it.

Therefore we are of the opinion that the court did not err in refusing to instruct a verdict for the defendant, and the judgment will be affirmed.

MIDDLETON v. STATE.

Opinion delivered February 18, 1924.

1. CRIMINAL LAW—HARMLESS ERROR.—Though, before selecting the jury, the State announced that accused would be tried under one indictment, it was not error subsequently, before the jury was sworn, to permit the State to try him under another indictment, no prejudice being shown, and the accused not having requested the court to select a new jury or to excuse any of the panel selected.
2. CRIMINAL LAW—NO REVERSAL EXCEPT FOR PREJUDICIAL ERROR.—A judgment of conviction will not be reversed unless prejudicial error was committed.
3. CRIMINAL LAW—EVIDENCE OF OTHER CRIME.—Evidence of other crime is admissible to prove the specific crime charged when it tends to establish motive or guilty knowledge on the part of accused or shows it to be a part of the same criminal plan or scheme as the main offense; it being necessary that some relation to or connection with the main offense exists.
4. CRIMINAL LAW—OPENING STATEMENT OF PROSECUTING ATTORNEY.—In a prosecution of accused as accessory before the fact to grand larceny of an automobile, the opening statement of the prosecuting attorney that the State would prove that the accused had taken two other automobiles or caused them to be taken in the same way as the car mentioned in the indictment, was not improper, as such evidence would tend to show motive, or that the taking charged was part of a general scheme of accused to procure other persons to steal automobiles for him.
5. CRIMINAL LAW—DISCRETION AS TO WITHDRAWAL OF TESTIMONY.—A defendant is not permitted to sit by and allow testimony to be developed against him, and then, as a matter of right, have it withdrawn from the jury, and the exclusion of such testimony, once thus admitted, is within the trial court's discretion.
6. CRIMINAL LAW—ACCOMPLICE—CORROBORATION.—Corroborating evidence need only tend to connect accused with the commission of a

crime, but must do so independently of the testimony of the accomplice.

7. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—In a prosecution or accused as accessory before the fact to grand larceny of an automobile, corroborating evidence *held* sufficient to support the verdict.

8. CRIMINAL LAW—EXCLUDED TESTIMONY—PREJUDICE.—Where, on appellant's objection, the court refused to permit certain questions to be answered, and told the jury that the questions were incompetent, no error is shown.

9. WITNESSES—CROSS-EXAMINATION OF ACCUSED.—The cross-examination of accused as a witness as to his associates, antecedents and guilty connection with other crimes is largely within the discretion of the trial court, such matters affecting the credibility of the accused.

10. CRIMINAL LAW—ADMISSIBILITY OF REBUTTAL EVIDENCE.—In a prosecution of accused as accessory before the fact to grand larceny of a car, where witnesses testified that they had met accused at a certain place after they had stolen cars for him, and accused, on cross-examination, denied having been there, testimony of another witness that he had been with accused and others at such place was competent to show a common scheme of accused in having cars stolen for him.

11. CRIMINAL LAW—INSTRUCTION.—In a prosecution of accused as accessory before the fact to grand larceny of an automobile, where no objection until after its admission was made to testimony that two other cars were subsequently stolen, it was then discretionary with the trial court to exclude it, and, upon refusing to do so, it was proper to tell the jury that such evidence could be considered only as a circumstance tending to shed light on the question whether accused advised the theft of the car mentioned in the indictment.

12. CRIMINAL LAW—HARMLESS ERROR.—No prejudice resulted where the court withdrew an instruction from the jury.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade*, Judge; affirmed.

Murphy, McHaney & Dunaway, for appellant.

J. S. Utley, Attorney General, *John L. Carter*, Assistant, for appellee.

HART, J. Clarence Middleton prosecutes this appeal to reverse a judgment and sentence of conviction against him for the crime of accessory before the fact to grand larceny.

The first assignment of error is that the court erred in allowing the defendant to be put on trial for the crime for which he was convicted after a jury had been selected to try him for a different offense.

It appears from the record that the prosecuting attorney first announced that the State would try the defendant on another indictment; but, after the jury was selected, the prosecuting attorney announced that the State would try the defendant on the indictment in question. The defendant, at the time, objected to the substitution of the indictment, and saved exceptions to the ruling of the court.

The change in the indictment was made because of the absence of a witness in the other case. The defendant did not request the court to select the jury anew, or to excuse any of the panel selected. The jury had never been sworn to try the other case, and was afterwards sworn to try the case at bar. It appears to us that, under the circumstances recited, the record shows that no prejudice resulted to the defendant, as far as the present case is concerned. He had already selected the jury as a fair one to try him under another indictment. The jury had not been sworn to try the first case. The defendant did not ask for them to be examined again as to any prejudice against him in the case at bar. He did not ask that any of the panel be excused. It is well settled in this State that a judgment of conviction will not be reversed unless prejudicial error was committed by the trial court. *Sellers* v. *State*, 93 Ark. 313; *Monk* v. *State*, 130 Ark. 358, and *Rogers* v. *State*, 136 Ark. 161.

The next assignment of error is that the court erred in allowing the prosecuting attorney to say, in his opening statement to the jury, over the objections of the defendant, the following: "The prosecutor, in his opening statement to the jury, stated that the State would prove that defendant had taken two other automobiles, or caused them to be taken, to one Woods' house, in the same way as the Studebaker car mentioned in the indictment, and that said cars had been stolen."

The indictment under which the defendant was tried and convicted charges him with advising and encouraging Roy McCallum and Louis Craig to steal an automobile from the Studebaker Corporation of America. To sustain their contention on this assignment of error, counsel for the defendant invoke the general rule that the commission of one crime is not admissible in evidence to prove the accused guilty of some other crime. It is equally well settled that there are several exceptions to the general rule. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish motive on the part of the defendant, or that the evidence of the other offense shows it to be a part of the same criminal plan or scheme as the main offense. In other words, there must be, in the extraneous crime thus sought to be proved, some relation to or connection with the main offense. There must be a common motive or intent running through all the transactions, or they must be such in their nature as to show guilty knowledge on the part of the defendant at the time of the main transaction. *Reed* v. *State,* 54 Ark. 621; *Nash* v. *State,* 120 Ark. 157, and *Hall* v. *State,* 161 Ark. 453.

The statement of the prosecuting attorney is that the State would prove that the defendant had taken two other automobiles, or caused them to be taken, to Woods' house in the same way as the Studebaker car mentioned in the indictment. This would tend to show a motive on the part of the defendant which induced him to advise and encourage McCallum to steal the car in question, or to show that it was a part of the general scheme of the defendant to procure other persons to steal automobiles for him.

The next two assignments of error relate to the testimony of Roy McCallum and Louis Craig, and may be considered together.

Roy McCallum was a witness for the State, and testified, without objection, that he stole the Studebaker car at the instigation of the defendant, and carried it out in the country to Woods' house. Subsequently the defend-

ant met him and Craig in a restaurant, and advised them to steal other cars to be used by him in running whiskey. No objection was made to any of the testimony of McCallum.

Louis Craig was also a witness for the State, and testified about helping McCallum to steal two automobiles at different times, at the instigation of the defendant. The defendant advised them to steal the automobiles to be used by him in running whiskey, and agreed to pay them for doing it. On cross-examination he was asked if he had any knowledge of the stealing of the Studebaker car, or in any manner participated in it. Craig replied that he had nothing whatever to do with it.

Counsel for the defendant then moved to exclude the testimony with regard to the other stolen cars, except the Studebaker car charged in the indictment, and saved their exceptions to the ruling of the court in refusing to exclude the testimony.

It is the contention of counsel for the defendant that the theft of the other two cars occurred subsequently to the theft of the Studebaker car charged in the indictment, and that therefore proof of these crimes in no sense would be a part of a common scheme on the part of the defendant to steal automobiles. They claim that the thefts of the other two cars, subsequent to that of the Studebaker car, are distinct transactions, and in no way connected with the theft of the Studebaker car.

We need not decide this question. Under our rules of practice, counsel could not wait until after the testimony had been admitted and then, as a matter of right, have it excluded, even if the theft of the other cars had no connection with or relation to the theft of the Studebaker car. They should have objected, in the first instance, to its introduction because no connection was shown between the two thefts.

A defendant is not permitted to sit by and allow testimony to be developed against him and then, as a matter of right, have it withdrawn from the jury. The exclusion

of the testimony, after it had been offered, was a matter in the discretion of the court, and it does not appear to us that the court abused its discretion in this respect. It cannot be said that counsel for the defendant were misled by the court's action in allowing the opening statement of the prosecuting attorney with regard to the two thefts. There it was stated by the prosecuting attorney that he would prove that the defendant had taken two other automobiles, or caused them to be taken, to Woods' house in the same way as the Studebaker car. This, as we have already seen, would tend to show a common scheme on the part of the defendant to procure the theft of all the automobiles as a part of a common plan, and it does not appear that the opening statement of the prosecuting attorney was not made in good faith. Hence we are of the opinion that the defendant should have objected to the testimony of McCallum and Craig, with reference to their subsequent theft of automobiles, because they were not related to or connected with the theft of the Studebaker automobile, at the time the testimony was given.

The next assignment of error is that the evidence is not legally sufficient to support the verdict. It is earnestly contended by counsel for the defendant that there is not sufficient corroboration of the testimony of Roy McCallum, who admitted that he stole the Studebaker car, and said that he did so at the instance of the defendant.

This court has uniformly held that the evidence relied upon for corroboration must, independently, and without the aid of the testimony of the accomplice, tend to connect the defendant with the commission of the crime. It is not necessary that the corroborating evidence should be sufficient to convict. It need only tend to connect the accused with the commission of the crime. *Brewer* v. *State,* 137 Ark. 243, and *Haskins* v. *State,* 148 Ark. 351. Tested by this rule, we think the corroborating evidence was sufficient.

H. F. Caskey, a salesman for the Studebaker Corporation, testified that a five-passenger Studebaker auto-

mobile was stolen from that corporation about ten o'clock in the morning in April, 1923, from the northwest corner of Fifth and Scott streets, in Little Rock, Arkansas. The witness stated that he first saw the automobile, after it had been stolen, at a farmer's house in Saline County, Arkansas.

On cross-examination he stated that the automobile was stolen on the last day of April, 1923.

Roy McCallum was the principal witness for the State. According to his testimony, he is nineteen years of age, and lives with his father and mother in Little Rock, Arkansas. He had known the defendant for about a year and a half, at the date of the trial. On the 30th day of April, 1923, the witness stole a Studebaker car belonging to the Studebaker Corporation, from Fifth and Scott streets, in the city of Little Rock, Arkansas. He stole the car to make some money out of it. He first carried the car to Albert Koban's place, on the Nineteenth Street pike. Subsequently he carried the car to the farm of a man named Woods, and placed it under a shed there. On this occasion the witness drove the Studebaker car to Woods' house, and the defendant went there in a Dodge car. The witness came back to Little Rock with the defendant in his Dodge car. The defendant went there for the purpose of bringing the witness back with him. The defendant talked with the witness about stealing cars for him before the car in question was stolen. The defendant did not tell the witness to steal this particular car, but did procure him to steal cars for him. The defendant had the witness to carry the car to Woods' house for the purpose of hiding it, and then brought the witness back to town with him. About a month after this the defendant met the witness and Craig in a restaurant, and made arrangements with them to steal cars for him, to be used in running whiskey. Pursuant to this plan, the witness and Craig first stole a Hupmobile car and then a Dodge car for the defendant.

Craig was also a witness for the State. According to his testimony, he assisted McCallum in stealing the Hup-

mobile and Dodge cars, but he did not have anything whatever to do with stealing the Studebaker car.

The theft of the automobile by some one is established by the testimony of Caskey, and Roy McCallum testified that he stole it, under the advice and procurement of the defendant. This made McCallum an accessory, and the court told the jury, as a matter of law, that his testimony must be corroborated, within the rule announced above, in order to convict the defendant. That is to say, it must be shown by other evidence that the defendant was connected with the commission of the crime. The State relied for corroboration upon the testimony of H. W. Woods and his son, Clarence Woods.

According to the testimony of H. W. Woods, he lived about a mile and a quarter from the turnpike road, in Grant County, Arkansas, and was engaged in farming. He has known the defendant five or six years. A brother of the defendant had married one of Woods' daughters. Woods had only seen Roy McCallum one time before he brought the Studebaker automobile to his house. Some time before this the defendant and McCallum came by Woods' house and asked him about some dogs. They were in a Ford car at that time. They only stayed a few minutes, and the defendant called McCallum "Skimpy." The next time McCallum came to Woods' house was when he brought the Studebaker car in question. He drove the car there by himself. The defendant was already there. He came in his Dodge car, and had been there about two hours when McCallum came. Woods went on about his work, and supposed that McCallum and Middleton left the place together. Anyway, the witness left them at the house together, and when he came back they had gone. The car stayed under the shed at Woods' house something over a week, and then McCallum came back and got it. It was shown by other testimony that Woods lived about twenty miles from Little Rock.

Clarence Woods corroborated the testimony of his father about McCallum and Middleton coming to the

house, separately, on the day that McCallum brought the Studebaker car there. He says that he did not see the defendant and McCallum leave together, but thinks that they did so. The witness was at work around the place, and knew that they left about the same time.

We think this testimony of Woods and of his son was sufficient corroboration of the testimony of McCallum. Woods lived about twenty miles from Little Rock, which was the home of the defendant and of McCallum. McCallum had never seen Woods but once before. Then he came by there with the defendant, and only stayed a few minutes. The defendant called McCallum "Skimpy," which indicated that he was familiar with him. The next time McCallum came back he brought the stolen car for the purpose of leaving it there. The defendant had been there about two hours when McCallum arrived with the stolen car. Woods and his son soon left and went about their work, leaving the defendant and McCallum at the house together. When they returned both of them had gone. The circumstances indicated that the defendant was at Woods' house, waiting for McCallum to arrive with the stolen car, and that they left together in the defendant's car to return to Little Rock. The attending circumstances tended to establish these facts, and this is what McCallum testified were the facts. This testimony of McCallum's is sufficiently corroborated by the testimony of H. W. Woods and his son. When their testimony is considered together, with all the reasonable inferences to be drawn from it, it appears that the defendant was connected with the theft of the automobile. Of course, according to his testimony and the evidence adduced in his behalf, he was not guilty. The jury was, however, the judge of the credibility of the witnesses, and, they having found the defendant guilty, the verdict must stand if there is any testimony legally sufficient to support it.

Being of the opinion that the evidence of McCallum was sufficiently corroborated, the jury was warranted in finding the defendant guilty. See *Haskins* v. *State*, 148 Ark. 351, and *Owens* v. *State*, 159 Ark. 503.

The next assignment of error is that the court erred in permitting the prosecuting attorney to read over an alleged statement made by H. W. Woods, in the presence of the officers, which statement tended to contradict his own testimony. The record shows that the prosecuting attorney asked the officers if Woods had made certain statements to them, and if he was not asked certain questions and had answered them. Counsel for the defendant made objections to this testimony, and the court expressly excluded the testimony from the jury. The court told the jury, in plain language, that the questions were incompetent, and the answers were not read to the jury as evidence. Hence the assignment of error is not well taken.

The next assignment of error is that the court erred in permitting the prosecuting attorney, in his cross-examination of the defendant, to ask him if he had not been guilty of certain minor criminal offenses. The cross-examination of a witness as to his associates, antecedents, and guilty connection with other crimes, is largely within the discretion of the trial court. Such matters affect the credibility of the defendant as a witness, and it does not appear that the court abused its discretion in this respect. *Hollingsworth* v. *State,* 53 Ark. 387, and *Noyes* v. *State,* 161 Ark. 340.

It is next insisted that the court erred in allowing the State to show in rebuttal, by Godwin Brown, that he had been with the defendant and other persons to Koban's place one night. The defendant had been asked, on cross-examination, if he had not been to Koban's place last winter, and he replied that he had not. He stated further that he had never met Koban until recently. McCallum and Craig both had stated that they had been to Koban's place and had met the defendant there, after they had stolen cars for him. The evidence was competent, as being a part of the circumstances, to show a common scheme or plan on the part of the defendant in having automobiles stolen for his use in running whiskey.

The next assignment is that the court erred in its instructions to the jury. The court was asked by the

defendant to tell the jury that they could not consider, for any purpose, that there were two other cars stolen besides the Studebaker car. The court refused to so instruct the jury. It told the jury, however, that it could not convict the defendant unless it found him guilty of the specific charge laid in the indictment. The jury was told that the evidence of the theft of the other two automobiles was only competent as a circumstance shedding light upon whether or not the defendant counseled, aided, or abetted in the commission of the larceny charged in the indictment.

As we have already seen, no objection was made to this testimony until after it had been given. It was then a matter of discretion with the court as to whether the defendant should be allowed to object to the testimony and have it excluded from the jury. There is no abuse of the discretion of the court in refusing to exclude the testimony after it had been admitted, and it was therefore proper to tell the jury that it could only be considered as a circumstance tending to shed light on the main fact, and that was whether the defendant had advised the theft of the Studebaker car, as charged in the indictment.

Objection is also made to instruction No. 15. It appears from the transcript that the court withdrew it from the jury. We do not need to set out the instruction for that reason. If the court withdrew it from the jury, it could not have prejudiced the defendant at the trial.

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

PHILLIPS v. STATE.

Opinion delivered February 18, 1924.

1. ROBBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution for robbery, evidence *held* to warrant a conviction.
2. CRIMINAL LAW—FORMER TESTIMONY OF ABSENT WITNESS.—Where a witness has testified in a former trial or in a proceeding before an examining court, and the accused has had opportunity to cross-examine him, his testimony on such trial is competent on a subsequent trial, on a proper showing that the witness is dead or beyond the court's jurisdiction.
3. CRIMINAL LAW—TESTIMONY BEFORE EXAMINING COURT.—An examining court may take the testimony of the prosecuting witness without inquiring of the accused whether he desired the aid of counsel, and, where accused cross-examined the witness, it was permissible to read the testimony of such witness on a subsequent trial, where the witness was beyond the court's jurisdiction.
4. CRIMINAL LAW—AID OF COUNSEL IN EXAMINING COURT.—Crawford & Moses' Dig., requiring the examining court, before commencing the examination, to inquire of the defendant whether he desires the aid of counsel, is directory and not mandatory.
5. STATUTES—DIRECTORY AND MANDATORY ACTS.—In determining whether a statute shall be construed to be mandatory or directory, the purpose of the act, the end to be accomplished, the consequences that may result from one meaning or the other, and the context, are to be considered.
6. CRIMINAL LAW—RIGHT TO AID COUNSEL.—Where defendant's counsel made arrangements with the deputy prosecuting attorney to have him notify counsel of the date when the case was set, but, when the case was set, the defendant was asked whether he desired the deputy to write to his counsel, and defendant stated that he had written to his stepfather who employed the counsel, and at the trial the court asked defendant whether he desired to be represented by counsel, and he answered "No," it was not an abuse of discretion to proceed to trial without furnishing defendant an attorney to represent him, as the right to have the aid of counsel may be waived.

Appeal from Phillips Circuit Court; *E. D. Robertson*, Judge; affirmed.

W. G. Dinning, for appellant.

J. S. Utley, Attorney General, and *John L. Carter*, Assistant, for appellee.

HART, J. Luke Phillips prosecutes this appeal to reverse a judgment of conviction against him for the crime of robbery.

J. M. Walker, a witness for the State, testified that he was present in the municipal court at the time the defendant had his preliminary examination, and took down the testimony of George Glenn, the prosecuting witness in the case. Walker first took down the testimony of Glenn in shorthand, and reduced it to writing, and swore the witness to it. The transcript of the testimony shows that the prosecuting witness was cross-examined. The transcript of Glenn's evidence is a correct statement of his testimony, and it was signed by him.

J. D. Mays, sheriff of Phillips County, was a witness for the State. According to his testimony, a subpoena was placed in his hands for George Glenn, but he was unable to find him. He found out that George Glenn was a nonresident.

The testimony of George Glenn taken at the examining trial was next read to the jury by the State. It is substantially as follows: I am seventeen years old, and reside at Whitmire, S. C. I recognize the defendant, Luke Phillips, and first saw him on Sunday evening, the 26th of August. I saw him at some place where we stopped to let a passenger train pass. The defendant robbed me of $10.76. There were two five-dollar bills, five buffalo nickels, one rusty one, one woman-headed nickel, one dime and six pennies, and one quarter. I was asleep, and the defendant flashed a light in my face, and held a gun on me. He made me turn around, and then put his pistol in his left hand, and then took the money from me. I was riding on the train at the time. I reported the robbery to the conductor, and pointed out the defendant as the man who robbed me. The witness further stated that he was positive that the defendant was the man who robbed him, and that the defendant got off of the train near the bridge south of Lexa, in Phillips County, Ark.

We copy the cross-examination of the witness by the defendant. It is as follows: "Q. What kind of a flash-light did I have? A. A bright flash-light and nickel-plated gun. Q. You say the light was lit? A. Yes sir. Q. Was it working all right? A. Yes sir. Q. You say the train had stopped to let a passenger train pass? A. Yes sir. When I woke up you were standing over me."

The record shows that the testimony was signed by George Glenn, witnessed by J. G. Burke, judge, and sworn to before J. M. Walker, a notary public, on the 29th day of August, 1923.

T. B. Poe, a brakeman and deputy constable, was the next witness for the State. According to his testimony, he resided at Lexa, Ark., and has known the defendant since he was arrested some time in August, 1923, on the charge of robbery. When the witness approached the defendant to arrest him he was sitting on the end of a tie, in the railroad yards at Lexa, Ark. The witness went up behind the defendant and told him to get up. When the defendant got up, he had a flash-light in one hand and a pistol in the other. The witness searched the defendant, and found a pocketbook with two or three dollars in it, and seventy-six cents in loose change in his pocket. He was searched by the witness for the two five-dollar bills which the prosecuting witness had reported had been taken from him, but failed to find them. After he had carried the defendant to the jail, he searched his clothes and found a mask in his pocket, and two five-dollar bills pinned up between his shoulders in his underwear. When the defendant was carried into the presence of George Glenn, the latter at once said, "That's the fellow; that's the man." George Glenn told the witness of the different denominations of the money, amounting to $10.76, of which he had been robbed, and the money found by T. B. Poe, the deputy constable, on the defendant corresponded with his description of it. This all happened in August, 1923, at Lexa, in Phillips County, Ark. The defendant was

a witness for himself, and denied his guilt. The evidence for the State, however, warranted the jury in returning a verdict of guilty.

The assignment of error upon which counsel for the defendant chiefly rely for a reversal of the judgment of conviction, and upon which they devote the most time in their brief, is that the court erred in permitting the prosecuting attorney to read to the jury the testimony of George Glenn taken at the examining trial.

Section ten of the bill of rights in our Constitution provides that, in all criminal prosecutions, the accused shall have the right to be confronted with the witnesses against him.

The rule is well established in this State and elsewhere that, where a witness has testified in a former trial or proceeding in an examining court, and the accused has had an opportunity to cross-examine him, his testimony on such trial is competent on a subsequent trial, on a proper showing that the witness is dead or beyond the jurisdiction of the court at the time of the subsequent trial. *Poe* v. *State,* 95 Ark. 172; *Eyer* v. *State,* 112 Ark. 37; *Ruloff and Berger* v. *State,* 142 Ark. 477; *Williams* v. *State,* 156 Ark. 205; and case-note to Ann. Cas. 1913-C at 464.

It is conceded that the testimony of the sheriff was sufficient to show that George Glenn lived in another State, and was therefore beyond the jurisdiction of the court; but it is insisted that the testimony is inadmissible because the examining court did not ask the defendant whether he desired the aid of counsel before commencing the examination. Counsel for the defendant rely upon § 2918 of Crawford & Moses' Digest, which is part of the procedure for magistrates holding examining courts in felony cases. Section 2918 reads as follows: "When a person who has been arrested shall be brought, or, in pursuance of a bail bond, shall come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall be forthwith

examined, reasonable time, however, being allowed for procuring counsel and the attendance of witnesses. The magistrate, before commencing the examination, shall state the charge, and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it."

According to the decisions cited above, the right secured by the Constitution to the defendant to be confronted with the witnesses against him is satisfied when, at some stage of the case against him, in a proceeding authorized by law, he meets the witnesses face to face and is given an opportunity to cross-examine them. The defendant in this case did meet the prosecuting witness face to face in the examining court, and cross-examined him, so that there was no infringement of the constitutional guaranty.

It is insisted that the statute is mandatory, and that the examining court had no right to take the testimony of the prosecuting witness until he had inquired of the defendant whether he desired the aid of counsel. We cannot agree with this contention. It is contrary to the reasoning and holdings of the court in our own cases bearing on the question. This court has held that the accusation returned by a coroner's jury and the commitment by the coroner have the force and effect of an examination and commitment by a justice of the peace. *Ex parte Anderson,* 55 Ark. 527.

In *McNamara* v. *State,* 60 Ark. 400, it was held that, on a trial for murder, the deposition of a witness who has since removed beyond the court's jurisdiction, taken before the coroner and reduced by him to writing, is admissible where defendant was, at the time it was taken, in custody before the coroner, charged with the commission of the offense, and had an opportunity to cross-examine the witness, and was legally called upon to do so, though he was not at the time represented by counsel. In that case the court, in discussing the provision of the Constitution above referred to, said that the

defendant did not ask to be represented by counsel, and hence was deprived of no right in that regard. The court further said: "The witness was under oath, and the substance of his testimony was reduced to writing by the coroner, and, while the record does not show that the testimony was read to and signed by the witness, appellant made no objection in the court below, and has urged none here on that account, presumably for the reason that this was done. The defendant had the power to cross-examine, was notified by the coroner of his right, and was legally called upon to do so. If he did not choose to avail himself of the opportunity, it does not lie within his mouth to complain."

Again, in *Poe* v. *State,* 95 Ark. 172, where the defendant was charged with the crime of rape, and was convicted by a petit jury of that crime, one of the assignments of error was that the court erred in admitting the testimony of two witnesses at the examining trial of the defendant before a justice of the peace. In discussing the question the court said: "At the examining trial the witness, Cotham, was present and heard the testimony there given by these two women, and, as court stenographer, took stenographic notes of their evidence and afterwards transcribed the same. Upon the trial in the circuit court he testified that this evidence was given by these two witnesses at the examining trial; there was no written statement thereof signed by them. The defendant was present at the examining trial, but without counsel. He was given the opportunity to cross-examine these two witnesses, and did propound to one of them some questions. It was shown, by testimony which the trial court found sufficient, and which we find to be sufficient, that these two witnesses were beyond the jurisdiction of the court at the time of the trial of the case in the circuit court. It was competent to prove what these two witnesses testified upon the examining trial."

The court further said: "Nor was it necessary, in order to render this testimony competent, that the

defendant should have been represented by counsel at the examining trial. *Butler* v. *State,* 83 Ark. 272." In discussing the question in the latter case, the court said: "Counsel also argue that the testimony of the absent witnesses was not competent, because the defendant was not represented by counsel at the examination before the justice of the peace, when the testimony was given. It is not necessary, in order to render the testimony competent, that the defendant should have been represented by counsel. The law does not provide that an accused person must have counsel in a preliminary examination before a justice of the peace or other committing court. That is a privilege which he may or may not take advantage of, as he chooses. The constitutional guaranty that he shall have an opportunity to be confronted with the witnesses against him is fulfilled by his presence when the testimony is given." *Butler* v. *State,* 83 Ark. 273.

We think it logically results from the reasoning of the court in these two cases, that the requirements of the statute as well as of the Constitution are met where the defendant is not denied the right of employing counsel and is given the opportunity to cross-examine the witnesses at the examining trial.

The case of *People* v. *Napthaly,* 105 Cal. 641, 39 Pac. 29, is not authority to the contrary. In that case the record showed that, at the preliminary examination before the magistrate, the defendant was not represented by counsel, and that the magistrate refused to continue the examination for the purpose of enabling him to employ counsel, and that the magistrate entirely failed to inform the defendant of his rights, as required by the statute. Under the circumstances the court held that he had not been legally committed by the magistrate, because he had been refused an opportunity to procure counsel. This is shown by the case of *People* v. *Figueroa,* 66 Pac. 202, which was decided by the Supreme Court of California at a later date. In that case it was

said that, in the absence of a showing to the contrary, it will be presumed that the magistrate before whom the defendant was first brought after his arrest duly informed him of his right to the aid of counsel in every stage of the proceeding. So it will be seen, even where the statute is construed to be mandatory, that there is a presumption that it has been complied with, in the absence of a showing to the contrary.

As above stated, we think our statute is only directory to the magistrate. When a statute relates to the manner in which power or jurisdiction in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory. In determining whether the words shall have a mandatory or directory effect ascribed to them, the purposes of the act, the end to be accomplished, the consequences that may result from one meaning or the other, and the context, are to be considered. *Nixon* v. *Grace,* 98 Ark. 505. In that case the court had under consideration the section of the statute which provides that, upon an indictment being found, the court shall forthwith make an order for process to be issued thereon.

The section of the statute under consideration in the present case prescribes the duties of the magistrate, directs the manner in which the powers conferred upon him are to be exercised, but it does not create a limitation upon his powers or jurisdiction. While it is the duty of the magistrate to observe the safeguards mentioned in the statute for the benefit and protection of the accused, it cannot be said that his proceedings are without jurisdiction and void, where the record does not show that he has refused to observe them.

In this connection it may be stated that the Attorney General insists that proper exceptions to this testimony were not saved at the trial of the case. We do not decide whether the contention of the Attorney General is correct or not. We have concluded to treat the assignment

of error discussed above as properly presented for review in this court, and, for the reasons given above, hold that it is not well taken.

The next assignment of error is that the defendant was not represented by counsel in the lower court. It appears from the record that the stepfather of the defendant employed counsel in the State of Mississippi, and that his counsel had made some sort of arrangement with the deputy prosecuting attorney to be notified of the date when the case was set for trial. By a series of misunderstandings, counsel did not get to the court until after the case had been tried and the defendant convicted.

Counsel who had come to represent the defendant admitted that the deputy prosecuting attorney had explained to him, on his arrival, that he had sent to the jail and asked the defendant if he wished him to notify his counsel, and that the defendant had reported that he had already written to his folks. The deputy prosecuting attorney said that he had then dismissed the matter from his mind. On this point the jailer and deputy sheriff was called by the State. According to his testimony, he and the defendant were present in open court on Friday, November 2, at the time the case of the defendant was set for trial on November 12 inst., which was on Monday. The defendant was advised of the day that the case was set for trial. The court had instructed the sheriff or jailer to see that the attorney for the defendant was notified of the day of the trial. The jailer then asked the defendant if he wanted him to write to his attorney, and the defendant replied no, that he had already written to his stepfather. His stepfather had employed the attorney. This conversation with the defendant was two or three days after the case had been set for trial. This was in ample time for the defendant to have notified his attorney of the day upon which the case was set for trial, and it cannot be said that the court abused its discretion in not continuing the case on

account of the absence of the defendant's attorney. When the case was called for trial, the court asked the defendant if he wanted him to appoint an attorney to represent him, and the defendant replied no.

This court has held that the constitutional guaranty of the right of the defendant in a criminal case to be heard in his own defense by himself and counsel is for the benefit of the accused, and that the accused may, at his option, decline to have counsel appointed to represent him, and conduct his own case. *Williams* v. *State,* 153 Ark. 289.

In a case-note to 17 A. L. R. 266, it is said that it is universally held that a defendant in a criminal case, who is *sui juris* and mentally competent, may conduct his defense in person, without the assistance of counsel. To the same effect see case-note to Ann. Cas. 1913-C, at p. 739. Numerous cases are cited in the notes to support the holding.

The defendant at the trial of the case cross-examined the witnesses who testified against him, and his cross-examination of the prosecuting witness at the examining trial has been set out above. It shows the defendant to be a man of intelligence, and to have appreciated the weight of the testimony given by the witnesses.

The officer who arrested the defendant testified that he found a mask in his pocket. The defendant does not at any time attempt to explain this fact, and the evidence for the State was abundantly sufficient to show his guilt.

We have carefully examined the record, and do not find any reversible error in it. It follows that the judgment will be affirmed.

MUTUAL AID UNION *v.* PERDUE.

Opinion delivered February 18, 1924.

1. APPEAL AND ERROR—DIRECTED VERDICT.—Where the court directed a verdict upon conflicting evidence, the court on appeal will presume that the jury would have found against the party for whom the verdict was directed.
2. INSURANCE—FAILURE TO PAY ASSESSMENTS.—Where the constitution and by-laws of a mutual assessment company provided that the assessments should be made by the board of directors, an assessment by the secretary was unauthorized, and a member was not in default in failing to pay such assessment.

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

J. V. Walker and *Norman & Amsler,* for appellant.

In excluding, on the motion of plaintiff, testimony regarding any assessment or dues, either of Nos. 10, 11 or 12, and, by its instructed verdict, the court invaded the province of the jury, and excluded evidence that has been held competent by this court. 125 Ark. 449. The burden was on the appellee to show that all the conditions of the contract had been performed. 98 Ark. 338. There is a presumption that the secretary acted on authority of the board of directors. Thompson Corp. (2nd ed.), par. 1608; Elliott on Private Corp. 667; 54 N. E. 433; 6 L. E. 552; 7 R. C. L. 455; 40 N. E. 799; 50 N. E. 665. In order to construe a contract of insurance, the primary object is to arrive at the intention of the parties in making the contract. 89 Ark. 471; 94 Ark. 417; 97 Ark. 425; 118 S. W. 211; 29 Cyc. 66. The fact that there is no formal record of the action of the board of directors does not necessarily render an assessment illegal. This is true even though there is in fact no action taken by the board. 123 S. W. 973.

Compere & Compere, for appellee.

Proof of mailing a notice is not a conclusive fact of notice. 130 Ark. 12. It was not necessary to produce the records of the corporation showing the assessment. 22

C. J. 1011; R. C. L. p. 154, § 125. There can be no forfeiture without an assessment by the board of directors. 85 Ky. 1, 7 Am. St. 571; 19 Am. St. 784; 52 Am. St. 572; 51 Ark. 447; 229 S. W. 407; 226 S. W. 615; 19 R. C. L. p. 1261, § 65; 194 S. W. 956.

SMITH, J. On June 24, 1916, Mattie Perdue made application to the Mutual Aid Union, a mutual assessment company, hereinafter referred to as the company, for a certificate of membership. John T. Perdue, her husband, acted for her in making the application for membership, and signed her name to the application, and was designated in it as the party to whom all notices of assessments against her should be mailed in case she became a member.

The application was accepted, and the company issued to Mrs. Perdue a certificate of membership No. 837, having a maximum value of a thousand dollars, and placed her in Circle No. 40. Mrs. Perdue died on January 17, 1921, and the company refused, on demand, to pay the claim of her husband, the beneficiary named in the certificate, and this suit was brought to recover the sum payable under the certificate. The trial resulted in a verdict for the plaintiff, which was returned under the direction of the court, and, judgment being rendered accordingly, the company has appealed.

The company refused to pay the claim of the beneficiary on the ground that the insured was not a member at the time of her death, the company claiming that she had forfeited her membership because of her failure to pay an assessment, No. 10, issued October 19, 1920, in the sum of 88 cents. The court instructed the jury that the proof failed to show that a valid assessment had been made.

Appellant says the questions for decision are: (1) Was there sufficient proof of a death upon which to base an assessment? (2) Was an assessment made as provided by the contract of insurance between the parties?

The constitution and by-laws of the company provided that notice of an assessment should be given by mailing to the insured, or to the person named in the application to receive notices, and the testimony on the part of the company shows compliance with this requirement, and, as the verdict was directed against the company, we must presume that the jury would have found that notice had been given, although the testimony is conflicting on this issue.

The system employed by the company in making assessments and in giving notice thereof was explained by the managing officers of the company, and was as follows: The company employed the card system. Each member had a membership card, ruled for a period of twelve months, and, among other things, contained the name of the member, the name of the person designated by the member to whom notices of assessments should be sent, the number and circle of the certificate of membership, the date and amount of assessments, and whether paid or unpaid. The card used by the company for giving notice of an assessment contains, among other things, the number of the assessment, the date of the assessment, the amount of the assessment, the name and address of the deceased member on account of whose death the assessment is made. This notice is signed by the secretary of the company, and gives the member instructions as to when and how to make remittance. The officers of the company testified that, in accordance with this system, notice had been mailed to appellee, but that no remittance had been made, and, after the expiration of the time allowed for payment, Mrs. Perdue's card was placed among those of the suspended members.

The secretary of the company testified that he mailed appellee, on October 19, 1920, a notice of the death of a member, Elzada Monday, of Leflore, Oklahoma, and that the assessment was numbered 10, and was for the sum of 88 cents, and that this notice was sent out by him on receipt of the proof of the death of the deceased member.

The court excluded this testimony, holding that assessments could not be made by the secretary as a clerical matter, but that assessments could only be levied by the vote and action of the directors of the company, and that, in the absence of a showing that the alleged delinquent assessment had been made by the directors, there was no valid assessment of which notice could have been given, and that, if such an assessment had not been made by the directors, there was no valid assessment of which the assured could have been given notice or was liable to pay.

The correctness of this decision depends, of course, upon the provisions of the contract of insurance. As has been said, the company is a mutual one, engaged in the business of insuring the lives of its members, who are placed in circles of not exceeding a thousand members, and, upon the death of any member, the surviving members are called upon to pay assessments, which are graduated, the first assessment paid by any member being 35 cents, and increasing 1 cent with each assessment until a maximum assessment of $1.15 is reached, after which the amount of the assessment is not further increased. The number of the assessments is, of course, dependent upon the number of deaths, and there might be a month in which there were no assessments, and there might be months in which there were more than one assessment. The purpose of the notice was to advise the members of the assessments which had been made. As a circle was depleted by deaths, the places were filled by the names of new members, it being the policy of the company to keep all circles approximately full at a number not exceeding one thousand members.

The certificate of membership made the constitution and by-laws a part of the contract of insurance, and these were offered in evidence, and it is to these writings we must turn to ascertain the rights and duties of the company and its members. The relevant portions of the by-laws read as follows:

"Section 4. The levying of an assessment shall consist of mailing notices of the death of a member in any particular circle in which the assessment is made, on the authority of the board of directors, stating the amount of the assessment due from the individual member, and, when the records of the association show that an assessment has been levied, it shall be accepted as *prima facie* evidence of the mailing of notices to all members from whom assessments are due."

"Section 6. These membership certificates shall be written in circles containing not more than one thousand members, and no equity, rights or benefits shall accrue either to the member or his beneficiary beyond his circle or the circle to which he may have been subsequently assigned. These assessments shall be made on the members in the respective circles in which the death occurs; except when there is an accumulation of deaths in any circle, the members of another circle or circles may, at the discretion of the management, be assessed incident to such excess deaths, or assessments may be made irrespective of deaths, and revenue derived therefrom shall be devoted to any purpose not inconsistent with the by-laws of the organization. All members are subject to each and every assessment made against their respective circle, at and after the date of their membership certificates."

"Section 8. When an assessment in any of the various circles has been deposited with the management of the Mutual Aid Union by the various members constituting a circle, and a death claim has been paid, the responsibility of the management of the Mutual Aid Union to its members of that circle ceases until another assessment by the management against the members surviving has been made and is received back into the treasury. It at all times being left to the discretion of the board of directors as to the manner and frequency of levying assessments, when there is an accumulation of deaths."

"Section 25. Duties of the President.—The president shall have supervision of all meetings of the Mutual Aid Union. Shall call same to order and preside; take the votes of members by yeas and nays, and shall declare the result of elections; and shall vote on any question that may come up before the body. He shall call all meetings of the board of directors, and preside in same as at regular meetings, and perform such duties as the board of directors may impose on him."

"Section 27. Duties of the Secretary.—It shall be the duty of the secretary to keep a true and correct account of the proceedings of each meeting of the Mutual Aid Union and its board of directors. To keep accounts of the organization, to pay over to the treasurer all moneys collected by him, and take receipts therefor, or a receipt from the official depository for the funds of the Mutual Aid Union, to answer the same purpose as a receipt from the treasurer. To keep or cause to be kept a correct set of books, showing the financial condition of the organization, and be ready at all times to submit his statement to the board of directors of the condition of the organization. To collect all moneys due the organization, and turn same over to the treasurer, or the authorized depository; to sign or countersign all warrants and checks drawn against the organization, and perform such other duties as the board of directors may see fit to impose upon him."

It will be observed that § 6 of the by-laws provides that, in the event of an accumulation of deaths in a particular circle, members of other circles may, in the discretion of the management, be assessed when that action is found necessary.

We think that, in the interpretation of the by-laws set out above, the court was correct in its holding that the levying of assessments was not a mere clerical duty which the secretary might perform, but that the authority and duty to levy assessments devolved upon the board of directors, and that a valid assessment could

only be levied by the board. The assessments were not fixed and definite and certain as to the amount to be paid, nor as to the time within which payment was to be made. Affirmative action was required to levy and validate any particular assessment, and this was a duty imposed on the directors, and the duty of the secretary was the merely clerical one of giving the assured notice of that action when it had been taken by the agency constituted for that purpose. If this is true, there was no valid assessment of which the secretary could have given notice, and the insured did not become delinquent and suspended until she had failed to discharge an assessment which had been properly levied.

It is the insistence of the company that the assessments against the member were, in reality, made when her application was accepted by the company, and that thereafter all that remained to be done was to notify the member that another member had died, and that an assessment had therefore become payable. We think this view is not correct, because it could not be known what number of assessments could be levied until the members had died and proofs of death had been made and the liability of the company had been ascertained and declared; and, as we have said, this was a function which the by-laws did not authorize the secretary to perform. It was the duty of the board of directors to determine whether a death had occurred which would impose a duty to levy an assessment. The company might have what the directors regarded as good cause for deciding that there was no liability on the certificate of some particular member, in which event there would have been neither necessity nor authority to levy an assessment.

In the case of *Stubbins* v. *State Farmers' Mut. Ins. Co. of Missouri,* 229 S. W. 407, the policy sued on was issued by a mutual company whose by-laws required the directors to levy the assessments against members to pay losses. Justice BLAND of the Kansas City Court of Appeals said that the certificate of the officers whose

duty it was to levy the assessment was not alone to afford *prima facie* evidence that the rate levied was due and payable, but that this action by the board was required for the protection of policy-holders against excessive assessments.

Appellant cites the case of *Burchard* v. *Western Commercial Travelers' Assn.*, 123 S. W. 973, in which the court held that an assessment against the members, which the insured in that case had failed to pay, was valid, although there was no formal record of the action of the board of directors in levying the assessment which the insured had failed to pay. The assessments in that case, however, were fixed in a definite sum, and were payable at regular intervals, but the court said: "In order to authorize a suspension for the nonpayment of an assessment, it is absolutely necessary that the assessment should have been made in strict accordance with the by-laws of the association" (citing a number of cases), and that, but for the by-laws which fixed the assessments in a definite sum and made them payable at regular periods, the court "would hold that the failure of the board to make the assessments at each regular monthly meeting prevented the association from suspending the assured for not paying an assessment."

In *American Mutual Aid Society* v. *Helburn*, 85 Ky. 1, 7 Am. St. Rep. 571, the insurance company operated on a plan not unlike that of the appellant company, and with a similar duty on its board of directors to levy assessments. The court said: "Thus we see that no assessment can be made on the surviving members of the society, to pay the benefits due the representatives of its deceased members, unless the assessments are made by the board of directors, or by an executive committee appointed by them for that purpose." The court further said: "Thus we see that, in making assessments by the appellant upon its members, it does not act in a judicial, but in a ministerial, capacity. Therefore no presumption can arise in favor of the regu-

larity or legality of its assessment; that the appellant's board of directors, or an executive committee appointed by them, are the only persons authorized by appellant's charter to make assessments against its surviving members to pay the benefits due the representatives of its deceased members; that a deceased member of the society should have died, and that his representative was entitled to a benefit arising from his death, and that an assessment upon all of the surviving members was actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments, are conditions precedent to the right of appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessment until these things occur. Nor do they forfeit their membership by reason of their failure to pay such assessments, unless these things have occurred. And when the society relies upon the failure of any of its members to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated, otherwise the member cannot be said to be in default."

This case was cited in the annotated note to the case of *Bankers' etc., Assn.* v. *Stapp,* 19 Am. St. Rep. 784, in which the annotator says: "In all cases the burden of proof is on the association to establish a forfeiture by evidence that an assessment was made in the mode pointed out by the charter, otherwise the member is not in default."

In 19 R. C. L., p. 1261, at § 65 of the chapter on Mutual Benefit Societies, it is said: "Where an assessment is not legally levied in the mode prescribed by the constitution and by-laws of the particular association, no liability arises on the part of a member to pay such assessment, and his failure to do so does not impair his right to the privileges and benefits extended by the association. In making an assessment, an association

acts in a ministerial and not a judicial capacity, and there is, accordingly, no presumption in favor of the regularity or legality of its assessments, and, where it seeks to avoid liability upon a benefit certificate by reason of the nonpayment of an assessment, the burden of proving that such assessment was duly made in the manner prescribed by the rules and regulations of the order rests upon the association."

See also *Hogan* v. *Pacific Endowment League,* 99 Cal. 248; *Tobin* v. *Western Mutual Aid Society,* 72 Iowa 261; *Underwood* v. *Iowa Legion of Honor,* 66 Iowa 134, 23 N. W. 300; *Baker* v. *Citizens' Mut. Fire Ins. Co.*, 51 Mich. 243, 16 N. W. 391; *Bates* v. *Detroit Mut. Ben. Assn.*, 51 Mich. 587, 17 N. W. 67. See also the following textbooks on insurance: Niblack, Accident Insurance and Benefit Societies (Mutual Benefit Insurance) 2d ed., §§ 250, 252; Joyce on The Law of Insurance, 2d ed., vol. 3, §§ 1253, 1291, 1292; Bacon on Life & Accident Insurance, 4th ed., vol. 2, § 484.

We conclude therefore that, as the testimony fails to show any action by the board in levying the alleged delinquent assessment, the verdict was properly directed for the plaintiff, and the judgment of the court below is affirmed.

McGEHEE v. STATE.

Opinion delivered February 18, 1924.

1. RAPE—SUFFICIENCY OF EVIDENCE.—In a prosecution for carnally knowing a female under 16 years, testimony *held* to sustain a finding that such intercourse took place before the prosecutrix reached the age of 16 years.
2. INDICTMENT AND INFORMATION—TIME OF OFFENSE.—In a prosecution for carnal abuse of a female under 16 years of age, proof of intercourse within the period of limitations and while prosecutrix was under 16 rendered immaterial an unproved allegation of the date of the intercourse.
3. RAPE—CARNAL ABUSE—CORROBORATION OF PROSECUTRIX.—In a prosecution for carnally knowing a female under 16 years of age, her

mother's testimony that defendant's attentions to prosecutrix were very noticeable, and that he sought many opportunities to be alone with her, was competent as tending to corroborate the testimony of prosecutrix that illicit relationship existed between her and defendant.

4. CRIMINAL LAW—HARMLESS EVIDENCE.—In a prosecution for carnal abuse of a female under 16 years old, testimony of the State's witness concerning defendant's remark to him that a certain girl whose identity was not proved could not be reached with a 10-foot pole, though incompetent, was too vague and irrelevant to be prejudicial.

6. RAPE—INSTRUCTION AS TO CHARACTER OF PROSECUTRIX.—In a prosecution for carnal knowledge of a female under 16 years of age, an instruction that the moral character of prosecutrix might be considered as a circumstance tending to show the truthfulness of her statements was not improper.

Appeal from Franklin Circuit Court, Ozark District; *James Cochran,* Judge; affirmed.

Linus A. Williams and *June P. Clayton,* for appellant.

J. S. Utley, Attorney General, *John L. Carter,* Assistant, for appellee.

SMITH, J. Appellant was convicted, upon a trial, under an indictment charging him with having carnally known Lena Fisher, a female under the age of sixteen years. The indictment was returned on September 27, 1923, and the girl alleged to have been abused had her sixteenth birthday on January 17, 1922. To sustain the conviction, it is essential therefore that the proof show that sexual intercourse was had at some time prior to January 17, 1922, and yet within three years of September 27, 1923, the date the indictment was returned.

It is first insisted that the testimony did not show any act of sexual intercourse while the girl was under sixteen which did not occur more than three years before the indictment was returned.

We do not think this is the only conclusion to be drawn from the testimony. Lena Fisher testified that appellant had married her sister, and that she visited at the home of her sister, and that appellant began having

sexual intercourse with her when she was only fourteen years old, and that he continued to do so whenever the opportunity was afforded, until after she became pregnant, and that she became a mother on June 16, 1923, and that appellant was the father of her child. It is true that, in the course of nature, this baby was begotten after Lena Fisher became sixteen years old, but it will be remembered that she testified that the illicit relation commenced when she was fourteen and continued over a period of three years.

The mother and younger unmarried sister gave testimony strongly corroborating the testimony of Lena Fisher. Her mother testified that appellant's attentions to Lena were very noticeable, and that he sought many opportunities to be with her alone, and that she was constantly watching them to keep them apart. The younger daughter testified that, when only herself and Lena and appellant were together, he would find some excuse to send her away, and that Lena and appellant sought opportunities to be alone with each other, and that on one occasion she and Lena slept in the same bed at appellant's home, and that she was awakened during the night and found appellant sitting on the bed, and that this incident occurred in 1921. Any act of intercourse committed at any time during that year would, of course, have been within three years of the date of the indictment and yet while Lena was under sixteen years of age.

It is true Lena did not specifiy any exact date on which an act of sexual intercourse occurred, but we think her statement that these acts of intercourse continued during a period of three years was sufficiently definite.

It is true also, as is pointed out by counsel for appellant, that the indictment alleged the date of the commission of the offense as being September 1, 1921, but this date is immaterial if the offense was in fact committed within three years of the date of the indictment and at a time when Lena was under sixteen years of age.

It is insisted that the testimony of the mother was irrelevant, incompetent, and immaterial; but we do not

think so, as it tended to corroborate the testimony of Lena Fisher that the illicit relationship continued after it commenced.

A Dr. Kirksey testified that he delivered the child, and that, while he was engaged in its delivery, Lena stated that appellant was its father. When this testimony was offered, appellant's counsel moved to exclude it on the ground that the statement was made after the girl had reached seventeen years of age. The court appears to have excluded the testimony on the ground that it was hearsay. It appears, moreover, that the admission of this testimony was not assigned as error in the motion for a new trial.

The court permitted Tobe Robinson, who was called as a witness for the State, to answer, over appellant's objection, the following question: "State if you ever had a conversation with him (appellant) about certain actions with any girls," and the witness answered that appellant had told him there was a certain girl he thought could not be reached with a ten-foot pole. The witness did not explain what was meant by this statement, but the inference is that the girl did not permit any one to have intercourse with her, and that appellant had acquired this information as the result of unavailing importunity.

We cannot conceive on what theory this testimony was admitted, nor do we see how it could have been prejudicial. The name of the young lady was not disclosed, nor does the testimony show in what connection the remark was made, nor what appellant meant by making the remark. The remark is too vague, too irrelevant, and so entirely *apropos* to nothing at all that we think no prejudice resulted from the admission of this incompetent testimony.

An exception was saved to an instruction which told the jury that the moral character of the female might be considered as a circumstance tending to show the truthfulness of her statements. We see no objection to this instruction, but, if it was erroneous, the giving of it was not assigned as error in the motion for a new trial.

Certain other assignments of error are discussed in the brief for appellant, but they involve no questions which we think require discussion, and for that reason we do not do so.

No error appearing, the judgment is affirmed.

WARREN v. MOORE.

Opinion delivered February 18, 1924.

1. PARENT AND CHILD—AWARD FOR SUPPORT OF CHILDREN.—In a suit by a divorced wife against the former husband for the support of a child, an award of $16 per month, where defendant owned a small farm and earned a small wage as a laborer, was not excessive.
2. PARENT AND CHILD—SUPPORT OF CHILD—LIEN ON REAL ESTATE.—In an attachment suit against a nonresident parent to secure payment for support of a child, it was improper to decree a lien on such parent's land for future monthly payments.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; modified.

Starbird & Starbird, for appellant.

1. In making an allowance for the support of the child, it was error to include in such allowance the value of the mother's personal attentions and service to the child.

2. The allowance of $16 per month was excessive, under the evidence.

3. The court erred in sustaining the attachment. The order and decree for an allowance was not a decree for the recovery of money within the meaning of the statute, C. & M. Dig., § 494. It is an action for future support. In such cases attachment is not necessary. 126 Ark. 164-168.

4. No cause of action lies to the children themselves to maintain this suit. The right is statutory, and the child needs no protection save that which the divorce

statute gives to the court granting the divorce. The statute must be strictly pursued. 38 Ark. 127; 88 Ark. 308.

5. It was manifest error to attempt to fix a lien upon appellant's land to secure payment of future installments of the allowance. 147 Ark. 147; 38 Ark. 477; *Id.* 127.

SMITH, J. Appellee brought this suit, as next friend for her three minor children, against appellant, who was formerly her husband, and is the father of the children, to require him to contribute to their support. She had obtained a divorce from him, and in that decree an award was made as alimony for herself and as support for her children, but she soon thereafter married another man, and this allowance was set aside. The present suit was brought for the benefit of the children alone.

Appellee's oldest son, though still a minor, earns $4.50 per day, and supports himself and contributes to the support of his mother. The second child is now living with its father, and is supported by him. The third child is a daughter, who lives with the mother, and the testimony as to the allowance which should be made relates to this child.

The testimony on this subject is conflicting. The mother prayed an allowance of $25 per month, of which amount she said $15 would be required to pay the actual expenses of the child, and that her own necessary service would be worth $10 per month. On the part of the father there was testimony placing the value of the child's board as low as $6 per month.

It may be conceded, as contended by appellant, that the mother is not entitled to recover for the value of those purely personal services and duties which the mother owes the child, but, leaving these out of account, we think the allowance made by the court—that of $16 per month—is proper, under the testimony. The expenses of the child may, and no doubt will, vary, but, in addition to her board, the child may need medical attention. and is of an age when she should be in school, and will, of course, have to have books and clothes, and these are all proper

items to be taken into account in fixing the allowance which the father should pay. As small as the allowance appears to be, we think it fair, in view of the fact that the father owns no property except a small farm, which, he testified, was worth not more than $450, and that he himself was a day laborer, earning only a small wage.

Appellant is now a nonresident of the State, and, upon the institution of this suit, the land was attached. The attachment was sustained by the court, and it was adjudged that the attachment lien is "hereby extended for the protection and security of such payment," and it was further decreed "that said lands, in default of any payment, shall be subject to sale as on execution for the sale of lands on execution from the circuit court," and that, in the event of sale, the proceeds thereof should be deposited with the clerk of the court, to be paid by him in accordance with the decree.

We approve this decree, except that part which decreed a lien on the land to secure the discharge of future monthly payments.

In *Whitmore* v. *Brown,* 147 Ark. 147, a wife obtained a divorce from her husband, with a decree for $3,000 alimony, to be paid in installments of $250 quarterly. There was also a decree for the support and maintenance of three minor children, at the rate of $75 per month, until the youngest should become of age, with a provision that, upon default in payment, an execution might issue as in cases of judgment at law. Later, on the petition of both the husband and the wife, this decree for alimony and support of children was set aside and a decree was entered by consent for $3,000, with provision that there should be a specific lien on certain town lots. The decree further provided that the wife should recover for the support of each of the children the sum of $37.50 per month, and provided that a lien be created on the lots to secure the payment of the same. The wife executed a quitclaim deed for the lots, and, as stated in the opinion, thus disposed of any interest she had therein, but she sought, by the suit which she instituted, to enforce a lien

in favor of the children. We said: "Divorce proceedings are regulated by statute, and alimony is just what the statute makes it. There is no statute in this State providing that a decree for alimony or for the support and maintenance of the minor children of the divorced parties shall be a lien on the real estate of the husband." We there expressly declined to consider where the weight of authority was, or whether the rule announced was supported by the better reasoning, upon the ground that this court had long since decided that no lien could be declared in such cases, the reason assigned being that to do so would be likely to embarrass alienation. The cases so holding were there cited and quoted from.

It follows therefore that no lien on the land should have been decreed, and that part of the decree must therefore be reversed, and the cause will be remanded with directions to modify the decree in this respect.

COKER v. FORT SMITH.

Opinion delivered February 18, 1924.

MUNICIPAL CORPORATIONS—ASSOCIATION WITH PROSTITUTES.—A municipal ordinance making it a misdemeanor for any male person over the age of 14 to ride or walk in the daytime or night within the city limits with any generally reputed prostitute is invalid, as in effect it deprives the prostitute of the right to reside in the city by depriving her of the privileges which give that right its value.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; reversed.

T. S. Osborne, for appellant.

It is beyond the power of the city council to enact an ordinance making it a criminal offense to be on the street with a prostitute. 45 Ark. 336; 250 S. W. 429.

Geo. W. Dodd, for appellee.

The ordinance is valid. Not only have municipal corporations in this State authority, under their general

powers, to enact such an ordinance but it is made their duty to enact such by-laws and ordinances as are necessary to suppress indecent and disorderly conduct and to punish all lewd and lascivious behavior on the streets and in other public places. C. & M. Dig., § 7494; 19 R. C. L. § 151; 71 Iowa, 87; 107 N. C. 962; 74 Ga. 516; 92 S. E. 1021.

SMITH, J. Appellant was tried and fined in the municipal court of Fort Smith on a charge of "being on the street with a prostitute." He appealed to the circuit court, and, on his trial there, was again found guilty and fined, and has appealed to this court.

At his trial in the circuit court an instruction was given, over his objection and exception, which reads as follows: "1. The court instructs the jury that, if you find from the evidence that the defendant, Troy Coker, in the city of Fort Smith, and within one year next before the bringing of this suit, being a male person over the age of fourteen years, was seen riding or walking, in the daytime or night, within the city limits, without there being any necessity therefor, with a woman known or generally reputed to be a prostitute or lewd woman, then you should convict the defendant."

This instruction appears to have been warranted under the ordinance of the city which appellant was charged with having violated. It reads as follows: "It shall be deemed a misdemeanor to do, or cause to be done, any of the following acts, and any person convicted thereof shall be fined not less than five nor more than twenty-five dollars: To keep a house of ill-fame or assignation house, to permit any house owned by him, her or them, or under his, her or their control, to be kept for the purpose of prostitution; to be an inmate of a house of ill-fame, or to be found in such house for lewd purposes; or for any woman of the town or any prostitute to walk the streets after nine o'clock at night, without having any lawful business or without any necessity therefor, or at any time to solicit any person on the street, or in any public place, to accompany them or to meet them at any place

for the purposes of prostitution; or for any male person over the age of fourteen years, who shall be seen riding or walking, in the daytime or at night, within the city limits, without there being any necessity therefor, with any woman known or generally reputed to be a prostitute or lewd woman."

The part of the ordinance which appellant is charged with having violated is the last clause thereof. By his appeal he questions its validity.

The facts upon which the conviction was had are briefly these: Appellant was seen, near midnight, in an automobile with a woman who bore the reputation of being a prostitute. He drove the car in one direction, and, after a short detour, drove it down the same street in the opposite direction. The officers stopped the car, searched it for whiskey, but found none. Appellant was then arrested upon the charge stated. In his own defense he testified that he met the woman at a party, and was merely carrying her home.

It may be said that it was clearly within the power of the city council to enact most of the provisions of this ordinance, and their validity is not affected by what is hereinafter decided. Endlich on Interpretation of Statutes, § 538; Dillon's Municipal Corporations (5th ed.), vol. 2, § 647; McQuillin's Municipal Corporations, vol. 2, § 816, and supplementary volume 7, § 816.

But the question for decision is whether the clause reading "or for any male person over the age of fourteen years, who shall be seen riding or walking, in the daytime or at night, within the city limits, without there being any necessity therefor, with any woman known or generally reputed to be a prostitute or lewd woman," is valid.

There are an almost infinite number of cases dealing with the authority of municipal corporations to enact ordinances of this character, and, after an examination of many of the cases collected in the annotated cases cited in the note to § 151 of the article on Municipal Corporations in 19 R. C. L., p. 844, we find the holding of these cases is there correctly summarized into a general

statement of the power of the municipalities in the enactment of such ordinances. It is there said: "A municipal corporation, under a general delegation of power, may enact ordinances to prohibit the keeping of houses of ill-fame and to punish the keepers thereof, and to punish any person found in or frequenting a disorderly house, leaving him to show, as a defense, if he can, that he was lawfully or innocently in the house. So also an ordinance forbidding owners of houses from renting them to others for the purpose of prostitution, or with knowledge that they were to be so used, is valid, and a municipal corporation may prohibit prostitutes from walking streets at night, except in case of reasonable necessity. Municipal regulations for the suppression of prostitution must, however, be reasonable. Ordinances have been held unreasonable, and consequently void, which declare that the owner or occupant of a house or room who permits single acts of illicit sexual intercourse shall be deemed guilty of keeping a house of ill fame, or which forbid any prostitute to reside in or stay in any house or room within the city, and forbid the renting of any such premises to a prostitute, without regard to its use, or which make it unlawful for any person to associate or converse with a prostitute upon any of the streets of the city, by day or by night, regardless of the subject and occasion of the conversation, or which punish as a crime the mere presence within or return to the corporate limits of a prostitute. The decisions in these cases fully establish the invalidity of ordinances which amount to an outlawry, or a denial of the right to life and liberty to any class of women, however abandoned, except so far as it may be in punishment of a specific offense. That is to say, women cannot be denied the right to occupy property and engage in lawful business by reason of any general bad character. But they may be subject to such police regulations as are reasonably necessary. So also the provisions for enforcing the regulations must be reasonable."

Among the annotated cases cited in the note is our own case of *Paralee* v. *Camden* (which will be again referred to), 4 Am. St. Repts. 35.

One of the best considered cases is that of *Dunn* v. *Commonwealth,* 88 Am. St. R. 344, 105 Ky. 834, 49 S. W. 813. In that case an ordinance which prohibited prostitutes from being on the streets of the city between the hours of 7 p. m. and 4 o'clock a. m. following, except in instances of reasonable necessity, was upheld as a valid exercise of the police power. The court said that the council had, no doubt, ascertained that the hours during which prostitutes were excluded from the streets was the favorite time for their business, and was therefore a proper ordinance to suppress the traffic whereby they earned their livelihood. The court further said: "We think this is a reasonable restraint, and it does not unreasonably abridge their personal liberty. By the terms of the ordinance they are allowed to go upon the streets if there is reasonable necessity for it. During the fifteen hours of the twenty-four these habitual offenders against the moral, social, and penal laws are permitted to go wherever they please upon the streets and alleys of the city, which affords them ample opportunity for healthful exercise, and of attending to their reasonable wants."

A very recent case on the subject is that of *Ex parte Cannon,* 250 S. W. 429, decided by the Court of Criminal Appeals of Texas. There an ordinance of the city of Texarkana, Texas, making it unlawful for a man to ride with, or walk along the street or to be together in a public place with, a prostitute, or to be found with a woman in a house of prostitution, or with a negro woman at her place of residence, unless he were a doctor, a deliveryman, a collector, or a police officer, was held violative of the provisions of the Federal and State Constitutions guaranteeing to every citizen the right of life, liberty and property. In that case the court quoted with approval from the decision of the Supreme Court of Missouri in the case of *Ex parte Smith,* 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606, 58 Am. St. Rep. 576, as follows: "This ordi-

nance is now attacked on the ground of its unconstitutionality, in that it invades the right of personal liberty by assuming to forbid that any person should knowingly associate with those who have the reputation of being thieves, etc. And certainly it stands to reason that, if the Legislature, either State or municipal, may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of any one may be. But, if the Legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty, which Blackstone says 'consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law.' 1 Bl. Comm. 134. Obviously, there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations, and one which commands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be."

Without further reviewing the decisions of other jurisdictions, it may be said that we have two decisions of this court which announce principles that are fatal to the validity of the portion of the ordinance under which appellant was convicted.

The first of these is *Buell* v. *State,* 45 Ark. 336. In that case the court held that a town council had no power to make it a misdemeanor for a prostitute to reside in or be found within the limits of the town. This decision was rendered in 1885.

The second case is that of *Paralee* v. *Camden,* 49 Ark. 165, which was decided in 1887, and in which it was held that a municipal corporation has no power to enact an ordinance punishing as a crime the mere presence in or return to the corporate limits of a prostitute, although the statute of the State authorizes municipalities to pass ordinances to punish persons for lewd and lascivious behavior in the streets or other public places, and to sup-

press bawdy and assignation houses and indecent and disorderly conduct.

It will be observed that both these cases were decided after the passage of § 7599, C. & M. Digest, which section of the Digest, together with §§ 7598, 7600, 7601 and 7603, C. & M. Digest, comprise § 9 of the act of March 9, 1875. Acts 1875, page 1.

The city could, no doubt, pass a valid ordinance prohibiting a prostitute from in any manner soliciting patronage in the streets, or at any other place, at any hour, and the city might, no doubt, prohibit the presence of a prostitute on the streets during such hours of the night as were apparently suitable for the solicitation of patronage; but the portion of the ordinance under review goes far beyond that. It, in effect, takes from the prostitute the value of the right to reside in the city by depriving her of the privileges which give that right its value. Under this ordinance no male person over the age of fourteen years, even though he were a near blood relative, could ride or walk with a prostitute within the city limits, without there being a necessity therefor. It is true, the ordinance does not make her exercise of such a right unlawful; but it, in effect, deprives her of this right by making it unlawful on the part of any male companion.

We think the portion of the ordinance under which appellant was convicted is too broad in its terms, and was beyond the power of the council to enact, and is therefore invalid.

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

DISSENTING OPINION.

McCULLOCH, C. J. The two decisions of this court cited by the majority (*Buell* v. *State*, 45 Ark. 336; *Paralee* v. *Camden*, 49 Ark. 165) hold that, whilst municipalities may suppress bawdy houses by "prohibiting the keeping of such places, by forbidding the renting of premises for such purposes, and by other like prohibitions," the mere presence of a prostitute in the municipality cannot be declared to be a crime. That is the full

extent of those decisions. The sole effect of the other decisions cited by the majority is that prostitutes cannot be denied the right of existence—cannot be completely outlawed—because of their immoralities. The reasoning of all those cases is that prostitutes and their male associates can be restricted in their freedom except to the extent that such restriction does not interfere with their reasonable necessities of life.

The majority opinion overlooks the exception in the ordinance under consideration which makes it reasonable in its operation. It only applies where the conduct referred to is "without there being any necessity therefor." This relieves the ordinance of unreasonable oppressiveness. A fair interpretation of the language of the ordinance means a prohibition of association of men with prostitutes or reputed prostitutes on the streets or other public places when there exists no reasonable necessity therefor, and it seems to me that this does not unduly restrict liberty of action. The ordinance, in its application to prostitutes themselves, only prohibits them from walking the streets during the hours of the night, and then only "without having any lawful business or without any necessity therefor;" but men are prohibited, in the other part of the ordinance, from walking or riding with them at any time, day or night, without the existence of necessity therefor.

Fallen women are unfortunate, and deserve pity, but when they give themselves over to lives of prostitution they cannot expect, and are not permitted, the same degree of liberty as that enjoyed by other members of society. Protection of society at large demands restriction of the liberty of those who habitually lead lives of immorality. What can be more demoralizing in its influence than for men to be seen in public places in association with prostitutes, or reputed prostitutes? The influence from such practices is worse in the daytime than in the night, for it is then that they come into public notice, to the humiliation of virtuous women, and to the demoral-

ization of youth. However much we may pity fallen women, it is shocking to the sensibilities to witness the flagrant and needless association of men with them in public places.

The only effect of this part of the ordinance is to prohibit men from walking or "joy-riding" with prostitutes, and it seems to me to be a strange doctrine to say that it is beyond the power of this State to prohibit such conduct.

Mr. Justice HUMPHREYS concurs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* HARRELL.

Opinion delivered February 18, 1924.

1. MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMED RISK.—In an action seeking recovery under the Federal Employers' Liability Act, it was error to instruct the jury that the plaintiff did not assume the risk of being injured by the negligence of fellow-servants.
2. TRIAL—CONFLICTING INSTRUCTIONS.—The giving of erroneous instructions was not cured by giving a correct instruction upon the same subject, as the jury may not have followed the correct statement of the law.

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

John R. Turney and *Lamb & Frierson,* for appellant.

1. Instruction No. 1 entirely ignores the questions of assumed risk and contributory negligence, and the latter part thereof assumes negligence on the part of the defendant in placing the skids. It is practically a peremptory instruction to find for the plaintiff. Conceding that other instructions were given submitting the questions of assumed risk and contributory negligence, the best that can be said of the situation is that they are conflicting. 83 Ark. 202; 140 Ark. 162; 143 Ark. 122; 144 Ark. 454; 146 Ark. 208; 70 Ark. 79.

2. The same error appears in instruction No. 4. Even though the defendant was careless in placing the skids, it was entitled, in view of the fact that plaintiff was an old and experienced employee, to have submitted to the jury the question of his assumption of risk, if they found that defendant was negligent in that respect. 56 Ark. 216; 233 U. S. 492.

Emerson & Donham and *Bogle & Sharp*, for appellee.

1. Instruction No. 1 only states an elementary principle of law. In cases presenting a similar state of facts, the question of negligence has been uniformly held a question of fact that must be submitted to the jury. 95 Ark. 291; 116 Ark. 277; 123 Ark. 119. It is admitted that all questions of law applicable to the facts were given. It can make no difference that separate instructions were given to cover these questions, since all of them were to be considered together. 105 Ark. 358; 28 Ark. 8; 34 Ark. 383; 46 Ark. 141; 43 Ark. 184.

2. Instruction No. 4 was not erroneous in telling the jury that appellee assumed all ordinary risks and hazards incident to his work, but did not assume any negligence on the part of the master or of his fellow-servants. 95 Ark. 291; 67 Ark. 209; 77 Ark. 367; 90 Ark. 226; 89 Ark. 427; 90 Ark. 556; 92 Ark. 102; Labatt on Master and Servant, § 279. See also as to the duties of the master, 123 Ark. 119; 104 Ark. 1; 93 Ark. 564; 97 Ark. 553; 105 Ark. 392; 116 Ark. 277.

SMITH, J. Appellee, the plaintiff below, was employed by the appellant railroad company on March 14, 1922, on which day he was engaged in unloading stringers, which were to be used in repairing a bridge across the White River near Clarendon, and, while so engaged, he sustained serious injuries, and he instituted this suit under the Federal Employers' Liability Act to recover damages to compensate the injury. He recovered a judgment, after a trial before the jury, to reverse which this appeal has been prosecuted.

We make no extended statement of the testimony, as the theory upon which a recovery was asked sufficiently appears in the instructions which we will set out and in our discussion thereof.

Over the objections of the appellant the court gave an instruction numbered 1, which reads as follows: "1. You are instructed that, if you find from the evidence in this cause that plaintiff was employed by defendant to assist in repairing its bridge over White River, in Monroe County, Arkansas, and, while in the discharge of his duties as such employee, was unloading timbers from one of defendant's flat-cars by dropping same upon skids placed against said car, and further find that other of defendant's employees negligently and carelessly placed one of said skids against the timbers on said car in such a negligent and careless manner as to cause the end of one of said timbers to strike plaintiff, while he was in the exercise of due caution for his own safety, then you should find for the plaintiff."

An instruction numbered 2 dealt with the measure of damages, and instruction numbered 3 with that of contributory negligence, and correctly told the jury that, if plaintiff was guilty of negligence which contributed to his injury, his damages should be diminished in proportion to the amount of negligence attributed to him.

Instruction numbered 4, which was also given over the objections of appellant, reads as follows: "4. Defendant has interposed, as a defense herein, that plaintiff assumed the risk of the injury which he received, and you are instructed that while, as a matter of law, plaintiff assumed all risks of injury ordinarily incident to the duties he was performing for defendant as its employee, you are further instructed that he did not assume the risk of being injured by negligence of other employees of defendant, and, if you find that his injuries were due to the negligence of other employees, you should not find for defendant upon the ground of assumed risk."

It will be observed that instruction numbered 1 undertook to define the conditions under which the plain-

tiff might recover, and directed the jury to find for the plaintiff, if there was a finding (1) that an employee of the railroad company, other than appellant himself, had negligently and carelessly placed one of the skids against the timbers on the car in such a negligent and careless manner as to cause the ends of one of said timbers to strike the plaintiff (2) while the plaintiff was in the exercise of due caution for his own safety.

In other words, this instruction told the jury to find for the plaintiff if his fellow-servants were negligent, and he was not. The defense of assumption of risk, which the railroad company interposed, was thus eliminated.

This error was emphasized by the 4th instruction, which dealt with that subject. It was the theory of the company that plaintiff was an old and experienced bridge man, and that he had assisted in loading and unloading many carloads of stringers at the bridge where he was injured and at other bridges, and that he knew when skids had been properly placed to unload stringers, and that, if the skids in question were improperly placed, he was aware of that fact, and appreciated the danger thereof, yet pursued his employment, after knowing that his fellow-servants had, by their negligence in placing the skids, increased the risk of injury to himself.

The testimony on the part of the plaintiff was to the effect that he was unaware of the negligence of his fellow-servants in placing the skids, and that he did not therefore assume that risk; but there was sufficient conflict in the testimony on this issue to carry it to the jury.

Instruction numbered 4, set out above, told the jury, as an affirmative proposition, that plaintiff did not assume the risk of being injured by the negligence of other employees, and that, if his injuries were due to their negligence, the jury should not find for the defendant upon the ground of assumed risk.

It thus appears from instructions 1 and 4, given at the request of the plaintiff, over the objection of the defendant, that the plaintiff's right to recover, if it other-

wise existed, was not to be defeated upon the theory that he had assumed the risk of injury arising out of the negligence of another employee.

We think the giving of these instructions was error which requires the reversal of the judgment. The recent case of *St. L. S. F. R. Co.* v. *Blevins,* 160 Ark. 362, was one in which an employee was injured while unloading piling from a car at a bridge, and the court gave an instruction embodying the thought expressed in instruction numbered 4, set out above, and reading as follows: "If you find that plaintiff was injured while in the performance of his regular duties, and you further find that his injury was caused or contributed to by the negligence of his fellow-employees, you are instructed that he did not assume the risk arising out of the negligence of his fellow-employees." We said the instruction took away the defense of assumed risk, and that such was not the law as declared in the Federal Employers' Liability Act, as that defense had not been abrogated except "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In that case, as in this, the charge of negligence was not based upon any violation of any statute enacted for the safety of employees, but the charge was based upon the principles of the common law in regard to negligence. Following the construction of this statute in the decisions of the Supreme Court of the United States there cited and quoted from, we held that a servant might assume the risk of negligence of a fellow-servant if he was aware of this negligence and appreciated the danger thereof, and, with such knowledge and appreciation of danger, continued to discharge the duties of his employment.

We reversed the judgment in the plaintiff's favor in that case, because, as we said, the jury might have found, had the question been submitted, that the plaintiff was aware of his fellow-servant's negligence and appreciated the danger arising therefrom, but proceeded with his work notwithstanding. So here, if the testimony on

behalf of the company is accepted, the jury might find that appellant knew of the negligence of his fellow-servant complained of, and appreciated the danger therefrom, but proceeded with his work notwithstanding. We deem it unnecessary to review again the decisions there cited and quoted from.

It is said that instructions F and G, given at the request of the defendant, submitted this question properly to the jury, and that the giving of these instructions cured the error of instructions 1 and 4. We do not think so. As much as can be said of instructions F and G is that they are in conflict with instructions numbered 1 and 4, and may not have been followed by the jury as correct statements of the law. *Anglin* v. *Marr Canning Co.*, 152 Ark. 1.

Error is assigned in the refusal of the court to give instructions C and D at the request of the defendant, which also dealt with the question of assumed risk. But we think instructions F and G, which were given, declared the law applicable to that issue with sufficient fulness and more accurately than instructions C and D, and no error was committed in refusing to give them.

For the error indicated in instructions 1 and 4 the judgment must be reversed, and the cause will be remanded for a new trial.

FORT SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY *v.* ROADY.

Opinion delivered February 18, 1924.

CARRIERS—TENDER OF LIVESTOCK FOR SHIPMENT.—Where, after a shipper in a certain county on October 26, requested a car for an interstate shipment of cattle, the Federal inspector issued an order including the county in a quarantine district, which prevented the cattle from being shipped from the county after October 31, it was the shipper's duty to have his cattle inspected, and their condition for shipment certified by a proper official before he could tender them for shipment, and that must have

been done in time to have them hauled out of the county before the quarantine order took effect; and where he failed to do so, the carrier could not be liable on the theory that the car was not furnished within six days after notification, under Crawford & Moses' Dig., § 895.

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

E. H. McCulloch and *J. B. McDonough,* for appellant.

Appellee failed to have his cattle inspected, and it would have been unlawful for appellant to have accepted them for transportation. Act Congress, March 4, 1913, amending act March 3, 1905; 37 U. S. Stat. at Large, 828; 188 Fed. 191; 222 U. S. 8; 139 U. S. 278. There must be a proper tender of the shipment before there can be any liability. 84 Ark. 150. As long as there remains something to be done by the shipper, the liability of the carrier does not begin. 1 Hutchinson on Carriers, p. 288; 42 Ark. 200; 60 Ark. 33; 69 Ark. 150. Appellee was lawfully compelled to be present with his stock at the place of shipment on or before the time when the last train would leave. 144 Ark. 11; 77 Ark. 357.

No brief for appellee.

HUMPHREYS, J. This is a suit by appellee against appellant, a common carrier, for damages in the sum of $660 on account of the alleged failure to furnish a cattle-car at New Blaine within six days after being notified, in writing, to do so, in which to make an interstate shipment of cattle.

Appellant filed an answer to the complaint, interposing the defenses, first, that the order was canceled by appellee, and second, that appellee failed to make a tender of his cattle for shipment in the manner required by law.

The cause was submitted upon the pleadings, testimony and instructions of the court, which resulted in a verdict and consequent judgment in favor of appellee, from which is this appeal.

The notice was given pursuant to the provisions of § 895 of Crawford & Moses' Digest, and is as follows:

"Blaine, Arkansas, Oct. 26, '22.

"Joseph A. Clark, Agent:

"You will please order me a thirty-six foot stock car at once, and oblige, Otto Roady."

Joseph A. Clark was the agent of the appellant at New Blaine. Appellant was operating a railroad between Ola, in Yell County, and Paris, in Logan County. The order was received and filed by the agent. He at once requested the proper official to furnish the car, and an effort was made to procure one from appellant's connecting carrier at Paris, the Missouri Pacific Railroad Company, without success. Owing to the fact that the government was about to place Logan County within the quarantine district because the quorum court had failed to appropriate money to assist in the eradication of cattle ticks, there was a great rush for cars. On account of the scarcity of cars on the Missouri Pacific line, which was the most direct route for shipping cattle to Kansas City, appellant made arrangement with its connecting carrier at Ola, the Rock Island, which would not benefit by the haul, to borrow a car to haul appellee's cattle. Appellee was notified that appellant could furnish him a car on the morning of October 31st if he could arrange to have his cattle inspected, and obtain an order for shipment from a Federal inspector in time to get the car out of Logan County by midnight on October 31st. After appellee made an order for a car, the Federal inspector issued an order incorporating Logan County within the quarantine, which prevented cattle from being shipped out after midnight on October 31st. Appellee, immediately upon receipt of the notice that the car could be furnished if an inspection could be obtained, attempted to communicate with the Federal inspector, and, during the morning, got in touch with Dr. D. Richardson, who was assisting D. F. McCarty, the Federal inspector, in inspecting cattle for shipment. Dr. Richardson agreed to inspect the cattle, but could not do so until four or five o'clock p. m. He did not do so, as that hour would

be too late for the car to be picked up by appellant's last train to Paris which connected with the 1:50 p. m. train of the Missouri Pacific to Kansas City. This was the last train that day, on said line, which could haul the cattle-car out of Logan County before midnight. The testimony is in conflict as to whether appellee canceled the order for the car after ascertaining that Dr. Richardson could not inspect the cattle before four or five o'clock that afternoon. The superintendent of appellant company took the matter up with the Federal inspector at Little Rock, and asked permission to receive the cattle after inspection by the local inspector and certification that they were free from disease, and to ship them out the following day, November 1. The inspector refused to grant the request of the superintendent.

The court, in substance, declared the law to be that appellant could not have legally received the cattle for shipment without inspection and a certificate that they were clean, or free from ticks; also that appellant could not be made to respond in damages if appellee was prevented from shipping the cattle on account of his failure to get them inspected, or in case he canceled the order; but that he could recover such damages as he sustained if he was prevented from shipping them because appellant failed to furnish a car. Appellant requested the trial court to instruct a verdict in his favor, claiming that the undisputed testimony showed that appellee was prevented from shipping the cattle because he failed to obtain the required inspection and a certificate for shipment from the Federal inspector or his representative. The court refused to peremptorily instruct the jury, over the objection and exception of appellant. The exception was properly preserved, and appellant now insists that the court committed reversible error in sending the case to the jury. We think appellant's interpretation of the testimony is correct. It was the duty of the appellee to have his cattle inspected and their condition for shipment certified by the proper official before he could tender them

to appellant for shipment, and this must have been done in time to have hauled them out of Logan County before the quarantine order took effect. According to the undisputed evidence, he failed to do this. The trial court should have instructed a verdict for appellant. On account of the refusal to do so, the judgment is reversed and the cause is dismissed.

DIXON v. STATE.

Opinion delivered February 18, 1924.

1. HOMICIDE—INDICTMENT—ALLEGATION OF INTENT.—An indictment charging that accused "unlawfully, wilfully and feloniously and with malice aforethought, after deliberation and with premeditation, did kill and murder," etc., sufficiently charges the intent to kill to sustain a conviction for assault with intent to kill.
2. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.—Evidence *held* to sustain conviction of assault with intent to kill.
3. CRIMINAL LAW—ARGUMENTS OF COUNSEL.—In a prosecution for murder, arguments of counsel that "there is not a man in M. county, including myself, and, if I may be permitted, including the judge himself, that will not swear a lie to keep himself out of the penitentiary," and that "if B. S., the deceased, were here, he could tell a different story to the one told by the defendant," though improper, were not reversible error, since they were mere expressions of opinion.
4. CRIMINAL LAW—ARGUMENT OF COUNSEL—EXCEPTION.—Argument of counsel will not be considered on appeal in the absence of exception thereto.
5. CRIMINAL LAW—EXCLUSION OF EVIDENCE—PREJUDICE.—In a prosecution for murder, refusal to permit defendant to ask a State's witness whether she had not had a baby born to her recently, *held* not to present error on appeal, where defendant failed to show that witness would have answered in the affirmative and did not offer proof that the child was born out of wedlock, as affecting the witness' credibility.

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

Combs & Combs, for appellant.

J. S. Utley, Attorney General, *John L. Carter, Wm. T. Hammock, Darden Moose* and *J. S. Abercrombie,* Assistants, for appellee.

HUMPHREYS, J. Appellant was indicted, jointly with his brother, by the grand jury of Madison County, of the crime of murder in the first degree for killing Bob Stepp, on the 7th day of September, 1921. The indictment, omitting formal parts, is as follows: "The said Otto Dixon and Roscoe Dixon, in the county of Madison, in the State of Arkansas, on the 7th day of September, 1921, while acting together with a common purpose and design, unlawfully, wilfully and feloniously, and with malice aforethought, after deliberation and with premeditation, did kill and murder one Bob Stepp, by cutting him on the body of him, the said Bob Stepp, with a knife held in the hands of him the said Otto Dixon, and by shooting him on the head and body of him the said Bob Stepp, with a pistol loaded with gunpowder and leaden bullets, and then and there held in the hands of him the said Roscoe Dixon, from the effects of wounds so inflicted he, the said Bob Stepp, died on the 8th day of September, 1921, against the peace and dignity of the State of Arkansas." At a subsequent term of court the appellant was separately tried under the indictment and convicted of assault with intent to kill, from which judgment he has duly prosecuted an appeal to this court.

The first assignment of error insisted upon by appellant for a reversal of the judgment is that the intent to kill was not charged in specific terms, and that, for this reason, the crime of assault with intent to kill was not embraced within the indictment under which he was tried and convicted. Appellant was charged in the indictment with "unlawfully, wilfully and feloniously and with malice aforethought, after deliberation and with premeditation, killing Bob Stepp with a knife held in his hands." This language, in effect, charges an intent to kill by an unlawful assault. Malice aforethought, deliberation and premeditation to kill necessarily mean an

intent to kill. So a proper charge for murder in the first degree includes all the elements constituting the crime of assault with intent to kill. *Davis* v. *State,* 45 Ark. 464.

The next assignment of error insisted upon by appellant for reversal is that no substantial evidence was introduced tending to show that, at the time of the assault, appellant had in his mind the specific intent to take the life of Bob Stepp. This claim is based upon the fact that Stepp was killed by gunshots fired by Roscoe Dixon, during the fight between appellant and Stepp, and not by wounds inflicted by appellant with his knife. An unsuccessful attempt to kill another by assaulting him with a deadly weapon makes it none the less an assault to kill within the meaning of the law. The gist of the offense is the intent with which the assault is made. The intent is arrived at by the character of weapon used, the manner of using it, and all the facts and circumstances connected with the assault. In the case at bar the testimony introduced by the State showed that the appellant was the aggressor in the fight between him and Bob Stepp, which occurred at a dance at Clifty; that appellant assaulted Stepp with a knife by striking him in the back, and cutting his coat in two places and his body in one; that Bob Stepp reached down, procured a stave, with which he struck appellant, whereupon Roscoe Dixon, a brother of appellant, fired five shots into Stepp's body, which resulted in his death. In short, testimony introduced by the State tended to prove every element necessary to sustain the charge of murder in the first degree against appellant, had death resulted from the assault made by him upon Stepp with his knife. The evidence was therefore sufficient to support the verdict and judgment for assault with intent to kill.

Appellant next assigns as reversible error certain statements made by the prosecuting attorney in his closing argument. The statements are as follows:

1. "There is not a man in Madison County, including myself, and, if I may be permitted, including the judge himself, that will not swear a lie to keep himself out of the penitentiary."

2. "If Bob Stepp, the deceased, was here he could tell a different story to the one told by the defendant."

3. "In order for one to be the aggressor in a difficulty he must strike the first blow."

While these statements were improper, the first one was ruled out by the court, and, in addition, was a mere matter of opinion. The second statement was also the expression of an opinion. For these reasons they did not constitute reversible error. *Butt* v. *State,* 81 Ark. 173; *Bowen* v. *State,* 100 Ark. 232. No exception was saved to the third statement, so it cannot be considered on appeal.

The next and last assignment of error insisted upon by appellant for reversal was the refusal of the trial court to permit appellant to ask the State's witness, Cora Stepp, if she had not had a baby born to her recently. This was a proper question, affecting the credibility of the witness, but appellant is not in position to take advantage of the court's refusal to permit it to be answered. No showing was made by appellant that she would have answered the question in the affirmative had she been permitted to do so. Appellant should have stated to the court that, if permitted to answer, he would prove that she had given birth to a child out of wedlock.

No error appearing, the judgment is affirmed.

AMERICAN RAILWAY EXPRESS COMPANY v. BALD KNOB FRUIT EXCHANGE.

Opinion delivered February 25, 1924.

1. CARRIERS—DUTY TO PROVIDE TRANSPORTATION FACILITIES.—A carrier is bound to make reasonable effort to provide instrumentalities for accommodating the business of the localities which it assumes to serve.
2. CARRIERS—FAILURE TO FURNISH ADEQUATE FACILITIES—EVIDENCE.—Evidence *held* to warrant a finding that an express company had not prepared itself to furnish adequate transportation facilities to its patrons.
3. CARRIERS—FAILURE TO FURNISH TRANSPORTATION FACILITIES—DAMAGES.—In an action for damages for failure to furnish express cars for shipment of strawberries, thereby necessitating their shipment by freight, evidence as to the decrease in value from such mode of shipment *held* to justify an award of damages.
4. CARRIERS—FORMAL DEMAND FOR CARS—WAIVER.—An express company, by furnishing forms upon which demands for cars are to be made, thereby waives the necessity for notice in the form prescribed by the rules of the Interstate Commerce Commission.
5. CARRIERS—WAIVER OF DEMAND FOR CARS.—Where an express company, through its local agent, gave notice that no more express cars would be furnished, this constituted a waiver of the necessity for a written demand for such cars as a prerequisite to liability for failure to supply them.

Appeal from White Circuit Court; *E. D. Robertson*, Judge; affirmed.

Mehaffy, Donham & Mehaffy, for appellant.

1. There was no competent proof of damages and the measure thereof. In order to hold appellant liable, proof should have been made of what the berries would have brought if the express car had been furnished, and what they actually brought when shipped by freight. 77 Penn. Sup. Ct. 174; 109 S. E. 523; 184 N. W. 914; 92 Ark. 573. It was not competent proof of damages to show that there was a difference generally of $1 to $3 per crate in the price of berries shipped by express and those shipped by freight. The defendant, had the plaintiff been held to competent proof, could have met it by showing what the market prices were on the days that the

berries should have reached the market, and what they were on the days the berries did reach the market, and this difference was the true measure of damages. 121 Ark. 150; 92 Ark. 111; 142 Ark. 272; 132 Ark. 446; 134 Ark. 300; 139 Ark. 302; 149 Ark. 669; 144 Ark. 11; 81 Ark. 373; 61 Ark. 540.

2. The appellant furnished to the plaintiff all the express cars it was required to furnish under the law, and is therefore not liable in any sum. If the express company had furnished any more cars than it did, it would not only have violated the Federal statutes and the provisions of its tariffs, which have the force and effect of a statute, binding alike on the carrier and the shipper, but also have violated the State statute, prohibiting discrimination. If it equitably distributed the cars that it owned and controlled, that was all that was required. 230 U. S. 194, 197; 6 Cyc. 372; 77 Ark. 357; 144 Ark. 11; 4 R. C. L. 946, § 426; 217 U. S. 136, 54 L. ed. 698; 242 U. S. 120; 280 Fed. 780.

3. It was erroneous to instruct the jury that the express company was bound to know that, at certain seasons of the year, there would be movements of certain commodities, and that it must anticipate and provide cars to reasonably supply the demand. The effect of this instruction is to tell the jury that the company must supply the cars, whether it owned them or not or had them under control. In view of the announcement in its tariff that it had only a limited number of cars, and of the proof showing that the railroad companies own the great majority of such cars, it would be unreasonable and unfair to mulct the express company in damages for failure to furnish cars when it had furnished all that it possibly could furnish without discrimination against others. 166 Fed. 10; 242 U. S. 208; 18 L. R. A. (N. S.) 508; 20 L. R. A. (N. S.) 310, and note.

G. G. McKay and *Brundidge & Neelly,* for appellee.

Appellant overlooks, in argument, the fact that this is a suit based on the failure to furnish cars, and not for damages for delay or loss in transit. It is not

brought under the statute prescribing a penalty for failure to furnish cars, but under the common-law liability. As to the proper rule for damages in this case, see 91 Ark. 192. There can be no question as to the amount of damages. The undisputed testimony shows that berries loaded in express cars sell for more on any market, and, specifically, that appellees could sell all the express cars when loaded, on the track at Bald Knob, at from one to two dollars more per crate. The relation of carrier and shipper existed by virtue of the demand for the cars by the appellees, and the refusal of the company to supply them, and all the testimony shows that they intended to load these cars if received, and either sell them on the track, or at St. Paul, which was their principal market. 146 Ark. 355. It was the express company's duty, when it held itself out as a common carrier, to equip itself with sufficient cars to supply the normal demand, and failure to furnish necessary cars, legally demanded, would render the company liable, except in cases of extraordinary or unusual emergencies which could not be reasonably anticipated. The company cannot excuse itself by saying it has only two hundred and fifty cars. 64 Law. ed. (U. S.) 261; 2 Hutchinson on Carriers, 3d ed., 540; 10 C. J. 72; 105 Ark. 115; 10 C. J. 74; 4 R. C. L. 675; 77 Ark. 357.

McCULLOCH, C. J. Appellee is a domestic corporation, engaged in the business of buying and selling fruits, vegetables and other farm products, at the town of Bald Knob, in White County. We understand from the record that this corporation is a cooperative concern, organized for the purpose of handling produce for the growers. At any rate, it is shown that the corporation is engaged in shipping and selling fruits, berries and vegetables, and was engaged in that business during the years 1918, 1919 and 1920, as well as other years before and since.

This is an action instituted by appellee against appellant express company, to recover damages alleged to have been sustained by reason of failure of the express company to furnish refrigerator cars for the shipment of

strawberries during the season of May, 1920. It is alleged in the complaint that appellee notified the express company, several months in advance, that thirty refrigerator cars would be needed, and that during the season written notices, or demands, were given to appellant for eleven cars, and that further notices were not given, for the reason that the shippers were notified by the agent of the express company that no further cars would be furnished and that other notices would be unavailing. It is also alleged that appellant furnished only five refrigerator cars to appellee, and that appellee was compelled to ship the remainder of its berries in railroad refrigerator cars, at a loss of two dollars per crate on account of deterioration resulting from the slower and rougher method of transportation. The complaint also alleged facts constituting discrimination on the part of the express company in distributing its cars, but this charge was abandoned, and the cause was tried below solely on the alleged failure to furnish cars on demand.

Appellant answered, denying the allegation with respect to furnishing cars, and pleaded that it was impeded in the distribution of cars by a switchmen's strike on the railroad, and that it fairly distributed its refrigerator cars, and assigned to the shippers at the town of Bald Knob their proportion of such cars owned by the express company.

Appellee's damages were laid in the complaint in the sum of $2,999, and, on the trial of the cause, the jury returned a verdict in favor of appellee for the amount claimed.

Appellee introduced proof tending to show that strawberries had been raised for market in the vicinity of Bald Knob for about eleven years, and that there was an increasing demand for rapid transportation of the berries to market; that in January, 1920, the agent of the express company at Bald Knob was notified that appellee would need thirty refrigerator express cars, that, after the shipping season opened in May, appellee delivered to the agent of the express company at Bald Knob

written notices, on blanks furnished by the company, for eleven cars, and that the agent thereafter notified appellee not to make any further demands, as no other refrigerator cars could be furnished; that the express company only furnished five refrigerator cars to appellee, that the remainder of the berry crop, 42 cars, was shipped in freight refrigerator cars, and that there was a loss of from one to three dollars per crate, on account of having to ship the berries by that mode of transportation.

Appellee introduced numerous witnesses, who were engaged in the fruit and berry shipping business at various places in the country, and these witnesses testified that there was a necessary depreciation in the quality and market value of berries shipped by express and by freight, the extent of the damage varying, according to the testimony of the witnesses, from seventy-five cents to three dollars per crate. The testimony shows that the average refrigerator car carries 448 crates. According to this testimony, the award of damages to appellee was considerably less than the testimony warranted, if the difference in the market price had been placed even at the lowest amount fixed by these witnesses.

Appellant introduced as a witness its superintendent of transportation, who testified concerning the number of refrigerator cars owned by the express company, and also stated in detail the methods of the company in furnishing and distributing cars. The testimony of this witness, as abstracted by counsel, fully sets forth appellant's defense in this case as follows:

"The American Railway Express Company owns 250 refrigerator cars. On the lines mentioned, with our own cars there are about 1,000 in the country—993, I think, is the exact number. Of this number the express company owns 250. The other cars, the railroad cars, are used constantly by the railroads when they are needed for the shipment of perishable goods. You get peak movements where the cars are not sufficient in number, and they vary from season to season. One season will come at different times, and next year, while it might be

the same, the next one is a little earlier or a little later. I distribute the cars to the territory, and they are distributed to the shippers by the route agent having charge of the district. Take this territory down here; we know this territory as the Little Rock district, by reason of the fact that the cars are usually distributed from Little Rock and then taken on the Missouri Pacific Railroad both ways out of Little Rock, also up toward Van Buren. In peak shipments all the cars, both express company and railroad company cars, are brought into use. That was true in 1920. We gave the Little Rock territory as many cars as other territory, proportionately. If we had given this territory any more cars than we did, we would have been discriminating against some other territory."

It is shown by the testimony of this witness that the business of the express company covers practically all of the United States, a part of Canada, and the Hawaiian Islands. The witness also testified that there was a contract between the express company and certain railroad companies for the latter to furnish refrigerator cars, but the witness was not certain as to the details of the contract, and the same was not introduced in evidence.

The first and principal contention of appellant is that the evidence is not sufficient to sustain the verdict, in that all of the cars owned by appellant were fairly and equitably distributed among shippers; that there is no charge of discrimination involved; that appellant was in readiness to furnish equipment for all usual and reasonable demands, and that it was not bound to anticipate unprecedented demands. We do not think that counsel for appellant has drawn the proper inferences from the testimony in the case—the inferences that the jury might have drawn in viewing it in its strongest light favorable to appellee. It is true that there is no charge of discrimination involved, but it is equally true that the evidence adduced by appellant does not show indisputably that the distribution of cars was interfered with by a switchmen's strike. One of the witnesses testified that there was such interference, but it is shown that the rail-

road company furnished all refrigerator cars that were demanded or needed, after the express company had refused to furnish such cars.

The testimony shows that it is highly desirable to ship berries by express rather than by freight, and that there is a considerable difference in the deterioration in quality and price, on account of the fact that express shipments are more rapid, and that there is better refrigeration and smoother riding. The testimony shows, as before stated, that the difference in price varies from seventy-five cents per crate to three dollars per crate. The evidence also shows that in the berry-growing sections there is an increasing demand for more express cars, for the reason stated above, and that for several years past shippers have been demanding all of such cars that they could get, and only ship by freight when compelled to do so by lack of facilities for shipping by express. Now, the testimony adduced by the express company shows that it only owns 250 refrigerator cars, and that the railroad companies own 750 refrigerator cars, and the evidence fails to show that, notwithstanding the increasing demands for express cars, there have been any increased facilities for that mode of transportation. The company, of course, must take notice of the general conditions of the country where it does business, and it is bound to know of these increasing demands for refrigerator cars.

The undisputed evidence shows that, in the year 1918, there were 250 carloads of berries shipped from White County, Arkansas, and that the shippers demanded all the express cars they could get, and yet, in the face of this growing demand, the company, according to the testimony, has made no attempt to increase its facilities to meet the demand. The testimony does not present a case of an unprecedented demand, but the usual and growing demand from year to year. The law requires a carrier to make reasonable effort to provide instrumentalities for accommodating the business of the localities which it assumes to serve. This is not merely a statutory require-

ment, but it is an elementary principle originating in the common law. 2 Hutchinson on Carriers, 540; 10 C. J. 72.

The jury could have found, from the evidence in this case, notwithstanding the statement of appellant's principal witness that it had adopted all reasonable means to furnish cars, that appellant had not prepared itself to furnish adequate transportation facilities to its patrons.

It is further urged that the testimony fails to support the verdict in that there is no proof of actual damages, according to settled rules of law. Appellant invokes the application of the rule that, in an action against a carrier for failure to transport and deliver property, the measure of damages is the depreciation in value of the commodity at the point of destination. *L. R. & Ft. Smith Ry. Co.* v. *Conatser,* 61 Ark. 560; *C. R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573; *C. R. I. & P. Ry. Co.* v. *Stallings,* 132 Ark. 446; *Hines* v. *Mason,* 144 Ark. 11. The answer to that contention is that this is not a suit for delay in transportation, but it is one to recover on account of failure to furnish proper facilities for transportation, and for damages arising because of such failure. In other words, it is a suit to recover damages resulting by reason of the difference in the modes of shipment, by freight or by express, and the proof abundantly establishes the fact that there is a necessary depreciation on account of the less desirable method of transportation by freight. There is no other way reasonably of establishing the damages than by the proof introduced by appellee. The berries had to be shipped by freight because of appellant's failure to furnish express cars. There was no unusual delay shown in the shipment by freight, otherwise there would have been a remedy against the railroad company. But the proof adduced does establish the fact that there is a necessary delay in shipping by freight, instead of by express, and that the fruit is necessarily injured on account of the transportation being rougher. Besides, the proof shows that it was the custom to sell berries to the highest bidders at the point of shipment, after being loaded on cars, and that

sales in that manner brought from $1 to $3 per crate more when the berries were loaded in express cars than when loaded in freight cars. This was sufficient to justify an award of damages on that basis.

It is also contended that appellee should not be permitted to recover, for the reason that the notices, or demands, for cars were not in writing. The proof shows that there were eleven cars demanded in writing. It is insisted that these written demands were not in the precise form required by the rules of the Interstate Commerce Commission, but it is shown that the notices were given on forms furnished by the company itself. The express company could waive the requirement, and did waive it, by accepting notices on blanks which it furnished to its patrons. *Mo. Pac. Rd. Co.* v. *Henderson,* 157 Ark. 43. Only five of the eleven cars actually demanded were furnished by the company. The testimony shows that other notices were not given, for the reason that the local agent, under instructions from the route agent, informed the shippers that no more express cars would be furnished. This constituted a waiver of the written notice. *Mo. Pac. Rd. Co.* v. *Henderson, supra.* After the refusal of the express company to furnish any more cars, it would have been a useless thing to give written notices or demands.

There are numerous assignments of error with respect to the court's charge to the jury, but it is unnecessary to discuss them in detail, for, on examination, we find that the instructions of the court were in accordance with the principles of law herein announced. The instructions also conformed to the principles of law announced in *DeQueen & Eastern R. Co.* v. *Park,* 146 Ark. 355, which are controlling in the present case, the facts being to some extent similar. The instructions properly presented to the jury the issues, and there was, as before stated, evidence sufficient to sustain the verdict.

The judgment is therefore affirmed.

MORRILTON COTTON OIL COMPANY *v.* FRAUENTHAL & SCHWARZ.

Opinion delivered February 25, 1924.

1. LANDLORD AND TENANT—LIEN FOR SUPPLIES.—Where a landlord signed a note to enable his tenant to secure money from a bank, the test of whether the landlord had a lien on the tenant's crop for such money as for supplies advanced depends upon whether the relation of debtor and creditor existed between the landlord and tenant, or whether the landlord was merely a surety; and the form in which the debt to the bank was evidenced was immaterial.
2. LANDLORD AND TENANT—LIEN FOR SUPPLIES—EVIDENCE.—Where a landlord signed a note with his tenant to enable the tenant to secure money from a bank, which renewed a chattel mortgage on the tenant's personal property and the crop to secure the note, evidence *held* to sustain a finding that the money obtained from the bank was not a loan to the landlord, but to the tenant, so that the landlord was not enitled to a lien as for supplies furnished to the tenant.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

Strait & Strait, for appellant.

The undisputed proof shows that Burke, the landlord, was not a mere surety on the note of the tenant, but, on the contrary, that the credit was extended to Burke, and was, as to him, an original undertaking, and that he in turn furnished the money to the tenant. The case falls clearly within the rule announced in *Foster* v. *Bradley,* 143 Ark. 320; 153 Ark. 599.

R. W. Robins, for appellees.

While the landlord's lien is primarily for rent alone, and the statute, C. & M. Digest, § 6890, has extended it to advances of necessary supplies, money, etc., yet it cannot be extended beyond the terms of the statute. 80 Ark. 243. The principles stated in *Kaufman* v. *Underwood,* 83 Ark. 118, are clearly applicable in this case, and should control. See also Tiffany, Landlord & Tenant, vol. 2, pp. 1911, 1912; 2 Underhill, Landlord & Tenant, 1414; *Id.* 1417; 16 R. C. L., § 498; 70 Miss. 60, 11 So. 566; 44 S. W. (Tex.) 915; 240 S. W. (Tex. Civ. App.) 641;

1 W. & W. (Tex.) 320; 106 S. W. (Tex. Civ. App.) 1145; 75 So. 383.

McCULLOCH, C. J. This is an action instituted by appellees in the chancery court to foreclose a chattel mortgage executed to them by one McNeeley on a crop of cotton. McNeeley was a tenant of Mack Burke, who was to have one-fourth of the crop as rent, and who furnished supplies to McNeeley to the extent of the sum of $82 to enable the latter to make and gather the crop. The cotton (about a bale and a half) was gathered by McNeeley, and he and Burke sold it to appellant, Morrilton Cotton Oil Company. McNeeley executed to the First National Bank of Morrilton a chattel mortgage, subsequent to the execution of the mortgage to appellees, conveying his interest in all crops and in certain other personal property, to secure a debt of $192, with interest. McNeeley, Burke, Morrilton Cotton Ooil Company and the First National Bank of Morrilton were made defendants in the action. The controversy arises between appellees and Burke concerning the latter's claim to a superior lien on the crop, as landlord.

It is conceded that Burke is entitled to one-fourth of the cotton as rent, and that he is entitled to payment of his debt of $82 for supplies furnished to McNeeley, but, after making these deductions from the price of the cotton, it leaves a balance of $136, which appellees claim under their mortgage, and which they recovered in the decree rendered by the chancery court. Burke claims a lien on this balance of $136 for the debt due the First National Bank of Morrilton, on the ground that it was for money advanced by the bank to McNeeley for Burke.

The proof shows that Burke signed the note to the bank with McNeeley, but he claims that it was money which he furnished to McNeeley, and obtained it from the bank. This comes down to a question of proof. If Burke was a mere surety for his tenant, and nothing more, he has no lien for the amount obtained from the bank. *Kaufman* v. *Underwood,* 83 Ark. 118. On the other hand, if Burke in fact obtained the money from the

bank and advanced it to McNeeley, or if he procured the loan for McNeeley from the bank and the relation of debtor and creditor subsisted primarily between McNeeley and Burke, then the latter is entitled to a lien, regardless of the form in which the debt to the bank is evidenced. *Forster* v. *Bradney,* 143 Ark. 319; *Walker* v. *Rose,* 153 Ark. 599; *Bank of Gillett* v. *Botts,* 157 Ark. 478. The test is, whether or not McNeeley, the tenant, is indebted to Burke, his landlord, for supplies. If there is no debt in existence, but merely the relationship of principal and surety, there is no lien; but if there is a debt, there is a lien, as before stated, regardless of the form employed in obtaining the money from the bank.

The evidence is not, we think, sufficient to overturn the finding of the chancellor as to the character of the relation between McNeeley, Burke and the bank. They both signed the note to the bank, and there is no written evidence of any debt from McNeeley to Burke. Burke testified that he procured the money from the bank and advanced it to McNeeley, but he is contradicted by his own admission to a witness introduced by appellees. This witness, Kuykendall, was the agent of appellees, and he testified that, when he went up to the farm where the cotton was raised, to see about hauling and shipping it, he had a conversation with McNeeley and Burke, in which it was stated to him that Burke only claimed $82 for advances in addition to the rent. The cashier of the bank was introduced, but he knew little, if anything, of the transaction, except what was shown on the face of the papers, that is the mortgage and the note.

It appears from the testimony that the bank held a mortgage executed by McNeeley on the same property during the preceding year, and their present mortgage was a renewal on the same property, except the crop, which was for a different year, and it embraced a lot of stock. McNeeley was not a tenant of Burke during the period of the first year covered by the mortgage to the bank, and he could not, therefore, have had any interest at that time in the transaction between McNeeley and

the bank. This indicates a course of dealing between the bank and McNeeley which excludes the idea that the advances were made by the bank not to McNeeley but to Burke. The inclusion in the mortgage to the bank of the live stock and other chattels, on which Burke had no lien as landlord, tended to show that the loan was made by the bank to McNeeley, and not to Burke.

Considering these circumstances, and the admission of Burke, made directly to appellee's agent, we cannot say that the chancellor erred in finding, from these facts, that the money obtained from the bank was not a loan to Burke, but was a loan direct to McNeeley, secured by the chattel mortgage and by Burke as surety.

The decree is therefore affirmed.

HOME LIFE & ACCIDENT COMPANY v. SCHEUER.

Opinion delivered February 25, 1924.

1. INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM.—Under a policy of life insurance providing that it should become void on failure to pay premiums when due, the nonpayment of a premium when due *ipso facto* caused a forfeiture of insured's rights.
2. INSURANCE—WAIVER OF FORFEITURE.—Where, after a policy of life insurance was forfeited for nonpayment of a premium, the insurer advised the insured that the policy was still in force, the forfeiture was waived.
3. APPEAL AND ERROR—WEIGHT OF EVIDENCE.—It is for the jury, and not the Supreme Court, to weigh the evidence, determine the credibility of witnesses, and reconcile real or apparent conflicts.
4. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A verdict sustained by substantial evidence is conclusive on appeal.
5. INSURANCE—EVIDENCE TO SUSTAIN FINDING.—In an action on a life insurance policy, evidence that insured wrote to the insurance company inquiring whether her policy was still in force, and that a letter advising her that the policy was still in force was received in reply thereto, *held* sufficient, in the absence of evidence to the contrary, to justify a finding that the letter was written by the company's authorized officers.
6. INSURANCE—AUTHORITY OF SUPERINTENDENT TO WAIVE FORFEITURE.—The superintendent of an insurance company's life insurance

department and underwriting manager, whose duty it was to pass on the reinstatement of lapsed policies, *held* authorized to waive a forfeiture of a life insurance policy, though the policy provided that only the president, vice president or secretary had power to modify the policy.

7. INSURANCE—WAIVER OF FORFEITURE.—In an action on a life insurance policy, evidence *held* to warrant a finding that the insurer waived a forfeiture because of nonpayment of premiums, and therefore was estopped to deny liability.

8. INSURANCE—FORFEITURE.—Where insured inquired whether her policy was still in effect, it was the insurer's duty to inform her with promptness that it would insist on a forfeiture, if such was its intention.

9. INSURANCE—PENALTY AND ATTORNEY'S FEE.—Under Crawford & Moses' Dig., § 6155, the beneficiary, on recovering on a policy of life insurance, was entitled to recover a penalty of 12 per cent. and reasonable attorney's fees.

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

T. D. Wynne, for appellant.

1. The policies lapsed and became null and void by virtue of the terms of the contracts themselves, on June 8, 1921. 75 Ark. 25; 148 Ark. 199; 112 Ark. 171; 75 Ark. 98; 156 Ark. 77. Thereafter they could only be reinstated in the method set out in the policies, viz., by payment of the second annual premium, application for reinstatement, and evidence of insurability satisfactory to the company made and received. None of these prerequisites were discharged.

2. The burden of proving a waiver was on the plaintiff. His own oral testimony pertaining to the receipt of a letter written by the company, assuring the insured and plaintiff himself that the matter was fixed up, and for them not to worry, was altogether insufficient for that purpose. It was incumbent on him to show that such letter was written by some one vested with authority to make the waiver. Provision (4) under the head of "General Provisions," is a part of the contract. Plaintiff should therefore have shown that the alleged letter was written by the president, vice-president or secretary. 2 Joyce on Insurance, § 539, and notes; 2 Bacon on

Insurance, § 589, and notes; 72 Ark. 62; 104 Ark. 512; 125 Ark. 119; 10 L. R. A. 517; 3 Cooley, Law of Insurance, 2513; 10 L. R. A. 577. Full effect should be given to the limitations and restrictions in insurance clauses prescribing by whom waivers may be made. 98 Pa. 384; 85 N. Y. 282; 57 N. Y. 500; 95 U. S. 326; 96 U. S. 234; 93 U. S. 24; 96 U. S. 572.

3. If it be granted that the letter was written, its contents were not such as constituted a waiver. The policy defined the consequences of default in the payment of premiums, *i. e.*, that the policy should be "*ipso facto* null and void." It ceased to bind the company and to protect the insured, without any act or declaration on the part of the company. 112 Ark. 171. The restoration of the policies to life by reinstatement would be a new assurance, a new contract, though under the former policies. 10 L. R. A. 577; 25 L. R. (N. S.) 78. Where the contract is complete, the prohibition express, the failure admitted, the burden of proof is not only upon the party asserting the waiver, but he should be held to a clear and convincing proof of knowledge on the part of the insurer of all the facts necessary to establish a waiver. 24 U. S. Law. ed. 387.

Botts & O'Daniel, for appellee.

1. The letter relied on did not come from some agent of the company, but from the company itself. It comes too late for the appellant to raise the question for the first time on appeal of authority to write the waiver letter, and to say that it was not written by the proper parties, especially since it admits, and the proof shows, that the letter came direct from the company itself, and from its home office. The question of agency is not involved. 83 Ark. 575. If appellant had authority to delegate the question of waiver to its president, vice president and secretary, it had authority to effect such waiver itself. 111 Ark. 436; 25 Cyc. 861.

2. Forfeitures are not favored in law, and when an insurance company has, by its conduct or course of action,

led a policy holder to believe that his insurance is in full force, the company will be estopped from denying liability. 132 Ark. 549; 96 U. S. 841; 53 Ark. 494.

3. The question of waiver was one of law. 25 Cyc. 861; 40 Cyc. 270.

4. The burden of proving a waiver is met when the party pleading it establishes a waiver by a preponderance of the evidence, and he is not required to prove it by the clear and convincing evidence insisted upon by appellant. 40 Cyc. 269.

WOOD, J. This is an action by the appellee against the appellant on two life insurance policies in the sum of $5,000 each, issued on the 8th day of May, 1920, insuring the life of Martha E. Scheuer for the benefit of the appellee, her husband. Mrs. Scheuer died on August 28, 1921. This action was brought by appellee on December 19, 1921. The appellee, in his complaint, set up the policies, alleged the death of the insured and the proof of death, and demand on the appellant for $10,000, the amount of the policies, and the refusal by appellant to pay same, and prayed for judgment in that sum and for $600 damages on each policy, and a reasonable attorney's fee.

The appellant, in its answer, admitted the issuance of the policies as alleged, but denied that proof of death had been made, and denied that the policies were in effect at the time of the death of Mrs. Scheuer, but, on the contrary, alleged that, at that time, the policies had lapsed and were forfeited by the insured, and became null and void because of a failure to pay the premium which was due on May 8, 1921. The appellant therefore denied liability to the appellee on the policies.

C. E. Condray testified that he was the cashier of the First National Bank of DeWitt, Arkansas. After the death of the insured the appellee brought some policies to the bank and asked witness to collect them for him. Witness wrote the appellant, ten or fifteen days after Mrs. Scheuer's death, at its home office at Fordyce, Arkansas, advising it of the death of Mrs. Scheuer and

requesting a special form for making proof of death. Witness received a letter from the appellant, in reply to witness' letter, stating that Mrs. Scheuer's policies had lapsed because of the nonpayment of premiums. The policies in controversy were identified by witness and introduced in evidence. The policies contained, among other, the following provisions:

"(a) All premiums are payable either at the head office of the company or to such agent as shall be designated by the company, upon delivery of a receipt signed by the president, vice president or secretary, and countersigned by the agent designated. If any premium or installment thereon is not paid when due, this policy shall be *ipso facto* null and void, and all premiums forfeited to the company, except as herein otherwise provided.

"(b) Reinstatement of this policy, in event of default of premium payment, may be made, unless the cash surrender value has been paid, at any time, upon presentation at the head office of evidence of insurability, satisfactory to the company, and payment of all past due premiums, and the payment or reinstatement of any indebtedness to the company hereon or secured hereby, with interest at a rate not exceeding six per centum per annum.

"(c) Only the president or vice president or secretary has power, in behalf of the company (and then only in writing), to make or modify this or any contract of insurance, or to extend the time for paying any premiums, and the company shall not be bound by any promise or representation heretofore or hereafter given by any agent or person other than above."

The appellee testified that one Colin Towler sold appellee and his wife $10,000 each of life insurance with the appellant. They dropped all other insurance and accepted insurance with the appellant. They paid Towler cash for the first premiums, that is, for $5,000 on witness' life, and for $5,000 on witness' wife's life. Towler issued a receipt when they paid him the money. The first premiums on the last two policies were paid in the

same way. Appellee and his wife executed notes for the last two premiums. Towler filled out the notes. Witness identified and introduced two receipts issued to Mrs. Scheuer, in the sum of $208.55, reciting that they were for the annual premium on the policy, and paid the same to May 8, 1921. These receipts were signed by Towler and countersigned by John R. Hampton, the secretary of the appellant. Witness testified to several receipts for payment of the premiums on his policy. The receipts were delivered to witness at the time the policies were delivered. All witness' dealings were with Towler. He took the cash payments, accepted the notes, and delivered to witness the receipts and policies. Towler was designated in the receipt as the agent. Witness never had any information from the appellant that Towler did not have authority to act for appellant in these transactions. Appellee sold to Towler eighty acres of land for $70 an acre. Towler said he would make the payments in the fall; that if he didn't have any money he would pay the insurance premiums. When the time came for paying the second premiums, appellee and his wife were anxious to know if they were paid. Towler had said, before the due date of the second premiums, that he would pay the same. About the 5th of May they gave blue notes for the second premiums. They aimed to give part of it in cash, and Towler said he would pay it, and appellee didn't know what a blue note was. Towler brought them to appellee. Appellee told Towler they wished to pay, and Towler said they had plenty of time—until the 8th of June. Appellee didn't have the notes in his possession, and didn't know where they were. There was a note for appellee and one for his wife in the sum of a little over $200. Appellee spoke about paying the balance of the premiums in cash, and Towler said there was no need to hurry about it—they had plenty of time to straighten it up. Mrs. Scheuer spoke to Towler about paying the cash part of the premiums, and he replied that he would straighten it up with the appellant, as the appellant owed him. Mrs. Scheuer got her check-book and insisted on

paying Towler the part of the second premiums that had to be paid in cash. He was reluctant to take it, and said, "Never mind." They had trouble getting Towler to fix it up. Finally they sent for him, and he came and brought the blue notes and filled out part of them there. Mrs. Scheuer offered two or three times to pay Towler the cash, telling him that she wanted it fixed up right, and he refused to take it. Appellee had no information from appellant that Towler didn't have authority to collect the second premiums like he had collected the first. After the notes were executed, Towler told appellee not to worry, that everything would be all right. After this some one told appellee that they could not depend on Towler, and they had better write the appellant. So Mrs. Scheuer wrote the appellant. Appellee didn't keep a copy of her letter—didn't have any idea he would need it. Mrs. Scheuer asked in the letter if Towler sent in the notes and if the insurance was "still going;" that she wanted to be sure about it, and, if it wasn't, they would send the money. She explained in the letter that they had fixed up the matter with Towler—had given notes—and asked when these notes were due. In the same letter she advised the appellant that they had been informed that they could not depend on Towler, and asked if their insurance was still in effect. They received an answer to Mrs. Scheuer's letter. Appellee didn't have this letter of the appellant, because, when they got sick, their stuff was moved out of the house. They searched for the letter everywhere, but couldn't find it. Appellee saw the letter. Appellant stated in this letter that Towler was its agent, and had fixed the notes up till November, and everything "would be all right—everything would be sure to go on—and not to worry." Towler got mad with them because appellee told him that they had been informed that he could not be depended upon. The appellant wrote them, before they made the notes, that the policies were due in June. That was the only notice they got. In response to that letter they went after Towler, and Towler fixed it up. They fixed it the way

Towler directed, and notified appellant that they had done so. After appellee's wife's death, on August 28, 1921, appellee requested Mr. Condray, the cashier of the First National Bank, to write the appellant, and gave him the policies to collect. The appellant had not paid any part of the policies. Towler had never paid appellee for his land purchased of appellee, and didn't even pay the taxes.

On cross-examination appellee stated, among other things, that they never paid anything toward the second annual premiums due on the policies. Appellee and his wife gave notes, and offered to pay them, and appellant would not take it. They offered to pay the premiums when the notes were made. The agreement with Towler was to pay the cash necessary. At the time the notes were executed, appellee and his wife looked to Towler to pay the cash deposit required. Before the second premiums were due, appellee and his wife were anxious to fix up the matter. They had a letter from the appellant, stating that the premiums would be due May 19, 1921. They then got after Towler, and he promised to fix it up, explained about the blue notes, and said that he would fix the receipt for it, and that it would be all right. Appellee had fixed up the payment of the first notes with Towler, and appellant had made no objection about that. After their agreement with Towler to make satisfactory arrangements for the second premiums, they became anxious about it, and Mrs. Scheuer wrote the letter as above stated. The answer of appellant to this letter, about which the witness had testified, was received in about a week or so after Mrs. Scheuer's letter was mailed. It was from the home office of appellant. In about two and a half or three months after they received appellant's letter appellee's wife died.

Towler testified, for the appellant, that he had been the agent of the appellant for three and a half years. His authority was only that of a soliciting agent—he took applications, etc. He took the applications for the policies in controversy. In payment of the first premiums

he took notes for half the premium, and the other half witness paid himself. When the policies were issued there was a land deal between witness and Scheuer. He had bought a piece of land from appellee, and had paid $500 on it, and was to pay the insurance premiums for the Scheuers from year to year, and the amount thus paid was to be credited on witness' indebtedness for the land. Such was the contract when the applications were made and the policies issued. Witness had promised to pay the second premiums of the Scheuers, on certain conditions in regard to the land deal, which the Scheuers did not comply with. The Scheuers knew that their insurance had lapsed on account of the nonpayment of the second premiums. Witness discussed the matter with them. They seemed to be anxious to reinstate it. Witness told them what was necessary to reinstate the policies—told them that it would be necessary for them to furnish a health certificate, showing the insured to be in good health, and also told them that a cash deposit would have to be made when the notes were delivered, if the appellant reinstated the policies. Witness continued his testimony as follows: "I presented to Mr. Scheuer the blue notes, and at the same time I told him I would pay the cash deposit required, but I didn't do it, because he refused and failed to comply with his agreement with me, and I told him that if he didn't do this I was not going to do anything for him along the line of reinstating his policies, that I was through with it. After the notes were signed, I kept them in my possession; I never did send or forward the notes or any money as a cash deposit to the insurance company. I have had the notes in my possession ever since. Mr. Scheuer signed a health certificate eventually—that was some time in June after the execution of the blue notes."

The testimony shows that Mrs. Scheuer signed the health certificate and gave it to the witness. The application for reinstatement and the certificate of good health signed by Mrs. Scheuer were introduced in evidence. A form of medical certificate, to be signed by the examining

physician, was also introduced, but was not signed by the medical examiner and approved by the medical director of appellant. The testimony of this witness further tends to prove that, after the nonpayment of the second premiums, an effort was made to compose the differences between witness and the Scheuers concerning the land, and, assuming that these differences had been adjusted, the witness, at the request of the Scheuers, and acting as their agent, went to the home office of appellant and told the bookkeeper that the Scheuers desired to reinstate their lapsed policies, and requested him to make up the amount of cash necessary to be paid, make up the blue notes to be executed, together with the certificates showing the insurability of the Scheuers. The bookkeeper complied with this request. These notes were executed by the Scheuers, but witness never returned the same to the appellant, nor was the cash paid by the witness, because, as he states, witness ascertained that the Scheuers had not complied with the conditions upon which he promised to make the cash payment necessary for the reinstatement of the policies. Witness did offer to accept the blue notes, and, if the Scheuers had paid the cash, he would have forwarded the notes to the appellant with the cash, and, if this had been done before the policies had expired, the insurance would have been extended. Witness knew that the Scheuers desired their policies reinstated, and he discussed the matter with the bookkeeper of the appellant, and told him that the witness thought he could reinstate the policies. Witness identified a letter which was written to him by the appellant from its home office at Fordyce, on its letter-head, dated July 25, 1921, as follows: "We have received another letter from Chas. Scheuer, and several days ago we wrote you in regard to this same matter. It is necessary that we give this party some reply, and will ask that you let us hear from you immediately upon receipt of this letter." Witness answered this letter on the back as follows: "I will let you know all about this matter within a few days, but my reasons for not doing so now

is because I want a settlement out of these people before I let you know about this matter, and then you can write them, and this will only be a few days." Stamped on this letter was the following: "Home Life & Accident Co. Received Aug. 1, 1921, A. B. Banks & Co., Managers."

Witness never explained to Mrs. Scheuer or said anything to her about not having anything more to do with the matter, after the failure to adjust the differences with appellee. She knew, however, that he was not going to take the land.

Witness Thatch testified that he was the superintendent of the life department of the appellant. He explained the provisions of the policies, and stated that, according to these provisions, if premiums were not paid within thirty-one days of grace allowed, the policy automatically lapsed. There was an effort made by the Scheuers to reinstate their policies. They asked the home office on what basis the policies might be reinstated, and the appellant informed them what was necessary. The notes were prepared in the home office, and the amount required in cash was figured out. No formal application was ever presented by the Scheuers for reinstatement to the home office, nor was there any medical certificate showing insurability after the policies had lapsed. The blue notes were never returned, nor the cash deposit. Witness identified the following letter, written by the Scheuers to the appellant, July 18, 1921: How about policies for Chas. and Martha Scheuer Nos. 18282, 17502, 18496 and 18497? Colin Towler, your agent, brought notes for us to sign for, now it was the blue notes, but he has acted the rascal with us in business matters and we feel we can't trust him. We don't want to lose out in the insurance. I have written you once before about this, now please let me know how we stand. We signed those blue notes and want to know if we are in good standing. Answer by return mail."

Witness answered this letter as follows: "Aug. 1, 1921. Mr. Chas. Scheuer, Stuttgart, Ark. Dear sir:

We had a letter from Mr. Towler today in which he advised us that he would talk to you within the next day or two with reference to your policy. If the conference you have with him is not satisfactory, please write us again.'' Witness didn't dictate the reply immediately after the letter of the Scheuers was received, but probably waited until he heard from Towler. The letter received from the Scheuers was the only one that witness knew anything about. If there was another letter, witness didn't know anything about it. Witness was not sure about writing any other letters, but if there was another letter received it would be in the files. All the correspondence with reference to the contract from the Scheuers was in the files, and witness found no other letter except the one introduced in evidence. Witness stated that the appellant might have waived the right to require a medical certificate and examination if the application for reinstatement and the notes and cash deposit had been received within a few days after the policies had lapsed.

The court, in substance, instructed the jury that the only evidence that would warrant a finding for the appellee was that part of the testimony of the appellee in which he testified that, after the execution of the blue notes and the agreement between him and Towler, he wrote the appellant a letter, making inquiry, and, in response to that letter, the appellant advised appellee that his insurance was in full force, and he need not worry; that, unless such letter was written by the appellant in reply to appellee's letter, and received by the appellee, the verdict should be in favor of the appellant; that, if such letter was written by the appellant and received by the appellee, it would operate, under the law, as a reinstatement of the insurance, and would constitute a waiver of every other condition in the policy and a ratification of everything that Towler may have done or promised to do, and would fix liability upon the part of the appellant; that, if the jury so found, its verdict should be in favor of the appellee in the sum of $10,000, less the amount of

the premiums that would be due on the policies for that year. The court further instructed the jury that the burden was upon the appellee to prove that the letter was written and received as stated. The appellant duly excepted to the rulings of the court.

The appellee requested, among others, the following prayer for instruction: "No. 2. You are instructed that, if you find for the plaintiff in this case for the amount claimed in his amended complaint, then you shall find in favor of the plaintiff in the sum of 12 per cent. as a penalty against the defendant, in addition to the amount due on the policies." The court refused this prayer, to which ruling the appellee excepted.

The appellant asked the court to instruct the jury to return a verdict in its favor, and also presented prayers for instructions in effect telling the jury that the policies had lapsed and were forfeited on the 8th day of June, 1921, and that the appellant was not liable unless the policies were reinstated, and that, unless they found the Scheuers had complied with the provisions of the policies concerning reinstatement, the verdict should be in favor of the appellant. The court refused these prayers, to which the appellant duly excepted.

The jury returned a verdict in favor of the appellee in the sum of $10,000, with six per cent. interest from the date of the proof of death, less the amount of the blue notes, with interest thereon at six per cent. from May 8, 1921, to date. Thereupon judgment was rendered in favor of the appellee in the sum of $10,439.26. The attorneys for the appellee moved the court to tax an attorneys' fee and a twelve per cent. penalty, and offered testimony by two reputable attorneys to the effect that a reasonable compensation to the attorneys for the appellee for services rendered would be between fifteen hundred and two thousand dollars. The court rejected this testimony, and overruled appellee's motion to tax an attorneys' fee and penalty. The appellant prosecutes this appeal from the judgment in favor of the appellee against it, and the appellee prosecutes here a cross-

appeal from the refusal of the court to tax a reasonable attorneys' fee and for a penalty of twelve per cent.

1. Under the express provisions of the contracts of insurance, evidenced by the policies which are the foundation of this action, the nonpayment of the second premiums on the 8th day of June, 1921, *ipso facto* caused a forfeiture of appellee's rights under these policies. *Fidelity Mutual Life Ins. Co.* v. *Bussell,* 75 Ark. 25; *Patterson* v. *Equitable Life Assur. Society,* 112 Ark. 171; *Bobnett* v. *Cotton States Life Ins. Co.,* 148 Ark. 199; *Home Life & Acc. Co.* v. *Haskins,* 156 Ark. 77. Upon the undisputed evidence, after these policies lapsed because of the nonpayment of the second premiums, there was no reinstatement thereof in compliance with the express provisions of the contract. Therefore the court ruled correctly in so declaring the law; and the only question presented by this appeal is whether or not the court erred in refusing to grant appellant's prayer for a directed verdict in its favor. The trial court, as we have seen, refused such prayer, but, on the contrary, instructed the jury, in effect, that, if the appellee, during the life of the insured, wrote to the appellant a letter inquiring whether the insurance was still in force, and the appellant, in reply thereto, advised the appellee, before the death of the insured, that the insurance was still in full force and that they need not worry, that such letter, if written, would constitute a waiver of the forfeiture, and render the appellant liable. These rulings of the court, under the testimony, were likewise correct.

2. We have set forth all the material facts bearing on these issues, and it could serve no useful purpose to reiterate them and argue them at length. They speak for themselves. Suffice it to say, whether or not Mrs. Scheuer wrote the letters referred to, inquiring whether the second premiums had been paid and whether the insurance was still in force, and whether the appellant received such letter and replied thereto, before Mrs. Scheuer's death, stating that Towler was its agent and that he had fixed up the notes until November, and that

everything was all right, and not to worry, were purely issues of fact. Learned counsel for appellant contends that the testimony of the appellee tending to establish the fact that Mrs. Scheuer wrote such a letter and received such an answer from appellant is not only inconsistent, but contradictory in itself. We do not concur with counsel for appellant in this view of the testimony. On the contrary, it occurs to us that the testimony of the appellee is not unreasonable, and, to say the least, when taken in connection with the testimony of Towler and Thatch, the duly authorized agents of the appellant in conducting the negotiations for the appellant resulting in the contracts of insurance, and the other letters in the record, which are established by the undisputed testimony, it fully justifies the conclusion that the letters were written as appellee testifies they were. But, even if the testimony were inconsistent and contradictory in itself, we are not the judges of the evidence and the credibility of the witnesses. It was for the jury to weigh all this testimony and reconcile the real, or apparent, conflicts. Certainly, it cannot be said that there was no testimony to warrant a finding by the jury that the letters were written, sent and received, as the appellee testified they were. *Eminent Household of Columbian Woodmen* v. *Heifner,* 160 Ark. 624. The verdict of the jury, where there is any substantial evidence to sustain it, is conclusive here. *Fowler* v. *Hammett, ante* p. 307, and cases there cited; *Gates* v. *Ritchie, ante* p. 484.

3. The policies provided that only the president, vice president or secretary of the appellant had power to make or modify this or any contract of insurance, or extend the time for the payment of premiums. The appellant contends that, under this provision of the policies, the appellee did not meet the burden of proof by showing that the alleged letter was written by the president, vice president or secretary of the appellant. The appellee testified that his wife wrote the letter to the appellant at Fordyce, and that they received, at Almyra, the alleged letter from the appellant, in reply thereto,

mailed from Fordyce. In other words, the testimony of appellee tended to show that his wife wrote the appellant and that the appellant answered the letter. There was no suggestion at the trial, either by cross-examination of the witness or by prayer for instructions, that this letter, if written, was not written by the president, vice president or secretary, the officers of the appellant having power, under the policy, to extend the time for payment of premiums and to reinstate policies of insurance. The testimony of the appellee was sufficient, in the absence of any contention or evidence to the contrary in the trial court, to warrant the jury in finding that the letter was written by the appellant, through its duly authorized officers and agents. Notwithstanding the above provision of the policies, Thatch, whose testimony shows that he was the superintendent of the life department of appellant and its underwriting manager, whose duty it was to pass on the reinstatement of lapsed policies, and who answered the letter of the Scheuers of July 18, 1921, concerning their standing with the appellant, would have had the right to waive the forfeiture of the policies, and by his conduct in the premises could have estopped the appellant from insisting on a forfeiture. *Industrial Mutual Indemnity Co.* v. *Thompson,* 83 Ark. 575; *Peebles* v. *Columbian Woodmen,* 111 Ark. 436; see *Woodmen of the World* v. *Newsom,* 142 Ark. 132, on rehearing.

It must be remembered that there is no testimony whatever in the record to the effect that the appellant did not write the alleged letter, which the appellee testified was received, bearing appellant's signature, and mailed from Fordyce, where appellant's home office is situated. On the contrary, Thatch testified concerning this: "I would have authority, I presume, to waive the application for reinstatement. Probably I never did notify Mr. or Mrs. Scheuer or Mr. Towler that these policies had lapsed." He nowhere denies that the letter was written which the appellee testified he received, and he does not testify that a letter was not written by the

appellant, advising the Scheuers that they were still in good standing, in reply to Mrs. Scheuer's letter of inquiry. We conclude therefore that the testimony was sufficient to warrant the jury in finding that the alleged letter was written by the appellant.

4. What was the effect of that letter on the contract of insurance? This letter shows clearly that it was not the purpose of appellant to insist upon a forfeiture of the policies because of the failure of the insured to pay the second premiums at the time same were due on June 8, 1921, the last day of grace. The letter of the Scheuers of July 18, making inquiry of appellant as to their standing, and the answer thereto, by the appellant, of August 1, 1921, and the letter of appellant to Towler, its agent, of July 25, 1921, all pertaining to these policies and relating to the question as to whether or not the policies were still in force, show that the appellant, at least as late as August 1, was not insisting on a forfeiture of the policies for the nonpayment of the second premiums. Mrs. Scheuer died on August 28, 1921. We are convinced that there was substantial testimony to warrant a finding by the jury that appellant, by this letter, intended to inform the Scheuers that these policies were still alive, and that it was the intention of appellant that they be kept alive until its agent, Towler, had perfected arrangements with the Scheuers for the continuation or reinstatement of the policies; or, at least, until they had had an opportunity to confer with Towler, and, if satisfactory arrangements had not been made, until Towler or the Scheuers notified the appellant to that effect. It is certain from the testimony that the Scheuers were anxious to keep these policies alive, and would have done everything required by the appellant, under the provisions of the policies, to reinstate the policies, possible for them to do, if they had been notified that their policies had lapsed, instead of being informed to the contrary. In the meantime, and without any further correspondence or notification in any manner that the policies had lapsed and were of no effect, Mrs. Scheuer died.

Forfeitures are not favored. It was the duty of the appellant, under the circumstances, to promptly answer the letter of the Scheuers and frankly tell them that their policies had lapsed, and that it would insist on a forfeiture, if such was its intention.

After a consideration of the whole record, we are convinced that the testimony was sufficient to warrant the jury in finding that the appellant had waived the forfeiture of the policies because of the nonpayment of the second premiums, and is estopped from asserting that it is not liable on the policies. The judgment therefore in favor of the appellee for $10,439.26, the amount of the policies with interest, less the amount of the second premiums, is affirmed.

5. The court erred in not granting the appellee's motion for penalty and attorneys' fee. Under our statute, and the pleadings and proof in the case, the appellee was entitled to recover a penalty of twelve per cent., together with a reasonable attorneys' fee. Section 6155, C. & M. Digest; *Queen of Ark. Ins. Co.* v. *Bramlett,* 103 Ark. 1; *Amer. Life Ins. Co.* v. *White,* 126 Ark. 483-494; *N. Y. Life Ins. Co.* v. *Adams,* 151 Ark. 123; *National Life Ins. Co.* v. *Sherrill,* 155 Ark. 381. The testimony on the motion to tax a reasonable attorneys' fee tends to prove that a reasonable attorneys' fee for the services rendered would amount to between $1,500 and $2,000. One witness stated that $1,500 would be a reasonable fee, and another that between $1,500 and $2,000 would be a reasonable fee. But we are of the opinion that the sum of $1,000 would be a reasonable compensation for the services rendered by appellee's counsel. The order of the court refusing to allow appellee the penalty and attorneys' fee is therefore reversed, and judgment will be entered here for a penalty of 12 per cent. on the amount of the judgment recovered below, and attorneys' fee in the sum of $1,000.

St. Louis-San Francisco Railway Company v. Fruitmen's Union.

Opinion delivered February 25, 1924.

1. Carriers—liability of railroad for negligence of express company.—Where the express business and freight business on a railroad were handled by separate companies, though both had the same agent, the railroad company was not liable for the failure of the express company to furnish a car for the transportation of strawberries.
2. Carriers—duty to furnish car for perishable freight.—Under Crawford & Moses' Dig., § 931, making it the duty of a carrier to furnish cars for transporting perishable freight within 24 hours from seven o'clock p. m. on the day following application therefor, a railroad company which furnished a car within 24 hours after the application was not liable for damages to the freight.

Appeal from Washington Circuit Court; *W. A. Dickson,* Judge; reversed.

STATEMENT OF FACTS.

Appellee brought this suit in the circuit court against appellant to recover damages for the failure to furnish an express car for the shipment of strawberries, and also for the negligent delay in furnishing a refrigerator car for the shipment of strawberries.

The two causes of action are embraced in the same complaint, but are stated in separate paragraphs thereof. In one paragraph it is alleged that, on the 10th day of May, 1920, at Johnson, Arkansas, appellee ordered an iced express car from appellant, for immediate use in loading for shipment 448 crates of strawberries, and, on account of the failure of the defendant to furnish the car, appellee suffered a loss of $896.

In the second paragraph of the complaint it is alleged that, on the 22d day of May, 1920, appellee ordered from appellant, for immediate use in shipping strawberries at Johnson, Arkansas, a refrigerator freight car, and that, by the negligence of appellant in failing to furnish said car as requested, appellee was damaged in the sum of $231.47.

W. L. Devin was the manager of the Fruitmen's Union for the strawberry season of 1920, and was the principal witness for appellee. According to his testimony, on May 10, 1920, he ordered a car from F. C. Morris, who was in charge of the office of appellant at Johnson, Arkansas, to be used in shipping 448 crates of strawberries. Devin ordered from Morris an iced refrigerator express car, and not a refrigerator car. The order was in writing. An express car was ordered because the berries were sold for $1.50 per crate higher shipped that way than if they were shipped in a freight refrigerator car. The berries were to be shipped to Buell Mayes, at Muskogee, Oklahoma. He had purchased the strawberries at the rate of $7.50 per crate on the express car. A refrigerator freight car was furnished, instead of an express car, as ordered, and the berries were shipped to Buell Mayes at Muskogee, Oklahoma, in it. Because they were shipped in a refrigerator freight car, instead of an iced refrigerator express car, he refused to receive and pay for them at the agreed price, and they were sold to him in the refrigerator freight car at a less price, which resulted in a loss to appellee of $1.50 per crate.

On May 22, 1920, Devin shipped an express car full of strawberries for appellee, and had left on hand 83 crates of berries. This was on Saturday. Devin then told Morris that he wanted a car for the 83 crates of berries, and Morris ordered the car for him. Devin intended to ship the berries out on Saturday night. A refrigerator freight car was set out on Sunday, within which to ship the berries. The berries became damaged because they could not be shipped Saturday night, and Devin sold them to a Mr. Curtis for $1.46 per crate. The market price of the berries at that time was $5 per crate in an iced express car.

F. C. Morris was the principal witness for the appellant. According to his testimony, he was the agent of both appellant and the American Railway Express Company at Johnson, Ark., during the strawberry season of

1920. Johnson is a small station in Washington County, Ark., north of Fayetteville. The express company paid him a salary. On May 9, 1920, Devin ordered from Morris an express car, to be loaded the following day. After some discussion about demurrage charges, it was agreed to change the date from the 9th to the 10th inst. Devin applied to Morris for an iced refrigerator express car for immediate use for shipping strawberries, and, in accepting the order for the express car, Morris was representing the American Railway Express Company and not the St. Louis-San Francisco Railway Company. The business of the express company and of the railway company is entirely separate, and separate requisitions are used.

The express company did not have any requisition blanks, and a requisition blank of the railway company was used in transmitting the order; but it was expressly stated that the car wanted was an iced express refrigerator car. Morris, in transmitting the request for the express car, was acting as agent of the express company. A refrigerator freight car, instead of an express car, was set in on the sidetrack at Johnson, to be used in making the shipment, and this car was so used. The requisition was in writing, and dated 5/10/20, and was for one iced express refrigerator car. The requisition was signed by "Fruitmen's Union."

With regard to the second shipment, Morris acted for the railroad in receiving the order for the car. A car had been loaded on Saturday, and 83 crates were left over from the strawberries on hand at that time. Another car was ordered to take care of the 83 crates. This order was made some time Saturday afternoon, and the car was delivered and set on the sidetrack to be loaded on the next day, which was Sunday. The 83 crates were not loaded on it, because the agent of appellee claimed they had been damaged by the delay.

Other evidence was introduced by appellant tending to show that the American Railway Express Company owned its own cars and carried all of the express which

was handled over the railroad of the St. Louis-San Francisco Railway Company in Washington County. The railway company and the express company are separate, and the express business is carried on by the American Railway Express Company.

The jury returned a verdict for appellee, and judgment was rendered upon the verdict against the appellant.

The case is here on appeal.

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

1. The court erred in refusing to direct a verdict for the appellant. The proof is clear and unequivocal that the order was for an iced express car. No liability could attach to the railway company for failure to furnish the express car. It was under no duty to furnish express cars, neither was there any evidence justifying the assumption that it held itself out as a carrier of express cars. 1 Hutchinson, Carriers, 86, § 90; 4 R. C. L. 663, § 140; *Id.* 674, § 150; 81 Ark. 373, 388; 4 Elliott on Railroads, § 2223; 242 U. S. 208, 61 L. ed. 251; 184 Pac. 442; 7 A. L. R. 140, 142. Appellant discharged its full duty to the public when it afforded to it reasonable express accommodations, which was done by the American Railway Express Company that transacted the business of supplying express cars upon orders therefor. 171 U. S. 1, 29 L. ed. 792; 2 Hutchinson, Carriers, § 517; 176 U. S. 498, 44 L. ed. 560, 569. The express company was a common carrier, and, as such, required to furnish suitable cars within a reasonable time, etc. 130 Ark. 210, 214; (U. S.) 23 L. ed. 872; 4 Elliott on Railroads, § 2106, note 41; 10 C. J. 48, note 26; Transportation Act 1920, § 400. Morris, the agent, acted solely for the express company in receiving and forwarding the order. He was, necessarily, not an employee of the appellant in that transaction. 1 Roberts, Fed. Liab. of Carriers, 907, § 522; (U. S.) 65 L. ed. 205; 171 N. Y. App. Div. 652, 157 N. Y. Supp. 420. Before the plaintiff could fix any liability on the railway company for failure to furnish cars,

it must have shown an offer to bring itself into contractual relations with the company. 4 Elliott on Railroads 656, § 2225; 61 Ark. 562. Notice given on one day for a car that was wanted on the next day was not a reasonable notice. C. & M. Digest, § 931; 146 Ark. 355.

2. As to the second car ordered, the proof is that a freight refrigerator car was ordered on Saturday the 22d, and that it was delivered on Sunday, the 23d of May, within thirty hours from the time the order was given. It was delivered in a reasonable time. 4 R. C. L. 678, § 153; 4 Elliott on Railroads 657, § 2225; C. & M. Digest, § 931; 84 Ark. 311.

HART, J., (after stating the facts). We will first take up the shipment of May 10, 1920, for the 448 crates of strawberries. Upon this branch of the case the undisputed evidence shows that appellee was not entitled to recover against appellant, and the circuit court therefore erred in not directing a verdict in appellant's favor.

The undisputed evidence showed that the express business was handled by the American Railway Express Company, which was a separate company from the St. Louis-San Francisco Railway Company. The express company owned its own cars and handled all the express shipments. It is true that both companies had the same agent, and that the express company operated its cars over the railroad tracks of appellant; but this did not render the railway company liable for any negligence of the express company in failing to furnish cars for its business. The agent of the shipper testified that he ordered an iced refrigerator express car for the shipment of his 448 crates of strawberries. This was done because appellee could get $1.50 more a crate if the strawberries were shipped in an express car. The express company and the railway company had the right to employ the same person as agent. No conflict of duty could arise in serving the two companies.

The agent also testified that appellee ordered an express car for the shipment of 448 crates of strawberries, and that, in accepting the order, he acted for the express

company. The failure of the express company to furnish an express car could not render the railway company liable. It had nothing whatever to do with the transaction, and the mere fact that it set out a refrigerator car for the use of the shipper would not render it liable for the failure of the express company to send an express car, as requested by appellee.

Therefore the court erred in not directing a verdict in favor of appellant, in so far as the first shipment of 448 crates of strawberries is concerned.

According to the allegation of the complaint, the cause of action for the second shipment is also based upon the alleged failure of the railway company to furnish an iced refrigerator express car for the shipment of the 83 crates of strawberries on the 22d day of May, 1920. If recovery is to be sought on the allegation of the complaint, the appellant will not be liable, for the reasons above stated. That is to say, the railway company is not liable for the failure of the express company to furnish the car, because the business of the two companies is separate and distinct. However, according to the evidence of appellant, a refrigerator freight car was ordered for the shipment of the 83 crates of strawberries. It appears that these berries were left over on Saturday from a quantity of berries which had been loaded into an express car for shipment. A telegraphic order was sent for a car some time Saturday afternoon, and it was intended to ship the berries in it some time Saturday night. Appellee ordered a refrigerator car, and it was not delivered until some time Sunday morning. Appellee claimed that the 83 crates of strawberries had become damaged by being kept over Saturday night, and appellee then sold them at a loss on Sunday rather than ship them in the refrigerator car. The refrigerator freight car in question was received at Johnson, Ark., pursuant to the order made on Saturday, and was received about 28 hours after the order was given to appellant's agent at Johnson.

Section 931 of Crawford & Moses' Digest regulates the duties of a carrier when a shipper makes application to a

station agent for a car, or cars, to be loaded with perishable freight, such as fruit and vegetables. The section provides that such railway company shall furnish a car, or cars, in the kind and quantity ordered at the place of shipment, within twenty-four hours from seven o'clock p. m. on the day following such application.

As we have already seen, the undisputed evidence shows that the refrigerator car was furnished by the railway company within the time prescribed by the statute. If it be said that the complaint should be amended so as to conform to the proof of appellant, there is no negligence shown on its part. Hence the appellee was not entitled, under the proof, to recover damages for the delay in furnishing a refrigerator car by the railway company for the shipment of the 83 crates of strawberries.

It follows, from what we have said, that the circuit court erred in not directing a verdict in favor of appellant, and for that reason the judgment must be reversed, and the cause will be remanded for a new trial.

POLK v. GARRISON.

Opinion delivered February 25, 1924.

1. BANKS AND BANKING—EFFECT OF MAKING DEPOSIT.—A general bank deposit creates the relation of debtor and creditor, authorizing the bank to mix the deposit with its funds and use it in its business.
2. BANKS AND BANKING—FORGERY OF ORDER.—A bank is liable for honoring a forged telegraphic order for payment of a depositor's money.
3. POSTOFFICE—LIABILITY OF POSTMASTER FOR DELIVERING REGISTERED LETTER TO IMPOSTOR.—Where an impostor, by forging a depositor's name, induced a bank to send the deposit by registered mail, and, by impersonating the depositor, induced the postmaster to deliver the package, the postmaster was not liable to the defrauded depositor, there being no privity of contract between them.

Appeal from Union Circuit Court; *L. S. Britt*, Judge; affirmed.

U. L. Meade, for appellant.

Appellee was jointly liable with the bank, and, at the option of appellant, suit could be maintained against him alone. See C. & M. Digest, §§ 1099, 1100, 6229, 6231. Bishop on Non-Contract Law, p. 230, §§ 521-522. A letter is within the custody and control of the postal department from the time received until delivered to the person entitled thereto. 170 Fed. 121. Appellee was also liable under Acts of 1913, p. 278, § 23, the uniform negotiable instruments act. A postmaster is liable for the act of his clerk. 90 Fed. 473, 33 C. C. A. 617. Jurisdiction of the court below was not challenged by the demurrer, and it was improperly sustained. See 5 Fed. Stat. Ann., § 3833, p. 794.

S. S. Langley, for appellee.

The money on deposit in the bank was the property of the bank, subject to the order of Polk. 104 Ark. 550; 124 Ark. 531; 126 Ark. 266. Polk, not having ordered the withdrawal of his money, the money in question was the property of the bank, and he has no cause of action against appellee. 94 U. S. 343; 98 Ark. 1. The bank having sent the money on a forged order, was liable therefor. 137 Ark. 251. The question of contract does not enter into the case.

HART, J. D. W. Polk sued J. H. Garrison to recover $200 alleged to be due him.

According to the allegations of the complaint, in December, 1921, J. H. Garrison was postmaster for the city of El Dorado, Arkansas. In November of the same year D. W. Polk and Henry Bomb occupied the same room in the oil fields near the city of El Dorado, Ark. Bomb stole from the suitcase of Polk certain receipts for bank deposits, which Polk had from the Bank of Morton, in the town of Morton, Miss. These receipts showed that Polk had on deposit in said bank over $200. Henry Bomb then sent a telegram to the Bank of Morton, signed by D. W. Polk, to send to said D. W. Polk at El Dorado, Ark., by registered letter, the sum of $200. The bank received the telegram, and in December, 1921, mailed to D. W. Polk

at El Dorado, Ark., $200 by registered letter, and charged said amount to the account of D. W. Polk. In due course of mail the registered letter was received at the post-office at El Dorado, Ark. Henry Bomb went to the post-office and represented himself to be D. W. Polk. The defendant delivered the registered letter to him, and Bomb converted the money to his own use.

The defendant, Garrison, filed a demurrer to the complaint, which was sustained by the circuit court. The plaintiff declined to plead further, but elected to stand upon his complaint. Whereupon the circuit court dismissed his complaint, and from the judgment rendered the plaintiff has duly prosecuted an appeal to this court.

The decision of the circuit court was correct. According to the allegations of the complaint, D. W. Polk had $200 on general deposit in the Bank of Morton. This created the relation of debtor and creditor between the bank and Polk. The bank was authorized to mix the deposit with its funds and use it in its business. *Covey* v. *Cannon,* 104 Ark. 550; *State National Bank of Little Rock* v. *First National Bank of Atchison, Kansas,* 124 Ark. 531, and *Citizens' Bank & Trust Co.* v. *Hinkle,* 126 Ark. 266.

This court has held that a bank is liable for the payment of a forged check or bill of exchange. The reason is that forgery can carry no title to the paper, even in the hands of a *bona fide* holder. Otherwise any person might be stripped of all his money in a bank without any act at all upon his part. *Sims* v. *American National Bank of Fort Smith,* 98 Ark. 1, and *Schaap* v. *First National Bank of Fort Smith,* 137 Ark. 251.

Counsel for appellant concede the correctness of this rule, but contend that the postmaster at El Dorado was liable, because he paid the money to Bomb without inquiring whether he was the person in reality entitled to it. Hence counsel for appellant argues that there was a joint liability between the postmaster and the Bank of Morton to D. W. Polk.

The contention of counsel would be sound if D. W. Polk had ordered the amount of his deposit sent to him-

self by registered letter to El Dorado, Ark., and the postmaster at that place had delivered the letter to some one impersonating Polk.

In the case at bar, however, Polk did not order the money sent to himself. The order was forged by Bomb, and Polk did not know of its existence. Hence there was no privity of contract between him and the postmaster at El Dorado. He could sue the Bank of Morton for the amount of his deposit if it refused to pay him, but he had no cause of action against the defendant. The Bank of Morton is not a party to the action, and the question as to whether or not it could recover from the postmaster is not an issue in the case.

It follows that the judgment will be affirmed.

GALLOWAY v. SEWELL.

Opinion delivered February 25, 1924.

1. WILLS—USE OF A THING.—Generally the use of a thing does not mean the thing itself, but that the user is to enjoy, hold, occupy or have in some manner the benefit thereof.
2. LIFE ESTATES—WILL GIVING WIFE USE OF PROPERTY FOR LIFE.—A will devising and bequeathing all of testator's property to his wife during her life "to have and to use, manage, control, sell and enjoy for said term," giving her power to sell the property, and directing that she be not held to account for disposition of the property used or sold during her life, the remainder to go to testator's legal heirs, entitled the wife to hold and occupy the real estate, and have all money during her life, and to receive the rents and interest, whether needed for her maintenance or not, whatever was left of the rents or interest at her death going to her legal heirs, and testator's administrator or the remainderman could not require her administrator to account for anything more than the principal of money received under the testator's will.
3. EXECUTORS AND ADMINISTRATORS—ACCOUNTING.—In a suit by a husband's administrator against the wife's administrator for accounting as to property received by the wife from the husband's estate, it appearing that moneys of the wife were a part of the property so received, defendant was not entitled to credit

for interest on such moneys up to the husband's death, in the absence of proof that she received any interest.

4. EXECUTORS AND ADMINISTRATORS—COST OF TOMBSTONE.—In the case of solvent estates, the necessary cost of a reasonable tombstone placed at the grave of a deceased person is properly classed as funeral or administration expenses.

Appeal from Pope Chancery Court; *W. E. Atkinson,* Chancellor; reversed.

STATEMENT OF FACTS.

R. K. Sewell, administrator of the estate of J. W. Dickey, deceased, brought this suit in equity against W. A. Galloway, administrator of the estate of Martha L. Dickey, deceased, for an accounting between the parties of the funds of the estate of which R. K. Sewell is administrator, which are in the hands of the defendant, and that plaintiff have judgment against the defendant for the amount found to be due.

J. W. Dickey and Martha L. Dickey were husband and wife, but had no children. J. W. Dickey died testate in Pope County, Arkansas, on the 1st day of October, 1907, owning both real and personal property in said county. The construction of his will is involved in this suit, and it reads as follows:

"The last will and testament of James W. Dickey.

"Know all men by these presents: That I, James W. Dickey, of Atkins, in the county of Pope and the State of Arkansas, being in good bodily health and of sound mind and memory, do make and publish this, my last will and testament, hereby revoking all former wills by me heretofore made:

"This is to say: It is my will that all my just debts be paid by my executrix, hereinafter named, out of my estate, as soon after the probate of this will as conveniently may be done. I hereby constitute and appoint my beloved wife, Martha L. Dickey, to be sole executrix of this my last will and testament, and I desire that she be permitted to execute the same, without bond, at any time.

"I give, devise and bequeath unto my said wife, Martha L. Dickey, all my property of every kind what-

soever, and wherever situated, real, personal and mixed, for and during the term of her natural life, to have and to use, manage, control and enjoy for the said term; and from and after the decease of my said wife, I direct that the residue and remainder of my estate, of every kind whatever, and wherever located, shall descend to my legal heirs at law, according to the statute in such cases made and provided.

"It is my will and I direct that my said wife, Martha L. Dickey, be permitted to manage, direct and control and use and enjoy all of my said property during the said term of her natural life, and she is hereby given full power and authority to sell and dispose of any of said property, and to make proper deeds therefor, when, in her judgment, it will be for the best interest of my said estate, and I hereby direct that she shall never be held to account for the disposition of any part of said property which she may use, sell or dispose of during the continuance of said term.

"In testimony whereof I hereof set my hand and publish and declare this to be my last will and testament, in the presence of the witnesses named below. This the 18th day of December, 1901.

"JAMES W. DICKEY."

The will was duly probated, and Martha L. Dickey qualified as executrix under the will.

J. W. Dickey and Martha L. Dickey were married in 1882. At the date of her marriage Martha L. Dickey had $800, which she had received from her father's estate in 1876. At the date of his death J. W. Dickey had on deposit in the Merchants' & Farmers' Bank, Atkins, Ark., $81.90, and had on deposit in the Bank of Atkins $484. After his death the amount of these deposits was transferred to the account of Martha L. Dickey. On the 25th day of October, 1907, she placed in the Merchants' & Farmers' Bank $3,350 in currency and gold, and on the same day she placed to her credit in the Bank of Atkins the sum of $6,000 in cash. At the date of his death J. W. Dickey owned a farm near Atkins and two houses in

Atkins. After his death Martha L. Dickey took charge of all of his property. During the World War she bought $3,000 worth of Liberty bonds and $175 worth of war savings stamps. She erected a monument over her husband's grave at a cost of $400.

At the time of the death of J. W. Dickey he had an insurance policy for $2,000, in which his wife was named as the beneficiary. She collected the amount of said policy, and placed it in the bank to her account. She enjoyed the use of the real and personal property so devised to her until the date of her death on November 20, 1920.

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

It was the opinion of the chancellor that Martha Dickey was entitled to the use and enjoyment of all the property devised to her in the will of her husband for her support during her natural life, but that she should account for all of that part of it which had not been disposed of, including the rents from the real estate and the interest which she had received from the money. The total amount found to be due, upon the accounting, was $14,371.62, and the administrator of the estate of Martha L. Dickey, deceased, was ordered to turn that amount over to the administrator of the estate of J. W. Dickey, deceased.

To reverse that decree W. A. Galloway, administrator of the estate of Martha L. Dickey, deceased, has prosecuted an appeal to this court.

J. T. Bullock, R. B. Wilson and *Hays, Priddy & Hays*, for appellant.

There is no presumption of law or fact to support the finding that the money deposited by Mrs. Dickey was the property of her husband. The law does not presume that money in the possession of a wife belonged to her husband instead of her. 42 Ark. 62; 24 Fed. 666. The fact of possession suggests ownership. 1 Jones' Comm. on Ev., § 74, p. 354. The presumption of a gift from the husband to the wife is stronger than that she was wrong-

fully holding the money of her husband. 116 Ark. 152. To establish a resulting trust the proof must leave no well-founded doubt on the subject. 118 Ark. 146. Appellee is precluded from relief by laches, having waited during a long period, and until after the death of the only witness who knew the facts, to assert his claim. Am. & Eng. Enc. Law, vol. 18, p. 106; 2 Wall. 87; 95 Ark. 178. Mrs. Dickey, under the will, had a right to spend the money left by her husband. 112 Ark. 527.

Robert Bailey and *Jack Smallwood, Jr.*, for appellee.

If Mrs. Dickey had any separate funds, she mixed them with the funds belonging to the estate of her husband. One who mixes trust funds with his own money, the whole will be treated as trust property, unless he is able to distinguish what is his. 13 L. R. A. 325; 83 Mo. 210; 57 Mo. 531; 58 Ala. 582; 8 L. R. A. 788; 11 Paige 520; 3 W. Va. 126; 104 U. S. 54; L. R. A., 1916-A, C-1; 58 L. R. A. 385; 52 L. R. A. 858; 26 A. L. R. 7; 95 Me. 353. Mere possession of money of a deceased person cannot raise any presumption of a gift during deceased's life. 142 Ark. 308; Enc. of Evidence, vol. 6, p. 830; 30 C. J., § 299; 97 Ark. 69; 93 Ark. 548. When a gift is claimed, it must be proven by strong and clear evidence. 42 Hun 161; 42 N. J. Eq. 352; 2 Edw. Ch. 337; 233 Pa. St. 316. A possession which is as consistent with agency as with gift must indicate agency instead of gift. 75 Me. 521; 80 Me. 575; 81 Me. 243; 90 Me. 382; 38 L. R. A. 193; 110 Me. 35; 93 Me. 291; 111 Me. 25; 261 Mo. 126; 61 N. H. 541. A life tenant in possession is not entitled to credit for money paid out for taxes, improvements and other expenses. 17 R. C. L. 535, § 25; 13 L. R. A. (N. S.) 514; note 32 L. R. A. 736; 12 R. C. L. 641, § 31; 17 R. C. L. 641, § 31; 137 Ark. 140.

HART, J., (after stating the facts). The third paragraph of the will of J. W. Dickey gave Martha L. Dickey, his wife, full power and authority to sell and dispose of any of the property of his estate and to make proper deeds therefor when, in her judgment, it would be for the best interest of said estate.

In the same clause the will directs that she shall never be held to account for the disposition of any of said property which she may use, sell, or dispose of during her natural life.

Conceding that this clause of the will gave her the power, as life tenant, to convey the estate absolutely and thereby defeat the estate of the remainderman, as decided in *Archer* v. *Palmer,* 112 Ark. 527, it need only be said that it does not appear from the record that she disposed of any part of her husband's estate, and consequently she did not exercise or attempt to exercise the power thus conferred upon her by the will.

This brings us to a consideration of what estate was vested in her under the will and what right she had in its use.

The second paragraph of the will devises and bequeaths to Martha L. Dickey all the property of every kind of the testator, for and during the term of her natural life, "to have and to use, manage, control and enjoy for said term." The same clause directs that the remainder of the estate of the testator should descend to his legal heirs.

In the third clause of the will the testator again directs that Martha L. Dickey be permitted "to manage, direct, control, use and enjoy all of his property during her natural life."

As a general rule the use of a thing does not mean the thing itself, but means that the user is to enjoy, hold, occupy, or have in some manner the benefit thereof. If the thing to be used is in the form or shape of real estate, the use thereof is its occupancy or cultivation, etc., or the rent which can be obtained for its use. If it is money or its equivalent, generally speaking, it is the interest which it will earn. *Blanton* v. *First National Bank,* 142 Ark. 404; and *Special School District No. 5* v. *State,* 139 Ark. 263, and cases cited; 39 Cyc. 845, and cases cited; 29 Amer. & Eng. Cyc. of Law, 2 ed. p. 444, and cases cited; *Crane* v. *Van Dyne,* 9 N. J. Eq. 259; *Cross* v. *Hoch,* 149

Mo. 325; *Rountree* v. *Dixon,* 105 N. C. 350; *Russell* v. *Andrews,* 120 Ala. 222; and *Warren* v. *Webb,* 68 Me. 133.

Under this rule Martha L. Dickey was entitled to hold and occupy the real estate devised to her for her natural life and to receive the income or rent therefrom. She was also entitled to the money received from her husband's estate and to the interest on it during her natural life. It did not make any difference whether she used or needed the rents from the real estate or the interest on the money for her support and maintenance. She was entitled to receive the same, and was not required to account for it, under her husband's will. At her death, whatever was left of the rents from the real estate or the interest from the money became a part of her estate, and, under our law of descents and distributions, went to her legal heirs. Her administrator could only be required to account to the administrator of her husband's estate, or to the remaindermen under the will, for the principal of the money she received under the terms of her husband's will.

It is not claimed that she received any personal property under her husband's will, except money. If there was any small amount of personal property left at her husband's death, it was doubtless consumed by use under the rule stated in *Fields* v. *Kline,* 161 Ark. 418.

As we have already seen, Martha L. Dickey did not attempt to dispose of any of the real or personal property which she received under the will. The basis of this suit is to require an accounting from her administrator of the personal property which she received under her husband's will, and which was undisposed of at the date of her death. The proof shows that, at the date of her husband's death, he had on deposit in one bank $81.90 and in another $484, making a total of $565.90. In a few days after his death she placed on deposit in a bank two sums totaling $9,350.

It was not shown that she had any money of her own, except $800 which she had received from her father's estate. It is suggested that she should be entitled to

interest on this amount from the time she received it until her husband's death, and that the interest should be added to the principal and the whole sum counted as belonging to her. If she had lent out the money and received interest on it, of course, it would belong to her, but there is no proof in the record that she ever put her money out at interest, and we cannot rely upon surmise or conjecture in the matter. Before she would be entitled to interest, she is required to prove that she had received interest, and the administrator of her estate has failed to meet the burden of proof in this respect. She did expend, however, $400 in erecting a monument over her husband's grave. His will directed that all his just debts be paid by his executrix. The monument on his grave was a proper charge against his estate. Credit should be allowed for a reasonable expenditure for a tombstone or monument for decedent. 24 C. J. 93, and cases cited.

A reading of the cases cited shows that it is quite generally held in the case of solvent estates that the necessary cost of a reasonable tombstone placed at the grave of a deceased person is properly classed as funeral expenses, or expenses of administration, which may be allowed to an executor or administrator in settlement of his account. Therefore in arriving at the sum which Martha L. Dickey received from her husband's estate, under his will, the amount of money which she owned, $800, and the $400 for the monument, making a total of $1,200, should be deducted from the money which she deposited in the bank. One thousand two hundred ($1,200) dollars taken from $9,350 leaves $8,150. To this amount should be added $565.90 on deposit by her husband when he died, making a total of $8,715.90, which she received under her husband's will and which went into the hands of her administrator at her death.

It is fairly inferable from the evidence that she had no money or property except the $800, as above stated, and it is also fairly inferable that she received the rest of the money, which she put into the bank shortly after her husband's death, from his estate. The result of our

views is that the chancellor properly held her accountable for the amount of money which she received from her husband's estate, and which, after deducting all proper allowances, we find to be the sum of $8,715.90.

J. W. Dickey had a policy of insurance in which Martha L. Dickey was the beneficiary. She collected this policy, and was entitled to it. It does not appear, however, that this was any part of $8,350 or the $6,000 deposited in bank. Both these deposits bear date of Oct. 25, 1907, and the proceeds of the life policy bear date of Jan. 3, 1908.

The learned chancellor erred in requiring her to account for any part of the income or rents derived from the real estate or interest on the money of her husband which she had loaned out.

It follows that the decree will be reversed, and the cause remanded with directions to render a judgment in favor of the plaintiff against the defendant for said sum of money, together with 6 per cent. interest thereon from the date of the decree in the court below, which was on the 12th day of October, 1922.

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purchaser may recoup damages for deceit though he lost right to rescind. *Id.*
purchaser of land knowing of claimant's possession is not innocent. *Naill* v. *Kirby*, 140.
possession as notice of title. *Id.*
vendor not estopped to enforce lien against subvendee when. *Witt* v. *Churchwell*, 357.

WILLS:

effect of willing the use of a thing. *Galloway* v. *Sewell*, 627.
effect of will giving wife use of property for life. *Id.*

WITNESSES:

error to refuse to permit witness to be cross-examined as to membership in Ku Klux Klan when. *Bethel* v. *State*, 76.
error to refuse to permit witness to be asked as to his having gone to defendant's home in disguise to interview him. *Id.*
witness cannot be contradicted as to collateral matter elicited on cross-examination. *Tullis* v. *State*, 116.
cross-examination of State's witness as to matter not relevant to examination in chief properly refused when. *Cook* v. *State*, 205.
prosecuting in carnal abuse case impeached by proof of intercourse with another when. *Climber* v. *State*, 355.
witness may be cross-examined as to whether he had been employed to deliver unlawful message. *Smith* v. *State*, 458.
he may also be asked as to his recent residence, occupation and associations. *Id.; Middleton* v. *State*, 530.

WORDS AND PHRASES:

beverages. *Rinehart* v. *State*, 520.
cause to be burned. *Fisher* v. *State*, 186.
cohabit. *Hovis* v. *State*, 33.
cohabitation. *Id.*
concubinage. *Id.*
deadly weapon, instrument or other thing. *Wilson* v. *State*, 494.
deposit. *Morgan* v. *State*, 34.
estimated cost. *Meyer* v. *Ring*, 9.
may. *Washington County* v. *Davis*, 339.
robbery. *Sutton* v. *State*, 438.
seduction. *Bethel* v. *State*, 76.
stillworm. *Rosslot* v. *State*, 342.
use. *Galloway* v. *Sewell*, 627.