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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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T. D. CRAWFORD
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JUDGES AND OFFICERS

OF THE

SUPREME COURT

OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

EDGAR A. McCULLOCH, - - - - - Chief Justice
CARROLL D. WOOD, - - - - - Associate Justice
JESSE C. HART, - - - - - - Associate Justice
FRANK G. SMITH, - - - - - Associate Justice
THOMAS H. HUMPHREYS, - - Associate Justice
J. S. UTLEY, - - - - - - - - Attorney General
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TABLE OF CASES
REPORTED

A

Adams *v.* State 308
Ætna Life Insurance Co. of Hartford, Conn., *v.* Duncan 395
Almond *v.* State 419
Arkansas Natural Gas Co. *v.* Norton Co. 172
Averitt *v.* Dodd 553

B

Bank of Morrilton *v.* Skipper, Tucker & Co. 49
Bayou Meto Drainage District *v.* Ingram 318
Beasley (Miller County Bank & Trust Co. *v.*) 44
Beauchamp *v.* Hayes Store Co. 126
Beloate *v.* New England Securities Co. 571
Board of Comr's. of Pav. Dist. No. 3 (Brown *v.*) 585
Board of Comr's Road Imp. Dist. No. 9 *v.* Furlow 60
Bostick *v.* Pernot 581
Britt *v.* Laconia Circle Special Drainage Dist. 92
Brooks *v.* Wilson 477
Brown *v.* Board of Com'rs. of Pav. District No. 3 585
Brown (Scott *v.*) 270
Burel *v.* Hutson 111
Buron *v.* Little River County 482
Buron (Little River County *v.*) 535
Burris (Robert Welch Stave & Merc. Co. *v.*) 556
Bushmaier (Clear Creek Oil & Gas Co. *v.*) 303
Butcher (France *v.*) 312

C

Cain *v.* Lane 205
Champion *v.* Williams 328
Citizens' Investment & Security Co. *v.* Daniel 543
Clarkson *v.* State 459

Clear Creek Oil & Gas Co. *v.* Bushmaier 303
Cloe (Hardy *v.*) 253
Coburn *v.* Gilbert 155
Collatt *v.* State 136
Collier Com. Co. *v.* Wright 338
Commissioners of Board of Imp. Dist. No. 20 (Conway *v.*) 487
Conway *v.* Commissioners of Board of Imp. Dist No. 20 487
Cornelius Lumber Co. (Garner Mfg Co. *v.*) 119
Coston *v.* Kealy 594
Craig (Greer *v.*) 209
Crank *v.* State 417

D

Daniel (Citizens' Investment & Security Co. *v.*) 543
Danley (Wilson *v.*) 565
Davison *v.* Harris 165
Deloney (Lavoice *v.*) 599
Dickinson *v.* Norman 186
Dodd (Averitt *v.*) 553
Dover *v.* State 496
Duncan (Ætna Life Ins. Co. of Hartford, Conn., *v*) 395

E

Eddy *v.* State 289
Evans *v.* State 424

F

Ferrel *v.* State 541
First National Bank (Petroleum Producers Association *v.*) 267
First National Bank *v.* Tisdial 40
Fleming (Western Union Telegraph Co. *v.*) 609
Fly *v.* Fort Smith 392
Fort Smith (Fly *v.*) 392
Fort Smith (Williams *v.*) 215
Fort Smith (Woodson *v.*) 443

France *v.* Butcher 312
Furlow (Board of Com'rs. of Road Imp. Dist. No. 9 *v.*) 60

G

Garner Mfg. Co. *v.* Cornelius Lumber Co. 119
Gilbert (Coburn *v.*) 155
Greer *v.* Craig 209
Guile *v.* Snyder 221
Gus Blass Co. (Republic Power & Service Co. *v.*) 163

H

Hachmeister *v.* Power Mfg. Co. 469
Haffke *v.* Hempstead County 158
Haglin *v.* Oakley 192
Hale Hardware Co. *v.* Ragland 258
Harahan Viaduct Improvement District (Hiter *v.*) 351
Hardy *v.* Cloe 253
Hardy *v.* Ouachita Nat. Bank 532
Harris (Davison *v.*) 518
Haskell *v.* Patterson 65
Hawkins *v.* Simmons 461
Hayes Store Co. (Beauchamp *v.*) 126
Hempstead County Bank & Trust Co. (Haffke *v.*) 158
Hendricks (McKee *v.*) 369
Hill *v.* Ralph 524
Hill (Walthour *v.*) 243
Hill *v.* Williams 421
Hiter *v.* Harahan Viaduct Improvement District 351
Holmes (Whittaker *v.*) 1
Hot Springs (Wacaster *v.*) 521
Houston *v.* State 294
Hudson (White *v.*) 232
Hughes (Lee County Nat. Bank *v.*) 493
Hutson (Burel *v.*) 111

I

Ingram (Bayou Meto Drainage District *v.*) 318
Interstate Jobbing Co. *v.* Velvin 263

J

J. H. Askew & Co. (Tidwell *v.*) 57
Johnson *v.* Johnson 195
Jones *v.* Smith 425
Jones *v.* State 250
Jordan *v.* State 502

K

Kealy (Coston *v.*) 594
Kindle *v.* State 284
Kirk (Thompson *v.*) 218
Knight *v.* State 226
Knox (Young *v.*) 129

L

Laconia Circle Special Drainage Dist. (Britt *v.*) 92
Lane (Cain *v.*) 205
Lavoice *v.* Deloney 599
Lee County Nat. Bank *v.* Hughes 493
Little River County (Buron *v.*) 482
Little River County *v.* Buron 535
Little Rock (Winn *v.*) 11
Lomax *v.* State 386
Looney (Storey *v.*) 455

M

McCain *v.* State 48
McDonald *v.* State 411
McFarland *v.* State 431
McKee *v.* Hendricks 369
McRae (Warren *v.*) 436
Martin (St. Louis Southwestern Ry. Co. *v.*) 30
Melton *v.* State 448
Mercer (Mizell *v.*) 224
Miller County Bank & Trust Co. *v.* Beasley 44
Missouri Pac. Rd. Co. *v.* Brooks 466
Missouri Pac. Rd. Co. *v.* Smith & Co. 546
Missouri Pac. Rd. Co. *v.* Wood 240

Missouri State Life Ins. Co. *v.* Witt 604
Mizell *v.* Mercer 224
Montgomery (Wisconsin & Ark. Lumber Co. *v.*) 560
Morgan (Wakin *v.*) 234
Morris *v.* State 452
Mosaic Templars of America *v.* Woolfolk 273
Murphy *v.* Murphy 246

N

New England Securities Co. (Beloate *v.*) 571
Norman (Dickinson *v.*) 186
Norman *v.* State 142
Norton Co. (Arkansas Natural Gas Co. *v.*) 172

O

Oakley (Haglin *v.*) 192
Ouachita Nat. Bank of Monroe (Hardy *v.*) 532

P

Patterson (Haskell *v.*) 65
Payne *v.* State 229
Penix *v.* Shaddox 152
Pernot (Bostick *v.*) 581
Petroleum Producers' Association *v.* First Nat. Bank 267
Plum Bayou Levee Dist. *v.* Pocket Cypress Drainage Dist. No. 1 576
Pocket Cypress Drainage Dist. No. 1 (Plum Bayou Levee Dist. *v.*) 576
Power Mfg. Co. (Hachmeister *v.*) 469

R

Ragland (Hale Hardware Co. *v.*) 258
Ralph (Hill *v.*) 524
Raymer (Wright *v.*) 146
Reed *v.* Webb 282
Reeves *v.* Reeves 505
Republic Power & Service Co. *v.* Gus Blass Co. 163

Road Improvement District No. 14 (Woodruff County *v.*) 101
Robert Welch Stave & Merc. Co. *v.* Burris 556
Rogers *v.* Tri-State Motor Sales Co., Inc. 590

S

Saint Louis Southwestern Ry. Co. *v.* Martin 30
Scott *v.* Brown 270
Shaddox (Penix *v.*) 152
Simmons (Hawkins *v.*) 461
Sims *v.* Weldon 15
Skipper, Tucker & Co. (Bank of Morrilton *v.*) 49
Smith (Jones *v.*) 425
Smith & Co. (Missouri Pac. Rd. Co. *v.*) 546
Snyder (Guile *v.*) 221
Starr *v.* State 54
State (Adams *v.*) 308
State (Almond *v.*) 419
State (Clarkson *v.*) 459
State (Collatt *v.*) 136
State (Crank *v.*) 417
State (Dover *v.*) 496
State (Eddy *v.*) 289
State (Evans *v.*) 424
State (Ferrel *v.*) 541
State *v.* Houston 294
State (Jones *v.*) 250
State (Jordan *v.*) 502
State (Kindle *v.*) 284
State (Knight *v.*) 226
State (Lomax *v.*) 386
State (McCain *v.*) 48
State (McDonald *v.*) 411
State (McFarland *v.*) 431
State (Melton *v.*) 448
State (Morris *v.*) 452
State (Norman *v.*) 142
State (Payne *v.*) 229
State (Starr *v.*) 511

State (Wilson *v.*) 148
Storey *v.* Looney 455
Stout Lumber Co. *v.* Treadwell 138

T

Thompson *v.* Kirk 218
Tidwell *v.* J. H. Askew & Co. 57
Tisdial (First National Bank *v.*) 40
Treadwell (Stout Lumber Co. *v.*) 138
Tri-State Motor Sales Co. Inc., (Rogers *v.*) 590

V

Velvin (Interstate Jobbing Co. *v.*) 263

W

Wacaster *v.* Hot Springs 521
Wakin *v.* Morgan 234
Walker *v.* Whitmore 276
Walthour (Hill *v.*) 243
Warren *v.* McRae 436
Washburn *v.* Wilson Mercantile Co. 464
Webb (Reed *v.*) 282
Weldon (Sims *v.*) 13
Western Union Telegraph Co. *v.* Fleming 609
White *v.* Hudson 232
Whitmore (Walker *v.*) 276
Whittaker *v.* Holmes 1
Williams (Champion *v.*) 328
Williams *v.* Fort Smith 215
Williams (Hill *v.*) 421
Wilson (Brooks *v.*) 477
Wilson *v.* Danley 565
Wilson *v.* State 148
Wilson Mercantile Co. (Washum *v.*) 464
Winn *v.* Little Rock 11
Wisconsin & Ark. Lumber Co. *v.* Montgomery 560
Witt (Missouri State Life Ins. Co. *v.*) 604

Wood (Missouri Pac. Rd. Co. *v.*) 240
Woodruff County *v.* Road Improvement Dist. No. 14 101
Woodson *v.* Ft. Smith 443
Woolfolk (Mosaic Templars of America *v.*) 273
Wright (Collier Commission Co. *v.*) 338
Wright *v.* Raymer 146

Y

Young *v.* Knox 129

TABLE OF CASES

CITED BY THE COURT

A

Abston *v.* State, 154 Ark. 59 301
Allen *v.* Northern, 121 Ark. 150 308
Alley *v.* Bowen-Merrill Co., 276 Ark. 4 171
Allison *v.* State, 74 Ark. 444 291
Altheimer *v.* Board of Directors, 79 Ark. 229 365
American Brewing Co. *v.* St. Louis, 2 Ann. Cas. 821 185
American Building & Loan Ass'n *v.* State, 147 Ark. 80 430
American Hardwood Lumber Co. *v.* Ellis, 115 Ark. 524 ..... 606, 608
Ammon *v.* Martin, 59 Ark. 191 383
Arkansas Z. & S. Corp. *v.* Silver Hollow Min. Co., 148 Ark. 512 343
Arlington Hotel Co. *v.* Rector, 124 Ark. 90 10

B

Baird *v.* Street Pav. Imp. Dist. No. 1, 148 Ark. 246 492
Baker *v.* Allen, 66 Ark. 273 118
Baker *v.* State, 54 Wis. 376 500
Baker-McGrew Co. *v.* Union Seed & Fertilizer Co., 125 Ark. 146 91
Batesville *v.* Smithey, 138 Ark. 276 446
Beck *v.* State, 141 Ark. 102 454
Beckwith *v.* Frisbie & Sons, 32 Vt. 559 185
Beekman Lbr. Co. *v.* Kittrell, 80 Ark. 228 350
Beeson-Moore Stave Co. *v.* Brewer & Story, 158 Ark. 512 343
Beidler *v.* Beidler, 71 Ark. 318 207
Bennett *v.* Johnson, 130 Ark. 507 64
Betts *v.* Hackathorn, 159 Ark. 621 90
Billings *v.* State, 52 Ark. 303 454
Bird *v.* Jones, 37 Ark. 195 190
Black *v.* Brown, 129 Ark. 270 335
Black *v.* Hogsett, 145 Ark. 178 ..... 346, 387
Blackshare *v.* State, 94 Ark. 558 ..... 152, 312
Blumensteil *v.* State, 148 Ark. 421 454
Board of Imp. *v.* Brun, 105 Ark. 65 492
Booe *v.* Road Imp. Dist., 141 Ark. 140 ..... 26, 523
Booe *v.* Sims, 139 Ark. 595 524
Boqua *v.* Marshall, 88 Ark. 373 91
Boles *v.* Kelly, 90 Ark. 37 492
Booneville Nat. Bank *v.* Blakey, 163 Ind. 427 466
Bowser Furniture Co. *v.* Johnson, 117 Ark. 496 284
Boyd *v.* Jones, 44 Ark. 314 575

Bracy Hardware Co. *v.* Herman-McCain Const. Co., 163 Ark. 133 8
Bray *v.* Timmons, 162 Ark. 247 86
Briggs *v.* Steele, 91 Ark. 458 267
Britt *v.* Laconia Circle Sp. Drainage Dist., 165 Ark. 92 360
Brockway *v.* Thomas, 36 Ark. 524 239
Brown & Hackney *v.* Daubs, 139 Ark. 53 306
Bruce *v.* Matlock, 86 Ark. 555 ..... 440, 442
Brust *v.* State, 153 Ark. 348 504
Bryant *v.* State, 41 Ark. 359 418
Buckner *v.* Warren, 41 Ark. 532 225
Buerger *v.* Boyd, 25 Ark. 441 ..... 9, 11
Bullen *v.* State, 156 Ark. 148 419
Burke Const. Co. *v.* Board of Improvement, 161 Ark. 433 488
Bush *v.* Delta Road Imp. Dist., 141 Ark. 247 64
Bush *v.* Taylor, 130 Ark. 522 242
Byers *v.* Moore, 110 Ark. 504 239

C

Cady *v.* Pack, 135 Ark. 445 540
Cain *v.* State, 149 Ark. 616 454
Caldwell *v.* Dunn, 156 Ark. 126 124
California Adjustment Co. *v.* Atchison, T. & S. F. Ry. Co., 175 Pac. 682 185
Camp *v.* Camp, 13 Am. Dec. 60 134
Carlile *v.* Corrigan, 83 Ark. 136 580
Carr *v.* State, 16 So. 150 500
Carter *v.* Bradley County Road Imp. Dists. 1 and 2, 155 Ark. 288 170
Carter *v.* Greenway, 152 Ark. 339 383
Carville *v.* Road Imp. Dist. 152 Ark. 487 529
Cary *v.* Watkins, 97 Ark. 153 170
Casey *v.* Trout, 114 Ark. 359 190
Casteel *v.* State, 151 Ark. 270 451
Castle *v.* Sanders, 160 Ark. 391 584
Chambliss *v.* Clear Creek Oil & Gas Co., 161 Ark. 549 179
Chicago *v.* N. W. Mutual Life Ins. Co., 1 L. R. A. N. S. 770
Chicago & A. Rd. Co. *v.* Chicago, V. & W. Coal Co., 79 Ill. 121 185
Chicago Land & Timber Co. *v.* Dorris, 139 Ark. 333 508
Chicago, R. I. & P. Ry. Co. *v.* Humphreys, 107 Ark. 330 116
Clardy *v.* Winn, 163 Ark. 320 443
Clay *v.* Bilby, 72 Ark. 101 337
Clear Creek Oil & Gas Co. *v.* Fort Smith Spelter Co., 148 Ark. 260 177
Clinton *v.* Ross, 108 Ark. 446 ..... 125, 474
Clough *v.* Boston, etc., R. Co., Ann. Cas. 1915B, 1195 185
Cole *v.* State, 156 Ark. 9 454
Collins *v.* Woodruff, 9 Ark. 463 10
Collman *v.* State, 161 Ark. 351 ..... 498, 501

Conditt *v.* Holden, 92 Ark. 618 214
Conway *v.* Com'rs of Board of Imp. Dist. No. 20, 165 Ark. 487 585
Conway *v.* Miller County Highway & Bridge Dist., 125 Ark. 325 64
Cook *v.* State, 109 Ark. 384 228
Cook *v.* State, 155 Ark. 106 454
Cooper *v.* Hogan, 163 Ark. 312 588
Cooper *v.* Newton, 68 Ark. 150 464
Cooper *v.* Roberts, 18 How. 173 479
Corning *v.* Thompson, 113 Ark. 237 137
Cotton *v.* White, 131 Ark. 273 ..... 317, 336
Cowell *v.* Springs Co., 100 U. S. 55 171
Cowling *v.* Hill, 69 Ark. 350 163
Cox *v.* Vise, 50 Ark. 283 ..... 381, 384
Cribbs *v.* Benedict, 64 Ark. 555 481
Crissman *v.* Carl-Lee, 132 Ark. 32 214
Cullin-McCurdy Const. Co. *v.* Vulcan Iron Works, 93 Ark. 342 474
Cumnock *v.* Alexander, 139 Ark. 153 64
Curd *v.* Wallace, 7 Dana 190 134
Cypress Creek Drainage Dist. *v.* Wolf, 109 Ark. 60 529

D

Dangerfield *v.* Williams, 26 App D. C. 508 134
Darden *v.* State, 73 Ark. 315 301
Davis *v.* Cook, 155 Ark. 613 579
Davis *v.* Owen, 13 L. R. A. N. S. 728 134
Davis *v.* State, 117 Ark. 296 ..... 453, 454
Davis *v.* State, 126 Ark. 260 481
Davis *v.* Yonge, 74 Ark. 161 163
Dickerson *v.* Tri-County Drainage District, 138 Ark. 421 100
Dickinson *v.* Atkins, 132 Ark. 84 281
Dickinson *v.* Hardie, 79 Ark. 364 335
Dodge *v.* Thomasson, 94 Ark. 621 407
Dows *v.* Nat. Exchange Bank, 91 U. S. 618 126
Drainage Dist. No. 7 *v.* Terry, 126 Ark. 518 97
Driggs Bank *v.* Norwood, 50 Ark. 42 163
Duncan *v.* State, 125 Ark. 4 49

E

Earle Improvement Co. *v.* Chatfield, 81 Ark. 296 190
Early & Co. *v.* Maxwell & Co., 103 Ark. 569 269
Edwards *v.* State, 34 Ark. 720 387
Elsey *v.* State, 47 Ark. 572 542
Equitable Surety Co. *v.* Bank of Hazen, 121 Ark. 422 407
Eubanks *v.* Futrell, 112 Ark. 437 100
Euclid Ave. Nat. Bank *v.* Judkins, 66 Ark. 86 59

F

Fears *v.* Watson, 124 Ark. 341 476
Ferguson *v.* Montgomery, 148 Ark. 83 ..... 458, 568
Fitzgerald *v.* Walker, 55 Ark. 148 492
Fleming *v.* Oates, 122 Ark. 28 255
Fondren *v.* Norton, 86 Ark. 410 592
Friend *v.* Smith Gin Co., 59 Ark. 86 54

G

Gaither *v.* Gage, 82 Ark. 51 317
Galloway *v.* Stallings, 154 Ark. 16 266
Gannon *v.* Moore, 83 Ark. 196 335
Garner Mfg. Co. *v.* Cornelius Lbr. Co., 165 Ark. 119 474
Gee *v.* Hatley, 114 Ark. 376 ..... 134, 136
George Taylor Com. Co. *v.* Bell, 62 Ark. 26 163
Gibson *v.* Inman Packet Co., 111 Ark. 524 125
Glass *v.* State, 109 Ark. 32 228
Gordon *v.* Clark, 149 Ark. 173 383
Grassy Slough Drainage Dist. *v.* National Box Co., 111 Ark. 144 328
Greene *v.* State, 88 Ark. 290 49

H

Hackley State Bank *v.* Magee, 128 La. 1008 535
Haley *v.* Sullivan, 162 Ark. 59 361
Hall *v.* Bledsoe, 126 Ark. 125 442
Hall *v.* State, 113 Ark. 455 289
Hallbrooks *v.* Rosser, 143 Ark. 559 220
Hamburg Bank *v.* George, 92 Ark. 472 520
Harbottle *v.* Central Coal & Coke Co., 134 Ark. 254 497
Harmon *v.* Harmon, 131 Ark. 501 383
Harmon *v.* Winegar, 157 Ark. 254 163
Harris *v.* Brady, 87 Ark. 428 335
Harrington *v.* Citizens' Inv. & Sec. Co., 160 Ark. 320 544
Harrison Elec. Co. *v.* Citizens' Ice & Storage Co., 149 Ark. 502 179
Hatcher *v.* Buford, 60 Ark. 169 383
Hay *v.* Nickey Bros., 142 Ark. 398 141
Haycock *v.* Tarver, 107 Ark. 458 163
Hayden *v.* Hill, 128 Ark. 342 335
Heinemann *v.* Sweatt, 180 Ark. 70 244
Hempstead County *v.* Phillips, 79 Ark. 263 484
Hettle *v.* State, 144 Ark. 564 454
Hill *v.* Williams, 165 Ark. 421 458
Hodges *v.* Collison, 116 Ark. 420 534
Hogue *v.* State, 93 Ark. 316 414
Howard County *v.* Lambright, 72 Ark. 330 110

Hunt *v.* Curry, 37 Ark. 100 12
Hunt *v.* Weiner, 39 Ark. 70 59

I

Indiana Natural & Ill. Gas Co. *v.* Anthony, 1 L. R. A. N. S. 770 185
Indian Bayou Drainage Dist. *v.* Watt, 154 Ark. 335 327
Ingles *v.* Oklahoma Oil & Gas Co., 163 Ark. 270 269
Ingram *v.* State, 110 Ark. 538 228
Irvin *v.* Dugger, 142 Ark. 104 163

J

Jackson *v.* Life & Annuity Association, 195 S. W. 535 406
Jacobson *v.* Atkins, 103 Ark. 91 47
Jenkins *v.* International Life Ins. Co., 149 Ark. 257 410
Johnson *v.* Ballard Co., 12 A. L. A. 766 223
Johnson *v.* Hamlen, 148 Ark. 634 584
Johnson *v.* State, 101 Ark. 159 444
Johnson *v.* State, 161 Ark. 111 414
Johnson *v.* State, 152 Ark. 218 454
Joiner v. State, 94 Ark. 198 49
Jones *v.* Floyd, 129 Ark. 185 429
Jones *v.* Glidewell, 53 Ark. 161 540
Jones *v.* Jones, 11 So. 11 203
Jones *v.* Railway, 53 Ark. 27 308
Jones *v.* Road Improvement Districts, 142 Ark. 73 245
Jones *v.* State, 154 Ark. 288 ..... 18, 25, 26, 29
Jones *v.* State, 100 Ark. 195 418

K

Kanawha-Ganley Coal Co. *v.* Sharp, Ann. Cas. 1916E, p. 386 47
Kansas City So. Ry. Co. *v.* Mabry, 112 Ark. 110 308
Kansas City So. Ry. Co. *v.* Watson, 102 Ark. 499 563
Kelso *v.* Robinson, 51 Ark. 397 12
Kempner *v.* Sanders, 155 Ark. 321 491
Kennedy *v.* Burns, 140 Ark. 367 335
Ketchum *v.* State, 125 Ark. 275 450
Kiernan *v.* Blackwell, 27 Ark. 235 497
Killeam *v.* Carter, 65 Ark. 68 335
King County *v.* Seattle School Dist., 263 U. S. 361 479
Kirchman *v.* Tuffli Bros. P. I. & C. Co., 92 Ark. 111 308

L

Lake *v.* Little Rock Trust Co., 77 Ark. 53 534
Larkin *v.* State, 131 Ark. 445 450
Latham *v.* First Nat. Bank, 92 Ark. 315 163

Leathem & Co. *v.* Jackson County, 122 Ark. 114 ..... 485, 539
Leehy *v.* Fullerton, 150 Ark. 371 225
Lehigh Coal & Nav. Co. *v.* Brown, 100 Pa. St. 388 185
Lehman *v.* Broyles, 155 Ark. 593 383
Lenon *v.* Brodie, 81 Ark. 208 245
Lindsey *v.* Bloodworth, 97 Ark. 541 ..... 220, 225
Linton *v.* Erie Ozark Min. Co., 147 Ark. 331 171
Little Rock *v.* Katzenstein, 52 Ark. 107 245
Little Rock *v.* North Little Rock, 72 Ark. 195 25
Lockett *v.* State, 136 Ark. 473 504
Logan *v.* Russell, 136 Ark. 217 567
Longstreth *v.* Halter, 122 Ark. 212 343
Loudermilk *v.* State, 110 Ark. 549 497
Louisville, E. & St. L. Rd. Co. *v.* Wilson, 18 L. R. A. 105 185
Lowe *v.* Hart, 93 Ark. 548 383
Lucas *v.* Futrall, 84 Ark. 540 440

M

McAlister *v.* Gunter, 164 Ark. 611 418
McAlister *v.* State, 92 Ark. 604 504
McClelland *v.* Pittman, 139 Ark. 341 363
McClendon *v.* Board of Health, 141 Ark. 114 440
McClure *v.* People, 61 Pac. 612 501
McDonnell *v.* Imp. Dist., 97 Ark. 334 491
McGehee *v.* Yunker & Ronk, 137 Ark. 400 125
McGuffin *v.* State, 156 Ark. 392 454
McIlvaney *v.* Smith, 76 Ark. 468 238
McIntosh & Beam *v.* Hill, 47 Ark. 363 ..... 125, 474
McLain *v.* Fish, 159 Ark. 199 ..... 457, 567, 568
McMurray *v.* Boyd, 58 Ark. 504 261
McRaven *v.* Clancy, 115 Ark. 163 584
McWilliams *v.* Bonner, 69 Ark. 99 334
Marshall *v.* State, 101 Ark. 155 228
Martin *v.* Stratton, 157 Ark. 513 220
Marsh *v.* State, 146 Ark. 77 515
Mason *v.* Intercity Terminal Ry. Co., 158 Ark. 542 430
Matthews *v.* Clay County, 125 Ark. 136 540
Maxey *v.* State, 66 Ark. 523 504
Maxey *v.* State, 76 Ark. 276 460
Mayers *v.* Byrne, 19 Ark. 308 480
Mays *v.* State, 163 Ark. 232 454
Mayfield *v.* Creamer, 39 Ark. 460 593
Meadowcroft *v.* People, 35 L. R. A. 176 502
Meeks *v.* State, 161 Ark. 489 450
Meyer *v.* Board of Imp., 148 Ark. 623 588
Middleton *v.* Miller County, 134 Ark. 514 440
Middleton *v.* State, 162 Ark. 530 454

Miles *v.* Jerry, 158 Ark. 314 192
Miller *v.* State, 162 Ark. 45 450
Milwee *v.* Tribble, 139 Ark. 574 245
Missouri Pac. R. Co. *v.* Waterworks Imp. Dist., 134 Ark. 315 490
Missouri State Life Ins. Co. *v.* Witt, 161 Ark. 148 607
Mitchell *v.* Directors of School Dist. No. 13, 153 Ark. 50 443
Mitchell *v.* School Dist., 162 Ark. 277 443
Mitchell *v.* State, 86 Ark. 486 416
Mobile & Montgomery Ry. Co. *v.* Steiner, McGehee & Co., 61 Ala. 559 185
Moreland *v.* State, 125 Ark. 24 418
Morrow *v.* Merrick, 157 Ark. 618 118
Murchison *v.* State, 153 Ark. 300 ..... 425, 450
Murphy *v.* State, 130 Ark. 353 454
Murray *v.* State, 151 Ark. 331 419
Mutual Life Ins. Co. *v.* Parrish, 66 Ark. 412 410

N

Nall *v.* Kelly, 120 Ark. 277 64
Nelson *v.* Nelson, 154 Ark. 36 490
Newbold *v.* Stuttgart, 145 Ark. 544 100
Newman *v.* Peay, 117 Ark. 579 317
New Orleans & N. E. Rd. Co. *v.* Louisiana Const. & Imp. Co., 94 Am. St. R. 395 185
Nichols *v.* State, 153 Ark. 467 454
Nixon *v.* Allen, 150 Ark. 244 529

O

O'Leay *v.* Keith, 134 Ark. 36 343
Olson *v.* Moody, Knight & Lewis, Inc., 156 Ark. 319 284

P

Papan *v.* Nahay, 106 Ark. 232 414
Parker *v.* Geary, 57 Ark. 301 220
Parks *v.* State, 136 Ark. 562 454
Parnell *v.* State, 163 Ark. 316 503
Paisley *v.* State, 148 Ark. 518 145
Parson *v.* People, 76 Pac. 666 26
Patton *v.* Vaughan, 39 Ark. 211 442
Pearrow *v.* State, 146 Ark. 182 415
Peebles *v.* Columbian Woodmen, 111 Ark. 435 269
Pekin Stave Co. *v.* Watts, 95 Ark. 331 269
People *v.* Cannon, 139 N. Y. 32 502
People *v.* Sybisloo, 184 N. W. 410 451
Percifull *v.* Platt, 36 Ark. 456 464

Peters *v.* Railroad Co., 51 Am. St. R. 814 185
Phares *v.* State, 158 Ark. 156 425
Pine Bluff Water & Light Co. *v.* Pine Bluff, 62 Ark. 196 443
Pine Bluff Water Co. *v.* Sewer Dist., 56 Ark. 191 217
Pocahontas *v.* Central Power & Light Co., 152 Ark. 276 181
Pomeroy *v.* Benton, 57 Mo. 545 91
Powell *v.* State, 149 Ark. 311 454
Pratt *v.* Frazier, 95 Ark. 405 497
Pulaski Gas Light Co. *v.* Remmel, 97 Ark. 318 217
Pumphrey *v.* Furlow, 144 Ark. 219 508

R

Rachels *v.* Stecher Cooperage Co., 95 Ark. 6 171
Railroad Co. *v.* Fire Association, 60 Ark. 325 171
Read's Drug Store *v.* Hessig-Ellis Drug Co., 93 Ark. 487 281
Reeves *v.* Davidson, 129 Ark. 88 191
Reformed Church *v.* Schoolcraft, 65 N. Y. 134 134
Rehoboth *v.* Carpenter, 23 Pick. 131 134
Rhodes *v.* Barton, 138 Ark. 497 64
Richardson *v.* State, 77 Ark. 321 514
Rickman *v.* State, 135 Ark. 298 542
Robertson *v.* Mena Bonded Warehouse Co., 145 Ark. 106 100
Ross *v.* Royal, 77 Ark. 324 335
Routh *v.* Thorpe, 103 Ark. 46 269
Rowland *v.* Taylor, 134 Ark. 183 191
Russ *v.* Strickland, 130 Ark. 406 256

S

Saint Francis Levee District *v.* Barton, 92 Ark. 496 116
Saint Louis Brewing Assoc. *v.* St. Louis, 37 S. W. 525 185
Saint Louis, I. M. & S. Ry. Co. *v.* Blaylock, 117 Ark. 504 39
Saint Louis, I. M. & S. Ry. Co. *v.* Caraway, 77 Ark. 405 39
Saint Louis, I. M. & S. Ry. Co. *v.* Dupree, 84 Ark. 377 39
Saint Louis, I. M. & S. Ry. Co. v. Early, 103 Ark. 356 468
Saint Louis, I. M. & S. Ry. Co. *v.* McMichael, 115 Ark. 101 302
Saint Louis, I. M. & S. Ry. Co. *v.* Puckett, 88 Ark. 204 35
Saint Louis, I. M. & S. Ry. Co. *v.* Steel, 129 Ark. 520 35
Saint Louis, I. M. & S. Ry. Co. *v.* Touhey, 67 Ark. 209 563
Saint Louis S. W. Ry. Co. *v.* Kilberry, 83 Ark. 87 308
Saint Louis S. W. Ry. Co. *v.* Mackey, 95 Ark. 299 118
Sallee *v.* Dalton, 138 Ark. 549 64
Sanders *v.* Baggerly, 96 Ark. 117 135
Security Nat. Ins. Co. *v.* Woodson, 79 Ark. 266 407
Shelby *v.* Burrow, 76 Ark. 558 350
Sheppard *v.* State, 160 Ark. 315 388
Shibley *v.* Ft. Smith & V. B. Bridge Dist., 96 Ark. 424 531
Shirey *v.* Shirey, 87 Ark. 175 ..... 203, 204

Simmons *v.* Terral, 145 Ark. 585 568
Sisemore *v.* State, 105 Ark. 179 447
Smith *v.* Scott, 92 Ark. 143 335
Sneed *v.* State, 143 Ark. 178 454
Snider *v.* Dennis, 159 Ark. 231 575
Snow *v.* Wood, 163 Ark. 280 267
Society for Propagation of Gospel *v.* Sharon, 28 Vt. 603 134
Southern Crawford Road Imp. Dist. *v.* Brown, 156 Ark. 267 ....363, 365
Southwestern Tel. & Tel. Co. *v.* Sharp & White, 118 Ark. 541 178
Spaulding Mfg. Co. *v.* Godbold, 92 Ark. 63 464
Special School Dist. No. 3 *v.* State, 139 Ark. 263 489
Spier *v.* State, 130 Ark. 457 454
Spier *v.* State, 157 Ark. 282 152
Spivey *v.* State, 133 Ark. 314 ..... 414, 415
Springer *v.* State, 129 Ark. 106 515
Starnes *v.* Boyd, 101 Ark. 469 ..... 125, 350, 474
State *v.* Boney, 156 Ark. 169 529
State *v.* Buck, 120 Mo. 479 502
State *v.* Caldwell, 44 N. W. 700 500
State *v.* Eifert, 38 L. R. A. 485 500
State *v.* Embrey, 135 Ark. 262 529
State *v.* Mitchell, 96 Ark. 259 500
State *v.* New York Life Ins. Co., 119 Ark. 314 481
State *v.* Railroad Commission, 109 Ark. 100 443
State *v.* Rawlings, 232 Mo. 544 26
State *v.* Sattley, 33 S. W. 41 501
State *v.* Schmidt, 232 U. S. 168 479
State *v.* Woodruff, 120 Ark. 406 481
Sterns *v.* Baker, 150 Ark. 321 126
Stoops *v.* Bank of Brinkley, 146 Ark. 127 306
Storthz *v.* Smith, 109 Ark. 552 47

T

Tallman *v.* Lewis, 124 Ark. 6 170
Tatum *v.* Arkansas Lumber Co., 103 Ark. 251 191
Taylor *v.* Dexter, 126 Ark. 122 266
Terry *v.* Klein, 133 Ark. 366 266
Texas Hardwood Lumber Co. *v.* Richardson, 115 Ark. 28 220
Thatcher *v.* State, 48 Ark. 60 444
Thomas *v.* State, 43 Ark. 149 228
Thomas *v.* State, 136 Ark. 290 137
Thomas Cox & Sons Mach. Co. *v.* Blue Trap Rock Co., 159 Ark. 209 ..... 474, 476
Thompson *v.* Baxter, 76 Ark. 326 281
Thornton N. Motley Co. *v.* Detroit Steel, etc., Co., 130 Fed. 396 466
Toby *v.* Haggerty, 32 Ark. 370 141
Triplett *v.* Mansur-Tibbetts Co., 68 Ark. 230 474

U

United States *v.* Hartwell, 6 Wall. 385 441
University of Maryland *v.* Calvary M. E. Church South, 65 Atl. 398 134

V

Valley Farms Co. *v.* Westchester, 261 U. S. 155 363
Van Winkle *v.* Satterfield, 58 Ark. 617 261
Vincenheller *v.* Reagan, 69 Ark. 460 440
Voss *v.* Reyburn, 104 Ark. 298 584

W

Wagner *v.* Lesser, 239 U. S. 237 363
Wallace *v.* Brown, 22 Ark. 118 12
Wallis *v.* State, 54 Ark. 611 430
Walls *v.* Brundidge, 109 Ark. 250 458
Washington County *v.* Davis, 162 Ark. 335 537
Watkins *v.* Griffith, 59 Ark. 359 492
Watkins *v.* Stough, 103 Ark. 468 110
Wells *v.* State, 151 Ark. 221 505
Western Union Tel. Co. *v.* Caldwell, 133 Ark. 184 611
Western Union Tel. Co. *v.* Duke, 108 Ark. 8 387
Western Union Tel. Co. *v.* Love-Banks Co., 73 Ark. 205 611
Westlake & Button *v.* St. Louis, 77 Mo. 47 185
White *v.* Hewlett, 42 So. 78 154
White River Lumber Co. *v.* White River Drainage Dist., 141 Ark. 196 101
Wiegel *v.* Pulaski County, 61 Ark. 76 484
Wilkins *v.* State, 121 Ark. 219 498
Williams *v.* Robinson, 158 Ark. 327 261
Williams *v.* State, 156 Ark. 205 454
Wilson *v.* State, 124 Ark. 477 294
Wilson *v.* State, 126 Ark. 354 388
Wimberly *v.* Road Imp. Dist. No. 7, 161 Ark. 79 361
Winter *v.* Lewis, 132 Ark. 399 350
Wisconsin & Ark. Lbr. Co. *v.* Fitzhugh, 151 Ark. 81 81
Wolfe *v.* State, 107 Ark. 29 289
Wood *v.* State, 157 Ark. 503 454
Wood *v.* State, 159 Ark. 671 291
Woodruff County *v.* Road Imp. Dist. No. 14, 159 Ark. 374 ..... 108, 110
Woodson *v.* Prescott & N. W. Ry. Co., 91 Ark. 388 563

Y

Yancey *v.* Batesville Tel. Co., 81 Ark. 486 178

Z

Zinn and Chaney *v.* State, 135 Ark. 342 288

ERRATUM.

In vol. 163 Ark. Repts., p. 348, 3d head note, last line, for "quashing the writ" read: *abating the suit.*

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

WHITTAKER *v.* HOLMES.

Opinion delivered April 28, 1924.

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—Any doubt as to the meaning of a lease prepared by the lessor must be resolved against her.
2. EVIDENCE—PAROL EVIDENCE TO EXPLAIN AMBIGUITY.—In an action on a lease, parol evidence is admissible to prove the real consideration where the contract is ambiguous.
3. EVIDENCE—PAROL EVIDENCE TO EXPLAIN CONSIDERATION.—Where a lease provided for the erection of a building on the premises by the lessor, and for the rent to begin on its completion, parol testimony was admissible to prove that the real consideration for the lease was the use of the building.
4. LANDLORD AND TENANT—CONSIDERATION OF LEASE—EVIDENCE.—In an action for rent where the building leased had been destroyed by fire, evidence *held* to sustain a finding that the sole consideration for the payment of the rent was the occupancy of the building.
5. LANDLORD AND TENANT—DESTRUCTION OF BUILDING—LIABILITY FOR RENT.—Where a lease contract was entered into with reference solely to a store building, and not with reference to the land on which it was situated, upon the destruction of the building and the lessor's failure to rebuild, the lessee was discharged from liability to pay rent.

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

Ernest Neill, for appellant.

There being no allegation of mistake or fraud or overreaching in the procurement of the written contract, there being no uncertainty or ambiguity in its meaning and intent, and appellees having admitted its execution,

they are bound by its terms, and are estopped from alleging a contract different in terms. 129 Ark. 513; 130 Ark. 197; 144 Ark. 279; 133 Ark. 105. It was the duty of the court to construe the contract from its written terms and recitals alone. 146 Ark. 127; 131 Ark. 144; 130 Ark. 381; 131 Ark. 585. This court has long since settled the law as to the effect upon a lease covering building and grounds, where the building is destroyed. 25 Ark. 441; 99 Ark. 193. The common-law rule, so far as applicable to or consistent with our form of government, is a part of the statutory law of this State, and the court is without power to engraft a different rule by judicial declaration. 16 R. C. L. 465, 956; *Id.* 466, 958; *Id.* 468, 959. The allegation as to surrender of possession to appellant falls far short of what is necessary to constitute a legal defense. In order to create a presumption of acceptance, the averment must show that the alleged acts of entry, possession or control were of such character, and done in such manner, as to appear on their face as hostile and inconsistent with the relation of landlord and tenant between appellant and appellee, and that the latter relied upon such acts as indicating an acceptance by the former. 4 Phila. 57, 69 Pa. St. 316; 1 Daly, 485; Woods on Landlord and Tenant, 844; 71 Ark. 254; 24 Cyc. 1373; 16 R. C. L. 674, 675.

W. M. Thompson and *McCaleb & McCaleb,* for appellees.

The lease itself makes the erection of the building a condition precedent to the commencement of the lease. The implied covenant that the lease carries with it makes it incumbent upon appellant to rebuild, after the destruction of the building, before asking payment of rents. An offer to rebuild was not sufficient. The case comes within the exception to the general rule announced in *Buerger* v. *Boyd,* 25 Ark. 441.

WOOD, J. This action was instituted by the appellant against the appellee, Clarence P. Holmes, to recover a balance alleged to be due under a lease contract. The appellant set up in her complaint a certain lease contract

entered into between the appellant and Clarence P. Holmes, and alleged that C. P. Holmes was due her on said contract the sum of $420 as unpaid rent; that the appellees, J. A. Holmes and G. E. Yeatman, were sureties of C. P. Holmes for the payment of this rent. She alleged that she had demanded payment of the balance due, both of principal and his sureties, which they had refused to pay. The lease and bond were made exhibits to the complaint.

The appellees, in their answer, admitted the execution of the contract and bond sued on, and, by way of affirmative defense, they alleged that in April, 1922, C. P. Holmes was desirous of engaging in the retail grocery business in the city of Batesville, Arkansas, and made a contract with the appellant, under the terms of which it was agreed that, if she should erect a store building, of the dimensions set out in the lease, upon certain lands therein described, he would lease same for the period of two years from the 12th of May, 1921, which will be thirty days from the date of the contract, and that he would pay as a rental for said building the sum of $30 per month. They alleged that it was agreed that plaintiff would erect and maintain the building and place Holmes in possession thereof within thirty days from the date of the contract; that the sole and only consideration for entering into said contract on the part of Holmes was the erection of said building by the plaintiff and the right to said Holmes to occupy and use same as a storehouse; that on the ..... day of May, 1921, Holmes entered into possession of the store building which had been erected by plaintiff pursuant to said contract, and continued to occupy the same until it was destroyed by fire in December, 1921; that the plaintiff soon thereafter collected the insurance upon the building, but failed to erect another building of like dimensions for the use of Holmes on the premises; that Holmes never at any time used or occupied any part of the real estate mentioned in the lease contract except that on which the building stood, and that the real estate outside of this building

was without any value whatever to Holmes. The defendants therefore pleaded a failure of consideration. They further set up that, shortly after the destruction of the building as alleged, the plaintiff, by her agents, took possession of the premises and exercised control over the same, and neither C. P. Holmes nor either of the other defendants had been in possession or had any control over said premises since the destruction of the building by fire; that C. P. Holmes had paid all the rent due the plaintiff up to that time. They therefore denied that they were indebted to the plaintiff in the sum of $420 or in any sum. The cause was, by consent, submitted to the court sitting as a jury, and the court found the facts to be as follows:

First: That the plaintiff, Mrs. Ruby Whittaker, and the defendant, Clarence P. Holmes, entered into a written contract of lease, referred to in the evidence and made "Exhibit A" to plaintiff's complaint, and that the defendants executed the written guaranty or bond for the payment of rents introduced in evidence, and made "Exhibit B" to plaintiff's complaint.

Second: That the defendant Holmes entered into the possession of the store building erected under the terms of said written contract, taking possession on May 16, 1921; that he and his subtenant, Kent, occupied said store building until December 16, 1921, and that at that time said building was destroyed by fire.

Third: That the defendant Holmes paid to the plaintiff the rent in full for the time the building was so occupied.

Fourth: That, under the terms of said contract of lease, the sole purpose of its execution by the parties hereto and the consideration therefor were the procuring of the erection of said building and its use and occupancy by the defendant Holmes and the payment of the rental therefor to the plaintiff, Mrs. Whittaker, and that, except for the erection of said building and its use and occupancy as a grocery store, the defendant Holmes would not have made said contract.

The court declared the law to be that, "upon the destruction of said building by fire, the defendant had the right to terminate the contract on his part." The court thereupon entered judgment in favor of the defendants, from which is this appeal.

The facts as found by the court in the first, second, and third findings of fact are undisputed, and the only real issue in the case is whether or not the court erred in its fourth finding of fact, and the correctness of its finding depends upon the construction that should be given the contract when viewed in the light of the situation of the parties to it, as shown by the testimony adduced to sustain the respective contentions.

The lease contract is as follows: "The said Mrs. Whittaker has this day leased unto said Holmes, for and during the period of two years from the date hereinafter mentioned, one certain lot or parcel of ground situated in what is now known as Bates' addition to the city of Batesville, and being in a large unnumbered block lying adjacent to and on the south side of Harrison Street, and just south of the intersection of Fourth Street, said parcel of ground fronting 16 feet on Harrison Street and running back towards Bates Street a distance of about 100 feet to the woven wire partition fence, and said parcel being on the west side of a driveway from said Harrison Street. The terms and conditions of this lease are as follows, to-wit: The said Mrs. Whittaker is to erect upon said leased parcel of ground a one-story box store building, 16 feet in width and 30 feet in length, with a glass front, the walls to be canvassed and papered, and the ceiling painted, and to provide said building with one counter and one section of shelving 16 feet long, as per sketch furnished by the said Holmes; the building to have also a shed porch in front and a brick flue, and to be provided with electric wiring, but not with plumbing or sewer connections. The work of constructing said building to be commenced within one week from the date hereof and to be completed within thirty days thereafter and as soon as practicable, and the time of the commence-

ment of this lease shall date from the date upon which said building is completed and ready for occupancy. The said Holmes, on his part, agrees and binds himself to pay, during the entire period of this lease, as rental for said building and premises, the sum of $30 per month, due and payable monthly in advance, and further agrees to give security for the payment of such sums. Said Holmes further agrees and binds himself to take good care of said leased premises and property, and turn the same back to the said Mrs. Whittaker, at the end of this lease, without notice, unless such lease shall be renewed by mutual agreement of the parties."

The bond is as follows: "Know all men by these presents: That we, Clarence P. Holmes, as principal, and J. A. Holmes and G. E. Yeatman, as sureties, are held and firmly bound unto Mrs. Whittaker in the sum of $720 for the just and faithful payment of which we bind ourselves, our heirs, executors and assigns firmly by these presents. The conditions of the above obligation are as follows, viz: Whereas, the said Clarence P. Holmes has leased of and from the said Mrs. Ruby Whittaker a certain lot or parcel of ground in the city of Batesville, upon which is to be erected, for his use and occupancy, a store building, and is to pay to the said Mrs. Whittaker, as rental therefor, the sum of $30 per month during a period of two years, such rental to be paid monthly in advance, the terms and conditions of which lease are set forth on the paper hereunto annexed. Now, if the said Clarence P. Holmes shall well and truly fulfill the obligations set forth in said lease contract, this writing is to be null and void, otherwise to be and remain in full force and effect. Signed by the parties on April 12, 1921."

The appellant testified that C. P. Holmes paid the rent from the time that he took possession of the property on May 15 to the 15th of December. He had not paid any rent since then, and owed from that time up to the bringing of the suit. There was not any building on the ground at the time she rented same to Holmes.

She agreed to erect a building for him for the purpose of his business, and it was on this basis that the contract was made. After the building was destroyed by fire she did not make any proposition to Holmes to rebuild. He never asked her to. She wanted to rebuild, and expected to, and for Holmes to continue. She thought she had to rebuild in order to make herself safe. She authorized her husband to act as her agent in all the negotiations with Holmes after the fire.

Whittaker testified that he acted as the agent of his wife, the appellant, in the matter of leasing to Holmes, of having the premises cleaned up and in the matter of settling the fire loss with the insurance company. Witness had the premises cleaned up about four months after the fire. The reason he did this was because he had been notified by the board of health of the city that the premises were unsanitary. At this time the insurance company had settled the fire loss. Witness testified that he had corresponded with C. P. Holmes in regard to the rent, and he exhibited copies of the letters which he had sent to C. P. Holmes, and also a copy of the letter which he had received from J. A. Holmes, father of C. P. Holmes, and his reply to same. He testified that, after this correspondence, he had a meeting with C. P. Holmes, at which Holmes presented him with a copy of a letter he had mailed to witness the night before, which letter was introduced. At that meeting witness made Holmes the proposition to allow him the use of the house for as much time, without rent, as he had lost on account of the fire; that if Holmes would say he had lost six months' use of the building, then his lease would be extended six months without further payment. Holmes stated that he did not want the use of the building, and did not want the same erected, and refused to consider the proposition. Witness stated to Holmes that his wife was under no obligation to make such a proposition, but that she did not want to take advantage of Holmes if he was inclined to carry out the contract. After he gave it up and turned it over to other parties, he tried to get the appellant to

release him from the contract and accept another party in his place, but appellant declined to do so. Witness made it plain to Holmes that the proposition to rebuild was conditioned upon his paying the rent, and he declined the proposition.

It is unnecessary to set out the correspondence referred to by the witness. It was to the effect that the appellant, through her husband as agent, wrote C. P. Holmes as early as January 1, 1922, after the fire, stating that it was her intention to rebuild the store after she got her money from the insurance company, and expected to carry out the contract with Holmes, and urging him to pay the rent. He claimed that he did not receive this letter. Then, after a period of nearly three months, she wrote, reminding him that he had not paid the rent, and urging him to do so, and stating that she intended to carry out the contract. Holmes, in reply, stated, in effect, that he considered the contract at an end by the destruction of the store, and that he did not consider that he was bound to pay the rent after the building was destroyed.

In *Bracy Hdw. Co.* v. *Herman-McCain Const. Co.*, 163 Ark. 133, we said: "The contract, which is the foundation of appellant's action, was written by the appellant, and therefore, under a familiar rule of law, if any of its terms are ambiguous so that it becomes necessary to construe it, parol evidence may be admitted to throw light upon the meaning of the contract. Where there is doubt as to the meaning of the contract, such doubt must be resolved against the party who prepared the contract. *Wis. & Ark. Lbr. Co.* v. *Fitzhugh,* 151 Ark. 81, and cases there cited."

The contract upon which the appellant predicates her action was prepared by the appellant, and is governed by the above rule. The first part of the first paragraph of the contract is free from ambiguity, in that it expressly recites that the appellant had leased to Holmes one certain lot or parcel of ground, but the concluding part of this paragraph recites that "the terms and conditions of the lease are as follows." Then the next para-

graph contains these terms and conditions, which are, in substance, that appellant was to erect a building of a certain description and Holmes was to begin to pay rental for the building and premises at the rate of $30 per month in advance, the payment of rental not to begin until the building was completed, which was to be within thirty days.

The bond executed by Holmes and his sureties for the performance of the contract also recites that Holmes had leased a certain lot or parcel of ground "upon which is to be erected for his use and occupancy a store building." There is sufficient ambiguity as to the real consideration of this contract to warrant the introduction of oral testimony. When the lease and bond are considered in the light of this testimony, we are convinced that the court correctly construed the contract, and did not err in finding that "the considerations therefor were the procuring of the erection of said building and its use and occupancy by the defendant Holmes and the payment of the rental therefor to Mrs. Whittaker," and that, "except for the erection of the building and its use and occupancy as a grocery store, the defendant Holmes would not have made said contract."

The general rule undoubtedly is as announced in *Buerger* v. *Boyd,* 25 Ark. 441, where we said: "We understand the law to be that, where a lessee takes an interest in the soil upon which a building stands, and the building should be destroyed by fire, he will be held for the rent of the entire property, unless he stipulates against casualties." In that case it was admitted that the lessee not only leased the house, but that he leased part of lots Nos. 11 and 12, in block 34, in Little Rock. In the case at bar there is no admission upon the part of the lessee that he leased anything more than the store building, but, on the contrary, the testimony of Holmes is direct and positive to the effect that he did not use any part of the lot upon which the building stood not covered by the building. He did not pay any rent after the build-

ing was destroyed because he did not feel that he owed it after the building was destroyed.

In the case of *Buerger* v. *Boyd, supra,* we also said: "If one simply leases the house or room, and acquires no control over or interest in the soil, and the building be destroyed, we understand the rule to be otherwise." We are convinced that the facts of this record show that the consideration of the lease under review was for the store building, and the store building alone. When the building therefore was destroyed by fire, the consideration for the contract failed, and the appellee Holmes was no longer obligated to pay rent on the premises.

The facts of this record certainly justified the trial court in finding that the parties to this contract were contracting with reference solely to the store building. It gave the contract its only value and consideration to the appellee, C. P. Holmes, and appellant knew that when she entered into the lease, and she contracted with reference to such fact. "In all contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse the performance. In none of the cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance, but that excuse is by law implied, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." 6 R. C. L., p. 1005, § 369, and cases cited in note; 13 C. J. 643, § 718, and cases cited in note. See also *Collins* v. *Woodruff,* 9 Ark. 463; *Arlington Hotel Co.* v. *Rector,* 124 Ark. 90, 101, 102.

The judgment of the trial court is correct, and it is therefore affirmed.

DISSENTING OPINION.

McCULLOCH, C. J. The rule at common law, with respect to liability of a tenant after destruction of the leased building, was stated and adopted by this court in

Buerger v. *Boyd*, 25 Ark. 441. The majority now adhere to it as an established rule of property in this State. I fail to discover any ambiguity in the contract. It is clearly one for the lease of real estate for a fixed period, together with the building to be erected thereon; and oral testimony should not have been admitted to prove that the building was the sole subject-matter of the contract. Such evidence varied the terms of the written contract as interpreted in accordance with the rule of law announced by this court in *Buerger* v. *Boyd, supra.* That rule of law is admittedly a harsh one, and has been rejected by some of the American courts, but it is in accordance with the weight of authority in this country.

HART, J., concurs.

WINN v. LITTLE ROCK.

Opinion delivered June 9, 1924.

TAXATION—EXEMPTION OF CEMETERIES—INVALIDITY OF TAX TITLE.—Since, under Const., art. 16, § 5, cemeteries used exclusively as such are exempt from taxation, one who purchased at tax sale land used by a city for a public cemetery acquired no title, and the city, suing therefor, was not required to first file an affidavit of tender of taxes, as provided by Crawford & Moses' Dig., § 3708.

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

Appellant *pro se.*

Before plaintiff could maintain a suit in ejectment or for possession, it was essential that the plaintiff file the affidavit required by law. C. & M. Digest, §§ 3708-9-10.

A. B. Cypert and *John F. Clifford,* for appellee.

The property involved, being part of a cemetery, used exclusively as such, is not subject to taxation, and appellant's tax deed is void. Constitution, art. 16, § 5; 26 R. C. L. 399; 37 Cyc. 1469. Since the assessment of taxes on the property and a sale thereof for taxes were void, the appellant acquired no title whatever, and it was not necessary to file the affidavit contemplated by the statute

relied on by the appellant. 22 Ark. 118; 37 Ark. 100; 51 Ark. 397.

WOOD, J. This is an action by the appellee against the appellant in ejectment to recover the possession of a certain tract of land, which is described in the complaint, containing 14.59 acres, more or less, and a part of Oakland Cemetery, to which appellee deraigns title through various mesne conveyances from the United States Government, as set up in its complaint. The appellee alleges that it is a city of the first class, and is legally holding the tract described exclusively for public purposes, to-wit, a public cemetery for burial of the dead. The appellee further alleges that the appellant was in possession of the land without any vestige of right, title or claim, and wrongfully refuses to surrender the possession thereof to the appellee.

The appellant filed a motion to dismiss the complaint on the ground that the appellant was in possession of the lands under a tax title, and that the appellee had not complied with the statute requiring it to file an affidavit of tender of taxes before the commencement of its action. The appellant did not file any answer to the complaint. The court overruled his motion, and appellant stood upon the motion. The court rendered judgment in favor of appellee against the appellant, from which is this appeal.

Under article 16, § 5, of our Constitution, cemeteries used exclusively as such are exempt from taxation. If the land in controversy was assessed and sold for taxes, as appellant claims, then such proceeding was null and void, and the appellant acquired no right thereunder. Section 3708 of Crawford & Moses' Digest, upon which appellant relies to sustain his motion, does not extend to sales that are void for want of power. *Wallace* v. *Brown,* 22 Ark. 118; *Hunt* v. *Curry,* 37 Ark. 100; *Kelso* v. *Robinson,* 51 Ark. 397; see also 37 Cyc. 1469 (b); 26 R. C. L. § 399, p. 443.

The judgment is correct, and it is therefore affirmed.

SIMS v. WELDON.

Opinion delivered June 16, 1924.

1. STATUTES—BUSINESS TRANSACTED DURING EXTRA SESSION.—Const., art. 6, § 19, declaring what business may be transacted during an extra session of the Legislature, is mandatory, and a statute enacted at such a session not in conformity to the constitutional provision is void.
2. CONSTITUTIONAL LAW—VALIDITY OF STATUTE—JUDICIAL QUESTION.—Whether a statute enacted at an extra session of the Legislature is within the purpose specified by the Governor, as required by Const., art. 6, § 19, is a judicial question.
3. STATUTES—VALIDITY OF ACT OF EXTRA SESSION.—Legislators convened in extraordinary session may act freely within the Governor's call and legislate on any or all of the subjects specified, or any part thereof, and every presumption will be made in favor of the regularity of their action, but when it appears that the statute does not fall within the purposes specified it is the court's duty to declare it void.
4. STATUTES—SPECIAL SESSION—GOVERNOR'S CALL.—Const., art. 6, § 19, requiring the Governor, in calling a special session of the Legislature, to specify the purpose for which they are convened, requires the Governor to confine legislation to particular subjects, but not to restrict the details springing out of such subjects.
5. STATUTES—EXTRA SESSION OF LEGISLATURE—SCOPE OF GOVERNOR'S CALL.—Under the Governor's proclamation calling the Legislature in special session to enact laws imposing "a tax on net incomes," a law imposing a tax on cigars and cigarettes was not authorized.
6. STATUTES—ACT OF EXTRA SESSION—VALIDITY.—Where the Governor's proclamation called a special session of the Legislature to enact a tax on net incomes, an act passed at such session imposing a tax on cigars and cigarettes will not be upheld, though the purpose of the Governor and of the act passed was to raise funds for school purposes.
7. EVIDENCE—GOVERNOR'S SUPPLEMENTAL PROCLAMATION.—The court takes judicial notice of a supplemental call by the Governor during the extra session of the Legislature, specifying additional subjects of legislation.
8. STATUTES—SUPPLEMENTAL PROCLAMATION OF GOVERNOR.—After an extra session of the Legislature has convened, pursuant to the Governor's call, he cannot issue a supplemental proclamation specifying additional subjects of legislation.
9. EVIDENCE—JUDICIAL NOTICE OF LEGISLATIVE RECORDS.—The court takes judicial notice of the contents of the records of the Legislature, and hence knows that the Legislature did not extend the

extra session of 1924 to take up other legislation than that specified in the Governor's proclamation.

10. STATUTES—EXTENSION OF SPECIAL SESSION.—Mere enactment of a bill at a special session of the Legislature, not within the scope of the Governor's call, is not tantamount to an extension of the session for the purpose of passing such act, even though it was passed by a two-thirds vote in both houses.

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

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

The Legislature is primarily the judge as to whether or not an act falls within the scope of an executive proclamation. 147 Ark. 453. It is true that in this case the Governor designated the enactment of an income tax law; but the method of providing the needed revenue was a question of legislative policy peculiarly within the sphere and jurisdiction of the General Assembly. The detail of providing such revenue relates back to the emergency which made the extraordinary session necessary, viz: the extreme financial needs of the public schools of the State; and, though the bill enacted may not be in the form prescribed, yet, if it meets the emergency which prompted the call, it is within the proclamation—especially when approved by the Governor as responsive to his call. 154 Ark. 295-6. On the question of the power of the Legislature in special session, see 154 Ark. 551, at page 559. In passing upon the contention raised by appellee that the Governor's proclamation does not bring itself within the requirements of art. 6, § 19, of the Constitution, because not broad enough to amount to stating the subject-matter upon which the lawmakers could act, and because the act in question was not specified in the proclamation, we think the court is justified in taking into consideration the public notoriety of the emergency, the extreme financial distress of the public schools, which made the calling of the Legislature into extraordinary session necessary. Taking the history of the call

into consideration, the Governor's proclamation was broad enough to justify construing it as stating the subject of legislation to be for school revenue, and as authorizing the Legislature to pass the bill in question. The same principle employed in interpreting a provision of the Constitution ought to be employed in interpreting the meaning of a proclamation by the Governor in calling an extra session. 105 Ark. 380; 85 Ark. 89.

Cockrill & Armistead, for appellee.

The act is not within the purview of the Governor's proclamation, and is therefore void. It is the mandatory duty of the court to go behind the act to the proclamation in order to determine whether the act is within the purview of the proclamation. 154 Ark. 288. A reading of the act and of the specifications contained in the Governor's proclamation, together with the opinion of the court in 154 Ark. 288, just cited, sustain the decree of the chancery court without further argument; but the question raised by this appeal involves more than whether this particular act shall stand. It brings into issue a vital principle of constitutional law. The evils of numerous special sessions of the Legislature are great enough, even with art. 6, § 19, of the Constitution relating to extraordinary sessions enforced and applied. The thought embodied in the Constitution as expressed in art. 5, §§ 5 and 16, and by Amendment No. 8, is that once in two years is sufficient for the meetings of the General Assembly authorized to pass general measures without limitations, and in order to guard against excess legislation the terms of the general sessions are limited; but, realizing that emergencies might arise requiring legislation between the general sessions, this § 19 of article 6 was brought in. The object and purpose of the limitation upon the power of the General Assembly, assembled upon the call of the Governor upon extraordinary occasions, is to check excess legislation, and to render laws a little more stable by furnishing a period of two years, during which they may be to some degree subjected to the test of a brief experiment. 115 Pac.

(Colo.) 696-698; 161 S. W. (Tenn.) 1006; 207 Pac. (Ariz.) 611, 613. The validity of an act passed at a called session depends therefore upon whether its subject-matter is within the purview of the specifications contained in the proclamation; if not, it is void. An excise tax on cigarettes and cigars does not come within the purview of a call for the passage of a net income law. In 154 Ark. 288, *supra,* it was held that the approval of the act by the Governor did not supply the lack of authorization for its enactment in the proclamation. That proposition is also supported by the following cases: 19 S. W. (Mo.) 530; 34 S. W. (Tex.) 769; 2 Heisk. (Tenn.) 759; 90 Mo. 646; 107 S. E. (Ga.) 765; 77 Ill. 127; 110 Mo. 286; 127 S. W. 208. An excise tax or a license tax upon those engaged in particular occupations, though graded in accordance with income, is a tax on the occupations, and is not an income tax. 26 R. C. L., "Taxation," § 116; 23 Grat. (Va.) 464; 28 L. R. A. 110; 82 S. E. (Va.) 695; Black on Income Taxes, § 3; 47 N. W. (Neb.) 280; 93 S. W. (Tex.) 436, 453.

Rowell & Alexander filed a brief on behalf of appellee, as *amici curiae.*

McCULLOCH, C. J. Appellee is engaged in the business of retailing cigarettes and cigars in the city of Little Rock, and he instituted this action attacking the validity of the statute passed at the recent extraordinary session of the General Assembly attempting to levy a tax on the sale of cigarettes and cigars—two dollars per thousand on cigarettes and ten per centum on the price of cigars sold in the State by retail dealers. The ground on which the validity of the statute is assailed is that the constitutional requirements were not complied with. No attack is made upon the form or substance of the statute itself or upon the authority of the Legislature to pass such a statute under circumstances which would meet the requirements of the Constitution.

The first question raised is whether or not the statute falls within the purposes specified by the Governor in his proclamation calling the extraordinary session.

The Constitution of 1874 contains the following provision with respect to extraordinary sessions of the General Assembly:

"The Governor may, by proclamation, on extraordinary occasions convene the General Assembly at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days." Article 6, § 19.

The amendment adopted in the year 1913 (Amendment No. 8) makes no change in the section quoted above which has any bearing on the present controversy. The only change related to compensation of members of the Legislature, and provided that, when convened in extraordinary session, they shall receive three dollars per day for their services the first fifteen days, and that, if the session shall extend beyond fifteen days, they shall receive no further *per diem*.

The proclamation of the Governor was made on March 8, 1924, calling the session to begin on March 24, 1924, and reads as follows:

"State of Arkansas, Executive Department.

"PROCLAMATION.

"To all to whom these presents shall come — Greetings:

"Know ye that, whereas, by virtue of power and authority vested in me by § 19 of article 6 of the Constitution of the said State, I do, by these presents, call a special session of the General Assembly of the said State to meet and convene at Little Rock, the seat of government, in the State Capitol, at the hour of twelve o'clock noon, on the 24th day of March, 1924, and I specify the purposes for which the General Assembly is convened to be as follows, to-wit:

"1. To enact a law imposing a tax on net incomes for the calendar year 1924, and each year thereafter, of individuals and corporations resident in this State or having a business or agency herein.

"2. To take such action as is deemed proper in regards the collection of the tax imposed by act 345 of 1923, the gross income tax law.

"3. To amend the severance tax act 118 of 1923 with reference to the tax on bauxite.

"4. To make all appropriations necessary for the expenses of this session and to carry out the purposes and provisions of any laws enacted thereat."

Our decision in the case of *Jones* v. *State,* 154 Ark. 288, is of much force in the present controversy, and is conclusive of some of the questions raised. In the first place, it was decided there that the constitutional provision now under consideration is mandatory, and that a statute enacted at an extraordinary session, not in conformity with the requirements of this provision, is void. It was also decided that the question whether or not a statute enacted at an extraordinary session falls within the purposes specified by the Governor is a judicial one, to be determined by the court ascertaining the validity or invalidity of the statute. Authorities supporting that view of the law were cited in the opinion. The rule announced in that case is that the lawmakers, when convened in extraordinary session, "may act freely within the call; may legislate upon all or any of the subjects specified, or upon any part of a subject; and every presumption will be made in favor of the regularity of its action," but that, when it appears to the court that the statute does not fall within the purposes specified, it is the duty of the court to declare the statute invalid. The statute under consideration in that case was declared invalid for the reason that it was not within the proclamation of the Governor. We feel constrained to add our approval to the statement of the law made in the dissenting opinion in that case, that the provision of the Constitution in question merely requires the Governor

"to confine legislation to particular subjects, and not to restrict the details springing out of the subjects enumerated in the call." In other words, the Governor must determine whether or not an emergency exists for calling a session of the Legislature, and then must specify the purposes of the legislation thought to be necessary to relieve the emergency, and such legislation must be confined to the general purposes specified in the proclamation. Much latitude is allowed for the specification by the Governor in his proclamation, but the purposes of legislation must be definitely specified, either broadly or in detail. That responsibility cannot be avoided by the executive, for the Legislature cannot be called together without a specification of the purposes of legislation to be considered.

Now, in the proclamation before us for consideration, the Governor merely specified the enactment of "a law imposing a tax on net incomes." It is thus seen that the scope of the legislation is the enactment of "a law imposing a tax on net incomes," and the passage of a law of a wholly different character does not fall within that specification. It is too obvious for controversy that an excise tax on the sales of merchandise of any kind is not "a tax on net incomes." Such a law has none of the elements of an income tax, and, on the contrary, the mere statement of the two characters of statutes shows their dissimilarity. A sales tax is the antithesis of an income tax, for the former may be, and generally is, added to the price and thus passed on to the purchaser, whilst the latter must be paid by the one who earns the income, and it cannot be passed on to another. If it were merely stated in the call, as one of the purposes of the session, that a law should be passed raising additional revenue for a given purpose, then the Legislature could adopt its own method in prescribing by statute the kind of tax to be adopted. But, in the present case, there is no designation of the ultimate purpose for which the tax is to be levied, and the sole guide in determining the purpose of the legislation is that it shall be an income tax—

there are no other words of definition found in the call. Therefore we are concluded, we think, in determining the validity of the statute, by the fact that the Governor called the session for the purpose of passing an income tax law, and that this law does not fall within that class.

It is contended, however, that, while the proclamation does not mention the purposes to which the revenue to be raised must be devoted, we can look to the "history of the times" to ascertain that the purpose was to raise additional revenue for school purposes; that certain public acts and declarations made by the Governor, in public addresses and newspaper interviews, mass meetings held, and the appointment of committees, show that there was a great public campaign made for the purpose of raising money for educational purposes, and that we can take notice of the fact that this movement prompted the Governor to call the extraordinary session of the Legislature, and that, when we thus view the situation, we should determine that the ultimate purpose of the tax was that it was to be used for school purposes. The Governor specified, presumably, all that was in his mind at the time he issued the proclamation, and we are not at liberty to go back of that call to determine what the purpose of the taxation was intended for. The call was to pass an income tax law, and the passage of such a law, regardless of the appropriation made of the revenues thus raised, would have been within the call, but any other kind of tax, regardless of the appropriation to any given use, was not within the call. The mental attitude of the Governor as to his intention, not expressed in the proclamation, does not supply the specifications required by the Constitution.

It is also argued that the fact that the Governor, in two other sections of the proclamation, referred to other statutes which we judicially know were statutes raising revenue for school purposes, is sufficient to constitute the proclamation a designation of the raising of revenue for school purposes to be the design of the call. We cannot agree to that view, for the second section of the

Governor's call merely designated legislation "in regards the collection of the tax imposed by act 345 of 1923, the gross income tax law;" and the third section merely related to an amendment to the severance tax law with reference to the tax on bauxite. These are references to particular statutes which relate to the raising of revenue for school purposes, and the only effect of these two specifications is to authorize the amendment or repeal of the gross income tax law, and the amendment of the law taxing bauxite. Neither of these sections call for the enactment of a sales tax for school purposes or for any other purpose. Our conclusion is therefore that the statute under consideration does not come within the specifications of the Governor's call.

Counsel for the State, in defending the validity of the statute, do not rely on any other ground except that the statute comes within the specifications of the Governor's call, but there are other questions which necessarily raise themselves and call for a decision in determining whether or not this statute was legally enacted.

It appears from the record in this case that the Governor issued a supplemental call—and we take notice of it, even without it being in the record—during the extraordinary session, and that this supplemental call specified the passage of "a kind of a revenue law" for school purposes. The bill for the enactment of this statute was introduced in the Senate on March 28, 1924, and finally passed the Senate on March 31, and was then sent to the House of Representatives. It was read the first time in the House on April 2, and was read the third time and passed on April 3. The proclamation of the Governor was made on April 2, after the bill had passed the Senate and was pending in the House. We deem it unnecessary to discuss the question whether or not the passage of the bill in the Senate, prior to the supplemental call authorizing the passage of such a bill, would render it invalid, for we are of the opinion that the Governor had no authority at that time to issue such a proclamation. The only authority of the Governor found in

the language of the Constitution is that he may, by proclamation, "convene the General Assembly," and that "he shall specify in his proclamation the purpose for which they are convened." This is the scope and extent of his power, and he has no further control over legislation except to approve or disapprove the bills finally passed by both houses.

The question whether the Governor may, before the meeting of the session, amend his call, is not presented in the present controversy, and we expressly refrain from passing upon that question, but we do hold that, after the session has begun, pursuant to the call of the executive, the power of the executive over that particular session has been exhausted. He may call another session, but he has no authority to interfere with the proceedings of the session then progressing by directing the further course of legislation. When the session begins, the lawmakers themselves are, under the Constitution, in complete control of the situation, subject, of course, to the prescribed restrictions that "no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days." The Legislature in extraordinary session determines for itself the extent to which it will enact legislation specified in the call, and, when that is determined, the Legislature may extend the session and take up other legislation.

Under the Constitution there is no other way for the General Assembly to consider and transact business outside of the specifications of the Governor's call, except by providing by a two-thirds vote for an extension of the session after the completion of the business specified in the proclamation. In the Constitutions of Mississippi, Missouri, Montana, Oklahoma, Nevada and Utah, and perhaps in some of the other States of the Union, there is an express provision authorizing the Governor, during an extraordinary session, to specify, from time to time,

additional matters to be considered, and in those States, of course, it is the practice to exercise that authority, and legislation enacted pursuant to it has been upheld. But it will be noted that our Constitution contains no such provision; on the contrary, it limits the authority, as we have already seen, to a proclamation convening the session and specifying the purposes for which the session is convened. If the Governor could, by repeated or supplemental specifications during the session, prolong it indefinitely, he could thereby deprive the Legislature of its constitutional power of remaining in session for general legislation. It seems clear to us that it was not the intention of the framers of the Constitution to confer any such power on the Governor. The language used does not justify it, but, on the contrary, it is against any such view. The Constitution prescribes an orderly method for calling into existence an extraordinary session, distributing the powers between the Governor and the Legislature, and neither can encroach upon the powers of the other.

The further question arises whether we should indulge the presumption that the Legislature extended the session for the purpose of taking up other legislation, or that the passage of this bill was tantamount to an extension of the session for that purpose. The first answer to this suggestion is that we take judicial notice of the contents of the records of the General Assembly, and we know that there was no formal extension of the session, therefore no presumption can be indulged in that respect. The enactment of this bill cannot be treated as tantamount to an extension of the session for the purpose of its enactment. This is so for more than one reason. The Constitution requires that an extension must be "by a vote of two-thirds of all members elected to both houses, entered upon their journals." This bill received two-thirds of the vote in the House, but did not receive two-thirds of the vote in the Senate. Moreover, it is clear to us that the mere enactment of a bill not within the call, even by a two-thirds vote, is not tanta-

mount to an extension of the session for the purpose of passing the bill. The language of the Constitution is clear and unmistakable. It means that, when the business within the call is completed, then there may be an extension of the session, otherwise the session comes to an end by operation of the force of the constitutional provision. The Legislature must, of course, determine for itself when it has concluded the consideration of business mentioned in the call. It may do so by either passing or rejecting the bills providing for legislation within the call, or it may determine, by formal resolution, that it has completed its consideration of the business embraced in the call, and then determine whether or not there shall be an extension of the session for other business, and this must be done by a two-thirds vote. In this instance there is nothing on the journal of the House to show that, after the completion of the business in the call, there was an extension of the session.

In the Jones case, *supra,* we said:

"Inasmuch as the session of the General Assembly was not extended by the vote of two houses after the completion of the business embraced in the Governor's call, the act under review must fall as having been passed without constitutional authority, unless authorization for its enactment is found in the Governor's proclamation."

The Constitution was intended to mark a clear and definite line between the business embraced in the call and the consideration of other business. There is a positive command that no other business shall be taken up until that has been disposed of, and then there may be an extension of the session, if, by a vote of two-thirds of all the members elected to both houses, and entered on the journals, such an extension shall be decided upon. In no other way can the Legislature take up further legislation.

Our conclusion therefore is that, in no view of the matter, has this piece of legislation been legally enacted, and the chancery court was correct in so deciding.

The decree is affirmed.

DISSENTING OPINION.

HART, J. In *Jones* v. *State,* 154 Ark. 288, it was held that a constitutional provision that an extra session of the Legislature shall have no power to act upon subjects other than those specially designated in the proclamation by which the session is called is mandatory, and that a statute passed at such session upon a subject not thus specially designated is unconstitutional.

Judge HUMPHREYS and myself have no quarrel with the declarations of law laid down in this opinion, but we believe that a review of the cases cited by the text-writers quoted from in that opinion shows that the court has narrowed the rule there announced in applying it to the facts in the case at bar. In that case this court was construing art. 6, § 19, of the Constitution, which provides that the Governor may, by proclamation, call a special session of the General Assembly, and that he shall specify in his proclamation the purpose for which they are convened, and that no business other than that set forth therein shall be transacted until the same shall have been disposed of. In construing the section the court held that judicial notice will be taken of legislative records.

It is also a cardinal principle of constitutional construction that the Constitution must be considered as a whole, and, to get at the meaning of any part of it, we must read it in the light of other provisions relating to the same subject. *Little Rock* v. *North Little Rock,* 72 Ark. 195.

Article 6, § 8, provides that the Governor shall give to the General Assembly from time to time information by message concerning the condition and government of the State, and recommend for their consideration such measures as he may deem expedient. This section of the Constitution makes the Governor's message a public document, and it becomes part of the journals of the Legislature. It is as much a part of the legislative records as the Governor's proclamation calling the Legislature in extra session.

This court has expressly held that the proclamation of the Governor calling an extraordinary session of the General Assembly is a record of which the courts take judicial notice. *Booe* v. *Road Improvement Dist. No. 4 of Prairie County,* 141 Ark. 140, and *Jones* v. *State,* 154 Ark. 278.

Other courts have held, under a constitutional provision confining such legislation to business specially named in the proclamation, that the message may be looked to to determine the construction put by the Governor on the scope of the proclamation. *Parsons* v. *People* (Col.), 76 Pac. 666, and cases cited, and *State* v. *Rawlings,* 232 Mo. 544, 134 S. W. 530.

The substance of the Governor's proclamation in the case at bar is as follows:

"1. To enact a law imposing a tax on net incomes for the calendar year 1924, and each year thereafter, of individuals and corporations resident in this State or having a business or agency therein.

"2. To take such action as is deemed proper in regard to collection of the tax imposed by act 345 of 1923, the gross income tax law.

"3. To amend the severance tax act 118 of 1923, with reference to the tax on bauxite.

"4. To make all appropriations necessary for the expenses of this session and to carry out the purposes and provisions of any laws enacted thereat."

In this connection we copy from the Governor's special message which was delivered upon the convening of the Legislature in special session. The first sentence is as follows:

"The financial distress of the public schools of the State has impelled me to convene you for the purpose of considering and passing laws for relief."

We copy other portions of his message as follows:

"The people have voted all the tax they could. The directors, desiring to keep the schools open as long as possible, have borrowed all the money they could. Some of you may be surprised to know that the school districts

of this State now have outstanding bonds aggregating $9,000,000 for buildings, many of which are now inadequate. And, in addition, have a floating indebtedness of $2,000,000 for current expenses. Schools cannot run long on a credit. They should never be run on a credit. Some of them have reached the limit of their credit and have closed their schools; others will have to close for want of funds. Some are shortening the term, some are supplementing the public funds with private donations, and some are charging tuition, and the boys and girls of poor parentage who cannot pay for their tuition must quit school. And this in a State whose Constitution requires that the State shall ever maintain an efficient system of free schools for all her children."

The Governor concludes the message with the plea that every child shall have an equal chance for a common-school education. The message is too long to insert herein, but it contains no subject whatever except a plea to pass a bill to raise revenue for the support of the common schools.

Now we do not think that a special message can contradict or vary the subject or subjects enumerated in the Governor's call, but it can be used in connection with the proclamation and as explanatory of it to ascertain the purpose of the call.

The proclamation advises the Legislature to take such action as is deemed proper in regard to the collection of the tax imposed by act 345 of 1923. This was an income tax act passed for the sole purpose of raising revenue for the public schools of the State. The severance tax act of 1923 referred to in the proclamation provides that the proceeds derived from it shall be wholly dedicated to the common schools of the State.

Thus we see that the special message, instead of attempting to vary or add to the subject embraced in the proclamation, strictly confines it within the limits of the subject or the purpose mentioned in the proclamation. While the Governor has the power under the Constitution to limit the subjects which the Legislature may con-

sider at a special session, and, in order to do this, he may define the subjects according to his conception of his public duty, still he cannot, under the guise of a definition, impose his will upon the Legislature as to the specific law it shall pass with reference to the particular subject or subjects embraced within the call. In this connection it may be stated that the Governor did not attempt to do this, as is clearly shown by the fact that he signed the bill which the Legislature passed.

The equality of the executive, legislative and judicial departments is recognized throughout our Constitution, and the supremacy of each department in its appropriate sphere is a cardinal principal thereof. It has been well said that, in this matter, "truth lies between the extremes, and the middle of the road is the path of safety." *In re* Governor's Proclamation (Col.), 35 Pac. 530.

It is also a well settled principle of constitutional law that no tax can be levied except for raising revenue for a public use. The right to tax therefore depends upon the ultimate use or purpose for which the money is to be raised. It follows that the use or purpose for which revenue is raised by taxation is so intimately connected with the object thereof that they necessarily constitute one subject or purpose.

When the proclamation, together with the legislative acts referred to in it and the special message, are considered and read together, the mind is forcibly and clearly impressed with the idea that the financial distress of the common schools of the State was the purpose of the Governor's calling the Legislature in extraordinary session, and that this subject was the one to be considered by it.

As a necessary incident to granting relief, of course it would be necessary to pass some kind of a bill for raising money. This, however, was only a means to an end. The raising of the money by taxation was ancillary to the main purpose, which was the relief of the common schools.

Our Constitution provides that the State shall ever maintain a general, suitable and efficient system of free schools, and, in the opinion of the Governor, this mandate of the Constitution could not be complied with unless he called the Legislature in extraordinary session for the purpose of passing a bill to raise additional revenue for their support and maintenance.

Under the principles of law laid down by the text-writers cited in *Jones* v. *State, supra,* "the Legislature may act freely within the call; may legislate upon all or any of the subjects specified, or upon any part of a subject; and every presumption will be made in favor of the regularity of its action."

The intention of the constitutional provision in question is to prevent the enactment of laws having no connection or relation to the purpose or subject embraced in the call. The particular kind of bill upon the subject embraced in the call is left to the discretion of the Legislature, subject to the right of the Governor's veto, as provided in other sections of the Constitution.

While the courts, in determining this question, will inquire whether the legislative act passed at a special session was within the Governor's call, in doing so they must give a liberal construction with a view of upholding the act if it can be reasonably done. In this way, and in this way alone, can the supremacy of the three departments of the State be preserved.

The Governor, in his proclamation and message, called the attention of the Legislature to the purpose for which they were convened and the subject upon which, in his opinion, there was an immediate necessity for legislation, and that subject was school taxation. He could not restrict the Legislature to any particular bill for the purpose. It was for the Legislature to determine what the legislation should be. It passed a bill for the purpose of raising money for the common schools. This act the Governor approved, thus deciding for himself that it was embraced in the subject mentioned in his proclamation. The bill passed was germane to the subject men-

tioned in his call, and we think that the court should have so held.

In short, the purpose of calling the Legislature in extra session was to secure additional revenue for the common schools, and this was the subject upon which the legislation was sought. The particular kind of revenue bill was ancillary or incidental to the subject, and was merely a means to accomplish the end desired; and the Legislature was supreme in this field. It could not, however, have taken up other subjects, such as revenue bills for the relief of road districts, drainage districts, levee districts, and the like, until it had disposed of the subject in hand: additional revenue for the relief of the common schools. Therefore we respectfully dissent.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. MARTIN.

Opinion delivered June 16, 1924.

1. COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—APPLICATION OF LOCAL ACTS.—In an action under the Federal Employers' Liability Act, local statutes imposing duties and liabilities are not applicable.
2. MASTER AND SERVANT—RULE AS TO SWITCHING OF CARS.—In an action for death of a railroad yard clerk crushed between cars by reason of negligence in kicking a car on a yard track without manning it, a bulletin issued by the yardmaster to engine foremen directing that helpers ride cars cut off into the yard tracks *held* a general rule, though it referred to the prevailing evil of subjecting merchandise cars to rough handling.
3. MASTER AND SERVANT—ABROGATION OF RULE A JURY QUESTION.—Whether a rule as to manning cars kicked into the yard tracks had been habitually disregarded and therefore abrogated *held* a question for the jury.
4. MASTER AND SERVANT—ASSUMED RISK—JURY QUESTION.—Whether a yard clerk, by walking through the yards, assumed the risk of nonobservance of a rule as to manning of cars kicked into yard tracks *held* for the jury, in view of the conflict of evidence on the subject.
5. MASTER AND SERVANT—ASSUMED RISK—EXTRAORDINARY DANGER.—Where an employee is aware of the negligence of his employer

or of a fellow-servant, and appreciates the danger arising therefrom, he is deemed to assume the risk of such danger, but he is not bound to anticipate or exercise care to discover extraordinary dangers arising therefrom.

6. MASTER AND SERVANT—ASSUMED RISK.—While an employee assumes such extraordinary risks caused by the master's or fellow-servant's negligence as are obvious and fully known and appreciated by him, he does not assume extraordinary risks incident to his employment merely because he was familiar with the dangers and character of the work.

7. MASTER AND SERVANT—ABROGATION OF RULE.—Habitual violation of a rule promulgated by a master does not abrogate it, unless so open and long continued as to raise the presumption that the employer or those appointed by him to enforce it consented to the abrogation or knowingly acquiesced in it.

8. MASTER AND SERVANT—NEGLIGENT KILLING—EVIDENCE.—In an action for the death of a yard clerk, evidence *held* to sustain a finding for plaintiff on the issue of negligence in kicking cars down the yard tracks without manning them.

Appeal from Jefferson Circuit Court; *T. G. Parham,* Judge; affirmed.

J. R. Turney, A. H. Kiskaddon, and *W. T. Wooldridge,* for appellant.

Appellant's motion for a directed verdict should have been sustained. The decedent's fellow-employees owed him no duty, in switching the cars, to maintain a lookout for his safety, in the absence of a rule requiring it. An employee assumes the risk of injury arising from the nature of his employment, as well as from the particular methods and ways in which the work is carried on. 145 U. S. 418; 201 Fed. 54; 144 Fed. 56, 76 C. C. A. 214; 276 Fed. 187; 178 N. W. 887; 158 Fed. 92. In this case the dangers were not obscure but were perfectly obvious, and the case comes within the exception to the rule that the servant does not assume risks which are not apparent and of which he knows nothing. 191 U. S. 64, 48 L. ed. 96. The decedent had to look out for his own safety, as appears by the undisputed testimony to the effect that the switching crews operating in the yards paid no attention to yard clerks and gave them no warning as they passed through the yards in the performance

of their duties, and decedent well knew these facts. 179 Pac. 191. See also 121 N. E. 403; 118 Ark. 304; 95 Ark. 562, 164 S. W. 857. From the foregoing authorities it is submitted that as a matter of law there is no merit in the contention that the death of plaintiff's intestate was due to the negligence of his fellow-employees in kicking the car onto the track without having it accompanied by one of the switching crew. The bulletin introduced in evidence imposed no duty on the switching crew to maintain a lookout for decedent. Its obvious and only purpose was to protect freight in cars which was liable to be injured by severe impact, and the rule is limited to merchandise cars. 161 Mass. 125; 66 Iowa, 346. If it had originally been intended to require that cars kicked in on switch tracks be manned, and intended for the protection of yard employees, that purpose was subsequently abrogated by constant and open violation of the rule. 32 S. W. 799; 77 Ark. 405; 84 Ark. 377; 117 Ark. 504. Decedent, being aware of the continuous and universal violation of the bulletin, assumed the risk arising therefrom, even if it be granted that the bulletin imposed an absolute duty on the switching crew to man a car kicked in on a switch track. 233 U. S. 492; 245 U. S. 441; 254 U. S. 415; 271 Fed. 268; 160 Ark. 362; 161 Ark. 122.

Rowell & Alexander, for appellee.

The lookout statute applies to railroad yards as well as to other places, and is for the benefit of employees as well as others. 88 Ark. 204; 83 Ark. 61; 80 Ark. 528; 100 Ark. 476. It is far-fetched to say that the switchmen owed decedent no duty. The extraordinary danger to which decedent was exposed is shown, first, because the kicking in of the box-car at excessive speed, without a switchman in control, and without a switchman present on the car at the point where decedent went through, for the purpose of making the joint, was a violation of the bulletin introduced in evidence; and, second, because the car must have been kicked in at terrific speed, to cause four standing cars, when struck, to suddenly close a space of four or five feet and catch decedent therein, all of

which was a manifestation of negligence in all respects, and misled decedent. He had the right to assume that the switchman would conform to the requirements of the rule, and when he approached the track in question, a merchandise track, and saw no switchman on the car at the opening, he had the right to presume that there was no danger at that point. The risk arising from the violation of the bulletin was not assumed by decedent. 77 Ark. 367; 29 C. C. A. 374; 43 S. W. 510; 42 N. E. 112. And certainly he assumed no extraordinary risk such as was requested in instruction numbered 4 requested by appellant. 229 U. S. 119. Assumption of risk was an affirmative defense, and the burden of proof was on the defendant to show it, unless it was shown by plaintiff's testimony. 140 Ark. 155.

McCULLOCH, C. J. Appellee's intestate, R. C. Martin, while working in the service of appellant, was crushed between two freight cars in the Pine Bluff yards, and was fatally wounded. He lived about thirty-six hours after the injury, and suffered great pain. He left a widow and children, and this is an action against appellant, instituted by the administrator of the decedent's estate, to recover under the Federal Employers' Liability Act. It is conceded that the injury to decedent occurred while working for appellant in interstate commerce, and that, if liability on the part of appellant exists at all, it falls within the terms of the Federal statute.

Deceased was, according to the undisputed evidence, working in the yards as clerk, his duty being to check cars and to weigh them when called upon by the foreman of the switch crew to do so. The injury occurred shortly after ten o'clock on the night of October 10, 1922.

The yard office was situated north of the main line, toward the eastern end of the yard, and the track scales upon which cars were weighed were situated toward the western end of the yard and south of the tracks, which ran parallel with the main line. There were twelve of these tracks between the track scales and the main line.

The yard-clerk, when on duty, usually remained in the yard office until called or directed to do particular work. When a car was placed by the switch crew on the scales to be weighed, a signal call to the yard clerk would be given from the engine by blasts of the whistle, and it was the duty of the yard-clerk to proceed immediately to the scales to weigh the car. It was necessary for the yard-clerk to cross the intervening tracks between the yard office and the scales. Decedent Martin received his fatal injury while he was crossing track No. 7, proceeding on his way pursuant to a call from the yard office to the scales to weigh a car. There were four cars, coupled together, standing on track No. 7, and another single car within about four feet of the end of the string of four cars. As Martin passed along this space between the end of the single car and the end of the string of four cars, a car which had been "kicked" in on track No. 7 by the switch crew came violently in contact with the other end of the string of cars, and threw them against the single car, catching Martin between the two cars and crushing him. It was dark in the yards at the time, and Martin had a lantern on his arm. These facts are all undisputed, and it is also undisputed that the car "kicked" in on the track was not in charge of any one, but was rolling down the track at a rapid speed, without any one on it to control its movement.

None of the employees engaged in the switching operations saw Martin as he passed along the yard and entered the space between the cars, and the first that any of them knew of Martin's dangerous situation or injury was when his groans or exclamations were heard after the impact of the cars.

The sole charge of negligence involved in the case is the act of the switching crew in "kicking" the car by a "flying switch" into track No. 7 and causing it to roll down the track at a rapid speed, without being manned by some one to control its movement.

In submitting to the jury the issue of negligence there was no cognizance taken of the "lookout" statutes of the State, which apply to the operation of switching

cars in railroad yards (*St. L. I. M. & S. Ry. Co.* v. *Puckett,* 88 Ark. 204), no mention was made in the instructions of the court as to any statutory duty in that respect of the railway company. The action being based on the Federal statute, *supra,* local statutes imposing duties and liabilities are not applicable. *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492; *St. L. I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520.

It is earnestly insisted that the evidence is not sufficient to sustain the charge of negligence, in that, according to the method in vogue of switching cars in the yards at Pine Bluff, there was no duty resting upon the switching crew to man the freight cars "kicked" in on the various tracks, and therefore no negligence in failing to observe that precaution.

It is also contended that the deceased was fully aware of the custom with respect to "kicking" the cars onto sidetracks without manning them, and that he assumed the risk, should be held as a matter of law to have assumed the risk.

It was proved at the trial that, nearly two years before the date of the injury of Martin, the yardmaster issued a bulletin, directed to engine foremen, which prescribed a rule of conduct in switching cars. The bulletin was dated January 17, 1921, and read as follows:

"To all Engine Foremen: Repeated attention has been called to engine foremen as to the rough handling of equipment in Pine Bluff yard. Do not see where you are in any way making any headway, as we are continually receiving complaints account concealed damage in merchandise cars, etc., on cars originating here in Pine Bluff and on cars passing through Pine Bluff yard, which are switched in breaking up trains. Effective this date, instruct your engine foremen that the helpers 'go high' on these cars that are cut off, and ride them into tracks. We have got to put an end to this rough handling of equipment in Pine Bluff yards. Acknowledge receipt and understanding of these instructions, and issue instructions to all your switch engine foremen, and secure their acknowledgments, as I am personally going to check these

foremen up to see that these instructions are complied with. Acknowledge receipt with return of this letter.

"Yours truly,

"CC: Mr. A. Holmes. (Signed) W. D. BADGETT."

The contention of appellant's counsel is that this bulletin did not attempt to establish a general rule with reference to the conduct of the switchmen in "kicking" in cars, but merely referred to the protection of merchandise cars. We cannot agree with counsel in this contention. It is true that the bulletin makes reference to the prevailing evil of subjecting merchandise cars to rough handling, but it states unequivocally a direction that helpers must "go high" on the cars "that are cut off, and ride them into tracks." This rule is fairly susceptible only to the interpretation that the cars that are cut off and "kicked" onto the tracks must be manned by men riding them into the tracks.

It is next insisted that this bulletin, or rule, was wholly and habitually disregarded to the extent that it was abrogated, and that this is shown by uncontradicted evidence. It must be conceded that there is much evidence of strong probative force tending to show that this rule was totally disregarded and was thereby abrogated, but it cannot be said that this testimony was uncontradicted, and we find evidence in the record which justifies the conclusion that it was always regarded as the duty of switchmen to accompany the cars to the place where they were to be "jointed up," or, at least, to have men on duty to see "that the cars go in the clear and that the couplings are kept open so that the joints will be made right, and to watch and see that the cars don't run back, and to watch out for any other object that might be across the track or any obstruction on the track, or for any carman that might be working on the cars, and to look out for any danger signals." The court did not err therefore in refusing to take this question from the jury.

The same may be said with respect to the contention that the undisputed evidence shows that the risk was assumed. If the rule was not abrogated, as some of the

evidence tended to show, then it cannot be said as a matter of law that Martin, the yard-clerk, by walking through the yards assumed the risk of the danger created by the nonobservance of the rule by the switchmen. If the rule had not been abrogated, Martin had the right to assume that it would not be disobeyed, and he did not assume the risk of possible dangers arising from disobedience of the rule.

Other assignments of error are predicated upon the objections made to the court's charge to the jury. The court gave, over appellant's objection, instruction No. 5, which reads as follows:

"You are instructed that it is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

We are of the opinion that this instruction is correct. An employee is not bound to anticipate or to exercise care to discover "extraordinary dangers that may arise from the negligence of the employer or those for whose conduct the employer is responsible." If the employee is aware of the negligent act of his employer or a fellow-servant, and appreciates the danger arising therefrom, he is deemed to assume the risk of such danger by proceeding, but, as before stated, an employee is not bound to anticipate extraordinary dangers arising from the negligence of his employer or a fellow-servant.

Appellant requested the court to give instruction No. 4, and the court modified it by striking out the word "extraordinary" where it appears and inserting the word "ordinary." The instruction as requested reads as follows:

"If you find from the evidence that the said Martin had been working for defendant company, in its yards

at Pine Bluff, for a number of years, and that he was familiar with the dangers and character of his work in the yards, and the manner and custom of the switching of the cars and the making up of the trains therein, and if you further find that he made no objections to the manner and danger of his work and the manner and danger of the switching and handling of the cars by the switching crews, to his superior or superiors, and continued in the performance of his work and duties, then you are instructed that he assumed, by virtue of his employment, the extraordinary risks incident to his employment. So, if you find from the evidence that the said Martin was injured by the extraordinary risks of his employment, then plaintiff cannot recover, and you will so find."

This modification was, we think, correct, for it would have been erroneous to tell the jury that, because the injured employee was familiar with the dangers and character of his work in the yards he assumed, by virtue of his employment, extraordinary risks incident thereto. It is true, as we have already said, that, where an employee is aware of the negligence of his employer or fellow-servant, and appreciates the danger, he assumes the risk, even though it is an extraordinary danger created by negligence. But this instruction goes farther than that and tells the jury that, merely because the employee was familiar with the danger and character of his work, he would assume the extraordinary risk incident to his employment. This instruction entirely ignored the fact, which could have been and doubtless was found by the jury, that there was a prevailing rule requiring the switchmen to man the cars so as to control them, or to provide other means for that purpose, and, under those circumstances, an extra hazard created by the negligence of the switchmen in failing to comply with that rule would not be assumed by another employee, who had not become aware of the danger before his injury. Counsel invoke the well-established rule of law that the servant does assume the extraordinary risks caused by the mas-

ter's negligence or negligence of a fellow-servant which is obvious and fully known and appreciated by the servant, but the trouble with this instruction now under consideration is that it misapplies that principle and brings the injured servant within the application of the doctrine of assumed risk, even where he is injured by reason of the negligence of a fellow-servant without knowledge or appreciation of the danger.

Finally, it is insisted that the court erred in refusing to give appellant's requested instruction submitting the question of abrogation of the rule established by the bulletin put in evidence, and in failing to give any other correct instruction on that subject. The instruction requested by appellant reads as follows:

"7. You are instructed that, if you find from the evidence that the bulletin introduced in evidence in this case, signed by Badgett, was not in force after the witness Tucker became yardmaster, and that said bulletin was habitually violated, then such bulletin was abrogated, and would not be in force after such habitual violation or failure to enforce the same."

The court correctly refused to give this instruction, for the reason that it was too vague, and failed to give a correct rule for determining whether or not the rule had been abrogated. Habitual violation of a rule does not constitute an abrogation unless it is done so openly and continues for a long enough period to raise the presumption that the employer, or those appointed by him to enforce the rule, consented to the abrogation, or knowingly acquiesced in it. *St. L. I. M. & S. Ry. Co.* v. *Caraway,* 77 Ark. 405; *St. L. I. M. & So. Ry. Co.* v. *Dupree,* 84 Ark. 377; *St. L. I. M. & So. Ry. Co.* v. *Blaylock,* 117 Ark. 504.

We do not discover any error in the proceeding, and, as the verdict is supported by legally sufficient evidence, the judgment is affirmed.

Note: Petition for certiorari in the above case was denied by the Supreme Court of the United States. (Reporter).

FIRST NATIONAL BANK v. TISDIAL.

Opinion delivered June 16, 1924.

MORTGAGES—INDEBTEDNESS SECURED.—Under a mortgage to a bank which described the mortgagor's note to the bank and the mortgagor's note to a third person held by the bank as collateral security for such third person's indebtedness to it, referring to both notes as an indebtedness of the mortgagor to the bank, and reciting that the mortgage was given to secure such debt, *held*, where the third person paid his indebtedness to the bank and took up the collateral note, he was not entitled to share in the proceeds of a subsequent foreclosure sale, since the collateral note was not a debt due the bank at the time of foreclosure.

Appeal from Clay Chancery Court, Western District; *Archer Wheatley*, Chancellor; reversed.

F. G. Taylor, for appellant.

Oliver & Oliver, for appellee.

SMITH, J. William Reno was indebted both to the First National Bank of Corning and to F. M. Tisdial, and Tisdial was himself indebted to the bank, and he had indorsed Reno's note to himself to the bank as collateral to his own note. These notes of Reno were not paid at maturity, and both were renewed, but, before the renewal, Tisdial had agreed to sell to the bank the Reno note to himself. This sale was referred to as being conditional, and it was never consummated.

On March 2, 1920, the cashier of the bank prepared a mortgage conveying an eighty-acre tract of land from Reno to itself, the mortgage reciting a conveyance to the First National Bank, and unto its successors and assigns, forever. Reno's wife joined in the execution of the mortgage, and released to the bank all her rights of dower and homestead.

The mortgage recited the condition that, "whereas, William Reno and Minnie Reno are justly indebted unto the First National Bank of Corning in the sum of $2,364.42, evidenced by one promissory note dated February 5, 1920, for $1,961.52, due August 5, 1920, with ten per cent. interest from due; one note for $402.90,

made to F. M. Tisdial, and assigned by Tisdial to the First National Bank, dated March 2, 1920, and due December 2, 1920, with ten per cent. interest from date until paid."

A power of sale was granted, and it was provided that the proceeds of the sale should be applied, first, to the costs of the sale; second, "to the payment of said debt and interest," and the remainder, if any, to be paid to the grantor.

Tisdial paid his note to the bank, and, upon doing so, demanded and received from the bank the note to himself from Reno.

When the note from Reno to the bank matured it was not paid, and Reno executed to the bank a new mortgage, conveying the same land to secure the sum then due the bank, which included additional advances which had been made to Reno, and Reno also executed to the bank a chattel mortgage.

The indebtedness secured by this second mortgage was not paid at its maturity, and a suit was brought to foreclose it. The bank also foreclosed the chattel mortgage, and realized $798 from the sale of the personal property.

Tisdial lived just across the State line, in Missouri, but Corning was his trading point, and service was had against him by publication, and it was alleged in the complaint that "the defendant, Tisdial, claims a lien on said land by virtue of a mortgage, which this plaintiff states has been discharged." Tisdial filed no answer, and the decree of foreclosure recited that "defendant F. M. Tisdial, who claims a lien on said land, may intervene and file his claim for the same."

A commissioner was appointed to sell the land, and, at the sale made by him, the bank became the purchaser. In the meantime Reno had died, and Tisdial had entered into possession of the land under an agreement with Reno's widow, and had cultivated sixteen acres of the land in cotton.

At the term of the court at which the commissioner's report of sale came on for confirmation, Tisdial filed an intervention, in which he prayed that the decree of sale be set aside and that the mortgage dated March 2, 1920, be foreclosed, and that, out of the proceeds of the sale, the two notes there described be paid ratably. Testimony was taken on the issues there joined, and it was in this proceeding that the court found the rental value of the land, and rendered judgment therefor against Tisdial.

The court denied Tisdial the relief prayed, and confirmed the sale to the bank. The court also found that the rental value of the land during Tisdial's occupancy was $100, and charged this into the account which was stated.

The bank insists that the testimony shows that the rental value of the land was greater than that fixed by the court; but, without reviewing the testimony on this issue, we announce our conclusion that the court's finding on this question does not appear to be clearly against the preponderance of the evidence.

The bank was charged with the proceeds derived from the sale of the property sold under the chattel mortgage, and the court directed that the sum bid by the bank for the land, less the costs of the sale, be pro-rated between the bank and Tisdial in proportion to the amounts of the respective notes, and the bank has appealed from this decree.

The cashier of the bank testified that the mortgage on the land was taken for the sole purpose of securing the indebtedness due it, and that it was so prepared to secure any indebtedness due the bank at the time of the foreclosure, and that the note owned by Tisdial was included in the mortgage on the assumption that the bank had, in effect, acquired the title to the note, and was, or would be before its maturity, the owner thereof.

Tisdial testified that the mortgage was taken, not for the purpose alone of securing the indebtedness that might be due the bank at the time of the foreclosure, but

to secure also the note to his order executed by Reno and described in the mortgage.

We have concluded that the bank is correct in its contention, and that Tisdial is not entitled to a *pro rata* distribution of the proceeds of the commissioner's sale. The mortgage was to the bank alone, and we find no recitals in it which appear to contemplate that the bank was assuming the relation of trustee for Tisdial's benefit. There are no recitals which provide that Tisdial shall share in the proceeds of the sale. Tisdial was not made a grantee in the mortgage, and the conveyance was to the bank alone. The sum total of the notes is given, and it is referred to as a single indebtedness and as being owned by the bank. It is also recited that "this mortgage is also given to secure said bank for any and all other notes, or forms of indebtedness of whatsoever kind, that said bank may hold against the said William Reno, or any renewals or parts of renewals of the notes mentioned herein or held by said bank prior to foreclosure of this mortgage."

The Reno note to Tisdial was withdrawn from the possession of the bank at the time Tisdial paid his own note to the bank, and that note was not therefore a part of the indebtedness due the bank at the time of the foreclosure.

And if it be true—and we think it is—that the mortgage was intended to secure only the balance due the bank at the time of foreclosure, the Reno note to Tisdial was not secured by the mortgage, although it is described in it, because it ceased to be a part of the indebtedness due the bank when it was withdrawn from the bank's possession.

The court should not therefore have decreed that Tisdial be allowed to participate in the distribution of the proceeds of the commissioner's sale, and the decree to that effect is reversed, and the cause will be remanded with directions to the court to enter a decree in accordance with this opinion. It is so ordered.

MILLER COUNTY BANK & TRUST COMPANY v. BEASLEY.

Opinion delivered June 16, 1924.

1. APPEAL AND ERROR—APPEAL FROM DIRECTED VERDICT.—On review of a verdict directed for plaintiff, the evidence must be viewed in the light most favorable to defendant.
2. BANKS AND BANKING—NOTICE OF LANDLORD'S LIEN.—Where a bank knew of a tenancy at the time a subtenant deposited funds from the sale of a crop to the credit of the tenant, which the bank afterwards applied to the tenant's debt, it was charged with notice that the landlord, under Crawford & Moses' Dig., §§ 6892 and 6894, had a lien thereon for rent.
3. EVIDENCE—KNOWLEDGE OF LAW.—A bank receiving a deposit from a subtenant and afterwards applying it on the tenant's debt to it is conclusively presumed to have knowledge of the statute giving the landlord a lien on the subtenant's crop for rent.
4. BANKS AND BANKING—NOTICE TO PRESIDENT.—A bank is charged with notice of facts known to its president, and also with such facts as would have been known by the inquiry which the president should have made, in view of the facts of which he was advised.

Appeal from Miller Circuit Court; *J. H. McCollum*, Judge; affirmed.

William H. Arnold, Jr., for appellant.

The money was Austin's, and the bank had the right to make the credit. The law of the case is well stated in 7 Corpus Juris, p. 658. See also 36 App. Div. 487, 55 N. Y. S. 941; 69 Ark. 47. Even if the money was Beasley's, yet he did not notify the bank that it was his money, or that Austin held it as his agent, or in trust. As to the relation between the lessor and sublessee, reference is made to 24 Cyc. 1183, and cases cited in note thereto; *Id.* 1176; 43 S. W. (Tex.) 556. The lower court erred in holding that C. & M. Digest, § 6892, changed the common-law rule that there is no privity of contract or estate between a landlord and a subtenant. That statute was only intended to limit the rights of the landlord. It does not mean that the subtenant is liable directly to the landlord,

and was not passed for the landlord's benefit, but to limit the extent of his lien. See also C. & M. Digest, § 6895.

Gustavus G. Pope, for appellee.

There is no dispute as to the money involved being the proceeds of rent cotton on lands rented to Willis Austin, and the crop raised by Ed. Johnson. The bank was duly notified when it was deposited, and Beasley informed the president of the bank that it belonged to him for rents before the note of Austin was due. C. & M. Dig., §§ 6880, 6894. It is immaterial whether Austin subrented to Johnson or not, or whether he acted as Beasley's agent. He had no authority to collect the rent either way. A landlord's lien is superior to any other lien, and, even if the Austin note had matured, and if the bank had a right to claim a lien, still it would have been inferior to the landlord's lien. 151 Ark. 405; *Id.* 145. Beasley as landlord had the right to the proceeds of the rent cotton deposited in the banks, identified as this was. 165 Pac. 682; 222 S. W. 859.

SMITH, J. C. A. Beasley owned a small farm which he rented to W. A. Austin for the year 1922. Austin subrented a portion thereof to Ed Johnson for a fourth of the cotton. Johnson raised two bales of cotton, one-fourth of the proceeds of which amounted to $57.83, and this amount he deposited with the appellant bank to the credit of Austin, who delivered the certificate of deposit to Beasley in the early fall. On January 4, 1923, Austin gave Beasley a check on the bank for the amount of the deposit, but the bank refused payment upon the ground that it had credited the amount of the deposit to a past-due note of Austin payable to the bank.

At the conclusion of all the testimony the court instructed the jury that Beasley was entitled to one-fourth of the proceeds of the cotton, and that the bank had no right to credit this amount to Austin's note to it, and to return a verdict for Beasley for the amount

thereof—this suit having been brought to recover this money.

The jury returned a verdict in accordance with this instruction, and from the judgment pronounced thereon is this appeal.

The testimony on behalf of Beasley was to the effect that, about the time the money was deposited, and before it was applied to Austin's note, Beasley notified Booker, the president of the bank, that the deposit was a part of the proceeds of the sale of Johnson's cotton, on which he had a landlord's lien; but, inasmuch as the verdict was directed against the bank, we must, of course, view the testimony in the light most favorable to it.

Mr. Booker denied that Beasley had told him about Johnson, but he admitted that he knew Austin was himself a tenant, and that he had a subtenant, and that Austin had stated to him that he would have some rent due from his tenant, and Austin agreed to apply this rent to his debt to the bank.

Johnson, the subtenant, was a colored man, and Booker admitted that, before Johnson paid his rent, Austin had told him "this darkey would be in to put some money there—rent he owed him."

We think it clearly appears from Booker's admissions that he knew, before the deposit was credited, that Austin was a tenant and that Beasley was his landlord, and that the deposit would be made by a subtenant. Being in possession of these facts, the bank was charged with notice that Beasley had a lien on the crop of the subtenant for the *pro rata* part of the rent due on the subtenant's land.

It is pointed out that at the common law there was no privity between the landlord and a subtenant. But this rule has been changed by the statute. Section 6892, C. & M. Digest, provides that any person subrenting lands or tenements shall only be held responsible for the rent of such lands as are cultivated or occupied by him; and by § 6894, C. & M. Digest, it is made unlawful for a ten-

ant who has leased lands to a subtenant, and has not paid his own rent, to collect rent from the subtenant without having first obtained from the landlord a written direction, to be delivered to the subtenant, stating the amount of rent authorized to be collected from the subtenant. By § 6896, C. & M. Digest, it is made a misdemeanor, punishable by fine or imprisonment, or by both fine and imprisonment, for a tenant to collect rent from a subtenant without first paying his own rent or obtaining written permission from the landlord to collect from the subtenant. Section 384, chapter Landlord & Tenant, 16 R. C. L. 879; *Jacobson* v. *Atkins,* 103 Ark. 91; *Storthz* v. *Smith,* 109 Ark. 552; and notes to the cases of *Kanawha-Ganley Coal Co.* v. *Sharp,* Ann. Cas. 1916E, p. 386, and the same case annotated in 52 L. R. A. (N. S.) 977.

It was not necessary for Beasley to call the attention of the bank to these sections of the statute, because the bank is conclusively presumed to have had knowledge of them. The bank will also be charged, not only with the facts actually known by its president, but also with such facts as would have been known by the inquiry which the president should have made, in view of the facts of which he was advised. It was known to Booker that Austin was Beasley's tenant. He admits that Beasley so advised him. He knew that Austin's tenant proposed to deposit rent money to Austin's credit, and he knew that Austin had not paid his own rent, and, knowing this, he must have known—for the law so provides—that the lien of Beasley was superior to that of Austin against the crop grown by the subtenant to the extent of the *pro rata* part of the rent due on the land cultivated by the subtenant. Booker knew Austin had not paid his rent; he knew that the deposit was made by a tenant of Austin, and Johnson told him, when the deposit was made, what is was for, and he must therefore be charged with knowledge, as a matter of law, that the lien of Beasley was superior to that of Austin, and that Austin himself had no right to collect this rent without first paying his own.

Booker should have known that Austin's tenant was not voluntarily paying rent twice, and he actually knew that Austin had not paid Beasley, for he admitted that Beasley had so advised him, and this was done before the deposit was credited to Austin's note.

Under these circumstances the verdict was properly directed in Beasley's favor, and the judgment is therefore affirmed.

McCLAIN v. STATE.

Opinion delivered June 23, 1924.

1. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL.—Permission to withdraw a plea of guilty, previously entered, is a matter that rests in the sound discretion of the trial court, under Crawford & Moses' Dig., § 3076.
2. CRIMINAL LAW—EXERCISE OF DISCRETION—PRESUMPTION.—Where the court denied a petition to withdraw a plea of guilty, every presumption must be indulged in favor of the court's proper exercise of its discretion.

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

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

McCULLOCH, C. J. Appellant was indicted for felony, and entered a plea of guilty, which the court accepted and upon which the court entered judgment. The judgment entered recites that appellant appeared in person as well as by attorney, and waived arraignment, and entered a plea of guilty. After the entry of the judgment and on the same day appellant, through another attorney, filed his petition praying that the court set aside the judgment and permit him to withdraw his plea of guilty and to enter a plea of not guilty. In the petition it was alleged that appellant was not guilty of the charge against him, and that, in the absence of his attorney, he was "unduly influenced and persuaded to enter a plea of guilty." On a later day of the term the court heard the

petition and entered an order overruling it, from which order and judgment an appeal has been prosecuted to this court.

There was no motion for a new trial filed nor bill of exceptions taken in the case—nothing appears in the record save the papers on file and the record entries.

There is a statute (Crawford & Moses' Digest, § 3076) which provides that the court may, at any time before judgment, permit a plea of guilty to be withdrawn and a plea of not guilty substituted. It has often been held by this court that permission to withdraw a plea of guilty previously entered is a matter that rests in the sound discretion of the trial court. *Greene* v. *State,* 88 Ark. 290; *Joiner* v. *State,* 94 Ark. 198; *Duncan* v. *State,* 125 Ark. 4. There is no statute on the subject of withdrawal of pleas after rendition of judgment, but the court has the power to set aside its judgment at any time before the expiration of the term. There is nothing to show that the court abused its discretion, and we must indulge every presumption in favor of the court's proper exercise of its discretion.

Affirmed.

BANK OF MORRILTON v. SKIPPER, TUCKER & COMPANY.

Opinion delivered June 23, 1924.

1. GUARANTY—CONSTRUCTION OF CONTRACT.—It is the duty of the court to interpret a guaranty contract according to its language if clear and unambiguous.
2. GUARANTY—CONTRACT HELD TO BE ABSOLUTE.—A contract of guaranty of the payment of a debt *held* to be absolute, and liability of the grantor matured immediately upon the failure of the principal debtor to pay, so that it was not essential that, before suit may be commenced against the grantor, suit be begun against the principal debtor and the claim reduced to judgment.
3. GUARANTY—CONSTRUCTION OF CONTRACT.—A contract whereby defendant guaranteed the payment to plaintiff of the account of a third person was not continuing and did not cover debts subsequently created.
4. GUARANTY—WAIVER OF FRAUD.—A bank which guaranteed payment under a contract did not waive fraud in obtaining the con-

tract of guaranty by making a payment to the guarantees of funds of the principal debtor in its hands.

5. BANKS AND BANKING—AUTHORITY OF BANK TO MAKE GUARANTY.—The authority of a bank to execute a contract of guaranty on the ground that it was a contract for its own benefit in the prosecution of its authorized business *held* properly submitted to the jury.

Appeal from Conway Circuit Court; *J. T. Bullock,* Chancellor; reversed.

Strait & Strait, for appellant.

1. The appellant was entitled to a new trial because the P. J. Lewelling Construction Company was not, in fact, made a party defendant, by amendment of the complaint, so as to set up any allegations against that company, and there was no evidence of any *bona fide* effort to procure service on it, nor of any legal service upon it. There was no evidence that that company was a foreign corporation, nor any showing that the officers, agents or representatives thereof were not located in this State. The attempted oral proof of service on the Auditor was not legal proof of such service. 4 Ark. 570; 28 Ark. 7.

2. The appellant, as a banking corporation, was not authorized to exercise the privileges of a surety company. It could not, by an instrument of the character sued on, guarantee the payment of another person's indebtedness, and the attempt of its president to bind the bank by the execution of the instrument in suit was *ultra vires,* and void. 96 Ark. 594; 95 Ark. 368.

3. By the instrument sued on there was no guaranty of any payment except the account *due* Skipper, Tucker & Co., referring to the then existing indebtedness, and not to any indebtedness arising in the future. 12 Minn. 279; 17 Wis. 181; 75 N. Y. Supp. 563; 4 S. E. 925; 18 N. Y. Supp. 412; 6 Abb. N. C. 206; 19 N. J. Law, 340; 54 Conn. 310.

Edw. Gordon and *Calvin Sellers,* for appellees.

1. There was sufficient proof of the corporate existence of the Lewelling Construction Company, and that it was a foreign corporation. The oral proof of the service

of the summons was sufficient to show that service was had on the Auditor of State.

2. Appellant was authorized to sign the guaranty sued on. The consideration therefor was the surrender to the bank of certain moneys or checks in the hands of N. B. Skipper to the bank. Appellant is estopped to plead *ultra vires.* 74 Ark. 377; *Id.* 190; 77 Ark. 109; 96 Ark. 594; 91 Ark. 367; 86 Ark. 287; 96 Ark. 308.

McCULLOCH, C. J. Appellees, Skipper, Tucker & Company, a copartnership, instituted this action against appellant to recover on a contract between the parties whereby appellant undertook to guarantee the payment of an account due to appellees by the Lewelling Construction Company. The contract is as follows:

"Morrilton, Arkansas, April 23, 1921. The undersigned, Bank of Morrilton, in consideration of the sum of $1 in hand paid, agrees to and does hereby guarantee the payment of the account due Skipper, Tucker & Co. by the Lewelling Construction Company.

"BANK OF MORRILTON,
"By Loid Rainwater, President."

It is alleged in the complaint that, at the time of the execution of this contract, the Lewelling Construction Company owed appellees on account the sum of $4,821; that this amount was increased by later purchases on account, which ran the aggregate up to $5,505.10, and that a payment had been made thereon reducing the account to the sum of $2,005.10, for which recovery was prayed.

The contention of appellees was that the guaranty was a continuing one, covering subsequent purchases by the Lewelling Construction Company, and that they are entitled to recover the full balance due on account, including subsequent purchases.

The contention of appellant is that the contract is not a continuing guaranty, but merely covers the amount of the account owing to appellees at the time of the execution of the contract.

Appellant defends on the ground that appellees represented to appellant, at the time of the execution of the

contract, that the amount of the account was $2,500, and that the construction company had enough coming to it from certain road districts to cover the indebtedness due by the construction company both to appellant and to appellees. Appellant also claimed that there was a misrepresentation concerning the amount due by the road districts to the Lewelling Construction Company as retained percentage, and that these fraudulent misrepresentations induced appellant to enter into the contract.

There was a judgment below in favor of appellees for the sum of $2,005.10, and an appeal has been duly prosecuted.

The facts developed on the trial were that, at the time of the transactions under consideration between appellant and appellees, the Lewelling Construction Company had about completed a contract with a certain road improvement district in Conway County. The construction company had been dealing with appellees, purchasing supplies from them, and had also received large advances in money from appellant bank. Appellant had secured from the construction company an assignment of all amounts due from the road district, and had applied to the district for payment, but the voucher had not been issued—there appears to have been some unreasonable delay in the issuance of the voucher. One of the members of appellee firm was secretary and treasurer of the road improvement district, and, in order to secure the help of appellees in getting the voucher for the retained percentage turned over to appellant, the latter executed the contract of guaranty in the suit. The check, or voucher, was for $13,500, and, as soon as it was delivered to appellant bank, another creditor of the Lewelling Construction Company—one Horn, by name—sued the construction company and caused a writ of garnishment to be served on the bank to reach this fund, claiming that it belonged to the construction company. In this situation, appellant bank paid over to appellees the sum of $3,500, and appellees executed to appellant the following agreement in writing:

"7/6/21. In consideration of $3,500 paid on account of Skipper, Tucker & Co. versus Lewelling Construction Co., we hereby agree to wait until garnishment is released before taking any legal action for balance held by Bank of Morrilton due us.

"SKIPPER, TUCKER & CO.
"By N. B. Skipper."

This amount was released from the garnishment by agreement between the bank as garnishee and the other parties to that suit.

Appellant introduced testimony tending to show that members of appellee firm, at the time of the execution of the contract of guaranty, represented to appellant that the debt of the construction company to appellees was not over $2,000 or $2,500. Appellant also introduced testimony to the effect that appellees represented to appellant that the amount due from the road improvement district to the construction company as retained percentage was about $17,000.

The testimony was sufficient to warrant the submission to the jury of the issues concerning these alleged misrepresentations, and the question whether the misrepresentations, if made, constituted the inducing cause for appellant entering into the contract. The evidence was conflicting on these issues.

Appellant filed a motion to require appellees, as plaintiffs, to make the Lewelling Construction Company a party to the suit. The court sustained the motion, and ordered appellees to make the construction company a defendant, and the cause was postponed until the next term of court to await service of process on the construction company. No formal complaint against the construction company was filed, however, but service was issued, and, during the progress of the trial, proof was introduced to show that a return had been made by the sheriff of Pulaski County, showing service on the construction company as a foreign corporation not having an agent in the State, the service having been made on the

Auditor of State. Appellant raised the question, during the progress of the trial, that the construction company had not properly been brought in, and appellant's counsel insist now that there should be a reversal of the judgment for the reason that there is no proof that the construction company is a corporation, either domestic or foreign, and that the proof was not sufficient to show that there was proper service of summons. Appellees introduced proof tending to show by the general reputation of the construction company that it was a corporation.

We deem it unnecessary to discuss in detail the question debated as to whether or not the construction company was a corporation and had properly been served, for we are of the opinion that it was unnecessary for appellees to make the construction company a party to the suit, and that appellant was not prejudiced by failure to do so.

It was the duty of the court to interpret the contract according to its language, if clear and unambiguous, and it is obvious, from a consideration of the language of the contract, that it was an absolute guaranty of the payment of the debt, and not conditional. Such being the case, the contract was an original undertaking to pay the debt, and liability of the guarantor immediately matured upon the failure of the principal debtor to pay, and it is not essential that, before the obligee is entitled to sue the guarantor, suit be commenced against the principal debtor and the claim reduced to judgment. *Friend* v. *Smith Gin Co.*, 59 Ark. 86.

Errors are assigned with respect to the court's charge to the jury. Exceptions were separately saved to the following instructions given by the court, over the objections of appellant:

"4. You are further instructed that the written guaranty signed by the Bank of Morrilton would not make defendant, Bank of Morrilton, liable for any indebtedness due to plaintiff, Skipper, Tucker & Company, by the Lewelling Construction Company, created

subsequent to the date of said written guaranty, unless you find that, by the agreement entered into between the parties at the time of the payment of the $3,500, was an admission of the indebtedness of the balance of the account by said Lewelling Construction Company to plaintiff up to that date, and if from the evidence you find this to be true, then the court instructs you that defendant, Bank of Morrilton, is liable to plaintiff for whatever sum was due and unpaid at the time the $3,500 was paid, and if you find this to be true, and find further that the garnishment pending between the P. J. Lewelling Construction Company and W. C. Horn has been released, then your verdict should be for the plaintiff for whatever balance remains due at the time of the date of the payment of said $3,500 as shown by the testimony, together with 6 per cent. interest from the date of filing suit.

"5. You are instructed that, although you may find or believe the Bank of Morrilton obligated itself to pay the indebtedness of plaintiff, and, under ordinary conditions, would be liable therefor, still if you further find that plaintiff, through its representatives, represented to the defendant, Bank of Morrilton, that the indebtedness of the P. J. Lewelling Construction Company which it was to assume was less than it actually was, and that the Bank of Morrilton, through its officers, relying upon this statement, was induced to sign any agreement to pay such indebtedness, then such representations would constitute a fraud in law upon the bank, which would annul the contract and release the bank from liability, and if you find this to be true, then your verdict should be for the defendant, unless you find the defendant bank waived this defense.

"6. You are further instructed that if you find, or believe, from the testimony in this case, N. B. Skipper represented to the defendant's officers that the retained percentage due the P. J. Lewelling Construction Company from Road District No. 4 was sufficient to pay the indebtedness of the bank, and the plaintiff, Skipper,

Tucker & Company, and the defendant relied upon this statement and believed same to be true, and, so believing, was induced to or did sign an agreement assuming the liability of the P. J. Lewelling Construction Company to Skipper, Tucker & Company, and was induced to sign same by such representations, when in fact said retained percentage was not sufficient, then such representations would in law constitute a fraud, and defendant would not be liable upon its agreement, and, if you find this to be true, your verdict should be for the defendant, unless defendant has waived this defense."

We are of the opinion that each of these instructions was erroneous. Instruction No. 4 was correct in stating that the contract only rendered appellant liable for indebtedness due or owing to appellees by the Lewelling Construction Company at the date of the execution of the contract, and not for any debt subsequently created, but the instruction is erroneous in stating that the payment of the sum of $3,500 on the debt rendered appellant liable "for whatever sum was due and unpaid at the time the $3,500 was paid." The payment of the sum of $3,500, or any other sum, had nothing to do with fixing the extent of appellant's liability; that was fixed by the contract itself, which was only an undertaking to pay the amount due to appellees by the construction company at the time of the execution of the contract of guaranty. The receipt, or contract, executed by appellees at the time of the payment of this sum of $3,500 created an obligation on the part of appellees not to sue for any balance until the garnishment was released. This instrument imposed no additional liability on appellant, nor is there any testimony tending to show that appellant, in the payment of the sum of $3,500, assumed any additional obligation other than that expressed in the original contract.

Instructions Nos. 5 and 6 were both erroneous in submitting to the jury the question whether or not appellant waived the defenses of misrepresentation recited in those instructions. There is no evidence of any such

waiver. The payment of the $3,500 out of the funds received from the Lewelling Construction Company did not of itself constitute a waiver, and there is nothing in the receipt, or contract, executed by appellees, the acceptance of which by appellant would imply a waiver of the defense of misrepresentation.

We are of the opinion that, upon the proof made in the case, the court should have submitted to the jury the issues concerning the misrepresentation, both with respect to the amount of the account of the construction company to appellees and as to the amount of the retained percentage due from the road improvement district to the construction company, without any submission of the question of waiver of those defenses.

The court properly submitted to the jury the question of the authority of appellant, as a banking institution, to execute the contract of guaranty, on the ground that it was a contract for its own benefit in the prosecution of its authorized business. There was no error in that regard.

But for the errors indicated in giving instructions Nos. 4, 5 and 6, the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.

TIDWELL v. J. H. ASKEW & COMPANY.

Opinion delivered June 23, 1924.

1. FRAUDULENT CONVEYANCES—EFFECT OF RETURN OF NULLA BONA.—A return of *nulla bona* on execution makes out a *prima facie* case of insolvency of a debtor in an action to set aside conveyances made by him as fraudulent.
2. FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCES.—Voluntary conveyances are presumptively fraudulent as against the grantor's existing creditors.

Appeal from Nevada Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

J. O. A. Bush, for appellants.

Tompkins, McRae & Tompkins, for appellees.

Appellant is mistaken in contending that it was necessary to go beyond proof of the issuance of the execution and the *nulla bona* return by the sheriff, and introduce other proof that the defendant did not have sufficient property out of which the execution could be made. The *nulla bona* return was conclusive evidence that the judgment creditors had exhausted their legal remedies, and they were under no obligation to proceed further with testimony of defendant's insolvency. 39 Ark. 70, 75; 146 Ill. 275; 23 L. R. A. (N. S.) 68 *et seq.*; 66 Ark. 486; 63 Ark. 417.

McCULLOCH, C. J. Appellees instituted this action against appellants in the chancery court of Nevada County to cancel three conveyances of land, executed by appellant John Tidwell to his three children, the other appellants. Appellees were judgment creditors of John Tidwell at the time of the institution of the action, and they allege that the conveyances were executed for the fraudulent purpose of hindering and delaying appellees as creditors. The chancery court decreed the appellees the relief prayed for, and an appeal has been prosecuted to this court.

John Tidwell owned a tract of land containing 640 acres, and he occupied 160 acres of it as his homestead, and conveyed the other three quarter-sections to his children. Tidwell was indebted to appellees on two notes executed by him to appellees, one for $750, dated January 20, 1920, and due October 1, 1920, and the other for $581.53, dated March 19, 1921, and due October 1, 1921. The deeds in controversy were executed by Tidwell to his children on June 16, 1922, and thereafter appellees reduced their claim against Tidwell to judgment and sued out an execution, on which there was a return of *nulla bona,* and then commenced this action to cancel the deeds as fraudulent.

Prior to the execution of the deeds to his children, John Tidwell had given an oil lease on the land, and in

the deeds to his children he reserved all mineral rights. Subsequently he assigned his royalty to accrue under the lease. He was to receive an annual rental of $313.50 under the oil lease, and appellees, at the commencement of this action, caused a garnishment to be served on the lessee to impound the rental price for the current year. The garnishee appeared and paid the rent into court, and, on final decree, the court sustained the garnishment and directed the clerk to pay the money over to appellees on their judgment. The court also canceled the conveyances, and ordered the land to be sold to pay the balance of the judgment debt due appellees.

About the only contention here in attacking the correctness of the court's decree is that the proof failed to show that appellant John Tidwell was insolvent at the time he executed the deeds to his children. The answer to that contention is that the *nulla bona* return of the sheriff was sufficient to make out a *prima facie* case of insolvency. *Hunt* v. *Weiner,* 39 Ark. 70; *Euclid Ave. Natl. Bank* v. *Judkins,* 66 Ark. 486. The conveyances by Tidwell to his children recited a consideration of one dollar, and there is no proof that any other consideration was paid. The conveyances were evidently voluntary, and the well-established rule is that a voluntary transfer of property is presumptively fraudulent as against existing creditors. *Driggs & Co.'s Bank* v. *Norwood,* 50 Ark. 42; *Fluke* v. *Sharum,* 118 Ark. 229. The facts developed by appellees in the proof show that appellant Tidwell rendered himself insolvent by stripping himself of substantially all his property except that which was exempt. It left him with no real estate except his homestead, and there is no proof of any personal property in excess of his constitutional exemptions. The oil lease was of uncertain value, and it does not appear to have a value in excess of the exemptions. Appellant made no attempt to overcome the presumption of insolvency by introducing any proof.

We are of the opinion that the decree was correct, and the same is in all things affirmed.

BOARD OF COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT No. 9 *v.* FURLOW.

Opinion delivered June 23, 1924.

1. STATUTES—CONSTRUCTION.—It is the duty of courts to construe a statute so as to render it valid if such a construction is reasonable.
2. HIGHWAYS—VALIDITY OF ACT.—Act No. 377 of Extraordinary Session of 1920, which created a road improvement district, authorized the improvement only of roads within the district.
3. HIGHWAYS—VALIDITY OF ACT.—Act Ex. Sess. 1920, No. 377, which created a road improvement district, and provided that if any part of the roads to be improved has not been laid out as a public road, it is made the duty of the county court to lay the same out, is not invalid as depriving the county court of jurisdiction to lay out public roads.
4. HIGHWAYS—AUTHORITY TO SELECT ROUTE.—Act Ex. Sess. 1920, No. 377, which created a road improvement district, is not invalid in that it authorized the commissioners to select or vary the route of the roads to be improved.

Appeal from Little River Chancery Court; *C. E. Johnson,* Chancellor; reversed.

Shaver, Shaver & Williams, for appellant.

It is elementary that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. All questions and doubts involved in its construction are resolved in favor of its validity. 153 Ark. 114, 239 S. W. 753; 155 U. S. 657, 15 Sup. Ct. 211, 39 L. ed. 297; 145 Ark. 279, 224 S. W. 622. To declare the act creating the appellant road improvement district invalid would contravene the application of this elementary rule. The statute in question does not constitute an invasion of the jurisdiction of the county court over roads and highways guaranteed to it by art. 7, § 28, of the Constitution. Note that it only authorizes the improvement of "public roads, or roads to be hereafter made public roads by proper orders of the county court of said county," and that it provides: "If any part of said roads have not been laid out a public road, it is made the duty of the county court to lay the same out in accordance with law." 125 Ark. 350, 188 S. W. 822; 130 Ark. 507,

197 S. W. 1148; 138 Ark. 549, 213 S. W. 762; 141 Ark. 247; 143 Ark. 203; 139 Ark. 153, 213 S. W. 767; 138 Ark. 497, 212 S. W. 333; 142 Ark. 52, 218 S. W. 381.

DuLaney & Steel, for appellee.

The act is invalid. Section 1 thereof confers on the commissioners a "roving" discretion. There is nothing definite or certain as to what roads the commissioners may deem it practicable and expedient to improve, and that is something the property owners are entitled to know. 147 Ark. 73; 118 Ark. 119; 130 Ark. 44.

McCULLOCH, C. J. The road improvement district involved in this controversy was created by special statute, designated as act No. 377 of the extraordinary session of the General Assembly of the year 1920, the territory described as constituting the district being situated in Little River County. Section 1 of the statute, after describing the boundaries of the district by metes and bounds, provides that said territory is created into a road improvement district "to be known as Road Improvement District No. 9 of Little River County, Arkansas, for the purpose of improving such public roads, or roads to be hereafter made public roads, by proper order of the county court of the county, as the commissioners hereinafter named may deem practicable and expedient."

Section 2 of the statute reads as follows:

"Said roads will follow the best route attainable and adhere to the existing roads as near as practicable. If any part of said roads have not been laid out as a public road, it is hereby made the duty of the county court of Little River County to lay the same out in accordance with act No. 422 of the Acts of the General Assembly of the State of Arkansas for the year 1911, entitled, 'An act to amend section 7328 of Kirby's Digest of the Statutes of Arkansas,' approved May 31, 1911."

Section 4 reads, in part, as follows:

"As soon as possible, the commissioners of said district shall form their plans for the improvement, with

the aid of the State Highway Department and of such engineers as they see fit to employ, and shall file the same with the county clerk of Little River County, along with specifications and an estimate of the cost."

The remainder of the statute is in the usual form, providing for the employment of engineers, etc., and other officers and employees, the assessment of benefits, the issuance of bonds and the construction of the improvement, in accordance with the plans formed by the commissioners.

Appellee owns property in the district, and he instituted this action against the commissioners to enjoin them from proceeding with the consummation of the plans by the construction of the improvement.

It appears from the complaint and exhibits that the commissioners selected as the route a public highway which forms a link in an interstate highway, and that this link forms a connection between the south end of an improved road, constructed by another road improvement district, and a public bridge across Red River. Appellants demurred to the complaint, and the court overruled the demurrer, and, appellants electing to plead no further, final judgment was rendered in favor of appellee, in accordance with the prayer of the complaint.

The first and principal ground of attack upon the validity of the statute is that it fails to sufficiently describe the public road to be improved, and that it is an attempt on the part of the lawmakers to delegate to the commissioners the unrestricted power to select a route, either inside or outside of the district. It will be observed that there is not found in the express language of the statute any designation of a particular road or roads, nor any language expressly stating whether the road to be selected should be inside or outside of the district. The only words of description are that "such public roads, or roads to be hereafter made public roads by proper order of the county court of said county, as the commissioners hereinafter named may deem practicable

and expedient," and a further provision that such road shall follow the best route attainable and adhere to the existing roads as near as practicable.

The first thing to determine, and the real turning point of the case, is whether or not the language is sufficient to restrict the road or roads to be improved to the boundaries of the district, for, if the language is insufficient to bear such a construction, then it is too indefinite. When we consider that the lawmakers were legislating with reference to the territory specifically and accurately described—a very limited area, comprising only a small portion of the county—it is fair to assume that they were attempting to deal with a public road or public roads within that territory, and not to roads situated elsewhere. Under well-known canons of construction it is our duty, if reasonable, to place such interpretation on the statute as will render it valid. Assuming therefore that the language of the statute necessarily referred to roads inside of the district, it constituted a legislative finding that the public highways inside of the district constituted a single unit to be the subject-matter of the improvement, and that the commissioners, though authorized, with the approval of the county court, to adopt another route, such new route "shall adhere to the existing roads as near as practicable." This could only mean that the public highway in the district should be adopted with such slight variations as the commissioners, with the approval of the county court, should deem advisable. It is not a case where the commissioners were given unrestricted authority to adopt a route anywhere and as many routes as they saw fit, and impose the cost on the lands mentioned in the statute creating the district. The area involved is a limited one, and we must indulge the presumption in favor of the legislative finding that public roads in the district, with such changes as the county court may approve, will constitute a single improvement from which all the property in the district will receive benefits to a greater or lesser degree. Viewing the statute in that light, the majority has reached the

conclusion that it is not void on account of indefiniteness or on account of being an attempt to confer unrestricted power upon the commissioners. Nor is the creation of the district invalidated by the fact that the commissioners were authorized to select or vary the route of the roads to be improved. This authority, it has been held, may be conferred by the Legislature upon the commissioners of a district. *Nall* v. *Kelley,* 120 Ark. 277; *Conway* v. *Miller County Highway & Bridge Dist.,* 125 Ark. 325; *Bennett* v. *Johnson,* 130 Ark. 507; *Rhodes* v. *Barton,* 138 Ark. 497; *Cummock* v. *Alexander,* 139 Ark. 153; *Bush* v. *Delta Road Imp. Dist.,* 141 Ark. 247.

It is also contended that the authority attempted to be conferred upon the commissioners of the district constitutes an invasion of the jurisdiction of the county court. We are of the opinion that such is not the case, for the authority of the county court is fully recognized. The direction is that public roads shall be selected for improvement, or such as may be made public roads by proper order of the county court. The language of § 2 is that, where the route selected has not been laid out as a public road, "it is hereby made the duty of the county court of Little River County to lay the same out," etc. But, as we held in the case of *Sallee* v. *Dalton,* 138 Ark. 549, this does not deprive the county court of the exercise of its jurisdiction in determining whether or not the road shall be laid out. There are many later decisions of this court on the same subject, and none of them, we think, sustain the contention that this language is sufficient to deprive the county court of its jurisdiction.

The conclusion reached is that the attacks on the validity of the statute are unfounded, and that the chancery court erred in sustaining them.

The decree is reversed, and the cause remanded with directions to sustain the demurrer of appellants to the complaint.

WOOD and HART, JJ., dissent.

HASKELL *v.* PATTERSON.

Opinion delivered June 23, 1924.

1. TRUSTS—CONSTRUCTIVE TRUST IN OIL AND GAS LEASES.—In an action to have a conveyance of oil and gas leases set aside and the grantor declared a trustee for a syndicate, evidence *held* sufficient to show that the properties were acquired by defendant as trustee for the syndicate, and that it would be a fraud on members of the syndicate to allow defendant to hold the properties in his individual right.
2. TRUSTS—CONSTRUCTIVE TRUSTS.—Constructive trusts arise when the legal title to property is obtained by a person in violation of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership.
3. TRUSTS—AGREEMENT TO PURCHASE OIL AND GAS LEASES CONSTRUED. —A trust agreement under which a syndicate to acquire oil and gas leases operated *held* clearly to show that the trustees were not prohibited from investing their own funds in the acquisition of such properties, but that, if they acquire any properties in their individual right, that fact must be designated in a manner so as to show that they are not syndicate properties.
4. TRUSTS—DUTY OF TRUSTEE TOWARD SYNDICATE.—Where a trustee of a syndicate organized to purchase oil and gas leases assumed the task of raising money to purchase leases, he could not change his attitude by claiming that he purchased property for his individual account without notifying the syndicate.
5. MINES AND MINERALS—SYNDICATE HELD A PARTNERSHIP.—Where members of a syndicate organized to purchase oil and gas leases had the power to amend the declaration of trust, to remove the trustees without cause and substitute new ones, to continue or terminate the trust, to require statement of accounts from trustees, and to transact any business specified in the call for the meeting, the syndicate was a partnership, rather than a trust.
6. MINES AND MINERALS—ESTOPPEL TO ENFORCE TRUST.—Where a trustee of a syndicate who had charge of its operations in acquiring oil and gas leases advanced money for such purposes, taking title in his own name, *held* the syndicate, not having been notified that he was claiming to hold such leases in his individual right, was not estopped to claim that he acquired them for the syndicate.

Appeal from Columbia Chancery Court, First Division; *J. Y. Stevens,* Chancellor; affirmed.

Harnwell & Young, Gibson & Hull, Henry Stevens, and *McKay & Smith,* for appellants.

Appellees seek to establish an implied trust, or resulting trust, under the second type, or general classification defined by Mr. Pomeroy, 3 Pomeroy, Equity Jurisprudence, § 1031, and as defined by this court in *United States Fid. & Guar. Co.* v. *Smith,* 103 Ark. 149; but in this we think they have wholly failed. They have failed to prove that any part of the trust funds placed in Haskell's hands for investment in property of this character were invested in the properties in litigation, and the chancery court so found. For the rule applicable to resulting trusts of the type in question, see 3 Pomeroy, Eq. Jur., § 1037. The determination of the question whether a resulting trust arises depends entirely upon the intention of the parties. 101 Ark. 451. Before a resulting trust could arise in this case, Haskell must have obtained the title to this property in violation of some duty, express or implied, that he owed the syndicate; in other words, must have been guilty of fraud, either actual or constructive, before he would be regarded as holding the legal title to the property for the benefit of the syndicate. 3 Pomeroy, Eq. Jur. § 1044. It appears that the chancellor decreed title to appellees in the Wepfer and Columbia Oil & Gas Company acreage on the theory that Haskell was an agent of the syndicate to purchase acreage, and that this alone prevented him from acquiring acreage in his individual capacity. When the reason for the rule, as stated by Judge Sanborn in *Trice* v. *Comstock,* 121 Fed. 620, ceases, the rule is impotent, and in any case the rule that an agent cannot purchase for himself is limited to the scope of his agency. Here the agency of the trustees was limited to the expenditure of funds delivered in securing a geological survey and purchasing oil and gas leases, and was not an unlimited agency to purchase. 2 C. J. 705, 59 N. Y. Sup. Ct. 410. No funds of the syndicate were used in the purchase of this property. If any right ever existed in appellees to impress this property with a trust, they were called upon to assert that right upon receipt

of notice of the purchase thereof by Haskell for himself, and they will not be permitted to stand by in silence, until the property has largely enhanced in value by the expenditures of Haskell on his own account. They must have proceeded at least in a reasonable time to assert their adverse claim. 33 Colo. 500; 153 Ark. 432; 10 R. C. L. 964; 125 Ark. 146; 147 Ark. 555; 10 R. C. L. 769; 9 Am. Dec. 500; 91 U. S. 587; 81 N. E. 614; 14 Ky. L. Rep. 606; 75 N. J. Eq. 90.

Stone, Moon & Stewart, Noffsinger & Harris, and *Joe Joiner,* for appellees.

1. The development syndicate agreement created an association which has some of the elements of trust, but more of the elements of a partnership. It is not necessary to determine the precise nature of the association for which Haskell acted, since the same rules must be applied, whether he was a trustee or a partner and managing agent. If it is desirable to determine the precise nature of the association, see Sears' Trust Estates as Business Companies, pp. 91-92 and 142-152; Wrightington on Unincorporated Associations and Business Trusts, pp. 38, 45, 71, 208, 211. Here the rights of third parties not being involved, it is not necessary to determine whether the association is a partnership or a trust. 233 Mass. 321, 123 N. E. 665; 241 S. W. 122, 125; Wrightington, Unincorporated Associations, etc., 109, § 21. The same principles apply, whether partners or not. 57 Mo. 531, 545; 1 Story, Equity Jur., § 468.

2. While acting as trustee for the syndicate, Haskell could not carry on for himself any business of the same nature or in competition with that of the association, and this rule must prevail even if the court finds that the trustee used his own funds in the transaction in question. The chancellor therefore properly held that all the oil and gas leases acquired by the trustee in Southern Arkansas belonged to the syndicate. 20 R. C. L. 879, 881; 21 R. C. L. 825; Amer. Ann. Cases, 1914D, 435; 4 How. 503, 11 Law. ed., 1076, 1099; 57 Mo. 531; 150 U. S. 524, 37 Law. ed., 1175; 92 Atl. 1033; 1 Wallace, 518, 17 Law. ed.

646; 5 Mackay (D. C.) 304; Ann. Cases, 1914D, 434; 201 S. W. 493; 101 Fed. 334; 1 Bates, Partnership, § 303; 43 Am. Rep. 242; 78 Pac. 550; 21 N. E. 193; 13 Ark. 173; 95 Ark. 408; 88 Ark. 373; 63 Ark. 516; 125 Ark. 146, 188 S. W. 571.

3. A trustee or managing agent cannot unite his personal and representative characters in the same transaction, and this Haskell attempted to do in the acquisition of the Wepfel and Columbia Oil & Gas leases. 78 Pac. 550; 66 Fed. 104; 8 Mo. App. 408.

4. As trustee or agent of the syndicate, Haskell was bound to keep his own property and business separate from the property and affairs of the syndicate, and if, in fact, any of his own funds were used in the acquisition of the properties in controversy, such funds were so mixed in the affairs and with the property of the syndicate as to make the whole the property of the syndicate. No change in the form of trust property can divest it of the trust. Dunn, Business Trusts, § 47, p. 80; 57 Mo. 531, 546.

5. For the following additional reasons Haskell could not, while trustee or managing agent, acquire, individually, any interest in the property in controversy: (1) He did not notify the beneficiaries or certificate holders of his desire or intention to acquire such separate interest; (2) he did not inform them fully or fairly of all the material facts and circumstances; and (3) he wholly failed to secure the consent or acquiescence of the beneficiaries. 48 N. E. 128, and authorities cited below on the question of estoppel or laches.

6. The three trustees, Haskell, Evans and Miller, constituted, as it were, one collective trustee, and, as such, were under the obligation to perform their duties, even in purchases and sales, in their joint capacity. This in itself affords additional and conclusive inhibition against Haskell's effort to "allot" to the syndicate only a small interest in the valuable properties in controversy, while taking for himself and associates a large interest. Dunn's Business Trusts, 172, § 97; Sears' Trust Estates,

etc., 248, § 248; Wrightington on Unincorporated Associations, etc., 247, § 46; 90 N. E. 278; 51 S. E. 439; 120 N. E. 487; 1 Perry on Trusts, 6th ed., § 411; 9 Fletcher, Cyclopedia Corporations, 10498, § 6093.

7. Appellants cannot successfully invoke the doctrine of estoppel and laches. The beneficiaries did not acquiesce in Hackell's breach of trust, and before estoppel could be invoked proof must have been made that all *cestuis que trust,* after being informed in the premises, fully acquiesced and concurred. 48 N. E. 128, 132; 126 Ark. 72, 189 S. W. 850; 87 Atl. 230, 234; 110 Fed. 322, 329; 10 Am. Law Rep. Ann. 378, 379; 10 R. C. L. 695, 697, 762; 153 Ark. 432, 243 S. W. 811.

WOOD, J. The plaintiffs below, appellees here, as trustees of the Arkansas Development Syndicate (hereafter called syndicate), instituted this action in the chancery court of Columbia County, Arkansas, against the defendants below, appellants here, to have an alleged fraudulent conveyance set aside and a trust declared in an undivided interest in oil and gas leases of land in Columbia and Nevada counties, Arkansas, which leases were taken in the name of M. G. Haskell, and the lands are described in the complaint.

The plaintiffs alleged that M. G. Haskell and O. M. Evans were first named as trustees of the syndicate in a trust instrument dated May 31, 1921, and of August 8, 1921, which is attached as an exhibit to the complaint. The syndicate first had a capital of $7,500, divided into units or shares of the par value of $100 each, but which was afterwards increased on the 8th of August, 1921, to $50,000, and Franklin Miller was also named as one of the trustees. It is alleged that the moneys obtained by the sale of the certificates of interest were used by the trustees for the purpose of buying oil and gas mining leases and oil and gas mining properties in the State of Arkansas, and for developing the same for the benefit of the members of the trust; that Haskell procured the leases in his own name, and, in violation of the terms of

the trust instrument, with the funds of the syndicate, and was claiming the property as his own and fraudulently using and disposing of the same. The plaintiffs further alleged that the defendants, as trustees, failed to keep accounts and to make reports and to perform their duties required of them under the trust instrument; that Haskell fraudulently assigned and conveyed property belonging to the syndicate to Fred L. McDaniels, trustee, to hold for the use and benefit of Lucy Haskell, wife of M. G. Haskell. They prayed that a receiver be appointed to take charge of the trust and manage the properties for the benefit of the syndicate, and that the defendants be enjoined from disposing of the properties; that the defendants, Haskell, Evans, and Miller, be required to give a full and complete account of all their doings, and that the title to the properties be confirmed and quieted in the plaintiffs as trustees for the syndicate.

The defendants answered and admitted the execution of the trust instrument, and that Haskell was named as one of the trustees. They also admitted that Haskell obtained the properties described in the complaint in his own name, but denied that he purchased the same for the syndicate or with funds of the syndicate. They denied that, in purchasing the property, he was working for the syndicate, but averred that the property was purchased for himself with his own funds. They alleged that the members of the syndicate knew that Haskell was procuring the property in controversy for himself and not for the syndicate, and permitted Haskell to expend large sums of money and to labor more than a year and to incur large liabilities on his own account after they knew that he had obtained the property with his own funds and for his own use and benefit, and that the syndicate was therefore estopped from now claiming the property.

The plaintiffs filed a reply to the answer, and denied all of its allegations.

The testimony is exceedingly voluminous, and we shall not undertake to set it forth in detail, but only such

portions thereof as we deem material to the decision of the cause. The trust agreement of August 8, 1921, which was substituted for the original agreement of May 31, 1921, is an exceedingly lengthy instrument, and it is unnecessary to set forth its provisions *in haec verba*. It is divided into sections, and the substance thereof is as follows:

Section 1 names the syndicate as "The Arkansas Development Syndicate," and declares that it is entered into between the trustees and the subscribers for the purpose of financing and securing a geological survey of territory in southern Arkansas and northern Louisiana, for acquiring oil and gas leases therein, and selling, trading, and handling the same in such manner as, in the judgment of the trustees, is for the best interests of the syndicate.

Section 2 authorizes the trustees to receive subscriptions to the capital stock to the amount of $50,000, and to issue certificates of interest of the par value of $100 each to those who subscribed and paid for such interest. The trustees shall issue to themselves a "number of interests equal to one-fifth of the total number, or one hundred interests, in compensation of their services; to William R. Jewell and P. J. Costello, in compensation for services rendered the syndicate, under contract with the trustees, in such proportion as may be agreed upon, one hundred interests of $100 each, apart from actual living expenses and other expenses incurred in work for and on behalf of the syndicate. The trustees shall issue to holders of original certificates a total of one hundred and fifty interests of $100 each, divided among the original holders in proportion to the number held by each individual subscriber, in the ratio of three interests for one interest previously held. Under this allotment there remained one hundred and fifty interests of $100 each to be sold by the trustees at par, in such number as they deemed advisable.

Section 3 vested title to the property in the trustees, to be held by them free from the management or control of the subscribers.

Section 4 provided for a meeting of the subscribers to be called on the first Monday of January, 1922, to determine the future policy and disposition of the syndicate and property; and by majority vote to wind up the syndicate, or to continue it.

Section 5 is as follows: "The funds of said syndicate received by the said trustees shall be by them employed in the securing of such additional acreage as may be necessary, in the expenses incident to the handling the affairs of said syndicate and disposing of such acreage as it may desire to sell, and for the purpose of exploiting or producing oil, gas or other minerals or royalties, or any interest in said oil, gas or minerals, or in any land which is believed to have the same. It being understood that the trustees are fully empowered to buy, sell and trade for the benefit of the said syndicate, and with the same power and authority and discretion as they could or would exercise if so selling or trading for themselves."

Section 6 is as follows: "The said trustees, in bargaining, selling, conveying, assigning, trading or exchanging any property so acquired by them, have full authority to execute such deeds, conveyances, or other instruments as to them may seem best, with such covenants, stipulations, conditions and warranties binding the said syndicate and its property as they may see fit in their discretion to enter into, and all the acts of the said trustees in the premises are hereby ratified and confirmed."

Section 7 relieves the trustees and the subscribers from any individual liability in contract or tort for acts growing out of any contract entered into by the trustees, but instead makes the property of the syndicate liable therefor.

Section 8 limits the individual liability of the holders of interests in the syndicate to the amount subscribed,

and limits the liability under any contract entered into by the trustees to the assets and property of the syndicate.

Section 9 authorizes the trustees to borrow money to carry on the business of the syndicate, and to secure the same by the assets of the syndicate.

Section 10 provides that the trustees shall only be liable for gross negligence, fraud, or breach of trust.

Section 11 authorizes the holders of a majority in value and amount of the syndicate interests to remove the trustees, at a meeting called for that purpose, by an instrument, duly signed and acknowledged, and to appoint their successors by such instrument, the successors to have the same powers, duties and estate as their predecessors.

Section 12 provides for a schedule to be duly executed and acknowledged by the trustees, in which the property, real or personal, acquired by the trustees shall be entered in ink, giving the names of the grantors, the date, location and brief description, with the book and page of the record where the instrument is recorded; that the trustees shall keep separate accounts with the syndicate by books or cards, showing clearly their dealings with the syndicate; that they "shall safely keep all deeds, conveyances and assignments, or other instruments running to them for the benefit of said syndicate, in a separate receptacle, which shall be plainly marked and designated so as to show that the said instruments are the property of this syndicate, designating the same by some word or number, as, for instance, 'M. G. Haskell, Franklin Miller and O. M. Evans Syndicate No. 1.'" That they shall so designate "in red ink the said documents or property of the said trustees individually, so as at all times to clearly show what properties are owned or held by the said syndicate, or in what properties it has made investments."

Section 13 provides that the trustees may invest the funds of the syndicate in other syndicates, corporations or companies carrying on a like business, the stocks or certificates to be thus acquired to be kept in a receptacle,

with indorsements in red ink indicating that they are held for the syndicate, the object of these provisions being to keep separate and distinct the property of the syndicate from any individual property or documents of the trustees.

Section 14 provides that the trustees shall issue certificates of interest of the par value of $100 each to the shareholders, which may be assigned by them. The assignments take effect when the assignee brings the same to the trustees and has the original certificate canceled and a new one issued in its stead. Until the assignment is thus protected, the trustees shall deal with the holders, as shown by their records, as the true owners.

Section 15 provides that, in the event of the death, resignation, or removal from the State of Oklahoma of the original trustees, the holders of a majority in value and amount of the interests shall appoint successors with the same powers, duties and estate as their predecessors.

Section 16 provides for a distribution of the assets of the syndicate, if the same is terminated as provided in § 4 of the instrument, to the holders of interest in *pro rata* amount of said assets, in proportion as the number of interests held by each interest-holder is to the amount of the assets which remain after all of the debts of the syndicate are liquidated.

Section 17 provides for special meetings of the holders of interests, at the call of the trustees, at any time, and that the trustees shall call such meetings upon the written request of a third in value and amount of the interest-holders, written notice of such meetings, giving the time, place and business to be transacted, to be given each holder of interest, through the mails, ten days before the time of the meeting, at which meeting the holders of interests may require of the trustees a statement of their accounts and dealings with the syndicate.

Section 18 provides that M. G. Haskell, Franklin Miller and O. M. Evans, as trustees, accept the terms of the instrument, and declare that they shall hold and dispose of any property or interests in property acquired

by them under the terms of the instrument, as trustees for the benefit of the holders of interest, and their heirs or assigns; that the trustees, or their successors, may become holders of interests in the syndicate evidenced by certificates like those issued by them to other holders of interests. This section concludes with a provision that the trustees and the subscribers thereto expressly agree to the terms of the instrument, and any person who thereafter may acquire an interest from the original subscribers, or otherwise, shall be deemed to have assented to and be bound by the instrument.

After the syndicate was established under the original instrument of May 31, 1921, the trustees named therein, Haskell and Evans, entered upon the performance of their duties. Haskell went to Arkansas about the first of June, 1921, and, with the assistance of Miller, who was not then a trustee, began to acquire property for the syndicate in Southern Arkansas and Northern Louisiana. They began to make investments and conduct operations which made it apparent that they would need much more than the $5,000 cash realized under the trust agreement of May 31, 1921. Hence the second agreement of August 8, 1921, above set forth, was entered into, which is the same as that of the 31st of May, 1921, except § 2 thereof, which increased the capital stock of the syndicate to $50,000 and makes a new allotment to the trustees for compensation and to the original holders of interest, leaving one hundred and fifty interests, or $15,000, in the syndicate treasury, to be sold by the trustees at not less than par.

According to the testimony of Haskell, the actual money of the syndicate which came into his hands was $13,975. The trustees and subscribers to the syndicate were all residents of Muskogee, Oklahoma. Miller and Haskell were experienced oil and gas men, and they conducted the negotiations for the syndicate in acquiring and developing the properties. The other trustee, Evans, was in the brokerage business at Muskogee. He remained there and assisted Haskell two or three days in raising

money by selling interests in the syndicate. He was supposed to be the secretary of the trustees. Haskell was the prime mover in the organization of the syndicate and the controlling genius in its management by the trustees. The trustees employed geologists to examine and report upon the territory in Arkansas and Louisiana in which the investments were contemplated. Upon receiving the reports of the geologists, the leases were taken in the name of Haskell, Miller, or Costello, with no indication on the face of the leases that they were being taken for the syndicate.

The acreage taken in the name of Haskell, as alleged and described in the complaint and admitted in the answer, is quite extensive. The method pursued was to take considerable territory in the localities reported and deemed favorable for the discovery of oil and gas. After acquiring the property, the trustees would sell part of the acreage in certain localities or blocks to oil operators or drillers, the only consideration being that they should drill the lands so conveyed for oil. The trustees were able usually to conduct such operations without any expenditure of syndicate money. The acquisition and development of the properties of the syndicate by the trustees were conducted in this manner from about the first of June, 1921, until they were deposed early in 1923. On December 29, 1921, Haskell wrote a letter to the holders of interest in the syndicate, in which he refers to the meeting to be held by the holders of interest on the 3rd of January, 1922, to determine the question of the continuance of the work of the syndicate under the present trustees, or the closing of its affairs on that date. In this letter he recounts the amount of money which had been received by the trustees, as above mentioned, to the sum of $13,975, and he shows that the "expenditures of the trustees in behalf of the syndicate total $16,152.27, as per list," viz:

W. R. Jewell, living and traveling exp.	$ 2,331.50
P. J. Costello, living and traveling exp.	2,176.00
Franklin Miller, living and traveling exp.	1,360.00
Purchase stock in Mary Oil Co.	2,500.00
Purchase Dodge car	1,251.00
Purchase Magnolia royalties	700.00
Purchase royalties 29-17-14	360.00
Optional price leases and royalties	640.00
1/6 interest 20 acres leases and royalties	166.67
Incidental expenses	1,290.47
Expenses Woodward-Dobie-Bernie in part	250.87
Expenses Ashley Co. in part drilling	603.00
M. G. Haskell, expenses paid	2,422.76
Total	$16,052.27

The letter continues as follows:

"Making an expenditure of $2,127.27 over receipts, for which the trustees have arranged a loan of $2,000 at eight per cent. (with personal indorsement of M. G. Haskell), and the balance of $127.27 is due M. G. Haskell on open account. All of the obligations of the syndicate have been met, with the exception of attorneys' fee for title work, not as yet rendered. In explanation of the above disbursements, beg to set out that, outside of actual living expenses, the account of Messrs. Costello, Jewell, Miller and the writer contain many items of expense incurred in behalf of the syndicate, and various other items equally necessary. Mr. Costello's car has been used by the syndicate during the entire time, making the cost of upkeep of this car, as well as the car owned by the syndicate, a very substantial amount.

"While the well drilled in 22-17-14 by the Mary Oil Company was abandoned, this company holds title to various leases, including a tract on the Magnolia structure and a tract on the Kerlin structure. Inasmuch as the syndicate holds a one-sixth interest in this company, the $2,500 invested may prove profitable. On the amount expended for options, $140 of this amount represents options that have expired; the remaining $500 was paid

for options on leases in township 15, range 20, Columbia County, on deal which the writer expects to see consummated on the 4th of January. On completion of deal the syndicate would be entitled to a return of the $500 and receive a substantial interest in some acreage holdings to be drilled, and which look very promising to the writer. The item of $1,290.47 of incidental expenses covers amounts paid for maps, stenographic work, a portion of hotel bills, labor bills, and of telephone and telegraph bills, etc. (The item of telegraph and telephone bills constitutes a considerable item every month, and is absolutely necessary in order for the trustees to keep in touch with all work being done). No salaries of any nature have been paid, and the writer feels that all working in behalf of the syndicate have been keeping their expenses as low as possible."

Haskell then mentions the "present holdings of the syndicate," and tells what is being done with them, and states in detail the present development and prospects. Among other things he says: "An agreement for the purchase of certain acreage in sections 23, 24, 25, 26, township 15, range 20, has been made, with a deposit made, and deal is expected to be closed within the next week. The deal calls for a well in section 24, and the syndicate would acquire an interest in well and couple hundred acres of close-in acreage. Location for this well was made by W. L. Dobie, geologist. In section 11, same township and range, a well was drilled to 2,175 feet, and has been flowing a small amount of high-grade oil, although it has been impossible to operate the same successfully on account of failure to properly set the casing. The new test would be located on what Mr. Dobie considers the best part of the structure. All of the above holdings are in Columbia County, Arkansas."

After telling of the wells being drilled in Union County, Arkansas, on holdings of the syndicate, and the prospect for a test well on 3,000 acres held by the syndicate in Union Parish, Louisiana, and the prospect of securing at least 5,000 acres in Ashley County, Arkansas,

with good prospects for a test well, and disposing of their excess holdings at a good price, and of tentative agreements for trades to acreage on other structures to be drilled by other parties, he says: "In conclusion, wish to say that those giving their time and efforts to the syndicate, without reference to the writer, have given intelligent and valuable service, and I feel certain that the returns from their investments will prove very profitable to those whose interest in the syndicate is from the standpoint of cash paid in. The prospects for the opening up of additional pools of oil in southern Arkansas and northern Louisiana are very bright, in our opinion, and the holdings we now have, together with what we should hereafter acquire, with our knowledge of the country and existing conditions, should prove of considerable value. The trustees ask for and expect your full cooperation and support. The writer, with the interest of your syndicate a paramount issue, feels that our services warrant your giving it. The trustees, Mr. Jewell and Mr. Costello, join in asking for the approval of a resolution continuing the present syndicate agreement."

A copy of the above letter was delivered to and received by the members of the syndicate.

While the plaintiffs seek to recover the large amount of acreage as set forth in their complaint, yet the most valuable acreage in controversy is that territory designated in the record as the Wepfer acreage and the Columbia Oil & Gas Company acreage (hereafter, for convenience, called, respectively, the "Wepfer" and "Columbia" acreages), because on this territory there are producing wells, and the other acreage in controversy is what is known as "wildcat" acreage, on which there has been no production.

In regard to the Wepfer acreage, the testimony of Miller, for the plaintiffs, tends to show that he and Haskell conducted the negotiations for this tract. They were commenced in December, 1921. There were about 1,400 acres in this deal. It was reported on by both the geologists employed by the syndicate. An option was taken

on the property for a consideration of $500, paid by check or draft drawn by Haskell on the syndicate. They raised the money to close the deal by selling acreage of the syndicate amounting to about $15,000. The money required to make up the purchase price of the Wepfer leases was put up by a check for $500 drawn by Haskell to Wepfer, December 22, 1921; January 21, 1922, $660 from Haskell to Wepfer from sale of acreage on the twenty-four deal; January 21, 1922, a check from McDaniel to Haskell, indorsed by Haskell to Wepfer, $2,666.40; January 27, Roxana Petroleum Company to John G. Wepfer, $2,800, from eighty acres sold January 21, 1922; Franklin Miller to Wepfer, $40.27, making a total of the price of the Wepfer acreage. Witness put up the $40.27 in way of a loan to the syndicate. He stated the amount was returned to him later by Haskell. The Columbia acreage was acquired when the drilling was down on the Wepfer acreage about sixteen or seventeen hundred feet. Haskell and witness then consulted together about taking over the 1,800 acres in the Columbia acreage. Witness then details the circumstances of that deal between its owners and witness and Haskell, which it is unnecessary to set forth. He stated that he and Haskell closed the deal for the Columbia acreage; that the deal did not cost anything except a little expense to get it. After the deals were closed for these properties, the drilling thereon developed producing wells. The syndicate was paying witness' expenses. They used the syndicate's automobile in consummating the deal for the Wepfer acreage, but not in the Columbia deal. Witness was not working for any one except the syndicate. The Wepfer and Columbia people did not know anything about the syndicate, but Haskell and witness knew that they were working for the syndicate. Witness stated that it was June, 1922, when he first heard Haskell suggest that he was going to cut the syndicate in on the Wepfer and Columbia acreages. He understood Haskell to consider it his property, and that he would give the syndicate an interest from a moral standpoint. About the time the well came

in, Haskell told witness that he lacked about $3,700 of paying for standardizing the well. He thought they ought to organize a stock company, and talked about the interest of witness and Woodward and other different interests—thought it best to organize a stock company because of the different interests, and so many of them could not put up the money to meet the indebtedness. Witness suggested that they give to each one a letter showing their interest, and let them hold the same in their own name, and that they borrow $500 on the property. Haskell made out a statement of his assets, and they borrowed the money, and witness supposed that Haskell paid off the note. Witness was not claiming any interest in the Wepfer and Columbia acreages for himself individually. He only claimed an interest in the syndicate. He told Haskell that if he did not get his interest in the syndicate he wanted the interest that Haskell proposed to set apart to him for his services. The syndicate furnished the money, and witness knew all the time that Haskell was trying to retain a certain interest for the last four or five months, and retain witness' interest along with his, but he wanted to give the syndicate a square deal, and did not think it was right to claim an individual interest after the suit was started. Witness had a one-third of $10,000 worth of stock in the syndicate. Haskell proposed to set aside one-sixth of the 500 acres of the Wepfer acreage and one-fifth of the 310 acres of the Columbia acreage to witness, which would mean more money to witness than he would get out of the syndicate if the syndicate won.

Haskell, in his testimony, gave a detailed account of his stewardship as trustee of the syndicate, and also of his individual transactions. He stated that in December, 1921, the syndicate not only had expended all the funds derived from the sale of interests, but were indebted to him as shown by his statement of December 29. The syndicate owed him, at the time he testified, for expenditures on behalf of the syndicate in excess of receipts from all sources, the sum of $7,159.57. Witness opened

negotiations for the Wepfer acreage on December 21, 1921, and procured an option on this acreage for $500 down, on December 21, 1921. Witness drew a draft for $500 in favor of Wepfer on the syndicate to pay for the option. It was not paid by the syndicate, and witness paid the same out of his own funds. The contract for the purchase of the Wepfer leases called for the payment of $6,666.67 for 720 acres and the drilling of a well 2,300 feet. The contract was dated December 21, 1921. Five hundred dollars was to be paid in cash, and the balance on January 4, 1922. The amount was not paid at that time, and witness paid, out of his own funds, $500 for extensions. He finally paid the full amount for the Wepfer acreage, and no funds of the syndicate were employed in making the entire deal. The syndicate never had any funds sufficient to meet their obligations to witness, after the date of obtaining the option for the Wepfer acreage. Witness purchased the Wepfer leases for himself. He paid for drilling the wells out of sale of the acreage and from his personal funds. Four wells had been drilled on the Wepfer acreage, and the fifth was going down. Witness began negotiations for the Columbia acreage about the 10th or 12th of April, 1922. Witness put up a check for $1,000 as earnest money, which was afterwards returned to him. This was not syndicate money. Witness had assigned different contracts for the drilling of wells on the Columbia acreage, giving the drillers one-half interest, with the exception of 120 acres which he had sold for $17,500. The syndicate had no interest in this property. In the fall of 1921, before the Wepfer or Columbia acreages had been tested, witness offered to turn over a two-fifteenths interest in certain property to the syndicate, because he felt that, as "it had put its money down there and had not obtained results to indicate a return on the money," he should carry a sufficient interest for the syndicate, so that, if he made anything personally, he would give the syndicate enough interest in the Wepfer deal to make it some money. He communicated this offer in the letter of

December 29, 1921, which has been set forth above. This offer was made before he acquired the Columbia acreage, and after that he made a selection of 500 acres, including 160 acres in the Wepfer acreage and 340 acres in the Columbia acreage, and gave the syndicate a 2/15 interest therein. He didn't indicate in his letter just what the interest would be. Witness was not able to raise any funds for the syndicate from the sale of interests, and none of the other members of the syndicate advanced or procured any additional funds after the first of December, 1921. Witness exhibited correspondence which he had with John R. Dudding and other holders of interests, which he claims fully advised the holders of interests in the syndicate of the interest he had acquired in the Wepfer and Columbia acreages, and he protests that the members of the syndicate were fully advised by his letters and reports of all his dealings, either as an individual or as trustee of the syndicate, and that they acquiesced therein, and that the syndicate was thereby estopped from claiming any interest, except that which he had indicated he was willing to give it in the Wepfer and Columbia acreages. Witness denied that, at the time he acquired the Wepfer and Columbia acreages, he was working for the syndicate. He was unable to determine the date he started to working for himself, but it was after the syndicate funds had been exhausted, and it was necessary for him to do something. He could not give an itemized list of expenditures for the syndicate unless he could get certain information from Muskogee. The reason he did not notify Evans at Muskogee that he was about to make a personal deal for the Wepfer and Columbia acreages was that he had been trying to raise more money from the syndicate, and Evans and Dudding had advised him that money was tight, and they could not get it. He received from sales out of Wepfer and Columbia acreages the gross sum of $42,999.20.

O. M. Evans, trustee, testified that he didn't know that Haskell was taking leases to develop for himself

individually until February, 1923. He and Haskell had talked over the affairs of the syndicate during the Christmas holidays of 1921, and he was authorized to vote Haskell's interest in the syndicate at the meeting to be held in January, 1922, when the syndicate was continued for another year by the interest-holders. Haskell was in charge of the finances of the syndicate. Witness was supposed to be the secretary of the trustees, but kept no books showing a list of the members and the dealings of the trustees. Haskell never furnished any memorandum from which he could make up such a book. Witness understood that the syndicate agreement required the trustees to devote their entire time to the affairs of the syndicate, in consideration of the interest set apart to the trustees. Witness did not do it, and voted for the resolution discharging himself.

The testimony of the plaintiffs tended to prove that they did not know that Haskell was doing any business in the oil and gas development other than for the syndicate. They understood that he was giving his entire time to the syndicate. The testimony of these and other witnesses tended to prove that Haskell, when he was organizing the syndicate, promised that, for the interest set apart to him in the syndicate, he would devote his entire time for the syndicate until it was a paying proposition; that Haskell never advised them that he was going to have an individual or personal oil business. As soon as the plaintiffs ascertained that Haskell was claiming valuable interests adverse to the syndicate, steps were taken to remove the trustees and to substitute others, which was done on the 5th of March, 1923, and the plaintiffs were substituted in their stead, and they immediately instituted this action.

Although there is much other testimony in the record, oral and documentary, the above, it is believed, presents the salient features of the evidence upon which the trial court based its findings of fact, to-wit: that M. G. Haskell, while in the employ of the syndicate, did purchase oil and gas leases for his own personal account and

pay for same out of his own personal funds, which leases were executed and assigned to Haskell personally; and upon which findings the trial court concluded that Haskell, while acting as a trustee, could not legally engage in purchasing oil and gas leases for his own personal account within the territory for which he was trustee for said syndicate; that he holds the leases in trust for the use and benefit of the syndicate, and that the assignment of Haskell to McDaniels, as trustee for the benefit of his wife, Lucy S. Haskell, is without consideration and void. Upon these findings of fact and law the court entered a decree setting aside the conveyance to McDaniels, and quieting the title to the plaintiffs in the lands which are described therein. From that decree is this appeal.

1. Mr. Pomeroy announces the doctrine on constructive trusts, which must govern the facts of this record, as follows: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and, in most cases, contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed trusts in *invitum;* and this phrase furnished a criterion, generally accurate and sufficient, for determining what trusts are truly 'constructive.' An exhaustive analysis would show, I think, that all instances of constructive trusts, properly so-called, may be referred to what equity denominates fraud, either actual or constructive, as an essential element, and as their final source. Even in that single

class where equity proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, the notion of fraud is not invoked, simply because it is not absolutely necessary under the circumstances; the existence of the trust in all cases of this class might be referred to constructive fraud. This notion of fraud enters into the conception in all its possible degrees. Certain species of the constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation; in all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls constructive fraud. Courts of equity, by thus extending the fundamental principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—to all cases of actual or constructive fraud and breaches of good faith, are enabled to wield a remedial power of tremendous efficacy in protecting the rights of property; they can follow the real owner's specific property, and preserve his real ownership, although he has lost, or even never had the legal title, and can thus give remedies far more complete than the compensatory damages obtainable in courts of law. The principle is one of universal application; it extends alike to real and to personal property, to things in action, and funds of money." 3 Pomeroy's Equity Jur., §§ 1044, 1053 and 155. We quoted the latter section from Mr. Pomeroy in *Bray* v. *Timms,* 162 Ark. 247.

Since this case, in its final analysis, must be determined largely upon our conclusion of fact, we have set forth above the material facts, and they speak for themselves. We deem it unnecessary to argue them at length. After a careful consideration of the entire record, we are convinced that the properties acquired by Haskell, title to which was taken in his own name, were the properties of the syndicate, under the doctrine of constructive trusts as above announced. We do not interpret the

trust agreement as prohibiting the trustees named therein from acquiring oil and gas properties in their own right. On the contrary, there is language in §§ 12 and 13 which clearly indicates, by implication at least, that the trustees are not prohibited from investing their own funds in the acquisition of such properties. But it is equally clear from these provisions that, during the time the trustees are acquiring and managing such properties for the syndicate, if they acquire any properties in their individual right that fact must be designated in a manner so as to show that they are not syndicate properties. This was not done. No separate books or cards were kept showing separate accounts of the trustees, as individuals, distinguishing their operations as such from operations as trustees of the syndicate. No separate receptacle was kept for documents and conveyances, with indorsements *in red ink* thereon, showing that they were for the individual rather than for the syndicate. The trustees wholly ignored these provisions of the trust instrument, but, on the contrary, elected from the start to keep all leases acquired, whether in the name of Haskell, Miller, or Costello, as the property of the syndicate, and there was no indication to the contrary until long after all the properties, including the Wepfer and Columbia acreages, had been acquired.

Haskell testified that he conceived the idea of making the Wepfer deal for himself about the first of December, 1921; that he made an effort to raise money for the syndicate; that all the syndicate funds had long been expended, and that he was unable to raise any money from the syndicate himself, or to get any assistance from syndicate members in raising more money, and that the Wepfer deal contemplated an expenditure in excess of all the amount that could have been raised by the syndicate if they had not spent a cent or any of the money. Haskell contends that his testimony in this respect was corroborated by correspondence with Dudding by letter of October 28, 1921, in which Dudding stated that they had worked "awful hard to raise more money, but in

vain." But this statement of Dudding as to the inability to raise money for the syndicate was before Haskell's letter of December 29, 1921, in which he makes a report to the syndicate of the transactions conducted by the trustees up to that time. In this letter, while he refers to an expenditure above explained of $2,127.27, he states that the trustees had arranged a loan of $2,000 for the payment of same by Haskell's indorsement, and the balance of $127.27 he had advanced as his own money. There is in all this letter no urgent appeal to the members of the syndicate to raise funds to enable the trustees to continue their extensive operations. On the contrary, the whole letter, as we construe it, was optimistic in tone, and gave the members of the syndicate to understand that the syndicate, instead of being in a distressed condition financially on account of the operations of the trustees, was then in a prosperous condition, and could be safely continued in anticipation of great profits, and he asked that it be continued.

Now, without arguing all of the testimony in the record which convinces us that Haskell should be held to have acquired the properties in controversy, especially the Wepfer and Columbia acreages, for the syndicate, it suffices to say that his own letter of December 29 shows that, up to that time, he himself regarded the option he had taken on the Wepfer acreage for the benefit of the syndicate. In this letter he plainly states that the amount expended "for optional price leases and royalties was $640" for the syndicate, and the undisputed testimony shows that $500 of this was for the option on the Wepfer acreage. True, in explaining this disbursement he says that the syndicate, on completion of the deal, would be entitled to a return of $500 and receive a substantial interest in acreage holdings to be drilled which looked very promising.

In construing the trust agreement by its own language, and in the light of the interpretation that was put upon it by Haskell and the other trustees, as well as the other members of the syndicate, it is certain that

it was not the intention of any of the parties to create a twilight zone of uncertainty in the management of the affairs of the syndicate, in which it might be difficult to discern just when Haskell was representing the syndicate and when he was representing himself. The instrument, as a whole, shows clearly that it was the intention of all parties that the trustees should give their first thought to the interests of the syndicate. The trustees were to devote their time and services to the syndicate, in consideration of the funds placed in their hands for investment and management and the opportunities thus afforded them to make money both for themselves and the syndicate. To sum up the whole matter on the question of fact, we are thoroughly convinced that, if Haskell, when the prospects for oil and gas on the Wepfer and Columbia acreages seemed imminent, had served the syndicate with the same fidelity and zeal that he served himself, he would have experienced no difficulty whatever in financing the same proposition for the syndicate as he financed for himself. Haskell, from the beginning of the operations under the trust agreement, had assumed the task and duty of raising money and handling vast operations for the syndicate, and his customary procedure was to use all the instrumentalities of the syndicate, its full equipment, in the negotiations which were consummated in the taking over of these properties. He could not change his attitude without giving notice to the members of the syndicate of such change. He contends that his letter of December 29 and subsequent letters did this. But not so. These letters "back home" contained no definite, explicit statement that would advise the members of the syndicate of his decision to abandon the syndicate's interests and to represent himself. The letters in which he claims he gave such notice were couched in language which would only camouflage his real purpose, and give no notice whatever of the actual situation. While, under the trust instrument, there was nothing to inhibit Haskell from acquiring leases individually, yet it must be held, under all the facts of this record, that he

did not do so. The money he raised from handling the properties in controversy was money of the syndicate, and individual funds, if any, advanced by him was money loaned to the syndicate. He had done this before, why not now? Haskell's professed magnanimity in donating a two-fifteenths in a selected small portion of the "Wepfer" and "Columbia" as a moral duty to the syndicate, which, according to his testimony, already owed him more than seven thousand dollars, is, to say the least, not impressive. To us this ostensible gift appears more like an emollient to a buffeting conscience than the satisfaction of a moral obligation. In reaching this conclusion it is unnecessary to convict Haskell of actual fraud in acquiring the properties in controversy, and we do not do so. But we do say that we regard the proof as clear, decisive and convincing that Haskell acquired the properties in controversy under circumstances which constitute a constructive trust, and it would be a fraud on the members of the syndicate to allow him to hold them in his individual right. Under the doctrine announced by Mr. Pomeroy above, the law superimposes upon his transactions the trust relation, and he holds title to the leases in controversy in trust for the syndicate, and must account to the syndicate for his dealings in the premises.

2. It is certain that this syndicate is not a pure common-law trust, as was created by the instrument in *Betts* v. *Hackathorne,* 159 Ark. 621-625. The syndicate created by the instrument under review combines some of the features of a partnership with those of a pure trust, but the predominant features are those of a partnership rather than a pure trust, because the interest-holders have the power to amend the declaration of trust, to remove the trustees without cause and substitute new ones, to continue or to terminate the trust, to require of the trustees a statement of their accounts in dealing with the syndicate and its assets, and to transact any other business pertaining to the properties of the syndicate specified in the call for their meeting. In other words, here the beneficiaries or interest-holders are the masters

of the trust, rather than the trustees. Where such is the case the association or syndicate should be classified as a partnership, rather than a pure trust. Sears, "Trust Estates as Business Companies," p. 144 *et seq.;* Wrightington's "Unincorporated Associations and Business Trusts," p. 38, *et seq.;* see also p. 71, where the author cites *Baker-McGrew Co.* v. *Union Seed & Fertilizer Co.,* 125 Ark. 146.

But, whether this syndicate should be classed as a pure trust or a partnership, under the terms of the instrument a fiduciary relation existed between the trustees and holders of interests, and this relation imposed upon the trustees primarily the duty, as we have seen, to look after the interests of the syndicate always in preference to their own. In defining the duties and obligations, and appraising the liabilities of trustees, the same rules and tests are applied to their conduct as are applicable to partners. *Pomeroy* v. *Benton,* 57 Mo. 545. As to the duties of a partner to those associated with him in the joint enterprises, see *Boqua* v. *Marshall,* 88 Ark. 373, and other numerous cases in appellees' brief.

Under the broad powers conferred upon the trustees by §§ 5, 6 and 9 of the trust instrument, we have no doubt that Haskell, in conducting the negotiations leading to the acquisition of the properties in controversy, should be held to have acted for the syndicate, rather than for himself. Having acquired the properties for the syndicate, Haskell was powerless to undo his work by undertaking to hold for himself the lion's share while allotting to the members of the syndicate and others such small portions as he wished them to possess. The trustees must be held to have acted as a unit in the acquisition of the properties, and Haskell had no power, as a trustee, to make allotments of the syndicate property to his own advantage and their hurt. Bum's Business Trusts, p. 172; Sears' Trust Estates, § 132; Wrightington's Associations and Business Trusts, p. 246, § 45.

3. It follows from what we have already said that the syndicate is not estopped from maintaining this action

by its present trustees. There was nothing in the letters of Haskell or in any of the testimony to apprise the holders of interest in the syndicate of the actual situation at the time Haskell acquired the properties in controversy. On the contrary, we believe that Haskell's letters were so framed that no interest-holder could have been accurately informed thereby of the true situation, and we do not find anything in the testimony that was sufficient to put them on inquiry of their rights until just before the commencement of this action. *White* v. *Sherman,* 48 N. E. 128; *Endicott* v. *Marvel,* 87 Atl. 230-234. The interest-holders, through their trustees, acted with due diligence, after they ascertained the facts, in instituting this action to cancel the conveyance from Haskell to McDaniels, trustee for Haskell's wife.

The decree is correct, and it is therefore affirmed.

BRITT v. LACONIA CIRCLE SPECIAL DRAINAGE DISTRICT.

Opinion delivered June 23, 1924.

1. DRAINS—NOTICE OF APPLICATION TO CHANGE FROM SPECIAL TO GENERAL DISTRICT.—Notice of an application to change a drainage district created by special act into a district operating under Crawford & Moses' Digest, §§ 3607-3654, was sufficient where the notice complied with the requirements of § 3652.
2. DRAINS—POWER OF DISTRICT TO BORROW MONEY.—When the special drainage district created by special act No. 668 of Special Acts of 1923, was changed to a district operating under the general law (Crawford & Moses' Dig., § 3607-3654), it was no longer bound by the limitation upon its power to borrow money contained in the special act.
3. DRAINS—REPEAL OF FORMER ACT COVERING SAME TERRITORY.—Special act No. 668 of 1923, creating a special drainage district, repealed act No. 359 of 1907, creating a drainage district covering the same territory.
4. STATUTES—REPEAL BY INCONSISTENT STATUTE.—A statute repeals a former statute with which it is in irreconcilable conflict.
5. DRAINS—DESCRIPTION OF BOUNDARIES.—When the chancellor found that an order of the county court creating a drainage district in a certain township and county "within the limits of what is

historically and generally known as 'Laconia Circle Levee,'" sufficiently described the boundaries of the district, and a plat, introduced in evidence and considered by the chancellor, is not brought into the record, it will be presumed that the chancellor's finding was supported by the evidence.

6. DRAINS—DESCRIPTION OF BOUNDARIES.—An order of the county court creating a district which describes its boundaries as embracing all lands within what is "generally and historically known as Laconia Circle" in a certain county and township, sufficiently delimits the boundaries of the district.

7. DRAINS—AUTHORITY TO CONSTRUCT LEVEE.—A drainage district operating under Crawford & Moses' Dig., §§ 3607-3644, is authorized to construct a levee.

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

Williamson & Williamson, for appellant.

1. The notice was not sufficient. It was so indefinite and uncertain that one reading it could not ascertain that it proposed to change a drainage district created by a special act to one operating under the general drainage laws and the laws amendatory thereof, without reference to other sources of information. 126 Ark. 518.

2. The district is bound by the provisions of special act No. 668, Acts 1923, with reference to the amount of money it can borrow. There is nothing in the general act to indicate that it was the intention of the Legislature that commissioners of a drainage district created by special act, when changed to one operating under the general law, might borrow money and issue bonds for a sum in excess of the amount fixed in the special act. See § 11 of act 668.

3. There was a drainage district, covering the same territory, created by act No. 359, Acts 1907, at the time of the passage of act No. 668, *supra,* and the same was not repealed by the later act, since it carries no words of revocation, expressing a repeal, and there is no such manifest repugnance between the two as that both cannot stand. The attempted change of the district created by act No. 668 is therefore void. 23 Ark. 304; 92 Ark. 600; 101 Ark. 238.

DeWitt Poe, for appellees.

1. The notice, unlike that in *Drainage District* v. *Terry,* 126 Ark. 518, relied on by appellant, was so full and complete that a stranger by reading it could understand just what was intended. The names of the commissioners were stated, the name and number of the special act, and it not only referred to the Acts of 1909 and amendments, but gave also the sections in C. & M. Digest; and it informed the landowners that they might appear and contest, or support the petition, as they deemed proper. It was sufficient.

2. The district is not bound by the limitation in § 11, act 668, Acts 1923, as to borrowing money. C. & M. Digest, § 3652, and the sections therein referred to, *i. e.,* 3607-3654.

3. The act 359 of 1907 was expressly repealed by the act 668 of 1923, by § 26 thereof, which provided that all laws and parts of laws in conflict therewith were repealed. See 72 Ark. 8; 76 Ark. 32; 112 Ark. 437; 114 Ark. 23; 138 Ark. 471; 145 Ark. 106; 145 Ark. 544.

4. The boundaries of the district are definitely established. Section 1, act 668, Acts 1923; § 1, act 39, Acts 1915; 132 Ark. 613.

WOOD, J. This action was instituted by the appellant against the appellees to restrain the commissioners of Laconia Circle Special Drainage District from proceeding with the improvement contemplated by the creation of said district. The complaint alleges that the Laconia Circle Drainage District was created by act 359 of the Acts of the General Assembly of 1907, and that the Laconia Circle Special Drainage District was created by special act No. 668 of the Acts of the General Assembly of 1923; that no action was ever taken under act No. 359; that the commissioners of the district created by act 668 have caused that district to be changed to one operating under the general drainage laws. Sections 3607 to 3654, Crawford & Moses' Digest.

The appellant alleged that he was a resident landowner in the district, and that the order changing the

district to one operating under the general drainage laws was void because no notice was given of such change, as required by law; that the act of 1923 (act 668) authorized the commissioners to borrow money and issue bonds not exceeding $40,000, but that the improvement contemplated under the change will cost $150,000, and that the commissioners are about to borrow that sum, in violation of act No. 668. The appellant alleged that act 359 of the Acts of 1907 had not been repealed by special act 668 of 1923; that act No. 668 was void because it undertakes to create a drainage district without properly describing or identifying the boundaries thereof; that the commissioners, under special act No. 668, planned to construct a levee as part of the improvement, whereas the special act only authorizes the construction of drainage canals and pump plant.

The appellees, in their answer, admitted the creation of the districts and that the change was made as set forth in the complaint, and that they are about to proceed to issue bonds and make the improvement as alleged in the complaint, under the change made by order of the Desha County Court. They denied all the allegations as to the illegality of the change in the district, and alleged that act 359 was repealed by act 668. They admit that identical territory is embraced in each law, but alleged that act 359 creating the first district was repealed by the latter act No. 668, and alleged that the later act sufficiently identified the lands embraced within the district, and that the manner prescribed by the act for ascertaining the bounds of the district was legal. Appellees set up that the purpose of the district was to drain territory known as Laconia Circle, Mississippi Township, Desha County, Arkansas, so as to protect the land therein from flood waters of the Mississippi and White rivers and to effect the removal of the surface waters within said circle; that, to properly drain this said territory will require a pumping station at the south side of the district, and the enlarging of 6¾ miles of private levee and the construction of a new levee

2,400 feet in length around a crevasse in the old private levee, and the digging of canals to carry the surface water to the pump plant.

The appellees exhibited with their answer the order of the county court ordering the change, which recites that it was done under the authority of §§ 3607 to 3654 of Crawford & Moses' Digest. The order recites that the district embraces all lands within what is "generally and historically known as Laconia Circle, Mississippi Township, Desha County, Arkansas," and describes the lands; that, since the filing of the petition for the change, the court had given notice of the application by two weeks publication in the Desha County Journal, a newspaper published and having a *bona fide* circulation in Desha County; that there was no objection made thereto by any person, and the court, deeming it most advantageous to make the change, "doth order the same, and direct that it shall have all the rights and powers and be subjected to all the obligations provided by the terms of the acts under which the change was made." Attached to the answer was also an exhibit of the order of the county court directing notice to be given to the landowners in the district of the date of the hearing of the application for the change, and also an exhibit of the plat of the district.

The county clerk of Desha County testified that the publication of the notice ordered by the court to be given the landowners in Laconia Circle of the filing of the petition for the change was published on February 14 and 21, and attached a copy of the publication to his deposition. Witness had always known of the tract of land called "Laconia Circle." It contained about 12,000 acres in Mississippi Township, which was completely incircled by levees. The small levee on the back side was privately built and maintained, and that is the section the commissioners wanted to enlarge to standard size under act 668. The notice referred to specifies that the commissioners, naming them, of Laconia Circle Special Drainage District, created by special act No. 668, have

petitioned the Desha County Court to change the special drainage district embracing all land lying within what is generally and historically known as Laconia Circle Levee, in Mississippi Township, Desha County, from its present status as a special district to a district operating under the general drainage law of 1909 and amendments thereto, known as the alternative system of drainage districts, as set out in §§ 3607 to 3654, inclusive, of Crawford & Moses' Digest." The notice further specifies that owners of real property within the district are notified of the hearing of the petition to be held at Arkansas City on March 3, 1924, and that they have the right to appear and contest the petition or to support the same; that the notice was given pursuant to an order of the Desha County Court, dated February 4, 1924.

The court found that the complaint was without merit as to each of the questions complained of therein, and entered a decree dismissing the same for want of equity, from which is this appeal.

1. The appellant's counsel first contend that the notice is not sufficient to meet the requirements of § 3652 of C. & M. Digest. To support their contention, they rely upon the case of *Drainage Dist. No. 7* v. *Terry,* 126 Ark. 518. In that case the notice specified that three owners of real property in the district petitioned the county court to constitute them a drainage district under the terms of the drainage laws passed by the Legislature in the year 1911, and that the petition would be heard on the first Monday in November, 1915. We held that the notice was not sufficient because it did not state that the petitioners requested the court to change the operation and control of the drainage district organized under the act of 1911 to the alternative system provided in the act of 1909. In that case we said: "It is only by intendment that one reading the notice might conclude that three property owners within a drainage district which had been established under one act were petitioning the county court to transfer the operation and control of that district from the provisions of the act under which it was

created to the provisions of another act. The notice should clearly and specifically declare this purpose, and, having failed to do so, we conclude that the court below was correct in holding the proceedings had thereunder to be void."

In the case at bar notice was given under the provisions of § 3652, C. & M. Digest, which were similar to the provisions of § 3654, under which the notice in the above case was given. Section 3652 provides, in part, that "any drainage district which has been heretofore organized, or which may hereafter be organized under any special act of the Legislature, may become a drainage district under §§ 3607-3654 by proceeding in the following manner: If said district is wholly in one county, the directors or commissioners of said district may petition the county court for an order changing said district from a special district to a district operating under the sections aforesaid, and thereupon the county court shall give notice of the application, by two weeks' publication in some newspaper published and having a *bona fide* circulation in the county, and of a time when the petition will be heard. All owners of real property within the district shall have the right to appear and contest the said petition, or to support the same."

Now, the notice given in the case at bar states the names of the commissioners of the district created under special act 668 of the Acts of 1923, and recites that they have petitioned for a change of the special drainage district into a district operating under the general drainage law and the amendments thereto, known as the alternative system, setting forth the sections of the Digest, and notifies them that they may appear and contest or support the petition, as they deem proper. The petition conforms minutely to the requirements of § 3652, *supra,* under which notice must be given when a change is petitioned for from special district to a district created under the Acts of 1909 and amendments thereto.

2. The appellant next contends that the district, after the change is made, is bound by the limitations of

the special act 668 under which it was originally created, which act prohibits the borrowing of money and the issuing of bonds for more than $40,000. Section 3652, *supra,* authorizing the change to be made, provides "that, if a majority in value or acreage of the lands in the special district petition for the change, the county court must make an order declaring said district shall henceforth be governed by the sections aforesaid," to-wit, §§ 3607-3654. Under the allegations of the pleadings, no work had been done under the special act prior to the time of the filing of the petition for a change to the alternative system under the general law, and after the order of the county court making the change. After that order the provisions of the general law applicable to the alternative system of drainage districts govern the subsequent proceedings by which the improvement is made. Otherwise interminable confusion would result in the proceedings under the drainage law. Therefore the trial court was correct in holding that the commissioners are not limited in the borrowing of money and the issuing of bonds to the amount fixed in act 668, but may proceed in that respect under the authority of the general drainage law and subsequent amendments thereto.

3. It is next urged that, when special act No. 668 was passed, there was already in existence a drainage district created by special act 359 of the Acts of 1907, covering precisely the same territory, and that, as there are no words in the last act expressly repealing the former, the former is still in force. We cannot agree with this contention. Act 668 of the Acts of 1923 concludes as follows: "All laws and parts of laws in conflict herewith are hereby repealed." Since it is apparent from the allegations of the pleadings that special act 668 was passed for precisely the same purpose as the earlier special act No. 359 (1907), to-wit, the drainage of the lands included in what is generally and historically known as "Laconia Circle," the last enactment is necessarily in conflict with the former, and therefore the former is expressly repealed by the latter, and this would be so

even if the last act did not expressly repeal the former, for they are in irreconcilable conflict. See *Eubanks* v. *Futrell,* 112 Ark. 437; *Dickerson* v. *Tri-County Drainage District,* 138 Ark. 421; *Robertson* v. *Mena Bonded Warehouse Co.,* 145 Ark. 106; *Newbold* v. *Stuttgart,* 145 Ark. 544, and other cases cited in appellee's brief.

4. It is next insisted that special act No. 668 is void because the boundaries of the district are not sufficiently described, and because there is no reference to political subdivisions in describing the land. The act creating the district describes the lands embraced therein as "all territory lying and being situated in Mississippi Township, Desha County, Arkansas, within the limits of what is historically and generally known as Laconia Circle levee," etc. The testimony of the only witness in the case shows that Laconia Circle is a tract of land aggregating about 12,000 acres in Mississippi Township, Desha County, completely encircled by levees, and in the exhibits to the answer there is a plat of the lands, which counsel for appellant say is not contained in the transcript. The decree of the court shows that the cause was heard upon the answer and the exhibits thereto, and the court found that the description of the bounds of the district is sufficient, and that there is no illegal delegation of legislative authority. In view of this finding of the court, in the absence of that plat or any evidence in the record *aliunde* showing that the boundaries were insufficient, the finding of the trial court must be sustained. We must presume that this plat, if brought forward in the transcript and abstract, would have shown that the lands in Laconia Circle Special Drainage District were definitely described. Moreover, the act, in its first section, described the territory as "within the limits of what is historically and generally known as Laconia Circle levee," etc. This description of itself would be sufficient to enable the landowners and the county court to readily ascertain and understand what lands were to be embraced in the district. From this description the commissioners and landowners and the county court could readily ascer-

tain and delimit the boundaries of the district, and it involved no illegal delegation of legislative authority to the commissioners.

5. In the last place it is contended that special act No. 668 gives no authority to construct a levee. But, as we have already shown, after the change the work of improvement is to be prosecuted under the general drainage law of 1909 and amendments thereto. Section 32 of act 279 of 1909 provides: "The word 'ditch' as used in this act shall be held to include branch or lateral ditches, tile drains, levees, sluiceways, floodgates, and any other construction work found necessary for the reclamation of wet and overflowed land." This section was amended by act 177 of 1913 so as to make the word "ditch" include levees, etc., and "to apply to the organization of districts the main object of which is the construction of levees." See *White River Lbr. Co.* v. *White River Drainage Dist.*, 141 Ark. 196.

The decree of the trial court is in all things correct, and it is therefore affirmed.

WOODRUFF COUNTY *v.* ROAD IMPROVEMENT DISTRICT NO. 14.

Opinion delivered June 23, 1924.

1. BRIDGES—APPROVAL OF CONTRACT FOR CONSTRUCTION.—Where the county judge by the same contract agreed to contribute to the building of two county bridges, and the county court approved and allowed a claim for building one of the bridges and in the judgment stated that the claim for the other bridge was deferred because not completed, this amounted to an approval of the contract.
2. BRIDGES—AGREEMENT OF COUNTY—EVIDENCE.—Evidence *held* to warrant a finding of a contract between a county judge and a road improvement district for the payment of a named sum toward the construction of two bridges.
3. COUNTIES—VERIFICATION OF CLAIM.—Where a county contracted to pay a named sum for the construction of a bridge within an improvement district, and accepted and used the bridge, it can-

not resist the payment of a claim therefor because the verifying affidavit was not couched in the precise language required by Crawford & Moses' Dig., §§ 2029, 2030.

Appeal from Woodruff Circuit Court, Southern District; *E. D. Robertson,* Judge; affirmed.

R. M. Hutchins and *Kirby & Hays,* for appellant.

The alleged contract under which the claim was made was void. It is not even claimed that the procedure was followed which is prescribed by law regulating the construction of bridges of this class, *i. e.,* the appointment of commissioners, the selection and report upon a site for the construction thereof, according to plans agreed upon and approved by the county court. Article 19, § 16, Const. 1874; C. & M. Digest, § 827. The contract was not regularly made, nor was there shown to have been a ratification of it by the county court, the only agency having authority to bind the county to pay for such improvements, and there can be no presumption in favor of its validity. The county court itself was powerless to make a valid contract for the construction of bridges of this class, unless an appropriation had previously been made for bridge construction, which was wholly or in part unexpended. C. & M. Digest, § 1976; 61 Ark. 74; 103 Ark. 468; 54 Ark. 645.

W. J. Dingan, for appellee.

In *Woodruff County* v. *Road Improvement District No. 14,* 159 Ark. 374, involving payment for the first bridge constructed under this contract, it was held that in an action to recover for building a bridge, the presumption is that money to build the same has been appropriated, citing 72 Ark. 330 and 103 Ark. 468; and also that the county court could have made a valid contract in the first instance for the construction of the bridge there in question. Under that decision the county court could have made a contract to build the bridge involved here, and for which payment is sought. And, as decided in that case, the court ratified the contract for the building of this bridge. The language employed by the county court in disposing of the Roaring Slough bridge claim by allow-

ing it, and in continuing the matter as to the Bear Slough bridge, because "same not being completed," can bear no other interpretation than a ratification. 72 Ark. 330.

WOOD, J. This action was instituted by Road Improvement District No. 14 of Woodruff County (hereafter called appellee) against Woodruff County to recover the sum of $2,500 alleged to be due the appellee for the cost of construction of a bridge across Bear Slough in Woodruff County and in the territory embraced in the improvement district. The commissioners of the appellee filed what is designated as an "account" in the county court of Woodruff County, in the nature of a complaint, in which they state that, "in pursuance of a contract entered into on the 15th day of April, 1920, between the county judge of Woodruff County and the appellee, through its commissioners (naming them), it was agreed that the commissioners of appellee act for the county and the appellee in the construction of a steel bridge across Bear Slough, on the boundary line between the northern and southern districts of Woodruff County; that it was agreed that Woodruff County would pay $2,500 of the contract price for the construction of the bridge; that the commissioners had constructed the bridge and had paid to the Illinois Steel Bridge Company, the contractors, the contract price for such construction. The following is the verification of this account or complaint: "State of Arkansas, County of Woodruff: Comes E. W. Butler, D. J. Williams and J. F. Summers, and on their several oaths state that they are the commissioners of Road Improvement District No. 14 of Woodruff County, Arkansas, and that the statements in the foregoing account are true and correct; that, under the contract referred to in said statement of account, Woodruff County justly owes Road Improvement District No. 14 the sum of $2,500, and said sum is past due and no part thereof has been paid. (Signed) J. F. Summers, E. W. Butler, D. J. Williams. Subscribed and sworn to before me this 30th day of March, 1922. A. H. Hamilton, notary public. My com. ex. 2/2/26."

An exhibit was attached to the account, the report of the commissioners, in which it is recited that the bridge had been completed by the contractors "according to the plans and specifications heretofore approved by this court * * *." They also exhibited a certified copy of the county court's order, which recited as follows: "On this day is presented to the court the claim of Road Improvement District No. 14 in the sum of $2,500, against Woodruff County for the construction of a bridge, and, upon an examination by the court, said claim is disallowed. January 1, 1923." They also exhibited the following account:

"Woodruff County, Dr., To Illinois Iron & Steel Bridge Co.

To steel bridge Roaring Slough	$2,500.00
To steel bridge Bear Slough	2,500.00
	$5,000.00

"Indorsed: Examined and allowed in the sum of $2,500 for the steel used on Roaring Slough. 12/30/1920. J. W. Simmons.

"The above is to be issued in $100 pieces. Filed December 30, 1920. Walter Jimmerson, Clerk. By N. N. Cain, D. C."

They also exhibited the following:

"On this day is presented the claim of the Illinois Steel Bridge Company for steel for Roaring Slough and Bear Slough bridges, and, upon consideration, the claim for $2,500 for Roaring Slough is allowed and the claim for Bear Slough bridge, *not being completed, is deferred.* J. W. Simmons, county judge."

The above account was filed and disposed of as above on the 30th of December, 1920.

They also exhibited a certificate of the county clerk to the effect that, according to the treasurer's report to the county court of Woodruff County, filed at the January term, 1921, there were no funds in the treasury to the credit of ordinary county funds and no funds to the credit of the road and bridge fund on the 30th of December, 1920.

J. F. Summers testified that he was one of the commissioners of the appellee and chairman of its board of directors; that appellee was a duly organized improvement district; that some time in March or April, just before the plans of the improvement district were filed, he called the attention of Judge Simmons, county judge, to the condition of the bridges over streams known as Roaring Slough and Bear Slough. The effect of his testimony was that, after talking over the matter with the county judge as to the character of the bridges appellee wished to construct over these streams, the county judge was to pay $2,500 towards the construction of each bridge; that, with that information in mind, the commissioners had the plans drawn for the expenditure of that sum above what they had contemplated, in order to compass the building of a permanent bridge of proper construction, as indicated by the county judge. The bridges were to take the place of the bridges that were on the public road running across the above-mentioned streams which had been in use since the roads were laid out, and were then in a dangerous condition, and had been condemned by the overseer. The bridges constructed by the appellee cost $8,500 each, and the county judge agreed to pay $2,500 on each of the bridges. At the close of the year 1920 the bridge over Roaring Slough had been constructed but the bridge over Bear Slough was only partially built, the piers having been put down and the steel work being all on the ground. The appellee presented a formal claim to the county court for $5,000 in the name of Illinois Iron & Steel Bridge Company, with the supporting affidavit and report of the engineer of the district and the testimony of the commissioners. Witness then identified the record of the county court as above set forth, and stated that it explained everything in connection with it. Witness referred to the order of the county court which recited that "the claim for $2,500 for Roaring Slough bridge is allowed, and the claim for Bear Slough bridge, not being completed, is deferred," as follows: "It says Bear Slough not being completed—it

wasn't completed, because only part of it had been constructed, and the steel was on the ground, and the court did not allow the entire five thousand dollars. The claim was recognized, but action was merely deferred until completion of the bridge."

Witness was asked this question: "Was there any question raised by the court so as to take proof on the allowance of this particular claim? A. None whatever. We brought in the engineer, and a regular sworn statement of the condition that it was in." Witness was then asked, "Later, after the new county judge came into the office, what further did the commissioners do with regard to having the remainder of the claim allowed, if anything?" and answered. "After the bridge had been completed and painted, and everything completed, the commissioners then made out and presented the claim, which is in this record here, to the county court, for allowance for the deferred amount mentioned in this order. This was merely a continuation of that matter. Q. And this is the claim which was disallowed? A. Yes sir."

It was from the action of the county court in failing to allow the balance of the claim that this appeal is taken. The witness further testified on cross-examination, explaining the agreement, and stated that the plans of the appellee for the bridges were not made and filed until after the talk with the county judge, and that the county judge was to pay the sum of $2,500 on each bridge, and stated that, by getting the substantial bridges at a cost of $2,500 each, it was an economical proposition for the county. The commissioners didn't expend all the money raised in the district by $65,000, and retired bonds in that amount that were not then due. The old bridges were wooden bridges.

The testimony of Summers was corroborated by the testimony of one of the other commissioners. The road overseer in appellee district testified that the new bridges were constructed in 1920. He corroborated the testimony of Summers as to the condition of the old bridges,

and testified that the county judge then in office, Judge Carl-Lee, successor to Judge Simmons, told witness to take what material he could get out of the old bridge and use it in building bridges over other streams, which witness did.

Judge Carl-Lee testified on behalf of the county, denying that he had told the overseer to take the material in the old bridges to use in building other bridges. He stated that the steel bridge constructed over Bear Slough by the Illinois Steel Bridge Company, on which the action in controversy was predicated, had not been accepted by him as county judge, or by the county court since he had been the judge; that the commissioners of the appellee were not his agents for the construction of any bridges, and had no authority to act for the county in any capacity from witness or from the records of his predecessor, as far as witness had been able to find. Witness did not think there was any such record. The county court since January 1, 1921, had not authorized the construction of the bridge over Bear Slough by the commissioners of the appellee. Witness could not say as to 1920. The county court had not ratified in any way any action of the commissioners of the appellee in the construction of the bridge over Bear Slough since January 1, 1921.

Both Woodruff County and the appellee introduced the record of the county court as above set forth, pertaining to the presentation and allowance and disallowance of these claims.

It was shown in rebuttal that the Illinois Steel Bridge Company had been paid in full for the construction of the bridges by the appellee. A witness stated that the county court said that the commissioners of the appellee were sufficient to act as the county's representatives in the construction of the bridges.

Upon the above facts the court overruled the motion to dismiss the action, and found that there was but one contract for the building of the two bridges, and that the county court approved and paid for one bridge

and entered an order of record mentioning the other bridge, and gave as a reason for deferring action on it that the bridge was not completed; that both bridges were under the same contract, and that the action of the county court amounted to an approval of that contract. The court thereupon entered a judgment in favor of the appellee, from which is this appeal.

1. In the case of *Woodruff County* v. *Road Imp. Dist. No. 14,* 159 Ark. 374, this court held that county warrants which had been issued in payment for the construction of Roaring Slough bridge were valid. The facts of that case show that Roaring Slough bridge was built under the same agreement or contract with the county judge as that under which Bear Slough bridge, the bridge involved in this controversy, was constructed. It was all one contract, and what was said in the opinion in that case clearly shows that the appellee is entitled to recover upon the facts disclosed by this record. In that case in the statement of facts we said: "After this bridge (Roaring Slough bridge) had been constructed, the board of commissioners of the road improvement district paid the Illinois Steel Bridge Company the full amount due it for the construction of the bridge. The payment was made out of the funds of the road improvement district. The board of commissioners of the road improvement district then presented a claim to the county court, in the name of the Illinois Steel Bridge Company, for the sum of $2,500, to be applied toward the payment of the construction of the Roaring Slough bridge." Other facts are then stated substantially as in the case at bar. In the opinion in that case we said: "The county court canceled the warrants in question, and refused to reissue them because they had been issued without authority in the first instance. The county court erred in this conclusion. The bridge across Roaring Slough was a county bridge, which it was the duty of the county court to construct in the first instance, and to replace after the old bridge had worn out. * * * This court has held that a county may, like an individual,

ratify an unauthorized contract made in its behalf if it is one the county could have made in the first instance. It follows that, if a county could ratify an unauthorized contract, it could ratify one which it had authorized."

We concur in the view of the trial court that the action of the county court in approving and allowing the claim for the building of the bridge over Roaring Slough and mentioning in its judgment the claim for the Bear Slough bridge, and reciting that "the claim for Bear Slough bridge, not being completed, is deferred," amounted to an approval of the contract between the county judge of Woodruff County and the appellee for the construction of the Bear Slough bridge. The undisputed facts show that the work of building these separate bridges was under one and the same contract. The language in which the order of the county court was couched was simply tantamount to saying, "The contract for the building of these bridges is approved, and the claim is allowed for the one completed, and the allowance of the claim for the other is deferred until that is also completed."

2. This cause was, by consent, submitted to the trial court sitting as a jury, and the trial court was warranted in finding, from the record and oral testimony in the case, that the contract between the county judge and the appellee for the payment of $5,000 toward the construction of these bridges was entered into in the spring of 1920, and that the bridge over Roaring Slough had been completed by December 30, 1920; that the bridge over Bear Slough was not then completed. But the contract with the county judge was made certainly before December 30, 1920. There is a certificate of the county clerk in the record showing that on December 30, 1920, there were no funds in the treasury to the credit of ordinary county funds or to the credit of road and bridge funds. But this testimony does not show or tend to show that there was no appropriation by the levying court for the building of these bridges prior to the time the contract was entered into between the county and the appel-

lee, nor does it tend to show that there was no money in the county treasury to the credit of the road and bridge fund at the time the contract was made.

In *Woodruff County* v. *Road Improvement District No. 14, supra,* we said: "This court has held that, in an action against a county to recover for building a bridge, the presumption is that money to build the same has been appropriated." Citing *Howard County* v. *Lambright,* 72 Ark. 330, and *Watkins* v. *Stough,* 103 Ark. 468. In *Howard County* v. *Lambright, supra,* we said: "But the evidence does not show whether such appropriation had been made or not, and, in the absence of any proof on that point, we should not presume that the county judge authorized the construction of the bridge, in violation of the statute."

Furthermore, there was testimony from which the trial court might have found that the county judge, as the new bridges were being constructed, authorized the road overseer to use the old material in the building of bridges elsewhere, thus showing that the county judge was accepting the new bridges for the use of the public. "We do not think," says Judge RIDDICK, "that the county can take charge of the bridge, and allow the public to use it as a public bridge, and thus get the benefit of the work and labor of the contractor and still defeat the claim for compensation. * * * The obligation to do justice rests on all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

3. It follows from what we have said above that, since there was a contract by the county with the appellee to pay the sum of $2,500 for this bridge, which the county has accepted and is using under the terms of the contract, it is in no attitude to resist the payment of the claim because the verifying affidavit was not couched in the precise language required by §§ 2029 and 2030 of Crawford & Moses' Digest concerning the verification of accounts for the allowance of claims. This so-called

account was really in the nature of a complaint stating a cause of action bottomed on a contract to pay a specified sum of money, and the verification thereto met the requirements of the law.

We find no reversible error in the record. The judgment is therefore affirmed.

BUREL v. HUTSON.

Opinion delivered June 23, 1924.

1. LIMITATION OF ACTIONS—OBSTRUCTION OF FLOW OF WATER.—In an action for damages caused by a levee, whether the levee was a permanent structure of such nature that damage caused thereby must necessarily result, so that a cause of action arose on completion of the levee, *held* for the jury under the evidence.
2. WATERS AND WATERCOURSES—FLOODING BY LEVEE—JURY QUESTION.—Whether a landowner was entitled to recover for damages from flooding caused by a levee, *held* properly submitted to the jury under correct instructions.

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

W. E. Beloate, for appellant.

The levee complained of was a permanent obstruction, and the action was barred by the three-year statute of limitations. 92 Ark. 406, 412; 107 Ark. 335; 136 U. S. 403; 22 A. & E. Enc. 698; Anderson, Law Dictionary, 769; 157 Ark. 125. The measure of damages is the difference between the value of the land as it would have been with the ditch open and the value of it with the ditch closed. 35 Ark. 622; 62 Ark. 360.

Smith & Gibson and *Cunningham & Cunningham,* for appellee.

Under the evidence the jury would not have been warranted in finding that the levee was a permanent obstruction. As to the right to recover, see 95 Ark. 299. The rule there stated was limited to some extent in the case of *Baker* v. *Allen,* 66 Ark. 273, in holding that the lower owner would only be liable when he unnecessarily

injures the upper proprietor by erecting a levee when, by reasonable care and expense, he could have avoided it; but this limitation was met by proof, uncontradicted, that appellant could have enlarged her ditch so as to carry off the water, at an expense of about twenty-five dollars, without building the levee.

WOOD, J. This is an action by C. C. Hutson against Lizzie Burel, to recover damages growing out of the alleged construction of a levee. Hutson alleged that he is the owner of a tract of land in Lawrence County, Arkansas, and that Lizzie Burel is the owner of a tract lying immediately south; that there is a low place or draw across his land which comes down from the lands lying north of it and passes on across the lands of the defendant, Lizzie Burel; that, in the year 1920, the defendant, Lizzie Burel, caused a levee to be built along the north side of her land across the draw or drain, which stopped the flow of the surface water in its natural channel and threw same back upon the lands of the plaintiff, to his damage in the sum of $200; that, in the year 1921, the defendant also caused the levee to be maintained, to the plaintiff's damage in the sum of $250, and that the same occurred in 1922, to plaintiff's damage in the sum of $300. The damage to the plaintiff caused by the defendant in the building of the levee as alleged was by reason of the overflow of back-water over the plaintiff's land and cotton crop.

The defendant, in her answer, denied all the material allegations of the complaint. She alleged that there was a small pond on the north end of her land, entirely cut off from the lands of the plaintiff by the county road and ditch, which ran east and west on her north line; that on the north side of the road was a ditch cut by plaintiff and paid for out of the funds of Lawrence County, running to the right-of-way of the Frisco Railroad lands, much lower than any part of defendant's land, which point was the natural drain both for her lands and those north of hers, but, at low water, the road prevented the water from getting to the ditch; that, in order to better

drain her small pond and keep her lands free from high water overflow when the water would run over the road and fill the low spot on her land, she, in 1909, placed a levee on her own land across the natural outlet of the water from her land; that some one, in 1920, 1921 and 1922, unknown to her, cut her levee, which she had maintained since 1909, and, upon discovering the same, she had the same rebuilt as it had been since 1909. She alleged that, since the construction of this levee, she had maintained the same as a permanent obstruction, and she therefore set up the three and seven-year statutes of limitation as a bar to the plaintiff's action.

The plaintiff testified that he owned the land as alleged in his complaint, and that the defendant owned the land lying south and adjoining his land. There was a low drain which ran through his land and down through the land of the defendant in a southeast course, and went out at the southeast corner of her field into Coon Creek ditch. The water, if not interfered with at all, would go down and drain on through into Coon Creek ditch. Defendant built the levee all the way from twelve inches to two feet high, and it holds the water up in the public road and backs it on the plaintiff's land. She has a ditch inside of her field up at the head of the levee. It would cost the defendant $25 to make a ditch that would drain off all the water. The levee was first put there nine or ten years ago. It had been washed down and rebuilt at different times—had been repaired from one to three or four times a year; that the levee is on the top of the ground. It is very easily and cheaply moved. If it had not been repaired from year to year it would have washed away, because the force of the water washes it out. When the big heavy rain comes, it overflows the top of it, and sometimes works through it and washes the levee out. The levee was all the way from a foot to two feet thick at the top and from a foot to two feet high.

There was testimony tending to show that the levee was from fifty to sixty feet long, and several witnesses corroborated the testimony of the plaintiff as to the

southeast course of the drainage from the lands of plaintiff on and across the lands of defendant. One witness testified that the levee had been maintained all the time since it had been built, except casual breakage, when it would be rebuilt. One witness testified that, if the levee was left alone, the high water would wash it away, and the main bulk of the water would go into Coon Creek. There was testimony to the effect that plaintiff put a culvert across the road which runs between the plaintiff's and defendant's lands; that the high water had washed a ditch across the road, and plaintiff put the culvert in running across the road. The road ditch was about eighteen inches lower than the top of the road, and the water had to go over that eighteen-inch ditch and over the road before it gets into defendant's land. The levee is across the road from plaintiff's land. It is fifteen or twenty steps long, or longer, and something like knee-high. The present rains run across the road. The water will go down the road ditch if it is open. The ditch is six inches lower than the road.

One witness stated that the culvert had to be put across the road; that the water could not get off any other way; that the road in some places was three feet higher than the ditch, and the ditch did not carry the water off. If there was no ditch on defendant's side, the high water would go off. It takes high water to get over the road and ditch to get into defendant's land.

The defendant testified that the levee was built in 1910. Prior to that time the water stood in her field, covering twenty-five acres or more. It had no outlet. Other parties would not let her clean out the ditch she had made across her lands to theirs, so she, last year, lost twenty-five acres of crop by water standing on her land. She had had no work done on the levee, except when some one would cut it, and she would have it refilled. She had never heard of the levee washing away. The road is about a foot higher than the land. In high water the water would have to run over the road to get to her land. She did not think there was any water on plain-

tiff's land caused by her levee. There was a good ditch on the north side of the road between her land and plaintiff's, and if they would keep that cleaned out it would take the water down to the railroad.

One of the witnesses for the defendant testified that the levee was just as it had been since he had owned the land. It was cut last spring, because the field ditch was not sufficient to take off the water. If the ditch was not there, the water would stay there. The defendant's field had to take care of the water that runs in there. The levee keeps it from running into the field. If it were not for the levee, the water that ran into the field would not run out. It would have to stay there and dry up. The road ditch and road do not cause any water to stand on plaintiff's land. During ordinary rains the water goes down the ditch between the public highway and Hutson's farm into the Frisco ditch. When big rains come the water backs up over plaintiff's land before it goes across the road to the levee.

One witness testified that this road is higher than Hutson's field, some three or four feet. When the water is standing in Hutson's field, the road is higher than the water. The road keeps it on Hutson's field, and not the levee of defendant. The levee is about as high as the road. There was other testimony to the same effect, corroborating the testimony of the defendant.

The court, after defining the issues, told the jury that the burden was on the plaintiff to prove by a preponderance of the evidence that the levee built by the defendant was the cause of his damage as alleged; that, if they so found, and further that the levee was not a permanent structure, they should find for the plaintiff in such amount as the evidence showed he was entitled to for the loss of his crop, less the expense he would have been put to in making and gathering a full crop.

In its instruction No. 3 the court told the jury, in effect, that, if the defendant caused the levee to be built in such manner as to cause damage to the plaintiff, when,

by reasonable care and expense, she could have avoided such injury, the verdict should be for the plaintiff.

In instruction No. 4 the court told the jury, in effect, that the defendant would not be liable for any damages that might have been caused by the construction of the road or the ditch on the north side of the road; that her responsibility rested solely on whether or not the levee which she erected was the cause of the damage.

In instruction No. 5 the court, in effect, told the jury that, if the defendant constructed the levee, and it was the cause of the overflow, yet if the levee was a permanent structure, that is, such an obstruction as would have continued except for the interference of man, then their verdict should be for the defendant.

In instruction No. 6 the court told the jury that the burden was on the defendant to prove that the levee was a permanent structure in order to entitle her to the bar of the three-year statute of limitation, and further, that it is only where a landowner obstructs the natural flow of surface water unnecessarily, when, by reasonable care and expense, he might have avoided such an injury, that he becomes liable to the upper proprietor for damages caused by the obstruction.

The jury returned a verdict in the sum of $150 in favor of the plaintiff. The court rendered judgment in his favor for that sum, from which is this appeal.

1. The principal contention of the appellant is that the levee is a permanent structure, of such nature that the damage caused thereby must necessarily result, and the certainty, nature and extent of the damage could be reasonably ascertained at the time of its construction, and therefore that the cause of action arose on the completion of the levee. To sustain this contention the appellant cites the cases of *Chicago, R. I. & Pac. Ry. Co.* v. *Humphreys*, 107 Ark. 330, and *St. Francis Levee Dist.* v. *Barton*, 92 Ark. 406. In the case of *Levee District* v. *Barton, supra*, the district constructed a solid embankment across certain lakes and bayous, thereby obstruct-

ing the lakes so as to cause the water to be impounded, overflowing lands cultivated by the plaintiff. Among other things, we there said, at page 410: "So, in this case, the obstruction of the ditch was permanent; that is, it will continue without change from any cause except human labor. The effect of it was to restore the land drained to the condition in which it was before the ditch was dug. Its present and future effect upon the land could be ascertained with reasonable certainty."

In the case of *Chicago, R. I. & P. Ry. Co.* v. *Humphreys, supra,* the railway built a railroad across a creek, with a culvert for the passage of the water, about eight feet high and thirteen feet long. Mrs. Humphreys occupied a house on certain lots across which the creek ran. She was damaged by an overflow, and alleged in her action for damages against the railroad company that the damage was caused by the negligent construction of the culvert by not making it large enough for the natural flow of the water. In that case the undisputed evidence showed that the culvert was insufficient from the time of its construction; that everybody in the neighborhood knew that, after the culvert was constructed, every big rain resulted in an overflow of the house in which Mrs. Humphreys lived.

In the above cases we held that, under the state of facts presented, the statute of limitations barred the action. In the case of *Chicago, R. I. & P. Ry. Co.* v. *Humphreys, supra,* we said: "Indeed, the question cannot arise unless the obstruction is of a permanent nature, but its permanency does not of itself determine whether the damages which result from its erection are original or recurring. If it is of such a construction as that damage must necessarily result, and the certainty, nature and extent of this damage may reasonably be ascertained and estimated at the time of its construction, then the damage is original, and there can be but a single recovery, and the statute of limitation against such cause of action is set in motion on the completion of the obstruction. If it is known

merely that damage is probable, or that, even though some damage is certain, the nature and the extent of that damage cannot be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitation is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries. There are many cases in our reports on this subject, and their difficulty consists in the application of the law to the facts of each case." (Then follows citation of numerous cases of this court on the subject).

The facts of the case at bar readily differentiate it from the facts of the above cases. In the above cases the obstructions were in and of themselves permanent. They would continue without change from any cause except human labor, but here the levee was of such an insubstantial character that the high waters would wash it away, and it had to be repaired from one to three or four times each year. The levee was not a permanent obstruction; it was subject to be washed away by the big rains. The construction of the ditch and road, taken in connection with the construction of the levee, was such that the nature and extent of the damage could not have been reasonably known and fairly estimated at the time the levee was built, but the amount of such damage would be only speculative and conjectural. At least there was testimony to warrant such inferences and to justify the court in submitting the issue of the statute of limitation to the jury, which it did under correct instructions.

2. As to whether or not the appellee was entitled to recover, was also submitted to the jury under correct instructions. See *Baker* v. *Allen,* 66 Ark. 273; *St. Louis S. W. Ry. Co.* v. *Mackey,* 95 Ark. 299; also *Morrow* v. *Merrick,* 157 Ark. 618.

We find no error in the judgment of the trial court. It must therefore be affirmed.

GARNER MANUFACTURING COMPANY v. CORNELIUS LUMBER COMPANY.

Opinion delivered June 23, 1924.

1. EVIDENCE—PAROL TESTIMONY TO EXPLAIN.—A written contract of sale reciting: "Terms cash 10—less 2 per cent.," is so ambiguous as to render admissible parol evidence to explain it.
2. SALES—RIGHT TO ALTER WRITTEN CONTRACT.—Parties to a written contract may alter, rescind or abandon same by a subsequent verbal contract.
3. SALES—DELIVERY OF BILL OF LADING.—Mere delivery to a buyer of a bill of lading which is nonnegotiable does not transfer the title unless such was the intention of the parties.
4. SALES—EFFECT OF RESERVATION OF TITLE.—Where a chattel is sold with reservation of title until payment of the price, the title remains in the seller until payment, and a purchaser from the buyer acquired no title, though he buys in good faith for valuable consideration.
5. SALES—INVOICE NOT EVIDENCE OF TITLE.—An invoice is not evidence of a sale, but is a mere detailed statement of the quantity and cost or price of things invoiced, and is as appropriate to a bailment as to a sale, and does not constitute a contract between the parties, though relevant in determining what the contract was.

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

Harry H. Meyers, for appellant.

Coleman, Robinson & House, for appellee.

WOOD, J. On October 13, 1922, the Sargent Lumber Company gave the following order: "To Garner Manufacturing Company, Marvell, Arkansas: Please furnish us with the material itemized below. One carload dry 6/4 mixed oak lumber." The order gave the prices to be paid for the various grades of lumber, and contained the statement that the printed part of the order is made a part of it, and that an inspector would be sent to load out the lumber in about thirty days. The order also contained the following statement: "Terms: Less 2 per cent. ten days." It was signed "Sargent Lumber Company, by T. S. Sargent," and was indorsed, "Accepted, Garner Manufacturing Company, by F. R. Garner."

This action was brought January 2, 1923, by the Garner Manufacturing Company against the Missouri Pacific Railway Company and the Sargent Lumber Company (hereafter called Sargent Company) to recover the possession of a certain car of lumber, which is described in the complaint. The complaint set up the above order of the Sargent Company, and alleged that the Garner Company sold to the Sargent Company the car of lumber in controversy under the false promise made by the Sargent Company that the car would be paid for in cash, and that the car was delivered to the railroad company on the promise and agreement that title was to be retained in the Garner Company until the balance of the purchase money was paid; that the car was billed by the Garner Company to the Mutual Lumber Company, St. Paul, Minnesota, under the orders and authority of the Sargent Company, and a bill of lading was issued to the Sargent Company by the railroad company December 15, 1922, and the car was moved by the railroad company to Paragould, Arkansas, where same is now held. The complaint alleged that T. S. Sargent and the Sargent Company were insolvent; that demand had been made upon them for the balance due on the car and they had refused to pay, and therefore the Garner Company was entitled to the possession of the car, and to damages against the Sargent Company for its detention, etc.

The Cornelius Lumber Company intervened on January 24, 1923, and alleged that it bought of the Sargent Company, December 15, 1922, the car of lumber in controversy, and caused the same to be delivered to the railroad company, consigned to the Mutual Lumber Company at St. Paul, Minnesota, and received its bill of lading for said lumber to the Mutual Lumber Company, which was indorsed and delivered to the Cornelius Company by the Mutual Company on the 15th day of December, 1922. The Cornelius Company denied that the Garner Company retained title to the carload of lumber, but alleged that it sold the same without reservation to the Sargent Com-

pany, and that it purchased the same from the Sargent Company for cash, and that the lumber was delivered to it before the action in replevin was instituted. The Cornelius Company set up that it was damaged by the wrongful detention of the property by the Garner Company in the sum of $500. It prayed judgment in the sum of $1,300, the value of the lumber, and $500 damages for its alleged wrongful detention. The Garner Company answered the intervention, denying all of its allegations.

Frank Garner of the Garner Company testified and introduced the above-mentioned order in evidence. He also introduced the invoice of the lumber made by his company to the Sargent Company, which bore the indorsement "Terms: Cash 10 less 2 per cent.," and recites that the lumber is billed to the Mutual Lumber Company, St. Paul, Minnesota, by the Sargent Company as shippers. Witness also introduced the original bill of lading, showing the car of lumber consigned to the Mutual Company at St. Paul, Minn., by the Mutual Lumber Company, and testified that he filled out the bill of lading, and signed the shipper's name to it and delivered the bill of lading to the agent of the Sargent Company. The bill of lading was indorsed on the back, "Deliver to Cornelius Lumber Company, or order," signed Mutual Lumber Company, by T. S. Sargent, treasurer. Over the objection of the appellee, the witness testified as to what was meant by the words "Cash 10—less 2 per cent." on the invoice, that is, if the purchaser paid for the car within ten days he got two per cent. off the invoice price, but if he paid after ten days he paid the full invoice price.

The witness was also permitted to testify, over the objection of the appellee, that he told Fisher, the agent who conducted the negotiations for the Sargent Company, at the time the bill of lading was made and the car loaded, to give him a check for the lumber, and Fisher replied that he had no checks with him—that it was after banking hours. Fisher told witness to put a draft in the bank,

and the Sargent Company would pay it. Witness said to Fisher: "I want you to understand we are not going to give you this lumber—we are not going to relinquish title until this lumber is paid for in full." Fisher replied, "That is all right—just put the draft in the bank, and it will be taken care of. We have the money in the bank to pay it." Upon the faith of this statement that the draft would be paid, it was made out and put in the bank, and at the same time the bill of lading was delivered to the Sargent Company. The draft was not paid, and this action in replevin was instituted. Sam Garner, over the objection of the appellee, testified to the same effect.

Sargent testified for the intervener substantially as follows: On December 9, 1922, the Sargent Company wrote the Cornelius Company in St. Louis offering to sell it this car of lumber. On December 11 the Cornelius Company replied, accepting the car. The Sargent Company then made out its invoice for the lumber and mailed it to the Cornelius Company. The Sargent Company sold the car in question to the Cornelius Lumber Company, as reflected by the letters and the invoice which were introduced in evidence. Witness testified that he was treasurer of the Mutual Lumber Company, and signed the indorsement on the back of the bill of lading. He had no connection with the Cornelius Company, and the Sargent Lumber Company received a check from them for $926.10. The invoice showed that the car was sold to the Cornelius Lumber Company for $1,127.02, terms 80 per cent., balance on arrival. The Sargent Company went into bankruptcy in January, 1923.

The cause, by consent, was submitted to the court sitting as a jury, and the above are substantially the facts upon which the court found, in part, as follows: "That the invoice of the Garner Company on its face showed that cash was not the condition of the transfer or delivery of this car. It was delivered f. o. b. Marvell. Evidently that car, according to this paper, was not a cash condition, because he at least had ten days to pay in

cash. They told Mr. Fisher if the money was not forthcoming there would be no sale, but that is in direct conflict with their invoice showing the terms, that he had ten days to pay it in. I think Mr. Garner should have his money, but I do not see how I can give him his lumber under this state of facts. My holding will be that Garner Manufacturing Company parted with their lumber on terms, and not conditioned on cash, by their express invoice, and that it was a sale on these terms. They say 'cash ten days,' and it appears to the court that he had ten days to pay for it."

The court thereupon entered a judgment in favor of the Cornelius Lumber Company, from which is this appeal.

The trial court found that the appellant parted with its lumber on terms, and not conditioned on cash, by their express invoice. This finding of the court was tantamount to excluding from its consideration the testimony of the Garners to the effect that the invoice, "Cash ten—less two per cent.," meant cash in hand to the Garner Company, and that such was the agreement and understanding with the Sargent Company when the bill of lading was made and the car loaded. On this point the Garners testified that, when the car was loaded and the bill of lading was made, Frank Garner for the Garner Company told Fisher, acting for the Sargent Company, that the Garner Company was not going to relinquish title to the lumber until it was paid for in full. To this Fisher replied, "That is all right—just put a draft in the bank and it will be taken care of. We have the money in bank to pay it." The Garner Company surrendered to the Sargent Company the bill of lading on that condition. On that condition the Garner Company forwarded the draft to the bank, and it was not paid. Thereupon the Garner Company brought this action in replevin.

The court erred in excluding this testimony from its consideration, and erred in holding that the above parol testimony was not admissible because in conflict with the

invoice showing that the Sargent Company had ten days in which to pay for the lumber. In other words, the court treated the invoice as the contract between the parties, and construed the invoice as meaning that the lumber was sold by the Garner Company on terms and not on condition that the title passed only upon the payment of cash. It thus appears that the court tried the cause without giving the appellant the benefit of its contention, which its testimony tends to prove, that title was reserved unless, and until, the cash was paid for the car of lumber. Even if the court were correct in treating the order and invoice as evidencing the only contract between the parties, yet there was sufficient ambiguity in the terms of the invoice, to-wit, "Cash ten—less two per cent.," to justify oral testimony as to the meaning of those terms. And the testimony of the Garners to the effect that the Garner Company reserved the title until the cash was paid, was not in conflict with, and did not tend to contradict or vary the terms of, the written contract, even if that contract meant that the Sargent Company was to receive two per cent. off if it paid cash in hand or cash in ten days. Therefore the excluded testimony was competent, even if the order and invoice evidenced the only contract between the parties. But we are further convinced that, even if the order and invoice evidenced the contract between the Garner and Sargent companies at the time the order was accepted and the invoice made to the Sargent Company, nevertheless the parties to the contract had the right to change the terms of the written contract afterwards by verbal agreement. They could alter, rescind or abandon it, and enter upon a new and oral contract. *Caldwell* v. *Dunn,* 156 Ark. 126, and cases there cited.

Therefore the court should have taken into consideration the testimony of the Garners tending to show that, at the time the bill of lading was surrendered by the Sargent Company to the Garner Company, it was with the understanding that the Garner Company did not

relinquish the title until the lumber was paid for in full. The Garner Company had a right to show, notwithstanding the delivery of the bill of lading to the Sargent Company, that it was not the intention of the parties at the time to pass the title to the latter company. *Gibson* v. *Inman Packet Co.,* 111 Ark. 524. See also *McGehee* v. *Yunker & Ronk,* 137 Ark. 400. If the court had not misapprehended the law as to the competency of the above testimony, it might have found from such testimony that the Garner Company did not part with its title to the car of lumber, and that such car was delivered to the carrier for the Sargent Company, and that the bill of lading was delivered to the Sargent Company on the condition that the title remain in the Garner Company until the draft was paid. It must not be overlooked that the bill of lading was nonnegotiable, and the mere delivery of the bill of lading to the Sargent Company did not operate to transfer the title to that company unless such was the intention of the parties at the time. If the title to the lumber was reserved in the Garner Company until the draft was paid, the court might have found, had it considered the above testimony, that the Sargent Company, by selling the lumber, could not pass any title to its vendee, although its vendee purchased without notice that the title was reserved in the Garner Company. It is well settled in this State that "when a chattel is sold with reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition. *McIntosh & Beam* v. *Hill,* 47 Ark. 363, and cases there cited. *Starnes* v. *Boyd,* 101 Ark. 469-473. See also *Clinton* v. *Ross,* 108 Ark. 446."

The error of the court in not taking into consideration the testimony of the Garners, as above indicated, was highly prejudicial to the rights of the appellant, and for this error the judgment must be reversed. As a guide to the trial court, in view of a new trial, inasmuch as the

court seems to have treated the invoice as evidencing the contract between the parties, we deem it proper to say, in the language of the Supreme Court of the United States, that "an invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale; hence, standing alone, it is never regarded as an evidence of title." *Dows* v. *Natl. Exchange Bank,* 91 U. S. 618-630; *Sterns* v. *Baker,* 150 U. S. 321-328. To be sure, the invoice was relevant testimony to be considered in determining what the contract was between the parties, but it of itself did not constitute a contract.

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

BEAUCHAMP v. HAYES STORES COMPANY.

Opinion delivered June 23, 1924.

1. SALES—EVIDENCE.—In an action on an account for goods sold to defendant B, where the defense was that the goods were sold to C, who was B's successor, and plaintiff's manager testified that he never knew anything about B having sold his business to C until after the sales involved, it was competent for B to prove by a witness that the latter purchased goods on a written order from C prior to the sales in question.
2. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.—The exclusion of competent testimony tending to establish the defense is prejudicial error.

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

STATEMENT OF FACTS.

Hayes Stores Company sued C. L. Beauchamp in the municipal court of Little Rock to recover $212.62 alleged to be a balance due for merchandise. The defendant denied owing the account. From an adverse judgment the plaintiff appealed to the circuit court.

According to the testimony of T. J. Hart, he was the manager for Hayes Stores Company in Little Rock, Arkansas, and was acquainted with C. L. Beauchamp. The latter owed the former a balance of $212.62 for merchandise. Beauchamp had been a customer of the Hayes Stores Company for about six years before the transaction in question, and his credit had always been good. The disputed account consists of various items, and runs from May 12 to June 20, 1922. Beauchamp bought some of the goods himself, but for the most part he sent his wagon to the store for the goods. Tickets were given to the driver when he received the goods. He said that he never knew anything about the Colonial Investment Company until the 24th day of June, 1922. Beauchamp then claimed that the Colonial Investment Company had bought a part of the goods in question.

C. L. Beauchamp was a witness for himself. According to his testimony, certain items of the account in question were purchased by the Colonial Investment Company, and Hart knew that fact and checked off some of the items on the account charged to Beauchamp and put them on the account of the Colonial Investment Company. Hart knew that the Colonial Investment Company had purchased the business of Beauchamp, and had continued to buy goods from the Hayes Stores Company.

Jim Wright was a witness for the defendant. According to his testimony, C. L. Beauchamp sold out to the Colonial Investment Company about the 28th day of April, 1922. The witness had been working for Beauchamp, and continued to work for the Colonial Investment Company. He worked for that company until some time in August. Beauchamp never had anything to do with the business after he sold it.

Ed Joiner was also a witness for the defendant. He worked for Beauchamp until he sold his business to the Colonial Investment Company, and worked for that company after it purchased the business. Joiner was first

permitted to testify that the Colonial Investment Company gave him an order for certain merchandise to the Hayes Stores Company on the 5th of May, 1922, and that he got the merchandise in question from T. J. Hart. Subsequently this testimony was excluded from the jury because the goods purchased by Joiner for the Colonial Investment Company could not be identified as part of the account sued on.

The jury returned a verdict in favor of the plaintiff for $212.62, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Lewis Rhoton and *X. O. Pindall,* for appellant.

Price Shofner, for appellee.

HART, J., (after stating the facts). It is insisted that the court erred in excluding from the jury the testimony of Ed Joiner to the effect that he had purchased certain merchandise on the 5th of May, 1922, from the Hayes Stores Company on an order sent by the Colonial Investment Company. The court excluded the testimony on the ground that the defendant could not identify the goods purchased as part of the account sued on. This did not make any difference. It is true, as contended by counsel for appellee, that testimony collateral to the main issue in a case cannot be introduced; but we do not think that that rule has any application here. According to the testimony of T. J. Hart, who was the manager of the Hayes Stores Company, he did not know anything about the Colonial Investment Company having purchased the business of C. L. Beauchamp until the 24th day of June, 1922. The goods sold before that date were sold on the credit of C. L. Beauchamp, and were charged to him. The testimony of Joiner to the effect that he bought goods from Hart on the 5th of May, 1922, on an order from the Colonial Investment Company, tended to contradict the testimony of Hart which we have just referred to above.

The jury might have found from the testimony of Joiner, which was excluded from it, that Hart was mis-

taken when he said that he did not know anything about the Colonial Investment Company having purchased the business of Beauchamp and commencing to trade with the Hayes Stores Company, until the 24th day of June, 1922.

It will be noted that Joiner testified that he got the goods from Mr. Hart himself on an order of the Colonial Investment Company on the 5th of May, 1922. If he did this, Hart would know from the transaction, at least, that the Colonial Investment Company was trading with him, and the testimony would tend to contradict that given by Mr. Hart.

We cannot know what credence the jury would have given to the testimony, and, as the jury is the exclusive judge of the credibility of the witnesses, it was necessarily prejudicial to the rights of the defendant to exclude testimony which was competent and tended to establish the defense of the defendant.

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

YOUNG v. KNOX.

Opinion delivered June 23, 1924.

1. LIMITATION OF ACTIONS — RELIGIOUS SOCIETIES.—The statute of limitations as to real estate is one of repose and intended to quiet titles, and it operates in favor of or against religious societies, as well as natural persons or private corporations.
2. ADVERSE POSSESSION—CHARACTER.—The possession which will bar the right of a former owner of land must be an open, visible, continuous and exclusive possession with claim of title, so that parties seeking information upon the subject might find that the property was not held under permission of any one, but adversely to every one.
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—The decisions of a chancellor on questions of fact will be upheld, unless against the clear preponderance of the evidence.
4. ADVERSE POSSESSION—EVIDENCE.—In a suit by the elders of a church congregation to enjoin one claiming under a deed from

another church from interfering with plaintiffs' possession, evidence of plaintiffs' adverse possession *held* to sustain a decree quieting title in plaintiffs as trustees.

5. RELIGIOUS SOCIETIES—PARTIES.—Under Crawford & Moses' Dig., § 8638, authorizing trustees of a religious society to defend and prosecute suits at law and in equity relating to church property, elders of a church congregation authorized to represent it were proper parties to sue to enjoin interference with their possession of a church building and to cancel a deed as a cloud upon the title to such property.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellant to enjoin him for interfering with their possession of a church building in Paragould, Arkansas, and to cancel a deed executed to him to said property as a cloud upon their title.

The defendant claimed the legal title to the property and the right of possession under his deed.

A. A. Knox, G. L. McDonald and John Rosson brought the suit for appellees, and were witnesses in the case. According to their testimony, they represented the local congregation of the Cumberland Presbyterian Church at Paragould, Arkansas, and were elders in said church. In 1906 the Cumberland Presbyterian and the Presbyterian Church U. S. A. formed a union. One hundred and six members of the General Assembly of the Cumberland Presbyterian Church declined to form the union, and conducted a general assembly at a separate place. The local congregation of the Cumberland Presbyterian Church at Paragould, Arkansas, refused to enter said union, and continued to occupy their church property for religious purposes. They had preaching in it about one-half of the time, and Sunday-school every Sunday. The congregation continued to hold the exclusive possession of said church from the time they refused to recognize the union in 1906 until John Young attempted to take possession of the property in 1923. No

other church organization attempted to control said church property during this time. The local congregation of the Cumberland Presbyterian Church, through its elders, has claimed title to said property since 1906. They have belonged to a synod of the Cumberland Presbyterian Church during all of this time.

W. E. Spence and W. S. Ellis, two witnesses for appellant, testified that the local congregation of the Cumberland Presbyterian Church at Paragould had occupied the church property in question since the union of the Cumberland Presbyterian with the Presbyterian Church U. S. A. in 1906; but that such use and occupation by said congregation had been permissive merely, and not under any claim of right. They testified that A. A. Knox admitted, in 1914, that the title to said property was in the Presbyterian Church U. S. A., but insisted that, as a matter of right, the congregation of the Cumberland Presbyterian Church ought to have it.

A collector for a street improvement district testified that Knox and Rosson told him that they would not pay the street improvement tax because the property did not belong to them.

Appellant produced a deed from the trustees of the Presbyterian Church U. S. A. to the property. He testified that he redeemed the property from the sale for paving taxes by paying about $769. A deed to the property was executed to him on the 11th day of April, 1923.

Knox denied that he told the collector of the paving district that the Cumberland Presbyterian Church of Paragould did not claim the property. He admits that he told the said collector that the Presbyterian Church U. S. A. had a claim of title against the property, and that they were not going to pay the paving taxes until the matter was settled. He denied that he ever told any one that the Cumberland Presbyterian Church was not claiming the property. He admits that he had a conversation with Dr. Ellis and Mr. Spence, and admitted to them that the Presbyterian Church U. S. A. had the

legal or paper title to the property, but told them that the Cumberland Presbyterian Church was holding possession of the property and claimed it as its own.

The chancellor found that appellees had acquired title to the church property in question by seven years' adverse possession; that the deed to appellant constitutes a cloud on the title of appellees, and should be canceled.

A decree was entered accordingly, and the case is here on appeal.

D. G. Beauchamp and *Jeff Bratton,* for appellant.

1. Appellees, as elders and trustees of the local congregation of the reorganized Cumberland Presbyterian Church, cannot acquire title nor hold title to the property in question, since they admit that their present church organization is identically the same as it was prior to the reunion of 1906. 96 Ark. 117; 34 Cyc. 1171; 32 Atl. 747.

2. Even if appellees could claim title to the property, and if they were proper parties, they stand in the attitude of grantors or dedicators remaining in possession, and as such cannot acquire title as against their grantee by merely remaining in possession of the property conveyed. A grantor remaining in possession is a tenant at the will of the grantee, or a trustee for the grantee. 2 C. J. 143; 69 Ark. 562; 2 C. J. 144; 85 Ark. 520.

3. The possession held by appellees was permissive, and could never ripen into title by adverse possession. 2 C. J. 131; 42 Ark. 121; 84 Ark. 140.

4. Appellees' possession was not under claim of title; it was not hostile; it was not notorious, but was held while they all the time admitted that the Prebysterian Church U. S. A., since 1906, was the legal owner. Therefore their possession was not adverse and could not ripen into title. 42 Ark. 121; 2 C. J. 122; 104 Ark. 641.

Block & Kirsch, for appellees.

The language quoted by appellant from 34 Cyc. 1171 does not support his challenge of appellees' capacity to

sue. Moreover, the provision of the 1920 digest of the laws of the Cumberland Presbyterian Church to the effect that it was the sense of the assembly that the rightful ownership of, and title to, church property belonging to a disorganized congregation, or of an abandoned church property, was, and should be, in the presbytery in whose bounds it was located, provided there were no provisions in the deed of conveyance directing what should become of the property when it ceased to be used for church property, can be susceptible to no other construction than that the ownership, where a congregation is not disorganized, or church property is not abandoned, is in the trustees, and not in the presbytery. Appellees alone have capacity to bring this suit. 26 R. C. L. 1271; 34 Cyc. 1171; 115 S. W. 684; 116 S. W. 360; 245 Ill. 74; 114 Ark. 376; 32 Atl. 747.

2. There is no force in appellant's contention that appellees stand in the attitude of grantors or dedicators, since this is not the old Cumberland Presbyterian Church which was merged into the Presbyterian Church by the union and reunion, but a new and distinct entity, reorganized after the union and reunion; but, even if the rule evoked were applicable, "the Presbyterian Church U. S. A. had actual knowledge of this adverse possession, or that appellees' occupancy had been so inconsistent with the presumption of possession as to impute knowledge to its trustees of that hostility." 114 Ark. 376, at p. 384.

3. Mere knowledge that the Presbyterian Church U. S. A. made claim to the property would not in itself make appellees' possession permissive, or prevent their claim from being hostile and adverse, if they were in fact claiming the title to the property. 144 Ark. 212.

4. As establishing title in appellees by adverse possession, see 132 Ark. 455; 27 L. R. A. (N. S.) 388.

HART, J., (after stating the facts). The title of appellees, who are plaintiffs in the court below, is founded upon the adverse possession of themselves and the local congregation of the Cumberland Presbyterian

Church at Paragould, Arkansas, for a period of more than seven years. The statute of limitations as to real estate is founded upon public policy. It is a statute of repose, and intended to quiet titles, and operates in favor of or against religious societies as well as natural persons or private corporations.

This court has held that the trustees of a church or religious society may lose title to real property by adverse possession. *Gee* v. *Hatley,* 114 Ark. 376. It is equally well settled that the trustees of a religious society may acquire title to real property by adverse possession. *Camp* v. *Camp* (Conn.) 13 Am. Dec. 60; *Dangerfield* v. *Williams,* 26 App. D. C. 508; *Curd* v. *Wallace* (Ky.) 7 Dana 190, 32 Am. Dec. 85; *University of Maryland* v. *Calvary M. E. Church South* (Md.), 65 Atl. 398; *Rehoboth* v. *Carpenter* (Mass.), 23 Pick. 131; *Reformed Church* v. *Schoolcraft,* 65 N. Y. 134; *Society for Propagation of Gospel* v. *Sharon,* 28 Vt. 603; and *Davis* v. *Owen* (Va.), 13 L. R. A. (N. S.) 728.

The decisions of the courts cited above, as well as many other decisions from this court, have determined the character of the possession which will bar the right of the former owner to recover real property. It must be an open, visible, continuous and exclusive possession with claim of title, so that parties seeking information upon the subject might find out that the property was not held under the permission of any one, but adversely to every one.

Tested by this familiar and well established rule, it cannot be said that the finding of the chancellor is against the preponderance of the evidence. It is the uniform rule of this court to uphold the decision of a chancellor upon a question of fact, unless it is against the clear preponderance of the evidence.

According to the witnesses for appellees, they were elders in the Cumberland Presbyterian Church at Paragould, Arkansas, and were trustees for it. They were present when the General Assembly of the Cumberland

Presbyterian Church and the Presbyterian Church U. S. A. voted to unite. One hundred and six members of the General Assembly of the Cumberland Presbyterian Church dissented, and immediately held an assembly of the Cumberland Presbyterian Church. The local congregation of the Cumberland Presbyterian Church at Paragould immediately joined the dissenters, and continued to occupy their local church. They say that they had exclusive possession of it, and have never permitted any one connected with the Presbyterian Church U. S. A. to exercise any control or dominion whatever over it.

It appears that they recognized that the legal title to the church property was in the Presbyterian Church U. S. A. under the decision of this court in *Sanders* v. *Baggerly,* 96 Ark. 117; but they denied that this church had any rightful title to the property. In other words, instead of their occupancy being permissive, it was hostile to the rights of the Presbyterian Church U. S. A. They had the exclusive, continuous and hostile possession of the church for more than seven years, according to their testimony, and acquired title to the church property by adverse possession.

It is true that their testimony was contradicted by two members of the Presbyterian Church U. S. A. and by the collector of a paving district; but, as above stated, it cannot be said that the testimony of these witnesses shows that the finding of the chancellor is against the preponderance of the evidence.

It is also contended that appellees are not the proper parties to maintain this suit. Knox, Rosson and McDonald all stated that they were elders in the church and represented the local congregation of the Cumberland Presbyterian Church at Paragould.

Our statute provides that the trustee or trustees for the time being of any religious society shall have the same power to defend and prosecute suits at law or in equity, and to do all other acts for the protection, improvement and preservation of said property, as

individuals may do in relation to their individual property. Crawford & Moses' Digest, § 8638.

In the case of *Gee* v. *Hatley,* 114 Ark. 376, the trustees and elders of a Presbyterian Church brought suit to recover possession of a part of the church property, and it was held that they might maintain the action.

It follows that the decree must be affirmed.

COLLATT v. STATE.

Opinion delivered June 23, 1924.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—TIME FOR FILING.—A motion for new trial could be made at a term subsequent to that at which the verdict was rendered, which sentence was not pronounced until such subsequent term, under Crawford & Moses' Dig., § 3218.
2. CRIMINAL LAW—SENTENCE AT SUBSEQUENT TERM.—Under Crawford & Moses' Dig., § 3218, the court may sentence an accused at a term subsequent to that at which the verdict was rendered.
3. CRIMINAL LAW—TIME FOR FILING MOTION FOR NEW TRIAL.—Where sentence was not pronounced at the term at which the verdict was rendered, defendant may file his motion for new trial at a subsequent term, provided he does so before the sentence is rendered.

Appeal from Saline Circuit Court; *Thomas E. Toler,* Judge; affirmed.

J. W. Westbrook, for appellant.

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

SMITH, J. Appellant was convicted at the September term, 1923, of the Saline Circuit Court. For some reason, which does not appear from the transcript which appellant has lodged with this court, he was not sentenced until the March, 1924, term of the court. At the March term he filed a motion praying his discharge from custody. In this motion he alleged that on Thursday, September 19, 1923, at the September term of the court, he had been convicted of grand larceny upon his plea of not

guilty, but sentence was not imposed at that term, and that he had not been sentenced, wherefore he prayed his discharge. The court overruled this motion, and sentenced the appellant to a term of imprisonment in the State Penitentiary. Thereafter appellant filed a motion for a new trial, which the court overruled, in which various errors were assigned, and, among others, that the court had erred in overruling his motion that he be discharged because the court had not sentenced him at the term of the court at which he had been convicted.

The action of the court in overruling the motion for a new trial is defended upon the grounds, (1) that it should have been filed at the term at which the conviction was had, and (2) that it should have been filed in any event before sentence was pronounced.

In support of the first proposition the cases of *Thomas* v. *State,* 136 Ark. 290, and *Corning* v. *Thompson,* 113 Ark. 237, are cited. In those cases it was held that an application for a new trial could not be made at a term subsequent to that at which the verdict was rendered and the judgment entered. Those cases are not in point here, for the reason that the judgment was not rendered at the term of the court at which the verdict was returned.

Counsel for appellant is mistaken in assuming that the court was without power to sentence appellant at the March term of the court. By § 3218, C. & M. Digest, it is provided that "the application for a new trial must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment."

It will be observed that this section of the statute does not define the conditions or reasons for which the sentence may be postponed, but it does provide that the application for a new trial must be made at the same term at which the verdict is rendered, unless sentence is post-

poned to another term, in which case the application for a new trial may be made at any time before judgment.

In other words, if, for any reason—through inadvertence or otherwise—the court fails to sentence a defendant at the term at which he was convicted, he does not go acquitted on that account, but he may be sentenced at the ensuing term. If the sentence is postponed beyond the term at which the conviction was had, the defendant does not lose his right to file a motion for a new trial, and this he may do at the ensuing term, provided he makes the application before judgment.

Here the defendant not only delayed the filing of his motion for a new trial beyond the term at which he was convicted, but he did not file the motion until after he had been sentenced, and, as this is beyond the time allowed by law for that purpose, the errors assigned therein which related to the sufficiency and competency of the evidence to support the verdict are not presented for review.

The indictment sufficiently charges the offense of which defendant was convicted, and, as no error appears upon the face of the record, the judgment must be affirmed, and it is so ordered.

STOUT LUMBER COMPANY v. TREADWELL.

Opinion delivered June 23, 1924.

1. ADVERSE POSSESSION — PAYMENT OF TAXES IN WRONG COUNTY.— Under Crawford & Moses' Dig., § 6943, providing that unimproved and uninclosed land shall be held to be in the possession of persons paying taxes thereon, if he have color of title thereto, for seven consecutive years, it is insufficient to pay the taxes in a county in which the land does not lie.
2. QUIETING TITLE — TITLE OF CLAIMANT.— One seeking to cancel another's deed as a cloud upon his title must show title in himself in order to obtain relief.

Appeal from Cleveland Chancery Court; *John M. Elliott,* Chancellor; affirmed.

Gaughan & Sifford, for appellant.

A tax deed is *prima facie* evidence of title. Section 10109, C. & M. Digest; 130 Ark. 424; 101 Ark. 301. Payment of taxes for seven years under color of title makes out a *prima facie* title. 131 Ark. 83. Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto. Section 6943, C. & M. Digest; 84 Ark. 1; 71 Ark. 390; 92 Ark. 121; 76 Ark. 447; 80 Ark. 82. A tax deed is good color of title, even though based on a void tax sale. 70 Ark. 487; 48 Ark. 187; 47 Ark. 528; 84 Ark. 320; 105 Ark. 646; Bouvier's Law Dictionary, Rawle's Third Revision, vol. 1, p. 527; Words & Phrases (First Series), vol. 2, p. 1264. It is not necessary that it be recorded, as an unrecorded deed is good color of title. 100 Ark. 582. The fact that the deed fails to locate the county or locates the wrong county would not vitiate the deed or prevent it being color of title, provided the correct description is given. 83 Ark. 196; 245 S. W. 802.

Danaher & Danaher, for appellee.

The tax deed of appellants was not executed substantially in accordance with the statute, and was therefore void. 132 U. S. 239; 9 Wheat. 541; 3 T. B. Monroe 161; 18 Kansas 223; 6 Kansas 65; 85 Mo. 526; 27 Minn. 259; 29 Wis. 152; 6 Colo. 314; 23 Tex. 36. Land shall be deemed and held to be in the possession of the person who pays the taxes thereon. 83 Ark. 520. Erroneous payment of taxes in one county does not discharge a valid assessment in another. 103 Ark. 371; 37 Cyc. 1159.

SMITH, J. The appellant was the plaintiff below, and, for its cause of action, alleged that it was the owner of the whole of section 33, township 10 south, range 12 west, including that part of said section situated on the east side of Moro Creek, which was particularly described, and which embraced 54.52 acres. Appellant deraigns its title beginning with a tax deed executed July 6, 1900, to J. J. Youngblood, which title was acquired by mesne conveyances, and it is stipulated that appellant

and its grantors had paid the taxes continuously for more than twenty years.

It appears that Moro Creek runs through section 33 and forms the boundary between Dallas and Cleveland counties. All of the section is situated in Dallas County except the 54.52 acres in controversy, which are in Cleveland County. It appears, however, that the entire section was assessed for taxation in Dallas County, and the taxes on the whole of the section have been paid in that county, and no taxes were paid by appellant in Cleveland County.

The records of Cleveland County were destroyed by fire, but there is a record of that county remaining which shows that the land was sold by the commissioner in the overdue tax case to the State, and on July 15, 1921, the Commissioner of State Lands conveyed the 54.52 acres lying in Cleveland County to appellees. A second deed was made by the Commissioner of State Lands to appellees on September 11, 1922, to correct an error in the former deed.

It appears to be mutually conceded that both the tax deed through which appellant derives its claim of title and the sale by the commissioner under the overdue tax decree were void; but appellant insists that this tax deed was at least color of title, and that, by the subsequent continuous payment of taxes for a period of more than seven years, its title has been perfected.

If it be conceded—and we do not decide—that a tax deed, regular on its face, issued by the clerk of one county, conveying the whole of a section for the nonpayment of taxes assessed in that county, could constitute color of title to a part of said section lying in another county, it does not follow that appellant's title has ripened by the payment of taxes on the land in question. This is true because the portion of the section in litigation lies in Cleveland County, and the taxes were paid in Dallas County.

Section 6943, C. & M. Digest, which provides that unimproved and uninclosed land shall be deemed and held to be in the possession of the person who pays the taxes thereon, if he have color of title thereto, for at least seven years in succession, contemplates that the payment shall be made in the county where the land is situated and where the record of such payments should be properly kept, and it is not sufficient, under this statute, to pay the taxes in a county in which the land does not lie. Such is the effect of the decision of this court in the case of *Hay* v. *Nickey Bros.*, 142 Ark. 398, where it was said: "It may be conceded that the tax deed under which appellees claim title is void for the reason that the forfeiture and sale took place in Bradley County, whereas the lands are situated in Calhoun County. *Toby* v. *Haggarty,* 32 Ark. 370. It may likewise be conceded that, for the same reason, the subsequent assessments of the land, and payments of taxes in Bradley County by the appellees and their privies in title, did not give appellees title by limitation under § 5057 of Kirby's Digest."

It is true the court denied the relief of cancellation of the title asserted in that case, as the result of the tax payments, but this was done because the parties asking cancellation were barred by laches.

Laches cannot be asserted here, because appellees only acquired their title July 15, 1921, and the suit to cancel it was begun August 9, 1921.

It is insisted that the deed to appellees conveyed no title because of the provisions of act 671, General Acts 1921, page 728, whereby the State relinquished the title to persons who had paid taxes for twenty years or more. We need not consider the effect of this statute on appellees' title, as they are asking no affirmative relief. Appellant—plaintiff below—must show title in itself to obtain the relief prayed, and this it has not done for the reasons herein stated.

The complaint was dismissed as being without equity, and that decree is affirmed.

NORMAN v. STATE.

Opinion delivered June 30, 1924.

1. ASSAULT AND BATTERY—EVIDENCE.—Evidence *held* to sustain a conviction of aggravated assault.
2. CRIMINAL LAW — OPINION OF WITNESS.— In a prosecution for assault with intent to kill, where a witness was asked whether he could have recognized the prosecuting witness from defendant's car, his answer that he did recognize such witness from a position beyond defendant's car was admissible.
3. HOMICIDE—ERRONEOUS INSTRUCTION HARMLESS WHEN.—In a prosecution for assault with intent to kill, where the jury found defendant guilty of an aggravated assault, an instruction that "the killing being proved, the burden of showing circumstances of mitigation * * * shall devolve upon the accused," though erroneous, was harmless in view of the verdict of the jury.

Appeal from Yell Circuit Court, Danville District; *J. T. Bullock,* Judge; affirmed.

Hays, Priddy & Hays, for appellant.

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

McCULLOCH, C. J. Appellant was indicted for the crime of assault with intent to kill, alleged to have been committed by shooting Lee Stewart, a deputy sheriff of Yell County. On the trial of the case appellant was convicted of aggravated assault, and his punishment fixed at a fine of one thousand dollars and imprisonment in the county jail for six months.

The shooting occurred in the early part of the night of October 26, 1923, on one of the streets of the town of Plainview, in Yell County. The State proved that appellant fired the shot at Stewart, which took effect in his leg, or thigh, and inflicted a dangerous wound, and the evidence was sufficient to support a verdict for the highest offense charged in the indictment.

A traveling salesman named Parks had the cushions stolen out of his automobile, and he applied to Stewart, the deputy sheriff, to assist him in searching for the lost articles and apprehending the guilty party. Suspicion rested on a certain young man who lived in the county

near Plainview, and Parks and Stewart went out in a Ford car to the place where the young man lived. Not finding him or the stolen cushions, they started on the return trip to town, and, after chasing another car, and, being eluded by it, Stewart got out to stop some of the cars that were passing along the road. It was then after nightfall, when appellant's father came along in a car, and Stewart waved a flashlight to him to stop, but the car passed on, and appellant's father called Stewart's name and cried out, "Look out, there!" and passed on. Another car passed shortly afterwards. Stewart and Parks went on to town and went by the house of appellant's father to apologize for having endeavored to stop his car. They called out to appellant's father, but got no response, and drove around another street, and there met appellant in his (appellant's) car. According to the State's testimony, appellant drove over to the wrong side of the road, and, when the cars got nearly together, both of them stopped. Stewart and Parks both testified that appellant got out of his car with his shotgun in his hand, and that they both tried to explain to him the circumstances about attempting to stop his father's car, but that appellant refused to be pacified, and said to Stewart, "I am going to kill you; I will learn you to stay off of our business and let us alone." They testified that Stewart again attempted to explain the matter to appellant, and that, as appellant presented his gun, he (Stewart) took hold of the barrel and pulled it down, and that at that time the gun fired and the load took effect in Stewart's thigh. Stewart fell to the ground, and spectators came up, having heard the noise, and the witnesses who came up at that time testified that appellant was in a rage, and cursed and abused Stewart. One witness testified that, when he came up and saw Stewart lying on the ground, he said, "Let's get the man out of the dirt, not let him die in the dirt," and that appellant exclaimed, "Let him die like a G—— d—— dog. The G—— d—— old grayheaded son of a bitch ought to be dead and in hell years ago."

Appellant testified that he was driving behind his father's car when the attempt was made to stop the car by Stewart and Parks out on the road, and that, when he met Parks and Stewart's car in town, he thought an attempt was being made to hold him up, and that he did not intend to shoot Stewart. He testified that Stewart, after getting out of the car, grabbed hold of the gun-barrel and jerked it down, and that the gun went off accidentally. He said that he did not pull the trigger. This conflict in the testimony was settled by the verdict of the jury, and there was abundance of evidence to support the verdict.

According to the testimony adduced by the State, the shooting of Stewart by appellant was a most aggravated and unjustifiable offense; that, in a fit of anger, he shot a man who was attempting, in a polite and earnest way, to apologize for an apparent discourtesy to appellant's father.

Error is assigned in permitting witness Westlake to testify concerning the ability of appellant to recognize Stewart at the distance from one car to another. Westlake was one of the witnesses who came up immediately after the shooting. The testimony showed that the engines of both cars were running and the lights burning. After describing the scene and stating the distance, the witness was asked to state: "From the condition of the lights there, could a person have seen and recognized him from Bill Norman's car to where he was?" After objection was made, the question was changed to this: "Do you know whether a man could have seen him (Stewart) from Bill Norman's car?" The witness answered, "I recognized Bill Norman beyond Lee Stewart's car, yes. What I mean, I was behind Bill Norman's car when I came down there—his car in here. When I came out on this side I could recognize him over there." We see no valid objection to the competency of this testimony. It was impossible for the witness to describe to the jury the condition of the lights on the car, and there was no other way to carry to the jury the informa-

tion whether or not it was possible or probable that appellant recognized Stewart when the cars came close together and stopped. The testimony tended to contradict appellant in his statement that he did not recognize Stewart, and that he thought the men in the car were trying to hold him up.

Another assignment of error relates to the action of the court in giving the following instruction:

"The killing being proved, the burden of showing the circumstances of mitigation, or to justify or to excuse the homicide, shall devolve upon the accused, unless, by the proof on the part of the prosecution, it is sufficiently manifest that the offense, if death had resulted, would amount to no more than manslaughter, or that the accused was justified."

The court gave instructions properly defining the crime of assault with intent to kill, and, among other things, told the jury that, in order to make out that offense, it was essential that, if death had resulted from the assault, it would have constituted murder. The court then proceeded to charge the jury as to the law applicable to all degrees of homicide, and gave the instruction set forth above.

Appellant relies on the case of *Parsley* v. *State,* 148 Ark. 518, where we decided that the statute, substantially in the language of the instruction above, had no application on a trial for offenses other than homicide. That case was one where the accused was convicted of the crime of assault with intent to kill, and we held that the instruction was not only erroneous but was prejudicial. In the present case the appellant was not convicted of the higher offense involving a specific intent to kill, and therefore there could be no prejudice in giving the instruction. The assault and the effect thereof were abundantly established by testimony adduced by the State, and it devolved upon the appellant to show circumstances of mitigation or justification. The reference in the instructions to a homicide could have had no prejudicial effect, for it was not contended that death

resulted; on the contrary, Stewart, the injured party, was introduced and testified as a witness. It being obvious that the instruction could have had no prejudicial effect, its inapplicability to the facts of the case does not call for a reversal.

We find no prejudicial error in the record, and the judgment is therefore affirmed.

WRIGHT v. RAYMER.

Opinion delivered June 30, 1924.

ANIMALS — STOCK-LAW DISTRICT — ANNEXATION OF CONTIGUOUS TERRITORY.—Crawford & Moses' Dig., § 330, authorizing annexation of contiguous territory to stock-law districts organized under the general law, did not authorize the annexation of contiguous territory to a district created by Sp. Acts 1921, p. 866.

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

J. F. Koone, for appellant.

Karl Greenhaw and *Garner Fraser,* for appellee.

McCULLOCH, C. J. The General Assembly of the year 1921 enacted a special statute creating a stock-law district, composed of seven townships, in Van Buren County. Special Acts 1921, p. 866. At the next session of the Legislature a portion of a certain other township was added. The statute prohibits the running at large in the district of any "horses, mules, cattle, sheep, goats, hogs, asses, or any domestic animals," and declares a violation of the statute to be a misdemeanor punishable by fine of not less than one dollar and not over twenty-five dollars for each offense. The statute also provides that any person violating the statute shall be liable "to any person aggrieved for double amount of damages caused by the trespass of any such animals enumerated."

Appellees are residents and qualified electors of another township in Van Buren County (Sulphur Springs Township), which lies adjoining the township composing

the district created as aforesaid, and they are seeking to have said township annexed to the district pursuant to the general statute authorizing the creation of the stock-law district and annexation of territory thereto. This statute (Crawford & Moses' Digest, § 321) was enacted by the General Assembly of 1915, and was subsequently amended in particulars not important to the present discussion. It provides for the creation of such districts on petition of twenty-five per cent. of the qualified electors of three or more townships in a body in any county, for the purpose of restraining the running at large of "horses, mules, asses, cattle, goats, swine and sheep, or any two or more of the said animals, or the male species thereof." Section 10 of the act of 1915 (Crawford & Moses' Digest, § 330), under which the annexation in the present case is sought, reads as follows:

"Whenever three or more townships shall have been formed into a unit for the purpose of restraining any stock as herein enumerated, and shall have been perfected in the way and manner as herein provided, then any other township, or any group of townships, that would be a contiguous whole to the unit thus formed, may be attached to and become a part of said unit in the same way and manner as herein provided for in the first instance, by merely stating in the petition, in addition to the other requirements, that the petitioners wish their township or townships attached to said unit, naming the townships therein."

The sole question presented for decision in this case is whether or not there is authority under the general statute, *supra,* for the annexation of contiguous territory to the district created by the special statute hereinbefore cited. Our conclusion is that there is no such authority. An examination of the section of the general statute authorizing the annexation of territory shows clearly that it applies only to districts organized under that statute. It reads that any other contiguous township may be joined to a district composed of three or more townships "formed into a unit for the purpose of restraining any

stock as herein enumerated and shall have been perfected in the way and manner as herein provided." It is thus seen that the language only refers to such townships as have been organized under that statute, and contains no authority to add territory to a district formed under any other statute.

Another reason why the statute cannot be held applicable to the annexation of territory to the district created by special statute is that the two statutes are wholly different in substance. The general statute relates to the restraining of running at large of stock, not only of the same kind enumerated in the special statute, but also to any two or more of them, or only to the male species thereof, whereas the special statute prohibits the running at large of all of the animals enumerated and of both sexes of such animals. The special statute makes it a criminal offense to violate it and prescribes a penalty, and also provides for double damages, whereas the general statute provides no penalty and only provides for liability for single damages. It follows that there is no authority under the general statute to add territory to the special district operating under the law prescribing penalties and liabilities not embraced in the statute under which the annexation of the territory was authorized.

The circuit court erred in holding that there was statutory authority for the annexation of territory in this instance. So the judgment is reversed, and the cause remanded with directions to dismiss the petition of appellees.

WILSON v. STATE.

Opinion delivered June 30, 1924.

1. INDICTMENT AND INFORMATION—JOINDER OF BURGLARY AND LARCENY.—Under Crawford & Moses' Dig., § 3016, the offenses of burglary and grand larceny may be joined in one indictment.
2. CRIMINAL LAW—PROOF OF LARCENY OF THINGS NOT ALLEGED.—In a prosecution for grand larceny wherein defendant was charged

with having stolen certain articles, proof tending to show that certain other articles stolen at the same time and place were subsequently found in defendant's possession was admissible.

3. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Error, if any, in an argument of the prosecuting attorney that a sentence of a year in the reform school would benefit the accused *held* cured by the court declaring same improper.

4. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Argument of the prosecuting attorney that "I think the best thing that could happen to him (accused) would be to spend a year in the reform school," *held* a mere expression of opinion, and not improper.

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

E. K. Edwards, for appellant.

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

WOOD, J. The appellant was indicted for the crimes of burglary and grand larceny. The count for burglary charged that the appellant feloniously and burglariously did break and enter the depot house of the DeQueen & Eastern Railway Company with the felonious intent to steal, take and carry away candy, check lines and snuff, the property of the DeQueen & Eastern Railway Company, a corporation, as bailee, of the value of $15. The count for grand larceny charged that the appellant did unlawfully and feloniously steal, take and carry away the property described above of the DeQueen & Eastern Railway Company, a corporation, of the value of $15. The indictment was in good form, and the appellant was put on trial for both offenses. The trial resulted in a verdict finding appellant guilty of the crime of grand larceny and fixing his punishment at imprisonment in the State Penitentiary for a period of one year. From the judgment sentencing him in accordance with the verdict is this appeal.

The testimony adduced on behalf of the State tended to prove that, on the night of May 5, 1923, the station house of the DeQueen & Eastern Railway Company (hereafter called company) at Lockesburg was broken

into, and snuff, candy and check lines of the aggregate value of $15 were stolen; that this property was in possession of the company as bailee. The station agent, after testifying that the above property was stolen, also testified, over the objection of appellant, that a little magnifying glass and a knife were taken at the same time. The deputy sheriff who arrested the appellant testified, over the objection of the appellant, in substance that he found a knife and small magnifying glass in the possession of the appellant, which were exhibited to the jury. The station agent testified that the glass belonged to witness and that the knife belonged to a man by the name of Pierce; that the knife introduced looked like the knife that witness missed. There was testimony also to the effect that a candy bucket was found near the place where the appellant was staying at the time of the commission of the alleged offenses. It was shown that the appellant was arrested a couple of weeks after the alleged burglary, and he told the officer at the time of his arrest that he got the knife and magnifying glass from a hobo in a berry patch.

1. The appellant contends that the court erred in admitting the testimony concerning the knife and magnifying glass, because it was not charged in the count for grand larceny that the knife and glass were stolen. Under the statute burglary and grand larceny may be joined. Section 3016, subdivision 8, Crawford & Moses' Digest. The appellant was on trial for both offenses. The testimony tended to show that the knife and glass were stolen on the night and on the same occasion that the burglary was committed, when the property alleged in the grand larceny charge was stolen. The testimony therefore was relevant to the offenses for which appellant was being tried. It tended to prove that the appellant was guilty of both the crimes of burglary and grand larceny, for these alleged offenses were committed on the same night and on the same occasion. It was an issue for the jury, under the evidence, as to whether the knife and magnifying glass were identified as the knife

and glass taken from the depot on the night of the burglary, and the court therefore did not err in admitting the testimony.

2. In his closing argument the prosecuting attorney made the following remarks: "Gentlemen, when we consider this defendant's environments and the bad influences he is subjected to, I think the best thing that could happen to him would be to spend a year in the reform school. I believe he would be benefited by such a sentence." Counsel for the appellant objected to the remarks, whereupon the court stated to the prosecuting attorney: "Mr. Steel, that is an improper argument, and the Supreme Court has so held." The appellant's counsel renewed his objection, and, among other things, stated, "There has been no evidence introduced to show his age or anything to show that he would be sent to the reform school if convicted." Whereupon, the court remarked, "No, I do not recall any testimony as to his age, and besides, the court is going to take care of the judgment in this case."

The court's remarks to the prosecuting attorney were tantamount to informing the jury that the argument was improper, and were sufficient to counteract any prejudicial effect on the minds of the jurors that these remarks were calculated to produce, even if they were improper. But we do not concur with appellant's counsel in the view that the remarks of the prosecuting attorney were an improper argument. These remarks were but the expression of an opinion on the part of the prosecuting attorney that the appellant would be benefited by a sentence to the reform school. These remarks did not have the effect of informing the jury that the appellant, if convicted, would be sent to the reform school, as was the case in *Pittman* v. *State,* 84 Ark. 292, and *Bird* v. *State,* 154 Ark. 299. They did not purport to state the law, and were not a misstatement of any legal proposition, as was the case in the above cases. The doctrine of those cases has no application here. The mere expression of the opinion of the prosecuting attorney, under

the circumstances, did not constitute reversible error. *Blackshare* v. *State,* 94 Ark. 558; *Spier* v. *State,* 157 Ark. 282.

The remark of the trial judge that he was going to take care of the judgment in the case furnished no grounds for an inference that the appellant, if convicted of grand larceny, would be sent to the reform school. This remark merely stated the truth, that the court had control over its judgment, and the only proper inference to be drawn was that the court would render proper judgment in the case. There is no prejudicial error in the record, and the judgment must therefore be affirmed.

PENIX v. SHADDOX.

Opinion delivered June 30, 1924.

1. COUNTIES—COURTHOUSE.—It is the duty of a county to erect and furnish a courthouse and to provide necessary offices for the several county officers.
2. COUNTIES — AUTHORITY OF COUNTY COURT TO ASSIGN OFFICES.—Under Crawford & Moses' Dig., § 2279, the county court has exclusive authority in the matter of assigning offices in the courthouse to the several county officers, and such authority is not exhausted when once exercised, but is continuous, and the assignment of offices may be changed whenever, in the judgment of the county court, the public convenience will be promoted by the change.
3. COUNTIES—ASSIGNMENT OF OFFICES—APPEAL.—A county officer aggrieved by the action of the county court in assigning offices in the courthouse should make himself a party to such proceeding and seek a review by the circuit court of the county court's order.
4. EQUITY—JURISDICTION OVER COUNTY COURT.—It is not within the province of a court of equity to correct an error of the county court when proceeding under statutory authority with discretionary powers.
5. INJUNCTION — RESTRAINING SHERIFF FROM DISOBEYING COUNTY COURT.—A suit by the county judge to enjoin the sheriff from interfering with the order of the county court designating a room to be occupied by the county treasurer does not lie; the proper remedy being to cite the sheriff for contempt upon his refusal to obey.

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

STATEMENT OF FACTS.

M. O. Penix, as county judge of the court of Boone County, Arkansas, brought this suit against Bob Shaddox to enjoin him from interfering with the order of the county court in designating a room to be occupied by the county treasurer.

According to the allegations of the complaint, M. O. Penix is judge of the county court of Boone County, Arkansas, and designated a room in the courthouse which should be occupied by the county treasurer, and in which his records might be securely kept. Bob Shaddox is the sheriff of the county, and occupies the room assigned to the treasurer for his office. He refused to surrender possession of the room to the county treasurer. Hence this lawsuit.

A demurrer was filed to the complaint on the ground that the chancery court had no jurisdiction of the case. The demurrer was sustained, and, the plaintiff declining to plead further, the complaint was dismissed. The case is here on appeal.

George J. Crump, for appellant.

Worthington & Williams, for appellee.

HART, J., (after stating the facts). It is the duty of a county to erect and furnish a courthouse, and to provide necessary offices for the several county officers. *Law* v. *Falls,* 109 Ark. 395.

Section 2279 of Crawford & Moses' Digest defines the powers generally of the county courts of the State. Among other things, the section provides that the county court of each county shall have the control and management of all the property, real and personal, for the use of the county, and to cause to be erected all buildings and all repairs necessary for the use of the county.

Thus it will be seen that the county court is given not only the authority to furnish a courthouse, but to provide the necessary offices for the several county offi-

cers. This includes the power to designate the rooms which are suitable for each particular office, and the action of the county court in assigning the particular rooms which shall be occupied by the different officers is the act of the county. This power is not exhausted when once exercised, but is a continuing one, and the assignment of offices may be changed whenever, in the judgment of the county court, the public convenience will be promoted by the change.

It appears from the record that Shaddox was the sheriff of the county; but he had no right to choose the room which he should occupy as his office. The law confers no authority upon him to take or hold possession of any room in the courthouse for his office when such room has been assigned by the county court to another county officer. The power of the county court is necessarily exclusive. *White* v. *Hewlett* (Ala.), 42 So. 78, and cases cited, and *Werts* v. *Feagle* (S. C.) 65 S. E. 226.

If the sheriff thought that the county court was acting in an arbitrary manner in assigning offices for the various county officers, he should have made himself a party to the proceeding and have appealed to the circuit court from the order of the county court assigning rooms to the various county officers. The county court had the statutory authority to make the order, and in making it the question of public convenience was involved and determined. A court of equity has no jurisdiction over the subject-matter for the purpose of opening up the question and determining it anew. It is not within the province of equity to correct the error of a county court when proceeding under statutory authority with discretionary powers. *Bowman* v. *Frith,* 73 Ark. 523, and *White* v. *Hewlett* (Ala.), 42 So. 78.

It is the duty of the sheriff to attend each term of the county court for his county, and execute all orders made by said court. Crawford & Moses' Digest, § 2272.

In this case it seems that the sheriff himself was the offending party, and refused to obey the order of the

county court. All courts have power to issue all writs and process which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law. Crawford & Moses' Digest, § 2104.

Hence the county court might have cited the sheriff for contempt of court in disobeying its orders, or might have enforced it by any other appropriate process. The result of our views is that the wrong remedy was pursued, and the chancery court was without jurisdiction to enforce the order of the county court in question.

It follows that the decree must be affirmed.

COBURN v. GILBERT.

Opinion delivered June 30, 1924.

1. EVIDENCE—RELEVANCY.—In an action by a broker to recover a commission for procuring a purchaser of land, testimony of the broker relative to a prior partnership arrangement between himself and the principal for the sale of the same land and division of profits, introduced as a narrative of what occurred between them leading up to the contract for commissions, *held* competent.
2. APPEAL AND ERROR — HARMLESS ERROR.— A judgment will be reversed for prejudicial error only.

Appeal from Saline Circuit Court; *T. E. Toler*, Judge; affirmed.

STATEMENT OF FACTS.

T. B. Gilbert sued J. A. Coburn in the justice court to recover $135, alleged to be the balance due him as commissions for the sale of two tracts of land belonging to the defendant.

The complaint was in writing, and contained two paragraphs. In the first paragraph it is alleged that the defendant employed the plaintiff to procure for him a purchaser for ten acres of land for $2,500, and agreed to pay him therefor a commission of five per cent. The plaintiff procured a purchaser under the contract, and thereby earned $125 as commissions. The defendant paid him $50, and refused to pay the balance of $75.

In the second paragraph of the complaint it is alleged that the defendant employed plaintiff to procure him a purchaser for five acres of land for $1,200, and agreed to pay him a commission of five per cent. No part of this amount has been paid, and the defendant owes him $60 for commissions for selling the five-acre tract.

The defendant filed an answer in which he denied owing the plaintiff anything. There was a verdict and judgment for the plaintiff in the justice court, and the defendant appealed to the circuit court. There T. B. Gilbert was the principal witness for himself. According to his testimony, J. A. Coburn was a prospective purchaser for the ten-acre tract for the sum of $2,500. The owner first asked $2,750 for it, and Coburn bought other land. Gilbert then sold the ten-acre tract to Dr. W. O. Tibbel for $2,500. About a month after his purchase, Dr. Tibbel authorized Gilbert to sell it for $2,000. Gilbert then went to J. A. Coburn and told him that he could get the place for $2,000, and sold it to him with the understanding that it was to be a partnership deal, and that they were to share equally the profits derived from a resale of it, and that Gilbert was to have the exclusive handling of it. Finally Coburn persuaded Gilbert to let him have the land for $2,000, with the privilege of selling it again for Coburn for a commission of five per cent. Gilbert then found a purchaser who was ready, able, and willing to pay $2,500 for the land. Coburn refused to sell, because he thought there was oil under the land. Coburn paid Gilbert $50 as commission, and refused to pay him any more. Gilbert also procured a purchaser for the five-acre tract at $1,200, and Coburn refused to sell it, because he thought there was oil under the tract. He refused to pay Gilbert any commission on this tract.

J. A. Coburn was a witness for himself. According to his testimony, Gilbert had agreed with him that, in case of a resale of the land, he would pay any tenant Coburn had on the land whatever was necessary to get rid of him. Gilbert refused to carry out his agreement

in this respect, and, for that reason, Coburn refused to let him sell the land. They finally compromised their differences in the matter by the payment of Coburn to Gilbert of $50. According to Coburn, this $50 was in full settlement of the matter. Gilbert denied this, and said that he only took it in part payment of his commissions.

The jury returned a verdict in favor of the plaintiff in the sum of $75, and from the verdict rendered the defendant has duly prosecuted an appeal to this court.

Brouse & McDaniel, for appellant.

J. W. Westbrook, for appellee.

HART, J., (after stating the facts). The sole reliance of the defendant for a reversal of the judgment is that the circuit court erred in admitting the testimony of T. B. Gilbert with reference to a division of profits upon a resale of the land. It appears that Gilbert bought the land from Coburn for $2,000. It was first agreed between them that the land should be resold, and that they should share equally in the profits. It is claimed by counsel for the defendant that the court erred in allowing this testimony to go to the jury. We do not agree with counsel in this contention. The evidence referred to was only admitted by way of leading up to the contract which was made between the parties, with reference to the commissions to be received by the plaintiff for a resale of the land for the defendant. The testimony in question was not admitted for the purpose of establishing the claim of the plaintiff for commissions, but only as a narrative of what occurred between them leading up to the contract they made. The plaintiff testified that the defendant finally persuaded him to take the agency for the sale of the ten-acre tract of land for a five per cent. commission. A written complaint was filed in the case, and the plaintiff only asks to recover the balance due him on a basis of a five per cent. commission for a sale of the ten-acre tract for the defendant. He procured a purchaser for this ten-acre tract for $2,500, and the defendant refused to sell. The plaintiff received $50 from the defendant, and

this would leave a balance due him of $75. The jury returned a verdict for him in this amount, thus indicating that it believed the testimony of the plaintiff to the exclusion of that of the defendant. No amount whatever was allowed the plaintiff for the sale of the five-acre tract.

The pleadings and the evidence introduced, when considered in connection with the verdict of the jury, show that it was in no wise misled by the evidence in question. No prejudice could have resulted to the defendant from admitting the evidence, and it is well settled in this State that a judgment will only be reversed for an error prejudicial to the rights of the appealing party.

It follows that the judgment will be affirmed.

HAFFKE v. HEMPSTEAD COUNTY BANK & TRUST COMPANY.

Opinion delivered June 30, 1924.

1. MORTGAGES—DELIVERY OF ITEMIZED STATEMENT OF ACCOUNT—WAIVER.—Delivery to a mortgagor of a verified itemized statement of the account secured by the mortgage before foreclosing a chattel mortgage was waived where the mortgagee presented an unverified but correct account, to which the mortgagor made no objection.
2. EQUITY — JURISDICTION TO FORECLOSE MORTGAGE OF DECEDENT.—Equity had jurisdiction to foreclose a mortgage executed by decedent and another where it made no order for payment of any deficiency judgment against decedent's estate, but found the balance due by decedent and ordered foreclosure therefor.
3. CROPS—DEEDS HELD TO CONVEY.—Deeds executed on March 31 and June 30, neither containing any reservation of crops, *held* to carry the title to a crop on the land.
4. HUSBAND AND WIFE—ESTOPPEL.—Where a wife permitted the 1921 crop to be appropriated to paying her husband's debt to a bank, without advising the bank that she had an interest in the land, and the bank made advances in 1922 upon the faith of the husband's mortgage on the crop, the wife is estopped to assert any right to rents out of such crop.

Appeal from Hempstead Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

E. F. McFaddin, for appellant.

The court erred in not sustaining the plea in abatement of Charles Haffke. Section 7403, C. & M. Digest; 65 Ark. 316; 73 Ark. 789. The statute is mandatory. 92 Ark. 313; 123 Ark. 265; 136 Ark. 516. A conversion of mortgaged property to his own use by the holder of the mortgage satisfies the mortgage debt to the extent of the value of the property. 11 Corpus Juris, 686. The intervention of Margaret B. Haffke should have been sustained. 30 C. J. 838; 50 Ark. 42; 62 Ark. 26; 69 Ark. 350; 74 Ark. 161; 107 Ark. 458; 92 Ark. 315; 142 Ark. 104; 157 Ark. 254.

Wm. S. Atkins, for appellee.

SMITH, J. On January 17, 1923, the Hempstead County Bank & Trust Company, hereinafter referred to as the bank, filed a complaint in equity against Charles Haffke, who was the only defendant named. In this complaint the appointment of a receiver was prayed to take charge of certain personal property mortgaged to the bank by Haffke. The complaint described a number of mules and certain farming implements, and there was a prayer that the property be ordered sold in satisfaction of certain mortgages executed to the bank. There were two of these mortgages, and each covered the property described. The first was executed by Charles Haffke and Pressley J. Barr. The second was executed on March 8, 1922, by Haffke alone.

Haffke filed a motion to quash the specific attachment which the bank had caused to be issued, on the ground that the bank had failed to comply with § 7403, C. & M. Digest, which requires the mortgagee, before foreclosing a chattel mortgage, to deliver to the mortgagor a verified itemized statement of the account, showing all items of debit and credit. This motion was overruled, and the bank later filed an amended complaint in which the executor of Barr was made a party defendant. As an exhibit to this complaint an itemized verified statement of the account was attached. Later the wife of

Haffke intervened and claimed an interest in the rent, as an owner of an interest in the land.

The executor of Barr demurred to the complaint on the ground that the chancery court was without jurisdiction to adjudicate an indebtedness against his testator. The demurrer was overruled, and exceptions saved. The court also found against the intervention of Mrs. Haffke. The court then found that there was a balance due the bank, as shown by the statement of the account, and entered a decree of foreclosure. Other facts will be stated in the opinion.

It does not appear that the bank complied with § 7403, C. & M. Digest, but we think this failure was waived. At the winding up of the crop for the year 1922 it was shown that Haffke could not pay his debt to the bank; indeed, the indebtedness had increased over that of the preceding year. It appears that the bank furnished Haffke a statement of the account about the first of December, 1922, which was, of course, prior to the institution of the suit in January, 1923. This statement was not verified, but its accuracy does not appear to have been questioned at that time. It was the same statement which was made a part of the amended complaint. At the time this statement was furnished in December, 1922, no objection was made to its form, and Haffke appears to have fully understood the amount claimed by the bank. Haffke's insistence at that time was that the bank should extend him additional credit to make his crop in 1923, and it appears reasonably certain that no objection to the account or to the balance claimed as due would have been made had the credit been extended.

This court held, in the case of *Lawhon* v. *Crow*, 92 Ark. 313, that the legislative purpose in enacting the statute now appearing as § 7403, C. & M. Digest, was not merely to save the mortgagor the cost that might be incident to a lawsuit, but also to prevent annoyance and inconvenience to him by having his property taken from him by process of law before giving him an opportunity to

adjust any differences with the mortgagee and to settle his account, if possible, without a lawsuit, and that it had therefore been made a condition precedent to the maintenance of a suit to foreclose a chattel mortgage, or to recover the possession of the mortgaged property, that the mortgagee furnish the mortgagor a verified statement of the account. But here the purposes of the law have been fully met. The mortgagor knew the sum claimed, and he apparently acquiesced in the demand made by the bank. The question considered between the mortgagor and the mortgagee was that of the extension of additional credit, and this was considered by the directors of the bank at more than one meeting, and, when the bank finally declined to accede to Haffke's demand for additional credit, he stated that it was the bank's next move.

Under these circumstances we think a strict compliance with the statute was waived, and the motion to dismiss for noncompliance with the statute referred to was properly overruled.

We think the court also properly overruled the demurrer of the executor of Barr's estate to the jurisdiction of the chancery court. The court assumed jurisdiction of the proceeding, so far as the executor was concerned, for the purpose only of ascertaining the balance due and secured by the mortgage which the testator had executed, and the court had this jurisdiction. The court undertook to make no order for the payment of any deficiency judgment against the testator's estate, but found the balance due by him under the mortgage which he had executed, and ordered its foreclosure.

The executor also claimed, for the benefit of his estate, an interest in the 1921 crop, which the court refused to allow. The court also found against the intervention of Mrs. Haffke for an interest in the 1922 crop, and this appeal questions the correctness of both those findings. These questions may be disposed of together, as both claims arise out of the same facts.

P. J. Barr died March 31, 1921, which was prior to the planting of the crops for that year. On March 25, 1921, P. J. Barr conveyed by warranty deed to Ralph W. Barr his interest in the land on which the crops were grown. Ralph W. Barr executed a power of attorney to appellant Charles Haffke, who was his brother-in-law, and, pursuant to this power, Haffke, on June 30, 1921, conveyed the interest originally owned by P. J. Barr to Margaret B. Haffke, who was the sister of Ralph W. Barr and the wife of Charles Haffke. This deed contained no reservation of the crops then growing on the land, nor did the deed from P. J. Barr to Ralph W. Barr. The crop of 1921 was marketed and the proceeds thereof turned over to the bank, to be credited on the indebtedness of P. J. Barr and Charles Haffke, which was secured by the mortgage which they had executed to the bank. Mrs. Haffke claimed no interest in the 1921 crop. By her intervention she claimed a part of the rent for 1922.

We think the deed from P. J. Barr to Ralph W. Barr and the one from Ralph W. Barr to Mrs. Haffke operated to convey the interest of the grantors in the crops to the grantees named, and the court therefore properly held that the executor of P. J. Barr was not entitled to recover any part of the 1921 crops. *Gibbons* v. *Billingham,* 10 Ark. 9; *Lee* v. *Bandimere,* 140 Ark. 277; *Nelson* v. *Forbes & Sons,* 164 Ark. 460.

P. J. Barr appeared to have owned an undivided 41½ per cent. interest in the land, and this is the interest acquired by Mrs. Haffke through the deed to her, and under it she asserts an interest in the rent for 1922 to that extent, as she did not sign any of the notes secured by the mortgage on the personal property and was not a party to that instrument. Her intervention raised this question.

We think the court properly found against the intervention of Mrs. Haffke for the following reasons: She permitted the 1921 crop to be appropriated to the debt due the bank without advising the bank that she had any

interest in the land on which she could predicate a claim to an undivided interest in the crop. We think she must have known that her husband represented to the bank, as a basis for the credit extended him in 1922, that he had the right to mortgage the crops. On March 8, 1922, Haffke wrote a letter to the bank in regard to the indebtedness then due and the additional advances which he was asking the bank to make him that year. In this letter he said: "I have made my calculation as to what it will take to furnish my place, necessary to insure cropping the entire place for 1922," and, after stating his demands, he advised that he could, with certain other assistance which he expected to obtain, "cultivate my entire farm."

The bank made the advances for the year 1922, and it was upon the faith of the security of the chattel mortgage here sought to be foreclosed upon the 1922 crop, and, as Mrs. Haffke permitted the bank to extend this credit under the belief that Haffke had the right to mortgage it, she is estopped from asserting that he had no such right. *Driggs Bank* v. *Norwood,* 50 Ark. 42; *George Taylor Commission Co.* v. *Bell,* 62 Ark. 26; *Cowling* v. *Hill,* 69 Ark. 350; *Davis* v. *Yonge,* 74 Ark. 161; *Haycock* v. *Tarver,* 107 Ark. 458; *Latham* v. *First National Bank,* 92 Ark. 315; *Irwin* v. *Dugger,* 142 Ark. 104; *Harmon* v. *Winegar,* 157 Ark. 254.

The decree adjudged the balance due and secured by each of the mortgages mentioned, and ordered their foreclosure in satisfaction thereof. This decree appears to be correct, and it is affirmed.

REPUBLIC POWER & SERVICE COMPANY v. GUS BLASS CO.

Opinion delivered June 16, 1924.

1. CORPORATIONS—POWER OF STATE OVER FOREIGN CORPORATIONS.—The only limitation of the State's power to impose conditions on foreign corporations doing business in the State is with respect to corporations engaged in interstate commerce.
2. CORPORATIONS—FOREIGN CORPORATIONS—CONDITIONS.—Neither a foreign corporation purchasing an interest in oil and gas leases

in Arkansas without having complied with the statutory requirements as to doing business in the State (Crawford & Moses' Dig., §§ 1825-1832), nor its assignee, can enforce its executory contracts, either at law or in equity.

3. CONTRACTS—WHEN EXECUTED.—A contract is "executed" when whatever is contracted to be done on either hand has been done.

4. CORPORATIONS—WHEN CONTRACT OF FOREIGN CORPORATION NOT EXECUTED.—The contract of a foreign corporation to purchase an interest in oil leases held by another than the seller for the benefit of all persons interested, was not executed, where such corporation was not given possession and the holder of leases refused to recognize its right to share therein.

5. CORPORATIONS—FOREIGN CORPORATIONS—ASSIGNMENT OF UNLAWFUL CONTRACT.—Where a foreign corporation contracted in this State to purchase oil leases without complying with the laws as to doing business in the State, its assignee, whether by contract or by law, cannot enforce rights under such contract if the contract must be proved to make out the case.

6. CORPORATIONS—FOREIGN CORPORATIONS—SUBSEQUENT COMPLIANCE WITH STATUTE.—The fact that a foreign corporation, which executed a contract in the State without complying with the State laws as to doing business, subsequently complied with the statute gives it and its assignee no right to enforce such contract.

Appeal from Ouachita Chancery Court, Second Division; *George M. LeCroy,* Chancellor; affirmed.

STATEMENT OF FACTS.

The Republic Power & Service Company brought this suit in the chancery court against Gus Blass Company and Joe House, Jr.

According to the allegations of the complaint, on May 27, 1919, eight persons, including S. R. Morgan, entered into a written agreement to associate themselves together for the purpose of securing leases for oil and gas in Ouachita County, Arkansas. The leases were to be taken in the name of J. W. House, Jr., and held by him for the benefit of all of them. It was agreed that all advances made by the parties to carry out the provisions of the contract between them should be made to J. W. House, Jr., and that he should keep an account of the moneys received. They secured oil and gas leases in

the name of J. W. House, Jr., for the benefit of the other persons in interest, to numerous tracts of land in Ouachita County, Arkansas. On the 30th day of June, 1920, S. R. Morgan executed what is called a bill of sale to Morgan & Company of Delaware to his one-eighth undivided interest in said oil and gas leases, which aggregate about 20,000 acres, and the title to which is in the name of J. W. House, Jr., as trustee for himself, for S. R. Morgan, and the other interested parties. The bill of sale was acknowledged before a notary public in the city of Little Rock, Pulaski County, Arkansas, on the same day. It was then delivered in Little Rock to a representative of the grantee. The grantee was a foreign corporation, and, at that time, had not complied with the laws of the State of Arkansas with reference to foreign corporations doing business in the State. Subsequently the Republic Power & Service Company succeeded to the rights of Morgan & Company and complied with the statutes of the State with reference to doing business in the State.

On May 3, 1921, the Gus Blass Company recovered judgment against S. R. Morgan in the Pulaski Circuit Court. On May 14, 1921, an execution was issued and returned *nulla bona*. The Gus Blass Company then brought suit in the chancery court against S. R. Morgan and J. W. House, Jr., to subject the interest of S. R. Morgan in said oil and gas leases to the payment of its judgment against him in the sum of $604.15. A decree was obtained in favor of the Gus Blass Company, and the one-eighth interest of S. R. Morgan was duly sold for the satisfaction of said judgment, and the Gus Blass Company became the purchaser at the sale for the amount of its judgment and the costs.

Morgan & Company complied with the law with regard to foreign corporations doing business in the State, and received its certificate to that effect on September 26, 1921. Morgan & Company was chartered as a corporation in the State of Delaware on the 14th day of May, 1920. On January 9, 1922, the name of this corpora-

tion was changed to the Republic Power & Service Company.

The prayer of the complaint in this case is for a partition of said oil and gas leases between the plaintiff, Republic Power & Service Company, and the other parties interested therein.

It is also asked that the claim of the defendant, the Gus Blass Company, be canceled and held for naught in said oil and gas leases; that said J. W. House, Jr., be restrained from recognizing or attempting to recognize the right or claim of the said Gus Blass Company, and that, if it be held that the lien of the said Gus Blass Company be superior to the right of the plaintiff, an adjudication of the amount be had, and that, upon payment of the amount thereof by plaintiff, its title and interest in said oil and gas leases be confirmed and quieted.

Upon the facts stated and proved, the chancellor was of the opinion that the complaint should be dismissed for want of equity. A decree was entered of record accordingly, and the plaintiff has duly prosecuted an appeal to this court.

Carmichael & Hendricks, for appellant.

The plaintiff was entitled to maintain the suit. The sale by Morgan of his interests in certain lands, made in St. Louis, to a foreign corporation not authorized yet to do business in Arkansas, was in the nature of interstate business. Appellant should prevail under the authority of 151 Ark. 269 and 157 Ark. 121. Judgment liens are subject to valid liens on the land at the time the judgment is rendered, whether recorded or not. 33 Ark. 328. Appellant was never made a party to the suit, which was to set aside a fraudulent conveyance. Land conveyed for the purpose of defeating creditors is not subject to the lien of a judgment, and *a fortiori,* if there was a conveyance in good faith, the vendee's rights would be superior to those of a judgment creditor. 111 Ark. 11; 67 Ark. 325; 113 Ark. 109.

Hamp Smead, Coleman, Robinson & House, and *Smead Powell,* for appellee.

Appellant can claim no rights under the bill of sale because it was not authorized to engage in business in this State at the time of its execution. Section 1832, C. & M. Digest. The transaction was had in Arkansas, and was in line with the particular business of the foreign corporation, and therefore void. 98 So. 787. There was ample evidence to sustain a finding that the bill of sale was made with intent to defraud creditors. Retention of possession by a grantor is a badge of fraud. 88 Ark. 433; 50 Ark. 289; 55 Ark. 116. See also 12 R. C. L., p. 480, § 12; 106 Ark. 230; 73 Ark. 174. While Morgan could sell his interest, such sale did not necessarily make the purchaser a partner of the others, as the purchaser has only a right to an accounting and settlement of the partnership affairs. 20 R. C. L. § 217. Appellant is concluded by the judgment against Morgan, as its rights had not then vested. 23 Cyc. 1253, 1260.

HART, J., (after stating the facts). It is well settled that the only limitation upon the power of the State to exact conditions upon which foreign corporations may transact business within its borders is where such corporations are engaged in interstate commerce, and that this limitation arises only because the Federal Constitution has committed to Congress the power to regulate commerce between the States. *Kansas City Structural Steel Co.* v. *State,* 161 Ark. 483; *Browning* v. *Waycross,* 233 U. S. 16, and *Mitchell Furniture Co.* v. *Selden Brack Construction Co.,* 257 U. S. 282.

Our statutes prescribing the conditions upon which foreign corporations may be authorized to do business in this State are contained in Crawford & Moses' Digest, §§ 1825-1832, inclusive.

Section 1832 provides that any foreign corporation which shall fail to comply with the provisions of the act, and which shall do any business in this State, shall be subject to a fine as provided in the act.

The section further provides that, as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate, as aforesaid, cannot make any contract in this State which can be enforced by it, either in law or in equity, and that compliance with the provisions of the act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract.

At the time Morgan & Company purchased the one-eighth interest of S. R. Morgan in the oil and gas leases referred to in our statement of facts, it was a foreign corporation, and had not complied with the provisions of our statute with reference to doing business in this State. It had therefore, under the statute, no legal right to make any contract in this State which could be enforced by it, either in law or in equity. By the terms of the statute it has no recognition in the courts of this State, and the plaintiff, which is its assignee, acquired no greater rights.

It is well settled by the authorities cited above, and other decisions from these courts, that the States have the power to impose such conditions as they please upon foreign corporations seeking to do business within their borders.

In the decision cited from this court a review of our former decisions is made, and the distinction is pointed out between a contract which is so connected with an interstate transaction that it is a part of it, and a contract which is so inherently intrastate that it does not lose its essential nature because it forms a part of an interstate commerce transaction to which it has no necessary relation.

No question of interstate commerce is here involved. There was only one transaction, and that was the sale by S. R. Morgan to Morgan & Company, a foreign corporation, of the former's undivided one-eighth interest in certain oil and gas leases taken in the name of J. W. House, Jr., and held by him for the persons beneficially interested, including S. R. Morgan. This contract was

evidenced by an instrument in writing called a bill of sale. It was prepared, signed, and acknowledged in the city of Little Rock, Arkansas, and there delivered to a representative of the foreign corporation.

It will be remembered that the Republic Power & Service Company succeeded to the rights and name of Morgan & Company. The contract having been made and the business transacted in the State of Arkansas, the transaction was essentially an intrastate one.

It is insisted that, although the contract may be an intrastate one and void under the statute, and not enforceable under it, a different rule prevails where the contract is fully executed.

It is pointed out that the former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed on such ground can be granted with respect to the latter.

Now the contract under consideration could in no sense be said to be an executed contract. An executed contract is one where whatever is contracted to be done on either hand has been done.

In the present case a bill of sale of the undivided interest of Morgan in the leases was executed and delivered to an agent of the foreign corporation; but no possession was given the foreign corporation of the leases; nor did House in any manner recognize its right or interest in the same. On the other hand, he refused to recognize the right of the foreign corporation to any share in the leases, and, on that account, was made a defendant to this lawsuit. One of the objects of the lawsuit was to establish the right of the plaintiff to an interest in the leases under his contract from Morgan; another was to require House to recognize the plaintiff as a party in interest; and the third was to secure a partition of the plaintiff's alleged share in the leases.

The test to determine whether the plaintiff is entitled to recover in an action like this, or not, is his ability to establish his case without any aid from the illegal transaction. If his right to recover depends on the contract which is prohibited by statute, and that contract must necessarily be proved to make out his case, there can be no recovery. *Cary* v. *Watkins,* 97 Ark. 153; *Tallman* v. *Lewis,* 124 Ark. 6; and *Carter* v. *Bradley County Road Imp. Dists. 1 and 2,* 155 Ark. 288.

The leases are in the possession of House, and the legal title is in him for the benefit of the parties designated therein. House refused to recognize any right of the plaintiff in the leases. The statute, however harsh its terms may be, is, as we have already seen, a valid and enforceable act. It provides, in express terms, that any foreign corporation which has failed to file its articles of incorporation or certificate as provided, cannot make any contract in this State which can be enforced by it, either in law or in equity.

Now it is evident that the plaintiff could not recover without introducing the contract under which it claims in evidence. It has therefore no legal right to demand partition of the leases or possession of any share therein. It does not make any difference that the Gus Blass Company has obtained possession of Morgan's interest in the leases by legal proceedings. The plaintiff must recover on the strength of its own title, and, as we have already seen, has no claim of any kind without introducing in evidence its contract of purchase from Morgan. To allow it to recover by introducing in evidence a contract absolutely void under the statute would defeat the main purpose of the statute.

Under our statute it makes no difference that the foreign corporation has subsequently complied with the statute. This gives it no right to enforce a contract made before its compliance with the statute.

It follows that the decree will be affirmed.

McCULLOCH, C. J., (dissenting). The statutes of this State do not prohibit a foreign corporation from acquiring property in the State, nor from suing in the courts to recover property or to seek redress for damage to property thus acquired. *Railroad Co.* v. *Fire Association,* 60 Ark. 325; *Alley* v. *Bowen-Merrill Co.,* 76 Ark. 4; *Rachels* v. *Stecher Cooperage Co.,* 95 Ark. 6; *Linton* v. *Erie Ozark Mining Co.,* 147 Ark. 331. In the absence of such a statute, foreign corporations may acquire property in a State and sue for in the courts of the State. *Cowell* v. *Springs Co.,* 100 U. S. 55. The only inhibition in our statute is that a foreign corporation shall not do business or make contracts in the State without complying with the statute.

The effect of the transaction now condemned by the majority of this court as unlawful was merely the acquisition of property by purchase—a consummated sale and purchase of personalty. It was not an executory contract for sale, but a consummated one. The bill of sale delivered by S. R. Morgan to the corporation completely consummated the sale—nothing remained to be done to complete it. Herein lies the error into which, I think, the majority have fallen. Morgan had no writing evidencing the lease to deliver—the leases were held in the name of Mr. House as trustee for himself and his associates, including Morgan, and the only way Morgan could transfer his interest was by separate bill of sale, which evidenced a completed sale and passed title to the purchaser. What more could Morgan have done to pass title to the corporation? If the title passed, there was no executory contract involved. The bill of sale was introduced as evidence of title, the same as a deed to realty, and not as a contract to be enforced by decree of the court.

This is a controversy between Morgan's creditor and the corporation to which Morgan sold his interest in the lease. The sale is not shown to have been fraudulent, so if it was completed so as to pass title, the property became that of the purchaser, and the creditor of

Morgan cannot complain. The situation is the same, I think, as if Morgan had conveyed land to the corporation and the creditor was seeking to set aside the conveyance. If the conveyance was free from fraud, it passed beyond the reach of creditors.

ARKANSAS NATURAL GAS COMPANY v. NORTON COMPANY.

Opinion delivered June 23, 1924.

1. GAS—CORPORATION HELD TO BE PUBLIC UTILITY.—Where a corporation authorized to produce, transport and sell natural gas exercised the rights and privileges of a public utility, and filed a schedule of rates, and subjected itself to control by State authorities, it constituted itself a public utility for the purpose of furnishing natural gas, and was subject to statutory regulations.
2. GAS—PUBLIC UTILITY.—A corporation supplying natural gas to customers cannot be considered as a public utility with respect to certain classes of consumers and a private corporation as to certain others.
3. GAS—PUBLIC UTILITY—DISTINCTION BETWEEN CONSUMERS.—While a corporation supplying gas to consumers cannot arbitrarily discriminate among consumers similarly situated, a distinction may be made between different consumers or classes of consumers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes.
4. GAS—POWER OF CORPORATION COMMISSION TO FIX RATES.—It was beyond the power of a natural gas company, operating as a public utility, to contract with respect to furnishing gas so as to interfere with the power of the Corporation Commission to regulate rates for gas furnished.
5. GAS—POWER OF GAS COMPANY TO ENFORCE RATE-FIXING CONTRACTS.—Where a natural gas company subjected itself to the control of the Corporation Commission, under Crawford & Moses' Dig., §§ 1653-1656, and was granted an indeterminate permit to surrender its franchise and be released from its contracts, and failed to apply for reinstatement of such contracts, as provided by Gen. Acts 1921, p. 177, creating the Railroad Commission in lieu of the Corporation Commission, it lost its power to enforce the rates provided in such contracts.

6. GAS—POWER TO ENFORCE RATE-FIXING CONTRACTS—CONSTRUCTION OF STATUTE.—Gen. Acts 1921, p. 177, creating the Railroad Commission, providing by § 22, as amended by *Id.* p. 429, § 1, that such Commission shall have no power to modify or impair any existing contract for supplying gas, meant that the validity of any such contracts shall not be impaired, and does not intend to give to such contracts any validity or continuing force which they did not have at the time the act was passed, and power to enforce rate-fixing contracts previously released was not preserved to the gas company by such act.

7. GAS—PAYMENT BY CONSUMER HELD INVOLUNTARY.—Where a public utility threatened to shut off the supply of gas if a consumer did not pay the increased rate without protest, money paid under such circumstances, though without protest, was not paid voluntarily.

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

Rose, Hemingway, Cantrell & Loughborough, for appellees.

The gas company was acting as a public utility in its service to the industrial consumers of the gas it supplied, and, as such, had no right to charge more than the rates established by the rate-fixing bodies of the State. Any contract or agreement the gas company might make with a consumer, whereby it charged higher than the established rates, was void. As to whether or not the gas company was acting as a public utility, see *Clear Creek Oil & Gas Company* v. *Fort Smith Spelter Company,* 148 Ark. 260, and the clear test set forth at page 273. The Dally letter of November 24, 1920, which set forth the terms on which the gas company would abstain from cutting off the gas of the Bauxite company in trying to enforce a higher rate than that permitted by law, would, as stated above, be void and without any contractual force. Act 571, Acts 1919, §§ 7, 8, 30; 149 Ark. 502, 507; 161 Ark. 549; 100 Ark. 22. The agreement to pay the 45c rate was clearly only to do so until appellant had made the application to the Corporation Commission then contemplated, and that application has been disposed of. There can be no doubt that, when Mr. Dally made his agreement with Mr. Murray, embodied in the

letter from Mr. Dally to Mr. Neilson, dated November 24, 1920, he had in mind that the gas company would only charge the 45c rate until the Commission passed on the application of the gas company for a higher rate, and that, if this application was denied by the Commission, or a lower rate put in force, refund would immediately be made to the Bauxite company.

Moore, Smith, Moore & Trieber, for appellant.

1. The parties understood by the contract entered into between the gas company and the Bauxite company in September, 1920, as evidenced by letter of A. B. Dally, Jr., a vice-president of the gas company, to W. C. Neilson, president of the Bauxite company, under date of November 24, 1920, that the refund was to be based on the rate as finally established, if a lower rate than the 45c rate was put into effect, as is shown by Mr. Neilson's telegram to the gas company, dated December 11, 1920, which withdrew the interpretative clause in his letter of November 30, 1920, and his effort to amend the contract in his letters of December 7 and 9, 1920, and this view is supported by the finding of the chancellor that the refund was to be based on the rate as "ultimately established." The persuasive effect of this finding of the chancellor will not be overturned if it is consistent with a reasonable interpretation of the evidence of the respective parties.

2. The Arkansas Railroad Commission was prohibited by the terms of act 443, Acts 1921, approved March 25, 1921, amending act 124, Acts 1921, approved February 15, 1921, from modifying or impairing the obligation of the contract entered into between the gas company and the Bauxite company in the fall of 1920, prescribing the rate for the supply of gas to the Bauxite company, and the conditions upon which a refund would be made, if a lower rate was ultimately established for the bauxite district. 261 U. S. 379.

3. The conditions of service to the Bauxite and Norton companies are so dissimilar from the conditions affecting other industrial users as to permit the gas

company to charge them a higher rate than the rates charged other industrials, and to make private term contracts with them not affected by the general rates prescribed the ordinary industrial user. The gas company has the right to make private contracts for the supply of industrial gas, based on competitive price of other fuels, and the cost to the particular consumer of the use of gas as a fuel unaffected by Commission regulation.

HART, J. Separate suits were brought by the Norton Company and the American Bauxite Company against the Arkansas Natural Gas Company in the chancery court to recover overcharges for gas furnished by the defendant, and also to enjoin the defendant from cutting off the supply of gas of the plaintiff. The cases involve in the main the same issues, and were consolidated for the purpose of trial.

The Norton Company is a corporation engaged in the business of manufacturing grinding wheels, and has a plant at Bauxite, in Saline County, Arkansas, for the drying of bauxite, which it uses in its business.

The American Bauxite Company is a corporation engaged in crushing and drying bauxite at its plant at Bauxite in Saline County, Arkansas. Both corporations use gas and other fuel in the conduct of their business. The Arkansas Natural Gas Company is a public utility engaged in the business of supplying natural gas to consumers in certain cities, towns and villages and the territory adjacent thereto in the State of Arkansas.

The Norton Company and the American Bauxite Company were consumers of natural gas furnished at their manufacturing plants by the Arkansas Natural Gas Company. On October 28, 1920, the Norton Company brought suit in equity against the Arkansas Natural Gas Company to enjoin it from shutting off its supply of gas for the reason that the plaintiff would not pay the increased price for gas, which it claimed was unreasonable.

On the 2d day of May, 1922, the American Bauxite Company brought suit in the same chancery court against

the Arkansas Natural Gas Company to restrain it from cutting off its supply of gas and for the recovery of the amount of overcharge which the defendant had illegally exacted from the plaintiff.

A separate decree was rendered in favor of each plaintiff against the defendant on January 24, 1923. By consent of all parties, an order was made consolidating the cases, not only for the purpose of trial in the chancery court, but for the purpose of appealing to this court.

The Arkansas Natural Gas Company has perfected an appeal to this court from the decree against it in each of said cases.

It is earnestly insisted by counsel for the defendant that its business of supplying natural gas to users for industrial and manufacturing purposes is a private business, and that in this respect it is not subject to the regulation of its rates as a public utility.

We cannot agree with counsel in this contention. The Arkansas Natural Gas Company is a corporation organized under the laws of the State of Delaware. Its charter authorizes it to prospect for and produce petroleum and natural gas, to transport the same by pipe lines, and market and sell the same. Its charter further authorizes it to lay, maintain, and operate pipe lines for the carriage of natural gas, and to purchase or otherwise acquire natural gas and to transport and pipe the same by means of pipe lines, etc., and to market and sell the same.

The Arkansas Pipe Line Company was organized under the laws of the State of Arkansas. Its charter authorized it to produce and market mineral oils and natural gas for heat, light and power by means of pipe lines from without the State to points within the State, or between points wholly within the State, with all the rights incident thereto, including the right to construct and operate telephone and telegraph lines. This company crossed public roads with its pipe lines whenever necessary, and applied to various county courts for permission

to do so. In one instance it filed a condemnation suit and made a deposit, as in other condemnation cases. It purchased right-of-way for its pipe lines from railroad companies and from private individuals and corporations. It laid its pipe lines from a point in the State of Louisiana in a northerly direction to the city of Little Rock, in the State of Arkansas, and, in laying its pipe lines, crossed numerous public roads and the right-of-way of several railroads.

The Arkansas Natural Gas Company took over all the property of the Arkansas Pipe Line Company, together with all the rights it had acquired under the exercise of the power of eminent domain, or the right to exercise that power under the statutes, as a corporation organized under the laws of the State for the purpose of producing natural gas and transporting or conveying it to market by and through pipe lines.

The Arkansas Natural Gas Company also commenced to exercise all the rights and privileges of a public utility, and filed a schedule of rates, and otherwise subjected itself to the regulation and control exercised over public utilities by the duly constituted authorities of the State of Arkansas. By doing these acts the defendant constituted itself a public utility for the purpose of furnishing natural gas to domestic and industrial consumers, and is subject to all the regulations prescribed by statute for utilities of this sort. We think this clear from the principles of law decided in *Clear Creek Oil & Gas Co.* v. *Fort Smith Spelter Co.*, 148 Ark. 260, and 161 Ark. 12.

Counsel for appellant concedes that the Arkansas Natural Gas Company is a public utility, so far as supplying natural gas to domestic and industrial consumers in the city of Little Rock is concerned, but claims that it is not such public utility with reference to the Norton Company and to the American Bauxite Company, which are situated outside of the city of Little Rock, and which, it is claimed, on account of their peculiar location and of the large amount of gas they use, are not susceptible of being classified.

Now, a corporation supplying natural gas to consumers cannot be considered as a public utility with respect to certain classes of its consumers and as a private corporation with regard to certain others. The acceptance by the Arkansas Natural Gas Company of the franchise and privileges granted it carried with it the duty of supplying all persons and corporations along the lines of its main with natural gas, without discrimination. All are entitled to have the same service on equal terms and at a uniform rate. The law will not tolerate a discrimination in the charges of public utility corporations. If this were not so, and if corporations existing by grant of public franchises, in supplying water, gas, electric lights and the like, could favor certain individuals or corporations with low rates and charge others higher rates for the same service, the business interests and domestic comforts of every one would be at their mercy.

In this connection it may be stated that, while public service corporations cannot act arbitrarily, or discriminate among their consumers similarly situated by way of favoring one consumer or class of consumers over others, a distinction may be made between different consumers or classes of consumers on account of location, amount of consumption, or such other material conditions which distinguish them from each other or from other classes. *Yancey* v. *Batesville Telephone Co.*, 81 Ark. 486; *Southwestern Telegraph & Telephone Co.* v. *Sharp & White*, 118 Ark. 541, and Pond on Public Utilities, § 213, p. 262.

It is next contended by counsel for defendant that to allow plaintiffs to recover overcharges for gas furnished them would impair the obligation of the contract entered into between each of the plaintiffs and the defendant for furnishing gas for use at their manufacturing plants.

We cannot agree with counsel in this contention. It is true that the Arkansas Natural Gas Company made a separate contract with the Norton Company and with the American Bauxite Company to furnish natural gas

for use at the manufacturing plant of each company; but the Arkansas Natural Gas Company was operating as a public utility, and it was beyond its power to contract with respect to gas so far as such contract might interfere with the power of the Corporation Commission to regulate rates for gas furnished. *Harrison Elec. Co.* v. *Citizens' Ice & Storage Co.*, 149 Ark. 502, and *Chambliss* v. *Clear Creek Oil & Gas Co.*, 161 Ark. 549.

It appears from the record that the Arkansas Natural Gas Company filed its schedule of rates with the Arkansas Corporation Commission, which was created by virtue of an act of the Legislature of 1919. In various other ways it also subjected itself to the control of the Arkansas Corporation Commission and exercised powers and privileges granted to public utility companies under the act creating the Corporation Commission. The act in question provided for what is called indeterminate permits to certain public utilities. Crawford & Moses' Digest, §§ 1653-1656 inclusive.

The latter section in particular provides that any public utility operating under an existing license, permit, or franchise shall, upon filing with the Corporation Commission a written declaration that it surrenders such license, permit or franchise, receive, by operation of law, an indeterminate permit as provided by the act, and that such public utility shall hold such permit under all the terms, conditions and limitations of the act.

The section further provides that the filing of such declaration shall be deemed a waiver by such utility of the right to insist upon the fulfillment of any contract entered into relating to any rate, charge or service regulated by the act.

By an act of the Legislature approved February 15, 1921, the Arkansas Corporation Commission was abolished, and the Arkansas Railroad Commission created in lieu thereof. General Acts of 1921, p. 177.

Section 15 of this act provides, in effect, that contracts, franchises, and leases may be restored to utilities

operating under indeterminate permits, upon application made by such public utility corporation in the manner provided in the act.

The section provides that the franchise and contracts of such corporation may be reinstated upon proper application under the same conditions as existed at the time said indeterminate permit was granted by the Arkansas Corporation Commission. The act further provides that, unless the application for reinstatement of its franchise and contracts is made within the time and in the manner provided by the act, such right shall be deemed waived by such public utility.

No application was made for the reinstatement of contracts by the Arkansas Natural Gas Company. It is contended, however, that all existing contracts were expressly exempted from the operation of the act creating the Arkansas Railroad Commission and giving it power to fix and regulate the rates of public utilities, including those furnishing natural gas for domestic and industrial use, by the section of the act amending the act creating the Arkansas Railroad Commission, approved March 25, 1921. See General Acts of 1921, p. 429.

The purpose of this act was to transfer to the Arkansas Railroad Commission the records under the control of the Arkansas Corporation Commission and to give it power to continue the hearings in regard to gas rates in certain cases, and to determine the same.

The section contains a proviso that the Arkansas Railroad Commission shall have no jurisdiction or power to modify or impair any existing contract for supplying gas to persons, firms, corporations, or municipalities or distributing companies, and that such contracts shall not be affected by the act, or the act of which it is an amendment.

It is contended that this section preserves to the Arkansas Natural Gas Company all existing contracts in force at the time of the passage of the act. We do

not think so. The act simply means that the validity of any contract shall not be impaired, and does not intend to give such contract any validity or continuing force which it did not have at the time of the passage of the act. This is shown by the concluding part of the proviso, to the effect that such contracts shall not be affected by this act or the act of which it is an amendment. As we have already seen, there can be no valid contract regulating rates as against the power of public control by the Corporation Commission. The public utility accepts the franchise and privileges granted it, subject to existing laws.

This is not a case like *Pocahontas* v. *Central Power & Light Co.*, 152 Ark. 276, where a municipal corporation was expressly authorized by the Legislature to grant a franchise to a public service corporation in order to procure it to enter the municipality, and to furnish electricity and gas to consumers upon terms and conditions accepted by the corporation.

Here the franchise and privileges granted to the Arkansas Natural Gas Company were not accepted by it upon any such terms, conditions or restrictions. It applied for and accepted a franchise subject to the existing laws of the State, and, upon its own motion, applied for and accepted what is called an indeterminate permit to surrender its franchise and be released from its contracts, and did not, under the amended act, apply for a reinstatement of its franchise and contracts.

As we have already seen, it has a practical monopoly of the business of furnishing natural gas within the limits of the territory described in its franchise, and it is its duty to furnish all consumers with gas upon the same terms, with the proviso above stated, that it may make a reasonable classification of its consumers. It cannot, however, fix different prices and impose different terms upon its consumers, either domestic or industrial, according to its own will. It is bound to furnish gas at a reasonable rate to every consumer and without unjust

discrimination, subject to the proper classification of its consumers as above indicated.

The defendant also seeks to reverse the decree against it in favor of the American Bauxite Company on the ground that the payments made by it were voluntary, and on that account cannot be recovered.

We do not think this contention is well taken. Some time between the middle of August and September, 1920, the purchasing agent of the American Bauxite Company first ascertained that his company was being charged a different rate from that charged other industries similarly situated. The defendant contended that it was entitled to receive the rate charged on account of the peculiar conditions relating to its service to the American Bauxite Company. It already had a written contract with the American Bauxite Company for furnishing gas to it. As we have already seen, notwithstanding this contract, the rates charged were subject to change appropriate to changed conditions relative to the service. At any event, in September, 1920, the defendant deemed that conditions had changed, and applied to the Arkansas Corporation Commission for the right to establish an increased rate to industrial consumers, including the American Bauxite Company.

It will be remembered that, at this time, the Arkansas Corporation Commission was authorized to establish rates for public utilities of this kind. When the matter was finally disposed of, the Arkansas Railroad Commission had succeeded to the powers of the Arkansas Corporation Commission, and established the rates which are the basis of the recovery in these cases.

The American Bauxite Company contested the right of the Arkansas Natural Gas Company to raise the rates, and, after some correspondence between the two corporations, the American Bauxite Company proposed to pay the increased rate under a protest incorporated in a clause of one of its letters to that effect to the defendant. In other words, the letter expressly made a tender of the

increased rates asked by defendant, subject to the American Bauxite Company not waiving its right to recover whatever excess payment it might make over the rates finally established by the Corporation Commission. The defendant refused to deal with it on these terms, and continually threatened to shut off the supply of gas if the American Bauxite Company did not pay the increased rates without protest, and so stated in a letter to it. Under the threat of its service not being continued, the American Bauxite Company finally made the payments demanded, and struck out from its letter, which was contractual in its nature, the clause to the effect that it was making the payments under protest.

The representatives of the American Bauxite Company claim that they did so because, if the gas supply of that company had been discontinued at that time, such action would have resulted in great and irreparable loss to the company. They stated in detail the conditions which would cause such a loss, but they need not be repeated here.

There is what is called moral duress, or business compulsion, which, when exercised, prevents overcharges, although not made under protest, from being voluntary payments, and therefore not recoverable.

As we have already seen, under modern business conditions, public utilities are a necessity, and have a practical monopoly in the fields occupied by them, respectively, in the business world. Their products must be accepted and used, not only for domestic convenience, but on account of business necessities. Take the case of supplying gas, for instance. The public service corporation furnishing it has the right, by purchase and by eminent domain proceedings, to secure a right-of-way over and across the lands of private individuals, the public roads, railroad right-of-way, and the streets of cities and towns. They also have a right to establish rates which are equivalent to the service performed by them. Thus they acquire a great advantage over their

business rivals, and are thereby enabled to furnish gas to consumers at a much cheaper rate and under much more favorable conditions. The manufacturer needing and using gas in his business must purchase it from the public service corporation, or his business competitors, who have such service, will have a great advantage over him. If a manufacturer or other business enterprise cannot secure the service upon the same terms and under the same conditions as his rivals in business, he will suffer serious loss or damage to his business, and in some cases his business will be entirely destroyed. If the public service corporation is allowed to act in an arbitrary and discriminatory manner in performing its service to the public, it can, in all cases, seriously injure any of its customers, or destroy his business entirely. The prosperity of the business man using the product of the public service corporation would depend upon the favors shown him by that corporation, or upon the mere whim or caprice of its agents. In such cases the parties do not stand on an equal footing. Delay or resort to law would be a matter of indifference to the public service corporation, but it might cause irreparable injury to the consumer. It is extortion to press the payment of illegal or unjust demands by such means. As a reasonable regulation, a public service corporation may cut off the supply of gas or other product furnished by it where its consumers fail or refuse to pay the proper charges. The public service corporation, however, has no power to establish excessive or unreasonable rates for its service, and to allow it to exercise the power of cutting off the supply of its product for the nonpayment of extortionate or excessive demands would be to give it the power to cripple business enterprises at will, and for no valid reason. Such action is generally held to be duress in law.

The rule is of universal application with reference to public carriers of freight, so far as we have ascertained. Hutchinson on Carriers, 3rd ed. §§ 521 and 1341; 30 Cyc.

p. 1303; *Mobile & Montgomery Ry. Co.* v. *Steiner, McGehee & Co.,* 61 Ala. 559; *Chicago & Alton Rd. Co.* v. *Chicago, Vermillion and Washington Coal Co.,* 79 Ill. 121; *Peters* v. *Railroad Co.* (Ohio), 51 Am. St. Rep. 814; *Clough* v. *Boston, etc., R. Co.* (N. H.) Ann. Cas. 1915B, p. 1195; *Lehigh Coal & Navigation Co.* v. *Brown,* 100 Penn. St. 338; *Louisville, Evansville & St. Louis Rd. Co.* v. *Wilson* (Ind.), 18 L. R. A. 105; *California Adjustment Co.* v. *Atchison, T. & S. F. Ry. Co.* (Cal.), 175 Pac. 682; and *Beckwith* v. *Frisbie & Sons,* 32 Vt. 559.

The rule stated, for like reasons, applies to other public service corporations, and the tendency in the later decisions is to extend the doctrine in favor of those making payments of illegal charges or exactions under apprehension that their business will be stopped or seriously injured if the money is not paid. *American Brewing Co.* v. *St. Louis* (Mo.), 2 Ann. Cas. 821; *Westlake & Button* v. *St. Louis,* 77 Mo. 47; *Indiana Natural & Illuminating Gas Co.* v. *Anthony* (Ind.), 58 N. E. 869; *Chicago* v. *Northwestern Mutual Life Ins. Co.* (Ill.), 1 L. R. A. (N. S.) 770; *St. Louis Brewing Assn.* v. *St. Louis* (Mo.), 37 S. W. 525; and *New Orleans & N. E. Rd. Co.* v. *Louisiana Construction & Imp. Co.,* (La.), 94 Am. St. Rep. 395, and case note.

Woodward on the Law of Quasi-Contracts, in § 220, says that, because common carriers and some other public service corporations usually enjoy an advantage of position not unlike that of public officers, illegal freights, tolls, or other charges exacted by such corporations may be recovered as money paid under compulsion.

In Keener on Quasi-Contracts, at page 437, it is said that money paid to one who, because of his position, is under an obligation to discharge certain duties to the public, but who refused to discharge such duties without the payment of a sum of money to which he is not entitled, can be recovered as money paid under compulsion.

Upon the circumstances of this case we are of the opinion that the payments were not voluntary. They were made in order to induce the Arkansas Natural Gas Company to do that which it was bound to do without them. To protest would be an idle ceremony. The law looks to the substance of things, and does not require useless forms. The public service corporation and the consumer were in no sense on equal terms, and the money thus paid to obtain the necessary service was not voluntarily paid, as the law interprets that phrase.

The briefs are very voluminous, but there seems to be no contention about the amount of gas furnished or the amount due under the rates finally established by the Arkansas Railroad Commission. The main contention is the right of the consumers to recover the excess charges made by the public service corporation.

The decree in the chancery court was made in conformity with the principles of law announced above, and it is therefore affirmed.

DICKINSON v. NORMAN.

Opinion delivered June 30, 1924.

1. QUIETING TITLE—LACHES OF PLAINTIFF'S GRANTOR.—In an action to remove clouds upon title, plaintiff was estopped by the laches of his grantor, who waited six years and eight months before she probated a will in which the lands were devised to her, where in the meantime a person holding alleged forged deeds from the testator had recorded them and had sold the lands to innocent purchasers who paid valuable considerations and made valuable improvements.
2. EQUITY—DOCTRINE OF LACHES.—While ordinarily the doctrine of laches will not be applied in cases of delay short of the period of limitation, courts of equity will not hesitate to apply the rule where supervening equities call for its application.

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

Mahony, Yocum & Saye and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

The finding of the chancellor was against the clear preponderance of the evidence. It is admissible to show that a grantor in a deed or mortgage never actually appeared before the officer purporting to have taken his acknowledgment, and that the grantor made no acknowledgment at all. 130 Ark. 413. When it is sought to show that the grantor did not acknowledge the deed at all, no rule as to the amount of evidence required obtains, but the court is to determine from all the circumstances disclosed whether the certificate is true or false. 103 Ark. 488; 130 Ark. 318; 116 Ark. 142; 117 Ark. 326. Where the evidence is so clear as to produce a moral certainty that the certificate is false, it will be held invalid. 1 C. J. 901. One purchasing land from a person who obtained title thereto by forgery is not a *bona fide* purchaser. 37 Ark. 195. Where a grantor has no title, the doctrine of *bona fide* purchaser does not apply. 217 Fed. 11; 222 Fed. 760. If a deed is void, a subsequent innocent purchaser is not protected. 52 So. 425.

Pat McNalley, for appellee.

Acts and declarations of a person in possession of a tract of land are admissible to show the character and extent of possession but not to contradict the title. 132 Ark. 227; 96 Ark. 589; 90 Ark. 149; 45 Ark. 472; 48 Ark. 169. The appellant was barred by his laches. "He who seeks equity must do equity." 137 Ark. 600. Laches is not mere delay, but delay that works disadvantage to another. 5 Pomeroy Eq. Jur. (3 ed.), § 21; 114 Ark. 359; 103 Ark. 251; 81 Ark. 296; 101 Ark. 230; 16 Cyc. 162; 55 Ark. 85; 135 Ark. 206. The findings and decree of a chancellor are persuasive and will not be set aside on appeal, unless clearly against the weight of the evidence. 136 Ark. 624; 129 Ark. 197.

HUMPHREYS, J. Appellant brought this suit in the chancery court of Union County on May 14, 1921, against John C. Norman, W. A. Tuberville, Lee Davis, A. G. Shivers, S. J. Garner, and James Coleman, to cancel two

deeds from Maria F. Norman to her husband, John C. Norman, one being dated February 12, 1912, and the other December 19, 1913, conveying certain lands in said county, and also to cancel certain deeds from John C. Norman to each of the other appellees for certain parts of the lands described in the two deeds. It was sought to cancel and remove all of said deeds as clouds on appellant's alleged title to said lands, upon the ground that the first two deeds were forgeries, and therefore passed no title to the lands to John C. Norman's co-appellees. Appellant alleged that he was the owner of said lands under a deed of gift from Fannie R. Norman, to whom they were devised by Maria F. Norman.

Appellees filed answers to the bill, denying that the deeds dated Feb. 10, 1912, and December 19, 1913, were forged instruments, and interposing the further defense of limitations and laches.

The cause was submitted to the court upon the pleadings and testimony, which resulted in a decree dismissing appellant's bill for the want of equity, from which is this appeal.

The record reveals that, many years before the execution of the first two deeds, John C. Norman had conveyed all his lands to his wife, Maria F. Norman, in an effort to save them from his creditors. John C. Norman testified that, after recovering from his financial distress, his wife voluntarily conveyed his lands back to him. All the lands involved in this litigation were embraced in the first two deeds, which were placed on record by John C. Norman a short time after their purported execution, and before the death of Maria F. Norman, which occurred on September 18, 1914. Either before or immediately after the death of Maria F. Norman, John C. Norman took actual possession of the lands in question, and paid the taxes on them until he sold them to his co-appellees. The dates of his conveyances of certain parts of the lands to his co-appellees are as follows: to S. J. Garner, January, 1915; to James Coleman, January 16, 1915; to A. G. Shivers, July 17, 1915; to W. A. Tuberville, January 2,

1917; and to Lee and J. W. Davis, February 19, 1919. The respective purchasers aforesaid of the various parcels of the land entered immediately into the actual possession of the parcel he purchased, paid the taxes, and made valuable improvements thereon. After John C. Norman conveyed the lands he became insolvent, and was in that condition when this suit was instituted and tried.

On January 19, 1913, Maria F. Norman executed a will, in due form, by the terms of which she devised all her property wherever situated to Fannie R. Norman. The will was admitted to probate in Union County, Arkansas, February 15, 1921. On May 6, 1921, Fannie R. Norman conveyed to appellant all of the property which had been bequeathed to her by Maria F. Norman, who immediately instituted this suit.

Appellant introduced testimony tending to show that the deeds of date February 10, 1912, and December 19, 1913, conveying the lands in question, were forged by John C. Norman.

Appellees introduced testimony tending to show otherwise.

We deem it unnecessary to set out and analyze this testimony, for a majority of the court have reached the conclusion that appellant is estopped from recovering these lands by the laches of his grantor, Fannie R. Norman. She waited for six years and eight months after the death of her testator before she probated the will in which the lands were devised to her. In the meantime John C. Norman, who had recorded the purported deeds from his wife in her lifetime, was permitted to occupy, pay taxes on, and sell the lands to his co-appellees for a valuable consideration, who, in turn, were permitted to pay the taxes and make valuable improvements upon the respective parcels owned by each. At the time of the institution of this suit John C. Norman was judgment proof, and none of the purchasers could have recovered the purchase money they paid him for the land. Ordinarily the doctrine of laches will not be applied in a case short of the period of limitations fixed by the

statute, but courts of chancery will not hesitate to apply the rule where supervening equities call for its application, as the particular circumstances in this case do. In the case of *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251, this court quoted with approval the following statement from Mr. Pomeroy relative to the true doctrine of laches:

"Laches, in legal significance, is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side, and injury therefrom on the other, it is a ground for denial of relief."

It again quoted and approved the doctrine in the case of *Casey* v. *Trout,* 114 Ark. 359, taking occasion to say that the doctrine quoted from Mr. Pomeroy had been defined in substantially the same language in the case of *Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296. It is true that this court said in the case of *Bird* v. *Jones,* 37 Ark. 195, that one purchasing land from a person who obtained title thereto by forgery is not a *bona fide* purchaser, but the doctrine of innocent purchaser does not control the instant case. The doctrine of laches rules it. The appellant is estopped to recover the lands, because his grantor delayed in asserting her title until it would have worked disadvantage and injury to the co-appellees of John C. Norman if permitted to do so. The equities of the co-appellees of John C. Norman supervene any right appellant now has.

No error appearing, the judgment is affirmed.

DISSENTING OPINION.

HART, J. It is well settled in this State, as well as elsewhere, that mere delay or lapse of time, however short of the statutory period, is not of itself sufficient to constitute laches unless such delay has so prejudiced the other party, by loss of testimony or changed relations, that it would be unjust to permit him to exercise his right. If it appears that lapse of time has not, in fact, changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief. *Tatum* v. *Arkansas Lumber Co.*, 103 Ark. 251; *Reeves* v. *Davidson,* 129 Ark. 88; and *Rowland* v. *Taylor,* 134 Ark. 183.

It does not appear from the record that any witness has died since plaintiff's cause of action accrued; nor has the transaction under consideration become obscure by lapse of time. So far as this record shows, it does not appear that any valuable or material improvements have been made upon the property in question. The rise in value of the lands is a purely accidental one, unconnected with any fault of the plaintiff or merit of the defendants. The plaintiff in this case has been guilty of no conduct and made no representations whatever that would induce the defendants to purchase the lands in question. He has done nothing but delay asserting his rights in the premises. On account of his relationship to John C. Norman and the latter's necessities arising from old age and poverty, he permitted him to hold possession of the lands in question. His occupancy was permissive and did not give him any right to dispose of the lands. As we have just seen, the defendants were not induced to purchase the lands by any representations or conduct on the part of the plaintiff. Nothing has occurred since the purchase upon which they might predicate a defense to the recovery of the lands by reason of estoppel or of laches on the part of the plaintiff.

It does not seem to me that the insolvency of Norman and the date of the decree cuts any figure at all. He was insolvent throughout the whole period of time involved in these transactions. If the deeds were forgeries, they gave him no title whatever. If they were not forged, Norman had the title to the lands, and the question of laches would not arise.

Having reached this conclusion, it becomes necessary for me to express my views on the question of whether the deeds under which the defendants deraign title are forgeries. I think the proof shows that the deeds were forgeries within the rule announced in *Miles* v. *Jerry,* 158 Ark. 314, and cases cited.

It follows that I respectfully dissent from the majority opinion.

HAGLIN v. OAKLEY.

Opinion delivered June 30, 1924.

LANDLORD AND TENANT—WAIVER OF RENTS.—Where a room and hall were leased separately from the main part of a hotel of which they were a part, and both leases were acquired by the appellee, the fact that the landlord accepted rent under the lease for the hotel proper, without demanding rent from the segregated portion of the building, did not waive his right to collect the rents on the latter.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; reversed.

Hill & Fitzhugh, for appellant.

The court erred in not rendering a judgment for the plaintiff. A waiver, to be binding, must either operate by way of estoppel or be supported by a valuable consideration. 72 Ark. 525. 27 R. C. L. 910; 40 Cyc. 267.

Cravens & Cravens, for appellee.

Every one is required to take advantage of his rights at the proper time, and a neglect to do so will be considered a waiver. 83 Fed. 684; 37 N. E. 540. A waiver takes place where a man dispenses with the performance of something which he has a right to exact. 36 Pac. 434.

HUMPHREYS, J. This is a suit by appellant against appellee for rent upon a large room in the rear end of the Haglin Hotel in Fort Smith and a hall or tunnel leading from Garrison Avenue, the main street in Fort Smith, back to said room, from November 18, 1920, until March 23, 1922, at the rate of $75 per month. This particular part of the hotel was not included in the original lease for the hotel proper, but was covered by a separate lease, which expired on November 18, 1920, with the privilege of renewal. On September 3, 1918, appellant leased the main part of the hotel, which had another entrance or rotunda from Garrison Avenue, to Messrs. Shipley and Sossman. Shipley bought out Sossman, and, on November 18, 1919, leased the tunnel and back room from appellant for $75 per month. On January 19, 1920, appellee bought out Shipley, and assumed both leases under written contract with Shipley and appellant, to the effect that he might relinquish the tunnel and said room on November 18, 1920, and be released from the rental thereon after that date, with the privilege to appellant, in case he released said tunnel and room, to rent them out for a confectionery store, barber shop, or a real estate office. Appellee paid the rent on the tunnel and room until November 18, 1920.

The only issue presented by the pleadings and testimony was whether appellee surrendered the possession of the tunnel and room on November 18, 1920, to appellant, or whether he held over by using them himself, or prevented appellant from renting them to other parties.

Appellant introduced testimony tending to show that appellee used the tunnel and room between the dates of November 18, 1920, and March 23, 1922, just as he had done before, and that he refused to pay rent or allow appellant to rent them to others when requested to do so.

Appellee introduced testimony tending to show that he surrendered this particular part of the hotel to appellant on November 18, 1920, and did not use or prevent appellant from renting same after that time, and that

appellant made no demand for rent thereon after same was surrendered to him.

In submitting the issue the court gave the following erroneous and misleading instruction to the jury, over the objection and exception of appellant:

"If you find that the plaintiff, Edward Haglin, leased to the defendant, S. Oakley, or allowed to be sublet to him, the property known as the Haglin Hotel building, in the city of Fort Smith, in which is located the hallway and room in the rear thereof for which rent is sought to be recovered, and that said S. Oakley continued to occupy said property until March, 1922, and that the plaintiff, Edward Haglin, accepted and received from said S. Oakley rent on the other part of the Haglin Hotel building, not including the hallway and room in controversy, and, in so receiving the rent for the other part of said building, did not claim or demand from the defendant, S. Oakley, any rent on the hallway or room in the rear thereof, then you are instructed that said plaintiff, Edward Haglin, by such conduct, waived his right, if he had any, to collect rent from the defendant, S. Oakley, for said hallway and room in the rear thereof, and, in this event, your verdict should be for the defendant."

The leases were separate and independent of each other, so the collection of the rent under one of them, without demanding the rent under the other, would not of itself waive the right to collect the rent under the other. It was error to tell the jury that, if appellant accepted rent under the lease for the hotel proper without demanding rent on the room and tunnel, he would thereby waive his right to collect rents on them.

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

JOHNSON v. JOHNSON.

Opinion delivered June 30, 1924.

1. DIVORCE—EVIDENCE.—A finding that defendant was not guilty of adultery *held* supported by the weight of evidence.
2. DIVORCE—AMOUNT OF ALIMONY.—The amount to be allowed as alimony is within the sound discretion of the trial court, and all circumstances should be considered in fixing it, such as the husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing upon the cause of separation.
3. DIVORCE—AMOUNT OF ALIMONY.—Where a wife's persistent association with immoral characters was largely responsible for the separation of the parties, an allowance to her as alimony of $250 per month will be reduced to $150 per month.

Appeal from Garland Chancery Court; *J. P. Henderson,* Chancellor; modified.

Martin, Wootton & Martin, for appellant.

Adultery need not be established by direct evidence, the law merely requires proof by circumstantial or inferential evidence. 143 Ark. 277; 101 Ark. 522; Schouler on Marriage and Divorce, p. 1794; 19 Corpus Juris, p. 129. The difficulty of proving adultery is well recognized in the law of divorce. Abbott's Trial Evidence, pp. 2033-3042; Encyclopedia of Evidence, vol. 1, p. 628; 2 Bishop on Marriage and Divorce, § 1353. In proving adultery on the part of the wife it is only necessary to prove a lascivious disposition toward her paramour and a favorable opportunity for its exercise. 19 Corpus Juris 129; 143 Ark. 277; Schouler on Marriage and Divorce, p. 1794. Wilful and continued association with a man of known immoral character in reference to his relations with women is in itself evidence of adultery and sufficient ground for divorce. Abbott's Trial Evidence, pp. 2033, 2044; 19 Corpus Juris 129.

Murphy, McHaney & Dunaway and *Murphy & Wood,* for appellee.

HUMPHREYS, J. On the 11th day of April, 1922, appellant instituted suit against his wife, the appellee, in the chancery court of Garland County for an absolute divorce upon the ground of indignities, and, on the 5th

day of May following, filed an amendment to his bill, charging her with having committed adultery with one Elmer Walters on the night of March 28, 1922, at the Marion Hotel in Little Rock, and at various other times and places, the particulars of which were unknown to him.

Appellees filed an answer specifically denying the material allegations in the bill and amendment thereto, and a cross-bill for alimony and attorney's fees.

On motion the court allowed appellee $200 per month alimony *pendente lite,* and a preliminary attorney's fee of $500. These allowances were paid by appellant.

The cause was submitted to the court upon the pleadings and testimony responsive to the issues of adultery, permanent alimony and attorney's fees, which resulted in a decree dismissing appellant's bill for the want of equity and an additional allowance of $1,500 for her solicitors, and permanent alimony in the sum of $250 per month, from which is this appeal. Appellee has prosecuted a cross-appeal from the allowances, seeking to have them increased.

The testimony introduced by appellant tended to support the specific charge of adultery, and that introduced by appellee tended to show that she was innocent of the charge. The record of the testimony is voluminous, and it would extend this opinion to great length to set it out in detail, so we shall only attempt to set out in a general way the history of the case leading up to the alleged act of adultery, and then briefly summarize the testimony responsive to that issue. The specific charge of adultery is entirely dependent upon the identity of the woman who was discovered and arrested with Elmer Walters in the Marion Hotel, room 379, in Little Rock, about 11 o'clock on the night of March 28, 1922. The burden was upon appellant to show that the woman in question was his wife. Appellant, having suspected the existence of an intimacy between Elmer Walters and his wife, had employed a detective by the name of Roy Stegall to

watch her. On the 27th day of March appellee drove over to Little Rock in the afternoon, in company with Mrs. Jeff Freeman and Mrs. Freeman's brother, Paul King. They arrived in Little Rock between five and six o'clock P. M. Before leaving Hot Springs appellee had got a clerk in the Como Hotel, partly owned by her husband, to telephone to the Marion Hotel to reserve a room for her and another lady. She and Mrs. Edith Brown, who had come to Little Rock earlier in the day, had arranged to occupy the same room at the hotel. When appellee arrived in Little Rock she stopped at the Marion Hotel for Mrs. Freeman and her brother to get out, and then went over to see the Pollocks on Scott Street. After visiting them she returned to the hotel, and registered in the name of Mrs. Ed Johnson, Hot Springs, and was assigned to room 379 on the third floor. When she registered the clerk remarked that another lady was to occupy the room with her, whereupon she asked whether she should register the other lady, and was told that it was unnecessary. She then met Mrs. Edith Brown on the mezzanine floor of the hotel, and they went to their room. Mrs. Brown informed her that Miss McFadden was at the Merchants' Hotel, and wanted appellee to spend the night with her. She left her grip in the room, and took her handbag, which contained her toilet articles, nightgown and other necessities, and went to the Merchants Hotel to spend the night with her lady friend. Later in the evening she called up another friend, Mrs. W. H. Park, who resided at 1900 Johnson Street, and invited her to go to the picture show. Mrs. Park came down in her car and, after the show, invited appellee and Miss McFadden to spend the night with her. They accepted the invitation. Early the next morning, the 28th, Mrs. Park took Miss McFadden and appellee to the Rock Island depot, and, while at the depot, appellee telephoned Mrs. Freeman to take breakfast with her. Miss McFadden left on the train, and Mrs. Park then took appellee down town, where they parted, with the understanding that they

would meet that evening at the Famous Cafe for dinner. Appellee then went to her room, took a bath, and, while resting on the bed, went to sleep. She was aroused by a telephone message from Mrs. Freeman, who was waiting to go to breakfast with her. She left Mrs. Brown in the room, who said she never ate breakfast until 10 or 11 o'clock. After breakfasting with Mrs. Freeman, appellee entered upon the performance of her duties as a delegate to the American Legion Auxiliary Convention, which was in session in Little Rock. She went to her room at the Marion about noon, where she again met Mrs. Brown. In the afternoon she attended the convention, and, in the performance of her duties, went on an inspection tour of the hospital at Fort Logan H. Roots. Upon her return she went to her room, where she found Mrs. Brown. After remaining there a short time she went to the cafe on Main Street to have dinner with Mrs. Park. According to the testimony of appellee and Mrs. Park, they drove around awhile after dinner, then went to the Merchants' Hotel, where appellee paid $4 for the room which Miss McFadden had engaged, and then to the home of Mrs. Park, where appellee spent the night on March 28. Mr. Park was away from home on the night of March 27, but returned on the 28th. He testified that appellee spent the night of the 28th in their home. Mr. and Mrs. Park fixed the date by the meeting of the convention of the American Legion Auxiliary. They knew of this meeting, and that appellee was in attendance upon it as a delegate.

Roy Stegall testified that he found out that room 379 in the Marion Hotel had been assigned to appellee, and that, early in the evening of the 28th, he had seen Elmer Walters enter an elevator in the basement of the Marion Hotel, and suspected that he was going to that room; that, upon inquiry, he ascertained that he had got off on the third floor; that he, Stegall, made arrangements to occupy a room across the hall from room 379, and stationed himself on a table so that he could look through

the transom and observe any one entering or coming out of room 379; that the bell-boy came up twice, first with ice water and then with lemonade, and that the door was opened on both occasions by appellee, who was dressed in a kimono; that later he heard a man cough in room 379, whereupon he notified Tom Moore, assistant manager of the hotel, that a man was in the room with appellee; that Moore, in company with R. A. Young, the hotel detective, and a man by the name of Evans, the hotel engineer, entered the room, and found Elmer Walters in the bathroom, in his night clothes; that appellee and Elmer Walters were arrested and turned over to T. L. Hooter, a policeman, who had accompanied the hotel proprietor and the detective to the third floor, and who waited for them in the hall until they came out of the room.

After Elmer Walters and the woman dressed they were taken by the police officer to the city hall, the woman into the chief's office and the man into the turnkey's office. The woman was interrogated by J. L. Bennett, the night chief, and a record was made, describing them. She gave her name as Vera Johnson, her residence as Hot Springs, and the following description of herself to the chief: weight, 140 pounds; height, 5 feet 4 inches; eyes, gray; hair, brown. This was a correct description of Mrs. Edith Brown. Appellee has brown eyes, black hair, is about 5 feet high, and weighs 118 pounds. Cases for immorality were docketed against the man and woman in fictitious names, and they were released upon cash bonds of $15 each, which were deposited by the woman. After being discharged, the woman went to the Capital Hotel and registered under the name of Mrs. L. Johnson, Hot Springs. Several days afterwards the name of Mrs. L. Johnson was erased, and that of Mrs. Edith Brown was substituted for it on the Capital Hotel register by Elmer Walters.

Elmer Walters testified that the woman arrested with him in room 379 on the night of March 28, 1922, was Mrs. Edith Brown.

Mrs. Edith Brown testified that she was the woman arrested with Elmer Walters in the room on the occasion referred to, and that, after their arrest and discharge, she registered for the remainder of the night at the Capital Hotel in the name of Mrs. L. Johnson, because she understood that was the way Mrs. Johnson had registered at the Hotel Marion, and that the baggage would be sent over from the Marion to the Capital Hotel in that name; that, several days afterwards, she had Elmer Walters change the register and substitute her own name for fear she would implicate Mrs. Johnson.

Tom Moore and R. A. Young testified that appellee was not the woman who was arrested in the room with Elmer Walters by them and turned over to the police. They described the woman who was found in the room, and their description tallied with the description of Mrs. Edith Brown.

J. L. Bennett and T. L. Hooter testified that appellee was the woman who was brought by T. L. Hooter from the Marion Hotel to the police station with Elmer Walters. They testified six or seven months after the episode, and, when appellee and Mrs. Edith Brown were presented to them, they identified appellee as the woman who was arrested upon the charge of immorality, and who deposited cash bail for herself and Elmer Walters on the night of March 28, 1922.

When appellee first testified she denied having seen Elmer Walters while in Little Rock, but, after Mrs. Jeff Freeman testified that appellee introduced Elmer Walters to her while they were lunching together on the 29th of March, she was recalled, and testified that she had seen him at that time, and that he went back to Hot Springs that afternoon in the car with Mrs. Freeman and herself.

There was some conflict between the testimony of appellee and Mrs. Freeman relative to statements made by appellee when registering at the Marion Hotel and with reference to visiting the Pollocks on Scott Street.

It was shown that appellee associated with Elmer Walters and Mrs. Edith Brown both before and after the separation between appellee and appellant. Elmer Walters had taught appellee how to swim, and had, on various occasions, danced and gone automobile riding with her. Appellee testified that her husband had encouraged and sanctioned her association with both these parties.

After the episode at the Marion had gained notoriety, appellee went to see Mrs. Freeman and Mrs. Maggie King, who had testified in reference to appellee's association with Elmer Walters, and, according to their testimony, made an effort to get them to suppress these facts. On cross-examination, however, Mrs. King admitted that their conversation pertained to the proposition that appellee regarded her as a good woman who would tell nothing but the truth, and Mrs. Freeman admitted that she requested appellee not to draw her name into the affair if it could be avoided.

John Green, one of appellant's attorneys, testified that he sent for appellee after the escapade at the Hotel Marion, and openly charged her with being in room 379 with Elmer Walters, which charge she denied, claiming that she spent the night of the 28th of March, 1922, at the Merchants' Hotel with Ona McFadden, and did not intimate that she had spent the night with Mr. and Mrs. Park.

There was a conflict between the testimony of Roy Stegall and Moore and Young. Moore and Young testified that, when they asked Stegall whether the man and woman were the parties he wanted, he said the man was, but that he did not see the woman, and would rely upon the register for her identification. Stegall denied making this statement to them.

Other discrepancies exist in the testimony, but I deem it unnecessary to refer to them. Suffice it to say, without further detail, that the charge of adultery was supported by the testimony of Roy Stegall, J. L. Bennett and T. L. Hooter, whose testimony was corroborated by circumstances testified to by other witnesses as above

set out; and that appellee's innocence was supported by the testimony of herself, Mrs. Edith Brown, Tom Moore, R. A. Young, Mr. and Mrs. Park, Elmer Walters, and the recorded description in the police record of the woman who appeared there, as well as other favorable circumstances which were developed in taking the testimony.

After a careful reading and analysis of the testimony, a majority of the court are of the opinion that the finding of the trial court, purging appellee of the charge of adultery, is supported by the weight of the evidence. Mr. Justice HART is of the opinion that the charge of adultery was established by the preponderance of the testimony.

The next and last issue presented by the appeal and cross-appeal for determination by this court is allowances of attorney's fees and permanent alimony. The record reflects that appellant is a very wealthy man. The estimated value of his estate is $250,000, and his annual income at about $25,000. Appellee, however, did not assist him in accumulating this fortune. He was a widower of sixty-eight years of age, and appellee a *divorcee,* thirty-one years of age, at the time of their marriage. They only lived together six years before the separation. This lawsuit has been a hotly contested long-drawn-out affair, involving much skill and time on the part of eminent counsel employed by the parties. Taking into consideration the nature of the charge made against appellee, the successful defense made in her behalf, and the ability of appellant to pay for legal services, we think the amount allowed by the chancellor to appellee for her attorneys is fair and just. We cannot affirm the allowance, however, made by the learned chancellor to appellee as permanent alimony. In affirming the finding of the trial court upon the issue of divorce, the majority did not intend to place the stamp of approval upon the conduct of appellee. While the evidence is insufficient to brand appellee as an adulteress, it did show that she had been and was associating with Mrs. Edith Brown

and Elmer Walters, who were arrested and fined upon the charge of immorality. Appellee's association with Elmer Walters was continued, over the protests of her husband, and with both of them after she ascertained that they had been arrested in her room at the Marion Hotel for immorality. We do not think such conduct on her part becoming or circumspect, and must take her persistent association with them into account in fixing the amount of alimony. Her association with Elmer Walters had a great deal to do with the separation. This court said in the case of *Shirey* v. *Shirey,* 87 Ark. 175 (quoting from syllabus 6):

"The amount to be allowed as alimony is within the sound discretion of the trial court; and all the circumstances of the particular case should be considered in fixing it, such as the husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing upon the cause of separation." A good discussion by the Supreme Court of Alabama of the reasons for this rule will be found in the case of *Jones* v. *Jones,* 11 So. 11.

Applying the rule thus announced to the facts in this case, we think the allowance made by the trial court should be reduced to $150 per month, and so order.

The decree is therefore modified in this respect, and, as modified, is affirmed.

Chief Justice McCULLOCH dissents from the modification.

Mr. Justice HART dissents from that part of opinion refusing to grant a divorce.

DISSENTING OPINION.

McCULLOCH, C. J. If I thought that appellee had, before and after the episode at the hotel in Little Rock, habitually associated with men and women of bad character, I would be in favor of granting appellant a divorce on the sharply disputed question whether the appellee or Mrs. Brown was the woman found in the room with Elmer Walters. In other words, if the association of appellee was so bad that she is not entitled to a proper allowance for her support, it has such an

important bearing on the question of her relations with Walters that it is of controlling force in determining the issue of adultery.

The evidence does not show that either Mrs. Brown or Walters was a person of bad character before the incident at the hotel occurred nor since that time, except as their reputations may be affected by that occurrence. The proof shows beyond any dispute that all of appellee's association, both with Walters and Mrs. Brown, before the incident, was with the knowledge and consent of appellant. When appellee danced with Walters, it was in the presence of her husband, and the testimony shows that he encouraged her to attend the dances. When she rode with Elmer Walters and went to the swimming pool, it was with the knowledge of her husband, and they were accompanied by another lady in Hot Springs whose reputation and character has not been brought in question.

Appellee frankly admitted in her testimony that since the occurrence at the hotel and the accusation of adultery made against her by her husband, and the conduct of Mrs. Brown in openly acknowledging that she was the woman in the room with Walters, she could not find it consistent with her feeling of gratitude to Mrs. Brown to cut her acquaintance and to refuse entirely to associate with her. Appellee gives, I think, a very reasonable explanation of her conduct, and one that is consistent with the natural impulses of most any person situated as appellee was with an ugly accusation against her. She should not be blamed for indulging friendliness toward one who, as did Mrs. Brown, acknowledged herself to be the sinner.

The Shirey case, cited by the majority in their opinion, has no application to the present case, for the facts are different. In that case, the wife sued the husband for divorce, but was denied a divorce on the ground that she had condoned her husband's wrongdoing. The court allowed the wife support, but, in fixing the amount, took into consideration her own improper

conduct. In the present case no such state of facts exists. Appellee has not asked for a divorce. On the contrary, she has, according to the undisputed evidence, sought in every way to regain her husband's affections and confidence, and, as before stated, there is nothing in the record rightly affecting her character. Her husband is shown to be a man of wealth and large income. Certainly the allowance made by the chancellor is not out of keeping with the ability of appellant to pay. I dissent therefore from that part of the judgment of this court which reduces the allowance to appellee.

CAIN v. LANE.

Opinion delivered July 7, 1924.

1. QUIETING TITLE—EVIDENCE.—In a suit to remove cloud on title to land created by execution sale under judgment against plaintiff's father, evidence *held* to support finding that plaintiff, and not her father, owned the land.
2. EXECUTION—TITLE OF PURCHASER.—Where a judgment debtor did not own land sold under execution, but had in good faith conveyed it to his daughter, to whom it already belonged, purchasers of the land at execution sale took subject to the daughter's rights, though the record title was in the judgment debtor at the time when judgment was recovered against him.
3. FRAUDULENT CONVEYANCES—RIGHT OF CREDITORS.—Though a judgment debtor paid for land and had it conveyed to his daughter to put it beyond the reach of his creditors, judgment creditors had no remedy unless he was insolvent.

Appeal from Faulkner Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

C. A. Holland, for appellant.

P. H. Prince, for appellee.

HUMPHREYS, J. On the 8th day of December, 1922, appellee instituted this suit in the chancery court of Faulkner County against appellants to remove the cloud cast upon her title to the S½ of the NE¼ section 5, township 7 north, range 13 west, in said county, by a levy and sale under an execution issued on a judgment

obtained in the circuit court of said county by the Bank of Conway against her father, J. P. Lane, and others. The judgment referred to was procured on April 3, 1922. At the instance of the bank an execution was issued thereon and levied upon the real estate aforesaid as the property of J. P. Lane, one of the judgment debtors, and advertised for sale on December 15, 1922. On December 11, 1922, C. B. Cain, Eula Hovis, and Winnie Waddell, also judgment debtors, purchased the judgment from the bank for $1,650, and purchased the land in controversy for $25 at the execution sale on December 15, 1922, and received a certificate of purchase therefor. On December 19, 1922, they filed an intervention in this suit, claiming title to said real estate under and by virtue of their purchase thereof at said execution sale, and the bank filed a disclaimer, alleging that it had sold and assigned the judgment to the interveners. The regularity of the proceedings under the execution sale was not challenged, so the only issue presented by the pleadings and testimony introduced by the parties was whether the real estate in controversy was owned by J. P. Lane, a judgment debtor, or appellee, when the bank procured its judgment against J. P. Lane and others on April 3, 1922. This issue of fact was determined adversely to appellants, and they have duly prosecuted an appeal to this court. According to the record, only two witnesses testified in the case, J. P. Lane, the father of appellee, and G. S. McHenry.

J. P. Lane testified, in substance, that his daughter, the appellee herein, purchased the 80-acre tract of land in controversy from the Missouri Pacific Railroad Company for $600 several years before she obtained a deed thereto on March 5, 1920; that she paid $200 of the purchase money out of her earnings, and that she mortgaged the land and he mortgaged some of his to Mr. Harton to get the balance of the purchase money; that she afterwards worked and earned the money to pay off the mortgage; that she worked out some, but worked for him and her mother most of the time; that his daughter was

twenty-nine years old at the time he was testifying; that he made the payments for his daughter, but that she helped to furnish the money; that, in the spring of 1921, he arranged to borrow some money from the Conservative Loan Company upon the real estate of himself and daughter, and procured G. S. McHenry, an abstracter, to prepare an abstract of title to the lands; that the abstracter suggested it would be cheaper to get up one abstract than two, and advised him to get a deed from his daughter to the 80-acre tract, and that he would embrace all the lands in one abstract; that, pursuant to this advice, she made him a deed to the 80-acre tract on March 14, 1921, reciting the nominal consideration of $1, and that he placed the deed on record; that, later, he decided not to include his daughter's land in the mortgage, and conveyed it back to her on January 12, 1922, and that she recorded same on November 11, 1922.

G. S. McHenry testified, in substance, that he made an abstract for J. P. Lane in the spring of 1921, who was putting up all his and his daughter's land for a loan from the Conservative Loan Company; that he advised him to get a deed from his daughter, and, after obtaining the loan, to deed the land back to her, subject to the mortgage; that it was not included in the mortgage, and was deeded back to her, on his advice; that the deed from appellee to her father was a deed of convenience, and without consideration.

The record reflects that the note upon which the bank obtained its judgment was over four years old at the time of the rendition of the judgment.

The interveners were purchasers at their own execution sale, and took the land subject to the rights of appellee. *Beidler* v. *Beidler,* 71 Ark. 318. Notwithstanding the fact that the record title was in J. P. Lane, one of the execution debtors, when the judgment was rendered against him and his co-defendants, the bank and its assignees acquired no lien upon the land, if he conveyed it to appellee in good faith before the judgment was rendered against him. Appellee acquired title

by delivery of the deed, so that it could not be reached by her father's creditors unless it was conveyed to her to defraud them. According to the testimony of the witnesses, the land belonged to appellee all the time, and her father never acquired it. She conveyed it to her father as a matter of accommodation, so that he might borrow some money on it and thereafter reconvey it to her, subject to the mortgage. He did not embrace it in his mortgage, and conveyed it back to her before the judgment was obtained against him. It is argued, however, that J. P. Lane paid for the land in the first instance, and that he had the railroad company convey it to his daughter for the purpose of putting it beyond the reach of his creditors. The record does not show that he was insolvent when the company sold and conveyed the land to appellee. If J. P. Lane was not insolvent at that time, he had a right to give the land to his daughter. Again, the testimony reflects that appellee earned the money with which to pay for the land. It is true that her father made the payments, but he testified that she earned and furnished the money with which to do so. It is not unreasonable that appellee could have accumulated this amount of money by working for her father and mother and for other people. She was twenty-nine years of age when her father testified, so was old enough to have earned money long before the deed was made to her by the railroad company.

We think the finding of the chancellor is supported by the weight of the evidence.

No error appearing, the decree is affirmed.

GREER v. CRAIG.

Opinion delivered July 7, 1924.

1. BROKERS—AGENT BECOMING PURCHASER—COMMISSION.—Where an agent, employed to sell land, became a purchaser without the vendor's knowledge, he could not be allowed to retain a commission as agent.
2. BROKERS—RIGHT OF PRINCIPAL TO RESCIND.—Where an agent employed to sell land became a purchaser without disclosing that fact, the vendor was entitled to rescind if she elected to do so within a reasonable time after discovering the facts.
3. BROKERS—LIABILITY FOR ACTUAL PRICE.—Where an agent sold land for a greater price than disclosed, and secretly became the purchaser of an undivided interest, the vendor need not rescind, but could elect to affirm and require the broker to account for the actual price.
4. BROKERS—GOOD FAITH.—Where a broker, employed to sell land, became a purchaser from the vendor without disclosing that fact, the vendor was under no duty to inquire whether the broker had acted in good faith, as she had a right to assume that fact.
5. COSTS—ON APPEAL.—Where, though the decree of the lower court was modified, and the cause remanded, the appellate court awarded appellee the relief prayed for by her, which is not substantially less than that awarded in the lower court, the costs of the entire case will be assessed against appellant.

Appeal from Prairie Chancery Court; *John E. Martineau,* Chancellor; modified.

Emmet Vaughan and *John E. Miller,* for appellant.

This action was barred by the three-year statute of limitations. If there was any breach of trust by M. H. Greer, the right of action arose immediately when that occurred, viz., on October 28, 1919, or, at any rate, not later than November 1, 1919, the date the deed was recorded, and this suit was not instituted until January 16, 1923. C. & M. Dig., §§ 6950, 6963; 132 Ark. 32; 145 Ark. 306-310; 17 R. C. L. 860, § 219; 108 Iowa 250; 75 A. S. R. 219; 158 U. S. 172, 15 S. Ct. 769, 39 Law. ed. 939; Ann. Cas. 1917A, 265; C. & M. Dig., § 1536; 46 Ark. 25-34.

Saye & Saye, for appellee.

The three-year statute of limitations is not applicable in this case. M. H. Greer is attempting to obtain title to appellee's land through fraud. The object of the

suit was not to recover possession of the notes held by Greer, but to recover the purchase price of the land, which appellee understood had passed into the hands of innocent purchasers, the purchase money not having been paid over to Greer at the time the suit was filed. But, in any event, the cause of action is not barred by the three-year statute. Appellee received no information that Greer had perpetrated the fraud, until February 12, 1920. 92 Ark. 618; 25 Ark. 462; 132 Ark. 32; 17 R. C. L. 796, § 163; *Id.* 856, § 217; *Id.* 853, § 214; 22 L. R. A. (N. S.) 215; 119 Iowa, 97, 93 N. W. 58; 71 Iowa 129; 72 Iowa 161; 2 Am. St. Rep. 232, 33 N. W. 448; 76 Iowa, 522, 14 Am. St. Rep. 235, 41 N. W. 207; 22 Minn. 287; 26 Wis. 614; 77 Wis. 414; 28 Kan. 292; 34 Tex. 544; 76 Kan. 169, 12 L. R. A. (N. S.) 493; 36 S. W. (Tenn.) 953. Appellant Greer is estopped to plead the statute of limitations by his own conduct in misleading the appellee and keeping her from coming to Arkansas at the time of the sale, and for some time thereafter, thereby preventing her from discovering his nefarious scheme. 134 Ark. 351.

2. On appellee's cross-appeal, attention is called to the court's error in refusing to give judgment against M. H. Greer for the $300 which she paid him as a commission for making the sale. Loyalty is one of the first duties that an agent owes his principal, and "it is unquestionably good law as well as good morals that the unfaithful broker who seeks a profit from the transaction other than the commission for his brokerage, cannot recover from his principal any commission." 74 Ark. 396, and cases cited; 142 Ark. 189; 150 Ark. 210. The fraudulent sale of an undivided one-third interest in appellee's land by M. H. Greer to himself, was void, and he thereby forfeited his commission. 21 R. C. L. 829; 82 Ark. 381; 126 Ark. 64; 143 Ark. 3; 248 S. W. 900; 247 S. W. 1052; 159 Ark. 178.

SMITH, J. Appellee was the plaintiff below, and, for her cause of action, alleged that appellant, M. H. Greer, was employed by her as her agent to sell certain lands

which she owned, and that he sold 1,200 acres of her land for $12.50 per acre, and reported the sale to her as having been made at $10 per acre, and on this sale she paid him a commission of $300.

Appellee testified that, in July, 1919, appellant reported to her that he had an offer of $12.50 per acre for this land, but, acting upon appellant's advice, she declined the offer.

In October, 1919, he reported that he had an offer of $10 per acre for the land, and appellant advised her to accept it. Appellee knew but little about the land or its value, and relied entirely and implicitly on the judgment and opinion of her agent.

Appellant informed appellee that he owned eighty acres of land of the same quality, which he proposed to sell at $10 per acre, and, at appellant's request, she deeded her land to him in order that he might make one deed to the proposed purchaser, and might attend to the collection of the deferred payments.

Appellee also testified that appellant represented to her that three persons were interested in this purchase, and, in order to make a sale, it would be necessary for him to finance one of the proposed purchasers. She accordingly made a deed to him for the recited consideration of $12,000, of which $6,000 was paid in cash, and two notes for $2,500 each were given, payable, respectively, January 1, 1921, and January 1, 1922, and a third note was given for $1,000 payable January 1, 1923.

This deed was executed and delivered on October 17, 1919, and on October 28, 1919, appellant conveyed the same land to G. A. Greer, G. W. Sparks and M. A. McCall, for $12.50 per acre, of which he received $8,000 in cash and two notes, each for $2,500, maturing, respectively, January 1, 1921, and January 1, 1922, and a note for $3,000 maturing January 1, 1923. This deed included the eighty acres owned by appellant.

G. A. Greer was appellant's brother and M. A. McCall was his sister, and on October 28, 1919, Mrs. McCall conveyed to appellant her undivided interest in the land.

The result of these transactions was that appellant acquired an undivided third interest in the land at a cost to himself of only $1,700.

The testimony shows that Mrs. McCall was never a real party in interest, and that appellant used her name only for the purpose of acquiring this one-third interest.

Appellant testified that he explained the transaction to appellee, and that she was fully advised, and had made the deed to him for the consideration of $10 per acre after having been put in possession of all the facts.

The court below accepted appellee's version of the transaction; and we concur in that finding; at least we are unable to say that it was clearly against the preponderance of the testimony.

The note due appellee maturing January 1, 1921, was paid, and the time for paying the note due January 1, 1922, was extended to January 1, 1923, on which date payment was tendered, but appellee by this time had discovered that the land had been sold at $12.50 per acre, and she demanded a settlement on that basis. When this was refused she brought this suit on January 16, 1923, in which she alleged the facts set out above, and prayed that appellant be declared a trustee for her benefit, and that she have judgment for the difference in the price, to be paid out of the balance due appellant from G. A. Greer and G. W. Sparks out of the unpaid purchase money, together with the commission which she had paid appellant.

The court found that Mrs. McCall had no interest in the transaction and had merely permitted appellant to use her name; but the court also found that Sparks and G. A. Greer had bought their respective interests in good faith, and were entitled to the benefit of their purchase.

Upon this finding the court set aside the deed conveying to appellant a one-third interest and declared a lien in her favor on the remaining two-thirds interest for the proportionate part of the unpaid purchase money, at $12.50 per acre, due by Sparks and G. A. Greer, and M. H. Greer has appealed from this decree.

The testimony shows that appellee first became aware of the fact that appellant had made the sale at $12.50 per acre, instead of $10, on February 12, 1920, although it is insisted that she should be charged with notice of the transaction from the date the deed from appellant to his grantees was placed of record, and it is earnestly insisted that her cause of action is barred by the three years' statute of limitation.

In reply to this insistence it is responded that this is a suit for money misappropriated by an agent, a part of which had not actually been collected when the suit was filed; and it is also responded that the three years' statute of limitations does not apply.

Without deciding whether the cause of action would be barred by the three years' statute of limitation, it may be said that, even though it applies to this suit, that time had not expired when this suit was commenced.

There was here a relation of trust and confidence. There was an admitted agency, and a commission as such was charged and paid. The agent had no right to make a profit at his principal's expense. Good faith required him to sell the land for her at the best price obtainable, and this he did not do. He cannot therefore be allowed to retain the profit which he made out of the transaction; nor can he be allowed to retain the commission. As he became, in effect, a purchaser from his principal without disclosing that fact, he must assume that attitude in accounting to her, and must restore the commission which he improperly charged. Many authorities are cited in the brief of appellee supporting this statement of the law; indeed, it is elementary. Appellee would, in fact, have been entitled to a rescission of the sale, so far as appellant is concerned, had she elected to do so within a reasonable time after the discovery of the facts. This she did not do, nor has she done so yet. This relief was not prayed in her complaint, but we think she had the right to elect, as she has done, to affirm the sale and require her agent to account to her for the actual purchase price.

Appellee was under no duty to inquire whether appellant had dealt with her in good faith. She had the right to assume that he had. *Conditt* v. *Holden,* 92 Ark. 618; *Crissman* v. *Carl-Lee,* 132 Ark. 32. Appellee lived in Kentucky, and her first actual knowledge to the contrary was obtained when she read a news item in a paper published in the county where the lands are situated concerning them. Upon reading this article she wrote immediately to the clerk and recorder for a copy of the deed from appellant to his grantees, and, when she obtained this copy, she learned that the sale had been made at $12.50 per acre. She did not then and has not yet asked a rescission, but, as we have said, she was not required to do so, as she had the right to affirm the sale the agent had made and to demand a settlement on that basis.

The decree adjudged a lien on the two-thirds interest of G. W. Sparks and G. A. Greer, who were properly made parties, for the balance of the purchase money due by them to appellant; but this lien must inure to appellee's benefit until she has first been paid. In addition, she will be awarded a lien on the undivided one-third interest of appellant to secure the balance of the purchase money due her on the basis of $12.50 per acre, and the court below will enter a decree in accordance with this opinion.

Appellant filed a counterclaim and prayed judgment for compensation for prior services rendered by him to appellee as her agent; but the court found that such services as had been rendered had been paid for, and we concur in that finding.

Although the decree below is modified and the cause remanded with directions (because a lien on land is involved), we assess the costs of the entire case, including the costs of this appeal, against appellant, as we have awarded appellee the relief prayed for by her, which is not substantially less than the relief awarded her in the lower court, and because it appears equitable to us to do so.

WILLIAMS v. FORT SMITH.

Opinion delivered July 7, 1924.

1. MUNICIPAL CORPORATIONS—AUTHORITY OF IMPROVEMENT DISTRICT.—An improvement district is an agency for the purpose of constructing the improvement; it gains no proprietary interest in the street to be improved, and whatever control was given to it for the purpose of making the improvement ceased upon the completion of the improvement.
2. MUNICIPAL CORPORATIONS—RIGHTS OF ABUTTING OWNER.—The taxpayers of an improvement district, neither as such nor as abutting owners, have any proprietary interest in the street or in the discarded materials formerly used in paving the street by reason of the fact that they were paid for by taxation on benefits to adjacent property.
3. MUNICIPAL CORPORATIONS—RIGHT TO USE DISCARDED PAVING MATERIAL.—Whether a city owns the fee or merely an easement in streets, its continuous control over streets carries with it the rights to use old discarded material paid for by taxation on benefits to adjacent property.

Appeal from Sebastian Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

W. L. Curtis, for appellant.

The salvage from the old pavement belongs to the abutting property owners, who paid for the original pavement through the agency of an improvement district, and not to the city. While there are no decisions directly on the point, by analogy the following authorities sustain the contention: 75 Miss. 846, 65 A. S. R. 625 (citing many cases). As to the title and property rights of abutting property owners on a street or highway, see the following: 2 Ann. Cas. p. 497, par. 1; 2 Ann. Cas. p. 594 and note. The following cases hold that a city has no right to take earth from a street, except for grading, and same can be used only on streets forming part of the same general plan of improvement: 78 Ind. 1; 20 Ind. App. 482; 36 Ind. 90. See also 19 Ga. 89; 58 Ga. 595; 35 Iowa 89; 24 Mich. 514. The following cases may also be examined with profit: 37 Minn. 423; 34 Mich. 86; 125 Mich. 167; 1 N. H. 16; 24 N. H. 208; 88 N. Y. App. Div. 192.

George W. Dodd, for appellee.

The powers of an improvement district are limited to the construction of the improvement, and it acquires no proprietary interest in the street. 56 Ark. 205; 97 Ark. 308; 103 Ark. 269; 105 Ark. 65. Where the city owns the fee, as in this case, it has full proprietary rights, subject to the rights of the public to free use of the street. 29 C. J., § 258; 13 R. C. L., § 159, p. 184.

McCULLOCH, C. J. Rogers Avenue, in the city of Fort Smith, was paved many years ago through the agency of an improvement district organized for the purpose of paving that and other streets of the city. The paving was constructed of bricks, which have about worn out, and another improvement district, known as Paving District No. 16, has been organized for the purpose of repaving Rogers Avenue with better material. Paving District No. 16 has no connection with the former district, and the boundaries of the two districts are not the same. In order to repave the district, it has become necessary to remove the old bricks. The city commissioners of Fort Smith propose to use the old bricks for the purpose of paving another street—little used—and for the paving of which the old bricks, though worn, will be sufficient.

Appellants are owners of real property abutting on a portion of Rogers Avenue which is to be repaved, and they lay claim to the old material as such abutting owners, and they instituted this action in the chancery court against the city of Fort Smith and its commissioners to recover possession of the old material or its value, and to restrain the city commissioners from appropriating it to the use of the city. The chancery court denied the relief prayed for, and an appeal has been prosecuted to this court.

We are of the opinion that the decree was correct. The old improvement district was but an agency for the purpose of constructing the improvement. The district gained no proprietary interest in the street, and whatever control was given to it for the purpose of making

the improvement ceased upon the completion of the improvement. *Pine Bluff Water Co.* v. *Sewer District,* 56 Ark. 191; *Pulaski Gas Light Co.* v. *Remmel,* 97 Ark. 318. The authority of the municipality over the street did not pass away from it on account of the authority given to the improvement district for a special purpose. *Pulaski Gas Light Co.* v. *Remmel, supra.* Neither did the taxpayers of the district, as such, or as abutting owners, gain any proprietary interest in the street or in the material used, by reason of the fact that the improvement was constructed and paid for by taxation on the benefits to adjacent property. Authorities cited by the appellant as to the rights of abutting landowners to trees, minerals or other substances in a street dedicated to public use have no application to the present case. It is immaterial whether the city owned the fee or merely an easement. The city's continuous control over the street carried with it the right to make use of discarded old material.

There is no question involved in this case of the right of abutting owners or the taxpayers in an improvement district to prevent an improvident waste of an improvement constructed with special taxes levied on the benefits to their property. It is not contended that the street does not need repaving, nor that it is a useless waste of material to tear up the old pavement and put down new. The only question raised is the bare one as to the title to the old material, and we are of the opinion that the city has the right to make use of the old material.

The decree is therefore affirmed.

THOMPSON v. KIRK.

Opinion delivered July 7, 1924.

1. APPEAL AND ERROR—RULING DIRECTING VERDICT.—In testing a ruling directing a verdict for plaintiff, the evidence is to be considered in the light most favorable to defendant.
2. LANDLORD AND TENANT—RIGHT OF LANDLORD TO POSSESSION.—Where, in unlawful detainer, the undisputed evidence showed that the tenant failed to pay rent as agreed, that the landlord then made demand in writing for possession, as required by the statute, the landlord was entitled to possession.
3. LANDLORD AND TENANT—RIGHT TO JUDGMENT ON RETAINING BOND.—Refusal of the trial court in unlawful detainer to render judgment against the sureties on defendant's bond, given under Crawford & Moses' Dig., § 4847, to retain possession, *held* error.

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

Cooper Thweatt, for appellant.

A contract of lease made orally is taken out of the statute of frauds when the lessee goes on the lands and, in compliance with the oral contract, makes valuable improvements thereon; 112 Ark. 562; 117 Ark. 500; 125 Ark. 393. The facts show an occupancy from year to year. 61 Ark. 377; 227 S. W. (Ark.) 593; 229 S. W. (Ark.) 20. A six months' notice was necessary to terminate the lease and dispossess appellant in 1923.

Emmet Vaughan, for appellee.

It is necessary, in order to take the case out of the statute of frauds, that the lessee must hold over under the consent of the landlord and must pay and the landlord receive a part of all of the rent. Nothing of this kind occurred in this case.

HART, J. This is an action of unlawful detainer brought in the circuit court by J. F. Kirk against A. K. Thompson to recover one-half acre of ground, on which is situated a storehouse occupied by the defendant.

There was a directed verdict in favor of the plaintiff, and, from the judgment rendered, the defendant has duly prosecuted an appeal to this court.

Inasmuch as there was a directed verdict in favor of the plaintiff, in order to test the ruling of the court on this point the evidence must be considered in the light most favorable to the defendant.

According to the testimony of A. K. Thompson, he made a verbal contract with J. F. Kirk in the fall of 1916, whereby he was to erect a store building on a half acre of ground belonging to Kirk, and occupy it for five years. After that he was to continue to occupy the store building as long as he pleased for an annual rental of $25. The storehouse cost him $350. He moved into it in December, 1916, and occupied it until November or December, 1921, which was the expiration of the five years. Kirk did not say anything about his continuing to occupy the building for the year 1922. It was understood that Thompson had it, and was to pay $25 for the year 1922. Along about Thanksgiving day, 1922, Thompson told Kirk that his health was bad, and that he would sell his business if he could do so. Kirk talked about buying him out; but, during Christmas week of 1922, Kirk informed Thompson that he would not purchase his stock of goods. Thompson continued to occupy the store building during the year 1923. Thompson owed Kirk $25 for the rent of 1922, and has never paid him any rent for that year. Thompson did not pay Kirk any rent for the year 1923. A written notice to quit, in the form provided by the statute, was served upon Thompson by Kirk in February, 1923. Thompson was notified to deliver possession of the premises to Kirk within three days after the service of the notice. Thompson refused to deliver possession of the premises, and Kirk instituted this action to recover possession of them. He gave the statutory bond required in a suit for unlawful detainer. Thompson gave bond to retain possession of the premises in the form prescribed by the statute.

Under this state of facts the court was correct in directing a verdict for the plaintiff. Our statute regulating the action of unlawful detainer confers upon a land-

lord the right to maintain it upon the refusal of the tenant to pay the rent when due and to quit possession upon demand in writing by the landlord. *Parker* v. *Geary,* 57 Ark. 301; *Lindsey* v. *Bloodworth,* 97 Ark. 541; *Texas Hardwood Lumber Co.* v. *Richardson,* 115 Ark. 28; *Hallbrooks* v. *Rosser,* 143 Ark. 559, and *Martin* v. *Stratton,* 157 Ark. 513.

According to Thompson's own evidence, he failed to pay the rent for the year 1922, and the undisputed evidence shows that Kirk made a demand in writing for the possession of the premises, as required by the statute. Hence the court properly directed a verdict in favor of the plaintiff for the possession of the premises.

The plaintiff has taken a cross-appeal. It is insisted by him that the circuit court erred in refusing to render judgment in his favor against the sureties on the bond of the defendant. The defendant gave a bond to retain possession of the premises, under § 4847 of Crawford & Moses' Digest. When the court rendered judgment in favor of the plaintiff against the defendant for the possession of the premises, it should also have rendered judgment against the sureties on the statutory bond of the defendant.

Section 4854 of the Digest provides that, in all cases where judgment is rendered against the plaintiff or defendant for any amount of recovery, judgment shall also be rendered against his sureties on the bond given under the provisions of the act.

The judgment will be modified so as to give the plaintiff judgment against the sureties on the statutory bond of the defendant as indicated, and, as modified, the judgment will be affirmed.

GUILE v. SNYDER.

Opinion delivered July 7, 1924.

HIGHWAYS—NEGLIGENCE IN DRIVING DEFECTIVE CAR.—When defendant was requested to drive some ladies home from a funeral, and for that purpose borrowed a car, which, unknown to him, proved to have a latent defect, by reason of which plaintiff was injured, defendant was not chargeable with negligence, since he was under no obligation to make a search for latent defects.

Appeal from Saline Circuit Court; *T. E. Toler,* Judge; reversed.

Brouse & McDaniel, for appellant.

J. W. Westbrook, for appellee.

SMITH, J. On December 1, 1922, appellant was one of a large number of persons who attended a funeral. After the burial the crowd began to disperse, and a Dr. Walton came to appellant and told him that two ladies had driven to the funeral in a Dodge car, and that the lady who drove the car had become ill and was unable to drive the car home. Dr. Walton asked appellant if he could not drive the Dodge car for the ladies. Appellant answered that he could not, but if some one had driven a Ford who could drive a Dodge he would drive the Ford home and the other party could drive the Dodge. This arrangement was made, and the ladies got in the Ford car with appellant, and they started home.

In leaving the cemetery it was necessary for the car to climb a hill, and, about the time appellant reached the top of the hill, the left hind hub of the car broke. He was thus left without a brake or control of the car, and it started rolling down the hill. Appellant could not stop the car, but he sought to retard its progress down the hill by cutting the car into the ruts of the road. There was nothing else he could do to stop the car or to retard it. He was afraid to turn the car out of the road for fear of overturning it. At the foot of the hill there was a congestion of vehicles, and there was also a little bridge on which there were a number of pedestrians at the time. Appellant sought to avoid running into this crowd, but

he was unable to blow the horn, as it was out of order.

As the car rolled down the hill, appellant discovered a tree, and he attempted to steer the car so that the back end of it would strike the tree and the car would thus be stopped. Just as he was about to do this, appellant heard some one call out, "Pull up! Pull off of him!" and he discovered that his car had jammed up against the running board of another Ford, and it caught appellee's leg, and a painful but not serious injury was inflicted.

Appellee brought this suit to recover damages for the injury thus inflicted, and a verdict was returned in his favor, and from the judgment pronounced thereon is this appeal.

Appellee asked two instructions, both of which were given. These were instructions defining negligence and stating the measure of damages. At the request of appellant, the court gave instructions on the burden of proof, and instructions defining negligence.

No exceptions were saved to the instructions given, and the only exception saved to any instruction which was refused was by appellant to the refusal of the court to give an instruction directing the jury to return a verdict in his favor.

It is conceded that the only question in the case is whether the testimony is legally sufficient to support the verdict.

Appellee's hearing is impaired to some extent, and his attention was not attracted to the rolling car. He was sitting on the running board of a car which was parked on the side of the road, and he was oblivious to any danger until he was struck.

Appellant was thoroughly familiar with the operation of Ford cars, and had driven one for ten years. He had never driven the car in question before. He made no inspection of the car, as he assumed it was in running order. There was no defect about it which was patent and obvious. He assumed, without examination, that the

car was in running order, when he started it and began the ascent of the hill.

The car was shown to have been in exceedingly bad repair, but this fact was unknown to appellant. The hub had ground out, and there was no way to control the car after the hub broke. The brakes would not work, and the car could not be stopped. The horn would not blow, and no alarm could be given.

Appellant was asked to drive the car in an emergency, and we do not think the ordinary care which he was required to use, under the circumstances, imposed on him any duty to search for latent defects.

The emergency under which appellant acted became more acute when the car, because of its condition, began rolling down the hill. Appellant's time was completely occupied in his effort to prevent the car from overturning or from running into the people of whose presence at the foot of the hill he was aware.

It is not contended that appellant was guilty of any negligence in operating the car. Negligence is predicated upon the proposition that he should not have undertaken to drive a car the condition of which was so defective that it could not be safely operated. But, as we have said, the condition of the car was unknown to appellant, and we think he was not guilty, under the circumstances, of negligence in failing to discover its defects, or in driving it without an examination to discover defects which were not patent or obvious.

At § 9 of the chapter on Negligence, in 20 R. C. L., page 13, it is said: "The foundation of liability, then, is knowledge—or, what is deemed in law to be the same thing, opportunity, by the exercise of reasonable diligence, to acquire knowledge—of the peril which subsequently results in injury. In a word, negligence or contributory negligence is lack of foresight or forethought." See also § 61 of the chapter on Bailments, in 3 R. C. L., page 138; *Johnson* v. *Bullard Co.*, 12 A. L. R. 766; Huddy on Automobiles (6th ed.) § 339, p. 402.

We think there is nothing in the testimony to show that appellant did anything which an ordinarily prudent man would not have done, nor did he fail to do what an ordinarily prudent man would have done. He was, of course, chargeable with knowledge of any patent defect in the car which would have been discovered by the observation which an ordinarily prudent man would have made; but, as we have said, he was not required, under the circumstances, to make an inspection for latent defects in the car, and, as no negligence was shown, the judgment must be reversed, and, as the cause appears to have been fully developed, it is dismissed.

MIZELL v. MERCER.

Opinion delivered July 7, 1924.

1. LANDLORD AND TENANT—ABANDONMENT OF LEASE.—A lessee may abandon his lease either by words or by equivalent acts.
2. LANDLORD AND TENANT—FAILURE TO PLANT CROP.—Failure of a tenant to plant a crop out of which he agreed to pay rent would amount to a repudiation of the lease, and a holding thereafter by the lessee would be unlawful.

Appeal from White Circuit Court; *E. D. Robertson,* Judge; reversed.

J. N. Rachels, for appellant.

The court erred in instructing the jury to find a verdict in favor of the defendant.

The failure of Mercer to sow oats and plant strawberries set at naught his right to remain in possession of the leased premises. 57 Ark. 301; 97 Ark. 541; 150 Ark. 371.

HUMPHREYS, J. This is a suit by appellant, lessor, to oust appellee, lessee, from the possession of the north half of the southwest quarter, section 30, township 6 north, range 7 west, in White County, on account of an alleged abandonment of the rental contract for same.

Appellee filed an answer denying that he had abandoned the rental contract.

The cause proceeded to a hearing, and, at the conclusion of appellant's testimony, on motion of appellee the court directed the jury to return a verdict for him, over the appellant's objection and exception, from which is this appeal.

It appears from the testimony that A. B. Hanley owned the land, and contracted to sell same to appellant some time in December, 1921, subject to a rental contract he had theretofore made with appellee for the year 1922. Hanley conveyed the land to appellant on January 30, 1922. In October or November, 1921, he had leased it to appellee for a share of the crops, with the understanding that appellee would set out fifteen acres to strawberries in February or March, 1922, plant five bushels of oats, and plant the rest of the land in corn and peas. Appellee did not move upon the land himself, but placed a tenant thereon. According to the testimony introduced by appellant, appellee failed to plant out the berries or to plant any crop on the land during planting season. The witnesses testified that neither appellee nor his tenant had plowed a furrow at the time this suit was instituted in April, 1922. This indicated that appellee had abandoned the rental contract, in which event he subjected himself to eviction. The lessee may abandon a contract creating a tenancy, either in words or by equivalent acts. A failure to pitch a crop out of which rent is agreed to be paid in kind would amount to a repudiation of the rental contract or lease, and a holding thereafter by the lessee would be unlawful. *Buckner* v. *Warren,* 41 Ark. 532; *Lindsey* v. *Bloodworth,* 97 Ark. 541; *Leehy* v. *Fullerton,* 150 Ark. 371.

On account of the error indicated the judgment is reversed, and the cause is remanded for a new trial.

KNIGHT v. STATE.

Opinion delivered July 7, 1924.

BURGLARY—ACCOMPLICE.—One watching outside while an accomplice broke into and stole from a store is as guilty as if he had committed the actual burglary.

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

C. M. Wofford, for appellant.

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

HART, J. Merritt Knight prosecutes this appeal to reverse a judgment of conviction against him for the crime of burglary. He was tried before a jury, and his punishment fixed by it at twelve months in the State Penitentiary.

The only assignment of error relied upon for a reversal of the judgment is that the evidence is not legally sufficient to warrant a verdict of guilty.

It appears from the proof that, on the night of the 8th of January, 1924, Otis Evans, a boy fifteen years of age, passed a Mr. Hitchcock's store in the east part of Van Buren, in Crawford County, Arkansas. As he approached the store he saw some men standing on the store porch, and one of them broke a window in the store and jerked the screen off of it. He did not recognize the men. Just before this he had seen an automobile with three or four men in it parked under an electric light about a block away. The car with the men in it had gone around to the side of the store before it was broken into. Evans went to a house near by and telephoned the officers about the burglary.

Oscar Whitson, a member of the police force, received the information concerning the burglary about two o'clock in the morning. He immediately telephoned Bill Beavers, who came for him in an automobile. As they approached Hitchcock's store, they saw a car stopped along the side of it. The automobile then started on, and Whitson overtook it, and saw Preston Lea and Leo

Campbell in the car. Whitson and Beavers then went back to the store, and they saw Merritt Knight and Speck Kelly standing on the edge of the store porch, which was a part of the sidewalk. Speck Kelly had a flashlight in his hand, and was motioning for them to come on up. Merritt Knight and Speck Kelly both approached the car, and the officers arrested them. They found $3 in money in the pockets of Speck Kelly, and one dollar of this was in pennies. They also saw some cigarettes on the store porch near where the screen had been taken off of the window. Knight and Kelly were standing close together in front of the store. Kelly was standing six or seven feet ahead of Merritt Knight.

Mathis Hitchcock was also a witness for the State. According to his testimony, he ran a grocery business with his brother. After the defendant, Merritt Knight, and Fred (or Speck) Kelly had been captured, he was called to the store. He found that about $14 worth of bacon had been taken out of the store and piled back of the store. The money out of the cash register had also been taken. He stated that there was about $3 taken, and about $1 of this was in pennies.

Merritt Knight was a witness for himself. According to his testimony, he had been to a dance near Hitchcock's store on the night in question, and started home some time after one o'clock in the night. When he got down in front of Hitchcock's store he saw a light in the store, and waited probably thirty minutes. A little later he saw a car coming, and stopped it in order to ride to town in it. Whitson jumped off of the car and arrested him.

Knight further testified that he was not with Speck Kelly at this time, and had not seen him for several weeks. He also testified that he was not with Leo Campbell and Preston Lea on that night. On cross-examination he admitted that he had been in the penitentiary one time and in jail more than one time. Other witnesses corroborated his testimony.

In testing the legal sufficiency of the evidence to support the verdict, it must be considered in its strongest light for the State. When this is done, we think the evidence authorized the jury to find the defendant guilty.

The uncontradicted evidence shows that some one broke into the store on the night in question. The proprietor of the store testified that the cash register was robbed and about three dollars were taken from it. One dollar of this was in pennies. This exact amount and kind of money was taken from Speck Kelly, who, with the defendant, was arrested at the scene of the robbery.

It is true that the defendant denied being with Speck Kelly on that night, but the other witnesses say that the defendant and Kelly were standing on the porch in front of the store. Kelly had a flashlight, and beckoned the automobile containing the officers to come on. It will be remembered that another car had been parked near the store just before this. It is fairly inferable that Kelly and Knight thought that they were signaling the occupants of this car to come on. The witnesses for the State say that Kelly was standing about six feet ahead of Knight. While Knight denies being with Kelly, the jury might have inferred that he did not tell the truth about this, and that they were both engaged in the burglary. The defendant admits seeing a light in the store some time after one o'clock in the morning, and that he watched it for thirty minutes. He does not attempt to explain what he saw.

All the surrounding circumstances, when considered together, warranted the jury in finding the defendant guilty. If he was there, and watched on the outside while Kelly got the money and other property from the store, he was just as guilty as if he had actually taken the money out of the cash register himself. *Thomas* v. *State,* 43 Ark. 149; *Glass* v. *State,* 109 Ark. 32; *Cook* v. *State,* 109 Ark. 384; *Marshall* v. *State,* 101 Ark. 155; and *Ingram* v. *State,* 110 Ark. 538.

It follows that the judgment must be affirmed.

PAYNE v. STATE.

Opinion delivered July 7, 1924.

1. BRIBERY—SUFFICIENCY OF EVIDENCE.—In a prosecution of a county judge for accepting a bribe for letting a certain bridge contract, evidence that the contract was let in an irregular manner and was improvident, and that the contractor was benefited by not being required to comply with the specifications, while competent, was insufficient of itself to prove that the contract was the result of a corrupt agreement.
2. BRIBERY—EVIDENCE.—In a prosecution of a county judge for accepting a bribe from T. for letting a bridge contract to a certain contractor, evidence that T. stated that accused "is hard-boiled, and wouldn't turn a wheel until the money is in his hands," *held* insufficient to show a corrupt agreement between defendant and T.
3. CRIMINAL LAW—STATEMENT OF CO-CONSPIRATOR.—Any adverse statement of a co-conspirator made during the execution of the conspiracy, in the absence of the other conspirators, is admissible against them, but not so if made after the consummation of the conspiracy.
4. CRIMINAL LAW—STATEMENT OF FELLOW-CONSPIRATOR.—In a prosecution of a county judge for accepting a bribe from T. for letting a bridge contract to T.'s company, *held* that statements made by T. after the contract had been let, and in defendant's absence, that T. had agreed to pay defendant $6,000 as a bribe to secure three bridge contracts for his company, and that accused let him off for $5,000, were inadmissible, being hearsay.

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

Hill & Fitzhugh, Bates & Duncan, and *Jno. F. Clifford,* for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Scott County for accepting a bribe of $2,000 from Bob Tate for letting a contract to the Southern Road & Bridge Builders, Inc., to build a bridge over Fourche River at Murphy Ford, in said county. The indictment, omitting formal parts, is as follows:

"The grand jury of Scott County, in the name and by the authority of the State of Arkansas, accuses the

defendant, Tom Payne, of the crime of bribery, committed as follows, to-wit: The said defendant, in the county and State aforesaid, on the 7th day of September, 1918, being then and there the duly and legally elected and the acting county judge of Scott County, Arkansas, did wilfully, unlawfully, corruptly and feloniously accept and receive from Bob Tate, then and there being, $2,000 lawful money of the United States of America, of the value of $2,000, as a bribe for the purpose of inducing and procuring him, the said Tom Payne, as such county judge, to let the contract for the building of a certain bridge over Fourche River at Murphy Ford, in Scott County, Arkansas, to the Southern Road & Bridge Builders, Inc., of Little Rock, Arkansas, and the said defendant, Tom Payne, unlawfully, corruptly and feloniously accepted and received said bribe from said Bob Tate for letting said contract to said Southern Road & Bridge Builders, Inc., aforesaid, against the peace and dignity of the State of Arkansas."

A change of venue was taken to Sebastian County, Greenwood District, where appellant was tried, convicted, and adjudged to pay a fine of $2,000 and to serve a term of two years in the State Penitentiary as punishment therefor, from which judgment an appeal has been duly prosecuted to this court.

The State sought to convict appellant upon the theory that the contract for building said bridge was let to the Southern Road & Bridge Builders, Inc., through a conspiracy between Bob Tate and appellant. In an attempt to establish the conspiracy, the State introduced evidence tending to show that the contract was let in an irregular manner; that it was an improvident contract, and that the contractor was not required to build the bridge in accordance with the plans and specifications, which liberality redounded to its benefit and to the detriment of the county. The gist of the bribery charge was accepting the money for an evil or malevolent purpose. While the testimony above referred to was competent as tending to establish the charge, it was not sufficient

within itself upon which to base an inference that the contract was the result of a bad motive or corrupt agreement between Tate and appellant. All of it could have been attributed to negligence on the part of appellant. The State attempted to supplement this character of testimony by hearsay statements made by Tate and appellant to John Harris, and a statement made by Tate to Lee Pile, when issuing warrants to him, to the effect that appellant "is hard boiled, and wouldn't turn a wheel until the money is in his hands." The statement to Pile was indefinite and did not refer to any specific corrupt agreement. It may have had reference to pay for something he expected appellant to do in the future, and have had no relation whatever to a corrupt agreement which had not been consummated concerning the bridge contract. Had this statement been connected up so as to show that it related to the letting of the bridge contract, the jury might well have inferred from it, in connection with the other testimony, that a corrupt agreement existed between Tate and appellant which was then in the course of completion or consummation. Any adverse statement of a co-conspirator during the execution of a conspiracy, in the absence of the others, is admissible against them, but not so if made after the consummation of the conspiracy.

The hearsay statements of Bob Tate, in the absence of appellant, as testified by Judge A. F. Smith, to the effect that he (Bob Tate) had agreed to pay appellant $6,000 as a bribe to secure three bridge contracts for his company, and that appellant let him off for $5,000, and that at one time appellant threatened to kill him unless he paid the whole amount, were inadmissible for the reason that they were hearsay, and that they were made after the consummation of the conspiracy. Judge Smith testified that he heard John Harris say that Bob Tate told him that he had bribed appellant, and that the statement was made by John Harris during an investigation of the affair by appellant's successor in office. The hearsay statement of appellant to the same effect was inad-

missible, for the reason also that it was strictly hearsay evidence.

On account of the admission of the hearsay evidence, as well as the insufficiency of the other evidence to support the verdict, the judgment is reversed, and the cause is remanded for a new trial.

WHITE v. HUDSON.

Opinion delivered July 7, 1924.

JUDGMENT—RES INTER ALIOS ACTA.—In an action for cutting timber, where there was a conflict as to the boundary between adjoining tracts, plaintiff claiming the "W" line and defendant the "M" line, it was error to admit in behalf of plaintiff a decree between other parties adjudicating the correctness of "W" line through the same tier of sections but relating to other property rights.

Appealed from Cleveland Circuit Court; *Turner Butler,* Judge; reversed.

George Brown and *J. C. Clary,* for appellant.

The introduction of the chancery decree was in itself erroneous, and, in addition, it was erroneous to instruct the jury that they might consider the decree, not as binding, but as a circumstance tending, with the other circumstances in the case, to show which was the true line, first, because it singled out and gave undue prominence to that particular circumstance (38 Cyc. 1674-5); second, it was not shown by the pleadings or otherwise in the case of England *v.* Dial, that the same issues and none others were involved in that case as in this, and the burden was on the appellees to show identity of issues (23 Cyc. 1532-1535); and third, the decree affected entirely different property, and the suit was between entirely different parties, between whom and the parties to this suit there was no privity of contract, blood or estate. 150 Ark. 594; 246 U. S. 158, 38 S. C. Rep. 301; 254 S. W. (Tex.) 255; 7 Enc. of Evidence, 829; Freeman on Judgments, 3rd ed., § 606.

Woodson Mosley, for appellees.

McCULLOCH, C. J. Appellees instituted this action against appellant in the circuit court of Cleveland County to recover damages for alleged cutting of timber on lands of appellees. The parties are respective owners of adjoining tracts of land, there being a dispute as to the boundary. Appellant cut and removed timber on a portion of the land claimed by appellees. There is no question involved as to the title or right of possession of the tracts of land claimed by the respective parties, the only controversy being as to the boundary.

Appellees inherited the land from their father, J. B. Hudson, in whose lifetime two surveys had been made of the boundary line in controversy. One of the surveys was made by Judge McMurtrey, and the result of his survey is known as the "McMurtrey line," and the other survey was made by Mr. Watts. The timber in controversy was cut between the two lines, and, if the Watts line is the correct boundary, the land between the two lines is a part of the tract owned by appellees, and they are entitled to recover, but, if the McMurtrey line is the correct boundary, the land is a part of appellant's tract, and he is the owner of the timber in controversy. Each party introduced testimony concerning the correctness of the surveys, and the court submitted that issue to the jury. There was evidence sufficient to sustain a verdict either way on the disputed issues as to the proper location of the boundary.

The court permitted appellees, over the objection of appellant, to introduce in evidence the record of a decree of the chancery court of Cleveland County in an action between Elizabeth England and E. A. Dial, adjudicating the correctness of the so-called Watts line, as extended through the same tier of sections as the land in controversy. When objection was made to the introduction of this testimony, the court stated that the decree was not binding on the parties to this suit for the reason that it was rendered in a suit between different

parties and related to a different tract of land, but that the jury might consider the decree "as a circumstance tending to shed light, together with all the other circumstances in the case, upon the question that you (the jury) are called upon to determine as to which is the true line through the center of section four."

The court, in its final charge to the jury, also gave an instruction, over appellant's objection, the same in effect as the statement made by the court to the jury at the time the decree was admitted in evidence.

We are unable to call to mind any correct theory upon which this testimony was admissible. It was a decree rendered in a controversy between other parties than those connected with the present controversy, and it related to other property rights. The decree had no binding force against either of the parties to this controversy, and it was entirely without evidentiary force in this case. It devolved upon appellees, as the plaintiffs in the case, to prove that they were the owners of the land from which the timber was taken, and the decree in the litigation between other parties had no tendency to relieve them of this burden. There was a conflict in the testimony as to the correct boundary, and we have no means of determining what effect was made on the minds of the jury by this erroneously admitted testimony, therefore we must treat the error in admitting it as being prejudicial.

Reversed and remanded for a new trial.

WAKIN v. MORGAN.

Opinion delivered July 7, 1924.

1. LANDLORD AND TENANT—UNLAWFUL EVICTION—DAMAGES.—In an action for unlawful eviction, evidence of net profits from the business and of the necessity of selling furniture and fixtures was inadmissible as too remote and speculative for consideration as elements of damage, in the absence of evidence that the rental value was greater than the rent agreed to be paid and

that the price received for the furniture was affected by the eviction.

2. LANDLORD AND TENANT—UNLAWFUL EVICTION—RESTITUTION.—Judgment for restitution of the premises to defendants, on a verdict awarding them damages for unlawful eviction, was proper, in view of Crawford & Moses' Dig., § 4854.

3. APPEAL AND ERROR—CURE OF ERROR BY REMITTITUR.—Error in a judgment in forcible detainer awarding defendant damages in addition to restitution of the premises *held* curable by remittitur.

Appeal from Miller Circuit Court; *J. H. McCollum,* Judge; affirmed.

John N. Cook, for appellant.

The court erred in permitting the appellees to reopen the case and testify as to damages. The instruction on the measure of damages given by the court was erroneous and prejudicial, and should not have been given. 36 Ark. 524; 76 Ark. 468; 110 Ark. 504. The question of restitution of the property was not submitted to the jury, and the verdict was not for restitution. It was error to put this in the judgment. 5 Ark. 700; 130 Ark. 575.

WOOD, J. This is an action of forcible detainer instituted by the appellants against the appellees to recover possession of certain space in a building in Texarkana, Arkansas, owned by the appellants. The appellants alleged that they were the owners of the space mentioned; that they had leased the same to a Greek named Tony, from day to day, at the price of $1 per day; that appellee Morgan acquired an interest in the business with Tony, and entered into possession of the space, and paid appellants $1 per day until about October 26, 1922, at which time Morgan acquired the interest of Tony; that on October 31 the appellants caused a notice to be served upon appellees to vacate the premises on or before the 11th day of November, 1922; that appellees refused to quit and deliver the possession to appellants, but unlawfully detained the same. Appellants alleged that the appellees were due them for rental the sum of $18, and that they were damaged by the unlawful detention in the sum of $50. They therefore prayed for a writ of possession and judgment in the sum of $68.

The appellees, in their answer, admitted that the appellants were the owners of the space in controversy and that same was rented to Tony at $1 per day; that they purchased from Tony the restaurant business which he was conducting in the space mentioned; that, prior to the purchase of such business, furniture and fixtures from Tony, they leased the space in controversy from the appellants at a rental of $7.50 per week for a period of one year, for the purpose of conducting the restaurant business; that the appellant well knew the character of the business which was to be conducted by the appellees, and contracted with them to permit them to use gas on the same meter that was used by the appellants in the building, the appellees to pay one-half consumed as shown by the meter. Appellees alleged that they took possession of the premises, and paid rent for the first week, which was accepted by the appellants; that, shortly thereafter, the appellants disconnected the gas from the space occupied by the appellees, which compelled them to use other fuel to conduct their business; that the appellees tendered the next week's rent when due, which the appellants refused to accept, and ordered the appellees to vacate the building; that, by reason of the wrongful acts of the appellants, the appellees had been damaged in the sum of $500, and further damaged by reason of the issuance of the writ of possession under which they were unlawfully deprived of possession, in the sum of $200. They prayed judgment in the sum of $700 and for costs.

The testimony on behalf of the appellants tended to prove that they rented the space to the Greek, who stayed over a month and a half, paying the appellants $1 per day. The Greek left on the 26th of October, and Morgan was in charge of the place. The appellants had no agreement with him. They told Morgan to get out. He stated that he was staying there until the Greek went to Little Rock. Appellants didn't have any trade with him at all, and served notice on him to get out. He tried three or four times to pay the appellants money, but they refused, and

told him they wanted their store. The space was rented to the Greek for no definite time—only by the day. The appellants had ordered the Greek out before the appellees took possession, and demanded possession of the appellees the day the Greek left the city. Morgan stayed in the building after the Greek left sixteen days, and never paid the appellants a cent. He wanted to pay and offered to pay three times, but the appellants refused to accept any rents from the appellees. They gave appellees notice to quit on November 11, 1922, and filed suit on November 13, 1922, and the sheriff put them out.

The testimony for the appellees tended to prove that the Greek was in possession of the space in controversy, doing a restaurant business. Appellees wished to purchase the business, and did buy it from the Greek. They had an agreement with the appellants before they purchased. Appellants made a contract with the appellees and with the Greek that the appellees should have the space for twelve months, provided they paid the rent once a week. Appellees paid one week's rent. The Greek stayed with the appellees a few days after their purchase. When appellees took charge they did not owe appellants any rent. They paid the first week's rent in advance, and tendered the rent for the next week, but the appellants refused to take it. Appellees were put out by the sheriff. They were in business there about sixteen days.

Over the objection of appellants the court permitted the appellees to prove that their net profits were $35 the first week and the second week about $40. They were also permitted to prove, over the objection of the appellants, that they were compelled to sell their furniture and fixtures at a loss, and also that they were not able to get any other place to do business in Texarkana. The court also permitted the appellee Morgan to testify, over the objection of appellants, that he remained in Texarkana, looking for work, for about two months.

The court instructed the jury, in effect, that, if they found from a preponderance of the testimony that the

appellees entered into a contract with the appellants by which the appellants agreed to rent or lease appellees the room in controversy for one year, they should find for the appellees, "and assess their damages at whatever you find from a preponderance of the evidence that they were damaged by having been evicted from the premises." The appellants objected to the instruction as to the measure of damages, and requested the court to instruct the jury that, if they found for the appellees, in arriving at a verdict as to the damages they could not consider any evidence as to the net profits. The court refused this prayer. To the rulings of the court the appellants duly excepted. The jury returned a verdict in favor of the appellees in the sum of $100 damages. The court thereupon entered a judgment that the possession of the premises in controversy be restored to the appellees by the appellants, and that the appellees recover of the appellants the sum of $100 damages, and costs, and ordered a writ of restitution, and also that execution might issue. From that judgment is this appeal.

The court erred in permitting the appellees to testify as to what were the net profits from their business and that, after they were evicted by the appellants, they were compelled to sell their furniture and fixtures, and also that they were compelled to go out of business, and remained in Texarkana two months looking for work. This testimony tended to prove damages which were too remote and speculative to be considered as elements of damage. The appellees were entitled only to the actual damages which they sustained by reason of their eviction from the premises, which the jury found was unlawful.

In *McIlvaney* v. *Smith,* 76 Ark. 468, Judge RIDDICK, speaking for the court, announced the rule applicable to such cases as follows: "When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover in damages whatever loss results to him as a direct and natural consequence of the wrongful act of the landlord. If the rental value of the place from which

he is evicted is greater than the price he agreed to pay, he may recover this excess, and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place." See also *Byers* v. *Moore,* 110 Ark. 504; *Brockway* v. *Thomas,* 36 Ark. 524.

The court erred in its instructions in not confining the jury to the actual damages and in not telling the jury that they could not consider net profits as an element of damage. There is no testimony in the record tending to prove that the rental value of the premises during the time the appellees were ousted was greater than that which they agreed to pay. The appellees testified that, by reason of the eviction, they were compelled to sell their furniture and fixtures, but there is no testimony tending to prove that the price of such furniture and fixtures was in any manner affected by the eviction. The testimony in the record furnishes no predicate upon which the judgment for damages in the sum of $100 can be sustained.

The judgment for restitution based upon the verdict was correct and in accordance with the statute (§ 4854, C. & M. Digest). The errors entering into the judgment related only to the damages, and these can be cured by a remittitur. If therefore the appellees will within ten days remit the damages adjudged against the appellants, the judgment will be affirmed. Otherwise, for the errors indicated, the judgment will be reversed and the cause remanded for a new trial as to the damages.

MISSOURI PACIFIC RAILROAD COMPANY v. WOOD.

Opinion delivered July 14, 1924.

1. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—The verdict of a jury upon conflicting evidence is conclusive.
2. RAILROADS—FIRE—EVIDENCE.—Evidence *held* legally sufficient to sustain finding that fire was communicated to plaintiff's building by a passing locomotive of defendant.
3. DAMAGES—BUILDING DESTROYED BY FIRE.—The measure of damages for a building destroyed by fire is its replacement value, taking into consideration the depreciation of the building before the fire; in other words, the cash market value of the building.

Appeal from Ouachita Circuit Court; *L. S. Britt,* Judge; affirmed.

E. B. Kinsworthy and *Samp Jennings,* for appellant.

Instruction No. 3 as to the measure of damages was erroneous. The proper measure of damages was the difference between the market value of the property before and after the fire. 81 Ark. 13; 67 Ark. 371; R. C. L., p. 480, No. 43; R. C. L., p. 481, No. 44.

Smead & Meek and *Creed Caldwell,* for appellee.

Instruction No. 3 correctly told the jury that the measure of damages sustained by plaintiffs was the reasonable cash market value of the property destroyed at the time and place of the fire. 130 Ark. 522. See also 77 N. W. (Iowa) 517; 33 Cyc. pp. 1389, 1390, 1391. The case in 81 Ark. 13 relied on by appellant is not in conflict with this view. See also 89 Ark. 418; 88 Ark. 533. The plaintiffs were entitled to the amount allowed by the jury. 119 Ark. 143.

McCULLOCH, C. J. Appellees instituted this action against appellant railroad company to recover the value of a building destroyed by fire, which is alleged to have been communicated to the roof of the building from a passing locomotive. The building was rented by appellees to tenants for business purposes, and it was totally destroyed by fire. The value of the building was alleged to be the sum of $2,000, and recovery was asked for that amount, with statutory penalty and attorney's fees.

The appellant answered denying that the fire which consumed the building of appellees was communicated from an engine.

There was a trial of the issues before a jury, which resulted in a verdict in favor of appellee for the value of the building, fixed by the jury at the full amount sought to be recovered by appellees.

The fire occurred between two and three o'clock on the morning of July 13, 1921. The building was situated in the city of Camden, near appellant's track, and testimony was adduced tending to show that a northbound freight train, operated by appellant, passed along the track near the building shortly after two o'clock in the morning of the date mentioned, that the engine was throwing sparks at the time, and that the fire was discovered shortly afterwards. One of the witnesses testified that a fire alarm was sounded about thirty minutes after the train had passed. It was a northbound train, according to the testimony of appellee's witnesses. The witnesses also testified that, when the fire was discovered and the alarm was sounded, it was observed that the roof of the building was on fire, and that there was no fire at first on the inside of the building. Testimony was also introduced concerning the value of the building.

There was a sharp conflict in the testimony in that appellant introduced witnesses whose testimony, if believed, established the fact beyond controversy that the only northbound train on appellant's track which passed through Camden on the night in question was a certain extra freight train, which passed Camden about ten o'clock and arrived at Gurdon about twelve o'clock. Appellant introduced its train dispatchers, and the trainmaster, and the conductor, engineer and fireman of the particular train involved in this controversy. The record of the movement of trains was also introduced, and all this testimony tended very strongly to prove that the only northbound freight train that night was one which passed through Camden about ten o'clock—certainly not

later than eleven o'clock. We cannot, however, treat this testimony as uncontradicted, for several witnesses introduced by appellees testified positively that a northbound freight train passed through Camden on appellant's road about two o'clock or two-fifteen in the morning. There being a conflict, and there being legally sufficient evidence to justify a verdict either way, we are not at liberty to disturb the finding of the jury on that issue.

There is also a conflict in the testimony as to the location of the fire at the time it was discovered and the alarm given. As before stated, appellee's witnesses testified that the roof was burning, and that there was no indication of fire on the inside of the building, but, on the other hand, appellant's witnesses testified that the building was afire on the inside, not on the roof. Appellant also introduced photographs and other testimony tending to show that the building caught from the flue of a stove in the rear end of the building.

It is earnestly insisted that the evidence is not sufficient to sustain the verdict, but we are of the opinion that there is legally sufficient evidence on all of the issues in the case, and that the verdict of the jury is conclusive.

The only other assignment of error relates to an instruction given by the court on the measure of damages, which stated the measure of damages to be the cash market value of the building. It is contended that the measure of damages should have been stated as the difference between the value of the premises before and after the destruction of the building. That question has, however, been put at rest by the decision of this court in the case of *Bush* v. *Taylor,* 130 Ark. 522, where we said that "if the value of the property destroyed depends upon its connection with the soil, the measure of the damages is the difference in the value of the land before and after the fire. But, if the property destroyed could be replaced in substantially the condition in which it existed before the fire, then the measure of the damages is the cost of so replacing it." This means, of course, the

replacement value, taking into consideration the depreciation of the old building, and that is tantamount to saying that the cash market value at the time is the true measure of damages. In the opinion in that case there is pointed out the distinction between destroyed property, such as fruit trees, pasture grasses, etc., which depend for their value upon their connection with the soil.

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

HILL v. WALTHOUR.

Opinion delivered June 16, 1924.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—BOUNDARIES. —As the action of a city council in including certain property within an improvement district is conclusive that it adjoins the locality to be affected, except when attacked for fraud or mistake, so its action in excluding certain property therefrom is conclusive unless it appears to have been left out through fraud or mistake.
2. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—BOUNDARIES. —An ordinance fixing the boundaries of an improvement district which adopted the distance of 150 feet from the improvement as the limit, though a portion of certain abutting lots was thereby excluded from the district, was not arbitrary.

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

Jean & Jones, for appellant.

Rogers, Barber & Henry, for appellee.

McCULLOCH, C. J. Street Improvement District No. 379 was formed by the city council of Little Rock, pursuant to the general statutes of this State, for the purpose of paving Fountain Avenue from Markham Street south 575 feet, and Thayer Avenue from Markham Street south 875 feet, and Grove Circle, a street or avenue extending through the block between Fountain Avenue and Thayer Avenue. The boundaries of the district are described so as to include all land abutting on either of said streets and within 150 feet of either of said streets.

Block No. 2 is circular in shape, but is not a complete circle, and it abuts on Markham Street on the north, on Fountain Avenue on the west, on Thayer Avenue on the east and on Grove Circle on the south. There is a circular area in the center 100 feet in diameter, and the lots are laid off so as to abut on the streets surrounding the circle. The lots are not of uniform width in front nor on the rear, as they abut on the circle in the center of the block, and, on account of the irregularity of the radii, some of the lots are of greater depth than the others. There are sixteen lots in the block, and the shortest one appears, according to the plat, to be 139.5 deep and the longest one 201.9. The north end of block 1 abuts on Grove Circle, and is of irregular shape. There is a semicircular court in the rear of the lots in block 1, abutting on Grove Circle, and this area is reached by an alley, the same as the circular area in the center of block 2. The lots in block 1 abutting on Grove Circle are of irregular depth, some more and some less than 150 feet deep. On account of the irregular length of the lots and the fact that the boundaries of the district extend only 150 feet from the front of the lots as they abut on the streets to be paved, many of the lots are not wholly included in the boundaries of the district; but, on the other hand, the two areas in blocks 1 and 2, and also that portion of the longer lots in excess of 150 feet in depth, are excluded from the district and will not be taxed for the construction of the improvement.

Appellant is an owner of real property in the district, and he attacks the validity of the district on the ground that, by reason of the situation hereinbefore described, property which would be necessarily benefited is excluded, which results in discrimination against the property owned by appellant and other property in like situation.

Appellant relies on decisions of this court which hold that where, in the creation of a district, there is an obvious exclusion of property which would necessarily be benefited, it renders the organization void. *Heine-*

mann v. *Sweatt,* 130 Ark. 70; *Milwee* v. *Tribble,* 139 Ark. 574; *Jones* v. *Road Improvement Districts,* 142 Ark. 73. Those cases are not, we think, applicable to the situation presented in the present case. It has long been the doctrine of this court that "the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake" (*Little Rock* v. *Katzenstein,* 52 Ark. 107), and that the city council "is invested with the same discretion in excluding real property from a district as it is in including it, and the same conclusiveness ought to and does attend its action, the reasons for the same being equally strong or stronger." *Lenon* v. *Brodie,* 81 Ark. 208. The fact that the real property excluded from the boundaries of the district constitutes the back ends of lots which are situated wholly within the outer boundaries of the district does not avert the application of the doctrine of the cases cited above, for, even though the property is thus situated, it cannot be said to have been a demonstrable mistake to conclude that this property, not abutting on any paved street and as much as 150 feet distant, would not receive special benefit from the improvement. The adoption of a uniform boundary line, measured by the distance from the improvement, is certainly not arbitrary, even though property is excluded which is wholly within the outer boundaries of the district. In other words, it cannot be said that the rear end of the lots which abut on the circular court in the middle of the block are necessarily benefited from the improvements of the street on which the front of the lots abut.

The chancery court decided that the attack on the validity of the district is unfounded, and dismissed the complaint for want of equity. This was correct, and the decree is affirmed.

HART, J., dissents.

MURPHY v. MURPHY.

Opinion delivered June 16, 1924.

1. FRAUDULENT CONVEYANCES—VALIDITY INTER PARTES.—A deed executed to defraud creditors is good between the parties.
2. FRAUDULENT CONVEYANCE—RIGHT TO CANCEL.—Under Crawford & Moses' Dig., § 70, providing that the executor or administrator of a fraudulent grantor may sue to set aside and cancel a fraudulent deed "for the use and benefit of the heirs at law of the fraudulent grantor," grantees, not the heirs, of such fraudulent grantor are not entitled to sue for such cancellation.
3. APPEAL AND ERROR—HARMLESS ERROR.—A decree will not be reversed for erroneous reasoning of the trial court if the cause for other reasons should be affirmed.

Appeals from Union Chancery Court, First Division; *J. Y. Stevens,* Chancellor; affirmed.

Melbourne M. Martin and *June P. Wooten,* for appellant.

There is no evidence that appellee was a creditor of J. Warren Murphy, hence he cannot maintain a suit to set aside the deed which he alleged was fraudulently executed. 96 Ark. 531; 121 Ark. 550; 21 Ark. 375; 34 Ark. 291. The deed was good between J. Warren Murphy and appellant. 52 Ark. 171; 52 Ark. 389; 59 Ark. 251; 25 Ark. 181. Conceding that appellee was a creditor, his long delay in bringing suit would bar him from attacking the deed. 34 Ark. 451; 67 Ark. 325; 132 Ark. 462; 59 Ark. 614. The necessary elements to establish adverse possession are lacking. 72 Pac. 9; 33 Fla. 261, 39 A. S. R. 139; 107 Ark. 374; 22 Ark. 79. Fitful acts of ownership are not sufficient. 81 Ark. 258; 84 Ark. 587; 48 Ark. 277. The burden of proof was on appellee to establish his claim from a preponderance of the testimony. 82 Ark. 51; 76 Ark. 426; 79 Ark. 109. See also 89 Ark. 19.

McNalley & Kitchen, for appellee.

This is primarily a suit to remove cloud from title and not to set aside a fraudulent conveyance, as contended by appellant. The deed to appellant never became operative for that purpose. 1 Devlin on Deeds, 3d ed.

pp. 387, 397. There must be an intention of the grantor to part with title. 101 Ill. 429. An acceptance of the deed is essential to pass title. 80 Ark. 8; 13 Cyc. p. 570. Appellee was in possession of the land under deeds and payment of taxes; appellant never asserted any claim under his purported deed, therefore the statute of limitations never did begin to run. 137 Ark. 69; 131 Ark. 22. When relied on as a defense, the statute must be pleaded in equity as well as in law. 78 Ark. 209; 19 Ark. 16; 80 Ark. 181. Where the statute was not pleaded below, it cannot be availed of on appeal. 80 Ark. 218. Adverse possession under color of title and payment of taxes for seven years raises a strong presumption that the possession was continuous. 34 Ark. 598; 38 Ark. 181.

McCULLOCH, C. J. These are two cases which involve the same questions of law and substantially the same facts, and will therefore be disposed of in one opinion. Each case involves the title to certain tracts of land, and the parties claim from a common source. All of the lands were formerly owned by J. Warren Murphy, who conveyed them by deed dated December 11, 1901, to L. D. Murphy, appellant in each of these cases.

Appellee T. W. Daniels claims title to 120 acres of the land—three tracts containing forty acres each—under mesne conveyances from J. Warren Murphy, who executed deeds in the year 1909, long after he had executed the first deed to appellant. O. T. Murphy, the appellee in the other case, who was a brother of J. Warren Murphy, claims title to forty acres of the land under mesne conveyances from J. Warren Murphy. Each of the appellees instituted a separate action against appellant to cancel the conveyance executed by J. Warren Murphy in the year 1901 to appellant L. D. Murphy, and alleged as grounds that the conveyance was executed for the purpose of defrauding creditors of said grantor. Each of the appellees sets up title in the respective tracts of land claimed by mesne conveyances, and each of them also alleges that he has title by adverse possession for

a period of seven years prior to the commencement of the suit.

Appellant filed answer in each of the cases, denying that the conveyance of J. Warren Murphy to appellant L. D. Murphy was executed for any fraudulent purpose, and denying that appellees had title by adverse possession or otherwise.

On the trial of the cause the court found that the conveyance from J. Warren Murphy to appellant L. D. Murphy was executed to defraud creditors, and entered a decree canceling that deed, and vesting title in appellees as to the tracts of land claimed by them respectively.

We are of the opinion that the decree in neither of the cases can be sustained on the ground that the deed was executed to defraud creditors. This is so because neither of the appellees were in position to complain of the fraudulent conveyance. A deed executed to defraud creditors is good between the parties. *Bell* v. *Wilson,* 52 Ark. 171. There is a statute providing that the executor or administrator of a fraudulent grantor may sue to set aside and cancel a deed "for the use and benefit of the heirs at law of the fraudulent grantor, saving the rights of creditors and purchasers without notice." Crawford & Moses' Digest, § 70. This court has decided that the heirs of a fraudulent grantor may institute an action under this statute, where the executor is a party to the conveyance and refuses to sue. *Moore* v. *Waldstein,* 74 Ark. 273. Neither of the appellees bring themselves within the terms of this statute, for neither is executor or administrator of the deceased fraudulent grantor, and neither of them is the heir. The court was therefore in error in decreeing in favor of appellees on this ground. But this does not call for a reversal of the decrees if, for other reasons, they were correct. We are of the opinion that both decrees are correct, for the reason that each of the appellees proved title by adverse possession.

The proof in the Daniels case showed that the tracts of land involved in that controversy were conveyed to

the grantor of appellees in the year 1909, and that possession was immediately taken. Appellee Daniels purchased the land in 1916 and took possession from his grantor, and occupied it up to the commencement of this action in June, 1922. There is a slight conflict in the testimony as to the character and continuity of the possession, but appellant introduced no testimony at all on this issue, and we are of the opinion that the preponderance of the evidence shows that appellee Daniels and his predecessor in title actually occupied the land more than seven years, claiming ownership under color of title. It does not appear from the proof that all of the lands were in cultivation, but, there being color of title and actual possession of a portion, the possession extended, in law, to the full limit of the boundaries described in the deed.

In the other case the proof was even stronger in favor of appellee O. T. Murphy. The record shows that he received a deed of conveyance to the land now claimed by him on October 29, 1910, and he testified that he entered into possession of the land immediately, and actually occupied it under this deed until the commencement of this action, a period of about twelve years. Another reason why the decree in the O. T. Murphy case should be affirmed is that J. Warren Murphy had parted with his title to the forty-acre tract of land involved in that controversy prior to his conveyance to appellant L. D. Murphy in 1901, J. Warren Murphy having conveyed the land to one Whatley in the year 1883, and appellee has a straight title under mesne conveyances from Whatley.

Our conclusion therefore is that in each case the decree was correct, on grounds other than those stated by the court in rendering the decree. Each decree is therefore affirmed.

JONES v. STATE.

Opinion delivered July 14, 1924.

1. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—In a prosecution for murder, an instruction that, if deceased did first assault defendant with intent of inflicting bodily harm less than death or great bodily injury, and it so appeared to defendant, the killing could not be justified, was abstract and prejudicial where there was no testimony calling for submission of such an issue.
2. CRIMINAL LAW—INSTRUCTION—WEIGHT OF EVIDENCE.—In a prosecution for murder the use of an illustration in defining malice that "circumstances may be many and varied, such as lying in wait for the intended victim to pass, and kill him as he approached," *held* not to amount to instructing on the weight of the evidence.
3. CRIMINAL LAW—MULTIPLICATION OF INSTRUCTIONS.—The court is not required to multiply instructions on the same questions.

Appeal from Poinsett Circuit Court, Second Division; *G. E. Keck,* Judge; reversed.

T. A. Turner, Aaron McMullin and *H. P. Maddox,* for appellant.

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

HUMPHREYS, J. Appellant was indicted in the circuit court of Poinsett County for the crime of murder in the first degree for shooting Jesse Adair, on the first day of August, in said county. He was tried upon the charge, convicted of murder in the second degree, and adjudged to serve a term of twenty-one years in the State Penitentiary as punishment therefor. From the judgment of conviction an appeal has been duly prosecuted to this court.

The testimony introduced by the State tended to show that appellant shot, with fatal effect, the deceased, Jesse Adair, in the back, as he was walking away from him.

The testimony introduced by appellant tended to show that he shot the deceased in necessary self-defense as deceased was attempting to draw his pistol with which to shoot appellant; that this attempt was made only a

short time after deceased had threatened to kill appellant, and not long after he had bought a pistol for that avowed purpose.

There was no evidence introduced tending to show that the deceased assaulted or attempted to assault appellant with his hands, a stick, or something with which he could not likely inflict great bodily harm upon or kill appellant. Notwithstanding the fact that the only evidence introduced in support of appellant's plea of self-defense was that deceased attempted to assault him with a pistol at the time he fired the fatal shot, the court, over the specific objection of appellant, instructed the jury as follows:

"The defendant seeks to justify or excuse this homicide on the ground of self-defense. The plea of self-defense is founded solely on the principle of necessity. Before this plea is available in this case, it must have appeared to the defendant, not only that danger to himself at the hands of the deceased was imminent, irremediable and actual, but that it was so pressing and immediately urgent that, to save himself from death or great bodily harm at his hands, the killing of the deceased was necessary, and that he acted in good faith under that apprehension, and not in a spirit of revenge, and that he employed all the means in his power, consistent with his safety, to avoid the danger and to avert the necessity of killing. He was not bound to retreat if the deceased first assaulted him, with an intent to murder or inflict upon him great bodily harm, but might have stood his ground, and, if necessary to save his own life or protect himself from great bodily harm, might have killed his assailant. And if the deceased did first assault the defendant, but did so with the intent of inflicting upon the defendant some bodily harm less than death or great bodily injury, and it so appeared to the defendant, acting without fault or carelessness in coming to such conclusion, then the killing could not be justified on the ground of self-defense."

The specific objection challenges the correctness of the following language used in the instruction, upon the ground that it was abstract and calculated to confuse and mislead the jury:

"And if the deceased did first assault the defendant, but did so with the intent of inflicting upon the defendant some bodily harm less than death or great bodily injury, and it so appeared to the defendant, acting without fault or carelessness in coming to such conclusion, then the killing could not be justified on the ground of self-defense."

This part of the instruction was abstract and prejudicial, for the reason that there was no testimony in the case to call for a submission of the issue stated therein. Testimony presented by the State tended to prove that appellant shot deceased without warning and without any provocation whatever, that deceased made no offensive demonstration at all against appellant. Appellant testified that, when he fired the fatal shot, deceased was in a hostile attitude, drawing a pistol. But there was no testimony to justify a finding that, if deceased was making an assault or hostile demonstration at all, it was to inflict only slight bodily harm, nor that it so appeared to appellant. The instruction was prejudicial, for, being entirely abstract, it may have led the jury into mere speculation as to whether or not deceased meant to inflict an injury less than death or great bodily harm.

Appellant also contends that the court committed reversible error by the use of the following illustration in instructions Nos. 1, 4, and 10, defining malice:

"These circumstances may be many and varied, such as lying in wait for the intended victim to pass and kill him as he approached."

We cannot agree with appellant that the use of this illustration amounted to an instruction upon the weight of the evidence, but it was unnecessary to incorporate it in the instructions to express the idea they intended to convey. The State can suffer no harm by the elimination

of the illustration from the instructions on a new trial of the cause.

Appellant also contends that the court committed reversible error in refusing to give six separate instructions which he requested, being Nos. 2, 3, 4, 5, 6, and 8. We have compared each of them with the several instructions given by the court, and find that they are all covered by the instructions given. The court was not required to multiply instructions upon the same questions.

Appellant contends for a reversal of the judgment upon other grounds than those referred to, but none of them are likely to recur upon a new trial of the cause, so we refrain from discussing them.

On account of the error indicated the judgment is reversed, and the cause remanded for a new trial.

HARDY v. CLOE.

Opinion delivered July 14, 1924.

1. HIGHWAYS—DUTY OF DRIVER OF AUTOMOBILE PASSING TEAM.—In an action for damages caused by plaintiff's team becoming frightened by defendant's automobile, it was error to instruct the jury upon the duty of defendant to stop his automobile, under the statute (Crawford & Moses' Dig., § 7428), which had no application where both vehicles were going in the same direction.
2. HIGHWAYS—CARE IN PASSING TEAM—JURY QUESTION.—In an action for damages for injuries sustained when defendant's automobile passing plaintiff's team made them unmanageable, what defendant should have done in the exercise of ordinary care *held* for the jury.
3. HIGHWAYS—NEGLIGENCE—JURY QUESTION.—In an action for injuries sustained when defendant's automobile in passing plaintiff's team made them unmanageable, whether defendant was negligent in driving at an unreasonable speed, or in passing on the wrong side, or in driving unnecessarily close to the plaintiff's team, *held* for the jury, without reference to Crawford & Moses' Dig., § 7428.
4. NEGLIGENCE—REFUSAL OF INSTRUCTION ON CONTRIBUTORY NEGLIGENCE.—In an action for damages for injuries sustained when

defendant's automobile frightened plaintiff's team in passing and made them unmanageable, an instruction to the effect that plaintiff was guilty of contributory negligence if he had recently been injured and had not fully recovered his strength, was properly refused, though such fact could be considered by the jury in determining whether plaintiff was negligent.

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

Rice & Rice, for appellant.

Vol T. Lindsey, for appellee.

SMITH, J. Appellee alleged and offered testimony tending to show that he was driving a wagon loaded with hay, drawn by a team of mules, on one of the public roads of Benton County, and that appellant, who was driving an automobile at an excessive speed, going in the same direction, passed him by going to his right and so near the wagon as to frighten his team. That he lost control of the team, and some of the bales of hay were thrown from the wagon, and he fell in front of the wagon, which ran over him and broke his leg. That appellant gave no warning of his approach, and, when he discovered appellant's presence, he attempted to drive over on the right-hand side of the road to allow appellant to pass, but, before he could do so, appellant flashed by so close to the wagon and at such speed as to frighten the mules and to cause them to become unmanageable.

Appellant denied that he was driving rapidly, and testified that his car was under complete control, but that appellee was driving in the middle of the road, but nearer the right than the left side of the road, and that he blew his horn for appellee to pull over to the right to allow him to pass on the left, and, when appellee failed or refused to give him space to pass on the left, he drove by on the right, where there was more space for passing. That the team did not appear to be frightened, and that he drove by without knowing that they had become so, and that he knew nothing of appellee's injury until he was told about it later.

The court gave, over appellant's objection, an instruction numbered 2, reading as follows: "The court

charges the jury that § 12 of act 134, Acts of 1911, reads as follows: 'Whenever it shall appear that any horse, ridden or driven by any person upon any of said streets, roads and highways, is about to become frightened by the approach of any such motor vehicle, it shall be the duty of the person driving or conducting such motor vehicle to cause the same to come to a full stop until such horse or horses shall have passed, and, if necessary, assist in preventing accident. Any person convicted of violating this section shall be fined in any sum not to exceed two hundred dollars.' "

Upon objection being made to this instruction, the court added the following modification: "But, before the defendant in this case could be held to be liable under this section, it must appear to him as his reasonable belief that the team driven by the plaintiff in this case was about to become frightened by the approach of defendant's motor vehicle, or had become frightened."

The instruction as thus modified was also objected to, and an exception was saved to the action of the court in giving it.

The giving of this instruction was error, for the reason stated in the case of *Fleming* v. *Oates,* 122 Ark. 28, where the same instruction was given, it being copied from § 12 of act 134, of the Acts of 1911, found as § 7428, C. & M. Digest.

In that case, as in this, the automobile had passed a slower vehicle, both going in the same direction, and we there said: "The purpose of that statute was to require drivers of automobiles to come to a full stop when they observe that an approaching horse, ridden or driven by another traveler, is about to become frightened. The statute imposes an absolute duty on the driver of the automobile to stop, and liability for damages arises from a violation of that statute. We think, however, that the statute was not intended to impose the absolute duty upon the driver of an automobile to stop his machine because a team in front, going in the same direction,

appears to be frightened, but, under those circumstances, it is left to a trial jury to say whether, under all the circumstances of the case, the driver of the automobile had been guilty of negligence."

Again construing this statute in the case of *Russ* v. *Strickland,* 130 Ark. 406, we said: "Since the enactment of this statute, the driver of a car cannot determine for himself whether it is as safe or safer to proceed than it is to stop (where he is meeting a frightened team). The law has decreed that he must stop his car, and he is under the duty to do so, although, in his opinion, some other course may be safer. His failure to stop the car under these circumstances is therefore negligence, and renders him liable for any injury of which it is the proximate cause, provided the party injured is not himself guilty of negligence contributing to his injury."

This section of the statute does not undertake to define what action the driver of the automobile shall take when he passes an animal being driven in the same direction, and the statute therefore has no application under the facts of this case. The driver of the automobile must, of course, exercise ordinary care in doing so, but the measure of this care has not been defined by the statute, except where one meets a frightened team, so that it is a question of fact in such cases as the instant one for the jury to decide what the driver of the car should have done in the exercise of ordinary care, and this conclusion should be reached without considering the statutory requirement applicable to a different situation.

The modification or addition to the instruction did not cure this error because, as we have said, the statute did not apply to the facts of this case.

Instruction numbered 3, given at the request of the appellee, is substantially to the same effect, and was erroneous for the same reason.

Other instructions given properly submitted to the jury the question whether appellant was driving at an unreasonable speed, and, if so, whether this was the

proximate cause of the injury, and whether also, under the circumstances, it was negligence for appellant to have passed the wagon on the right side instead of passing it on the left.

Appellant may have been negligent in driving at an unreasonable speed, or in passing on the wrong side, or in driving unnecessarily close to the team; but these were questions of fact to be passed upon by the jury, without reference to the statute copied into instruction numbered 2, and, if appellant was guilty of negligence in any of these respects, appellee would have the right to recover, unless he was himself guilty of negligence contributing to his injury.

An instruction asked by appellant on the subject of contributory negligence was refused by the court. This instruction was based upon testimony that appellee had been previously and recently injured in an automobile accident, and had not fully recovered his strength, and the requested instruction would, if given, have told the jury that this constituted contributory negligence. This instruction was properly refused, for the reason that it constituted a charge upon the weight of testimony. It was, of course, proper for the jury, in passing upon the question of appellee's contributory negligence, to consider whether his physical condition was such that he was unable to exercise that control over his team which another traveler on the road had the right to expect; but this was a question of fact for the jury, and not one of law for the court.

Except in the particulars indicated the case appears to have been submitted under correct instructions, but, for the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

HALE HARDWARE COMPANY v. RAGLAND.

Opinion delivered July 14, 1924.

1. MASTER AND SERVANT—WRONGFUL DISCHARGE—DUTY TO SEEK OTHER EMPLOYMENT.—A salesman, wrongfully discharged, is not bound to seek or accept other employment of a different character in order to minimize his employer's damages.
2. MASTER AND SERVANT—RIGHT TO DISCHARGE SERVANT.—The general rule is that an employer may lawfully refuse to continue in his employ a servant who has shown himself to be negligent, incompetent, inefficient or dishonest.
3. MASTER AND SERVANT—INJURY TO MASTER'S BUSINESS.—A servant, while engaged in the master's service, has no right to do any act which may injure his trade or undermine his business.
4. MASTER AND SERVANT—INJURY TO MASTER'S BUSINESS—EVIDENCE.—Evidence *held* not to show that a discharged servant was wilfully and knowingly guilty of any acts which tended to injure the business of his employer.
5. MASTER AND SERVANT—WRONGFUL DISCHARGE—REDUCTION OF DAMAGES.—Where a wrongfully discharged servant obtained employment for a time after his discharge, he thereby reduced the amount he was entitled to recover from his employer as damages for his wrongful discharge.

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

E. G. Mitchell, M. A. Hathcoat, Worthington & Williams, for appellant.

Even if the contract relied upon by appellee was made, it was fraudulent, and the appellant was not bound by it. 33 Ark. 425; 12 R. C. L. pp. 238 and 239, §§ 1 and 2; Words & Phrases, vol. 2, "Fraud," p. 268. Though fraud was not raised by the pleadings, the court should have treated the pleadings as amended to conform to the proof. 124 Ark. 388; 98 Ark. 312; 100 Ark. 212; 152 Ark. 203. Appellee's demeanor to customers, and the fact that he was injuring the business of the company, were sufficient grounds for his discharge, even in the face of the contract. 58 Ark. 504; Wood, Master & Servant, pp. 167, 210, 211, 232; 26 Cyc. 987; 89 Minn. 77; 20 A. & E. Enc. Law, 2nd. ed. p. 33.

George J. Crump, for appellee.

Fraud will never be presumed where the act does not necessarily import fraud and may have as well occurred from a good as a bad motive. 17 Ark. 151; 9 Ark. 482; 11 Ark. 378; 22 Ark. 184; 144 Ark. 88. While appellee did make an effort to seek any kind of employment, he was not required to seek or accept employment of a different character. 158 Ark. 329; 58 Ark. 622; 9 Ark. 394; 63 Barb. 177; 2 Denio 609; Wood, Master & Servant, p. 250; 2 Sutherland on Damages, § 693.

HART, J. On the 22d day of December, 1922, the Hale Hardware Company brought suit in the chancery court against E. A. Ragland to obtain judgment for $40.26 for materials used in constructing a certain building in Harrison, Arkansas, and to declare the amount of said judgment a lien on said building.

E. A. Ragland filed an answer, in which he admitted that he owed the Hale Hardware Company the amount sued for, and, by way of cross-complaint, asked judgment against it for $725 as compensation due him for a breach of contract of employment.

The chancellor rendered a decree in favor of E. A. Ragland against the Hale Hardware Company for $559.74, and the case is here on appeal.

E. A. Ragland was the principal witness for himself. He admitted owing the Hale Hardware Company $40.26, and based his right to recover against the hardware company on the ground that he had been wrongfully discharged from its service. During the year 1921, and for several years prior thereto, the Hale Hardware Company was engaged in selling hardware at retail in the city of Harrison, Arkansas, and Ragland had been in its employment as a salesman. Prior to the year 1921 he had been employed by the month. At the first of the year 1921 John Hale, who was the manager of the business of the hardware company, employed E. A. Ragland to work for it for a period of one year at a salary of $1,500, to be paid in monthly installments. Ragland discharged his duties as salesman for the hardware com-

pany in a faithful and efficient manner. In the first part of July, 1921, he was discharged without any cause. There was another hardware firm in Harrison, and Ragland endeavored to obtain employment from it, and failed. He also went to other towns and cities and tried to get employment, but failed to do so. During the remainder of the year he worked at some other employment and made a small amount of money.

Ragland's testimony that he was employed for a year at a salary of $1,500 was corroborated by E. O. Lopp, a fellow-salesman, who was present when the contract of employment was made. John Hale was discharged as manager of the Hale Hardware Company soon after he employed Ragland, and Ragland was discharged by F. M. Angel, who succeeded Hale as manager of the hardware company.

John Hale was a witness for the Hale Hardware Company. He denied having employed Ragland for a year at a salary of $1,500, but stated that he had employed him by the month at a salary of $125. Hale denied having admitted to Ragland, in the presence of the latter's brother-in-law, that he had employed him for a year for $1,500, to be paid at the rate of $125 per month.

Ragland's brother-in-law testified that Hale made such an admission to him in the fall of 1921, after Ragland had been discharged.

Prior to his discharge, Ragland was paid every two weeks at the rate of $125 per month. Under this state of the record, the chancellor found that Ragland had been wrongfully discharged, and that the Hale Hardware Company owed him for the balance of his salary, $600 less $40.26 due by Ragland to the company, leaving a balance due Ragland of $559.74.

It cannot be said that the finding of the chancellor that the Hale Hardware Company had hired Ragland for a year for $1,500 was against the preponderance of the evidence. The company admitted that it only paid him up to the time of his discharge, during the first part of July. It was Ragland's duty to seek and accept other

like employment, but he was not required to seek or accept employment of a different character. *Van Winkle* v. *Satterfield,* 58 Ark. 617, and *Williams* v. *Robinson,* 158 Ark. 327.

The Hale Hardware Company claims, however, that it had grounds for discharging him. The general rule is that any person may lawfully refuse to continue in his employ a servant who has shown himself to be negligent, incompetent, inefficient, or dishonest. Ragland was impliedly bound by his contract of employment to serve the Hale Hardware Company faithfully and to refrain from doing any act knowingly and wilfully which might injuriously affect the business of his employer. This court has expressly held that a servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business. *McMurray* v. *Boyd,* 58 Ark. 504.

The main grounds relied upon for discharging Ragland is that he was injuring the business of the hardware company by driving off its customers on account of his sympathy with the railroad strikers.

It appears from the record that, during the year 1921, there was a strike by the railroad employees at Harrison, Arkansas, and other points along the line of railroad running through Harrison and that portion of the State. The positions held by the strikers had been supplied by other persons, and the feeling between the strikers and those taking their places had become very bitter. The people along the line of the railroad took sides in the matter, because the railroad strike injured all classes of business along the railroad. The citizens were divided in the matter. Some of them sympathized with the strikers, and others became imbittered against them. F. M. Angel, the manager of the Hale Hardware Company, who discharged Ragland, said that it was his policy not to take sides, either for or against the strikers. He does not say, however, that he told Ragland that he must quit talking with the strikers in the store or refuse to allow them to congregate there. He does not even

testify that he directed Ragland to avoid sympathizing with the strikers in the store. He said that it was generally understood that Ragland was in sympathy with the strikers, and that he would allow them to congregate in the store, and would talk with them.

A number of other witnesses testified that they had quit trading with the store because they understood that Ragland sympathized with the strikers and permitted them to congregate in the store. All admitted that the feeling between the two factions had become very acute.

Angel further testified that, on one occasion, Ragland delayed about waiting on a customer. We do not think the evidence on this point was strong enough to warrant Angel in discharging Ragland for neglecting the business or injuring it. Ragland denies that he, on any occasion, neglected to wait on the customers or that he was not courteous to them. The proof does not show that he allowed the strikers to congregate in the store and act in a tumultuous or overbearing manner towards other customers of the store. The strikers were accustomed to purchasing goods from the store as they needed them. It does not appear that Ragland permitted the strikers to become boisterous or otherwise annoy the other customers. None of them heard him use any offensive language against those not in sympathy with the strikers. They said that his general attitude was one of sympathy for the strikers, and that they would see him talking with little groups of them in the store.

It is fairly inferable that the customers who quit trading at the store did so because they believed that Ragland was in sympathy with the strikers; but their conduct in this regard was the result of their own bitterness in the matter, and was not caused by the acts or conduct of Ragland. It does not appear that he did anything of an affirmative character that warranted the customers in carrying their trade to another store. If Ragland had been guilty of any affirmative conduct in the premises which caused them to quit trading with the Hale Hardware Company, this would have been grounds

for his discharge; but his mere sympathy with the strikers and his act in allowing them to meet in the store in a quiet manner was not cause for his discharge. It does not appear that Angel forbade him talking with the strikers or expressing his sympathy with them. As the situation became more acute and the two factions became more bitter towards each other, it was apparent that it would be difficult for the same store to keep both factions as its customers.

After examining the evidence carefully it does not seem to us that Ragland was guilty of any overt acts or conduct wilfully and knowingly which would tend to injure the business of his employer. He might have thought his quiet sympathy with the strikers would hold their trade, and that he would not lose the trade of the other faction. If Angel thought otherwise, he should have advised or directed Ragland what course to pursue in the matter during business hours. In any event, the evidence does not show that he was wilfully and knowingly guilty of acts which of themselves tended to injure the business of his employer.

Upon the cross-appeal it need only be said that Ragland obtained other employment for a time after his discharge, and thus reduced the amount he was entitled to recover. It cannot be said that the weight of the evidence is against the finding of the chancellor in any respect, and the decree will be affirmed.

INTERSTATE JOBBING COMPANY v. VELVIN.

Opinion delivered July 14, 1924.

1. CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—LIABILITY.—Where the president and secretary of a business corporation failed to file the annual report required by Crawford & Moses' Dig., § 1715, they became personally liable for the debts of the corporation contracted during the year of their default, under § 1726, *Id.*
2. CORPORATIONS—FAILURE TO FILE ANNUAL REPORT—LIABILITY.—Where the president and secretary of a corporation failed to

file the annual report during 1921, and hence were liable for its debts incurred during that year, their liability was not reduced by payments on account during the year which were applied by the creditor to earlier items.

Appeal from Hempstead Circuit Court; *James H. McCollum,* Judge; reversed.

STATEMENT OF FACTS.

Appellant brought this suit against appellees to enforce the statutory liability against them for failing to make their annual report as president and secretary of a corporation.

Appellant, Interstate Jobbing Company, is a domestic corporation, doing business at Little Rock, Arkansas, for the years 1919, 1920, 1921, and since that time. During the years 1919, 1920, and 1921, it sold to the Farmers' Mercantile Company, a domestic corporation, at Washington, Arkansas, merchandise to the amount of $2,882.70. Of this amount $493.40 was furnished during the year 1921. Payments on the account were made to the amount of $2,423.25. Of this amount $350 was paid by the Farmers' Mercantile Company during the year 1921. The Farmers' Mercantile Company was subsequently adjudged to be a bankrupt, and the appellant received a dividend from the bankrupt court in the sum of $51.05. The appellant filed an itemized account, duly verified, and attached the same to the complaint in this case, which was also duly verified. The itemized account showed a balance due the appellant of $459.45.

E. D. Velvin was president of the Farmers' Mercantile Company from January 1, 1921, until December 1, 1921. R. L. Byers was secretary of the Farmers' Mercantile Company from the time of its organization until December 1, 1921. No report was filed by the president and secretary of the corporation for the year 1920, as required by § 1715 of Crawford & Moses' Digest. No report, as such officers of said corporation, was filed by E. D. Velvin and R. L. Byers from January 1, 1921, to December 1, 1921. The last item of goods purchased by the Farmers' Mercantile Company from the Interstate

Jobbing Company was on September 12, 1921, and the last payment was on September 28, 1921.

There was a verdict and judgment in favor of appellees, and the case is here on appeal.

E. F. McFaddin, for appellant.

Instruction No. 1 was error. In the absence of an application of payments by the debtor, the law applies the payment in liquidation of the oldest item of the account. 91 Ark. 458, and cases cited; 30 Cyc. 1227; note 12 L. R. A. 712. The liability of the president and secretary for failure to file the report required by § 1715, C. & M. Digest, was primary and absolute. 90 Ark. 51; 68 Ark. 433; 78 Ark. 517. Instruction No. 11, which was requested by appellant and refused, states the law as set out in 124 Ark. 495. See also 68 Ark. 433; 75 Ark. 107; 90 Ark. 51; 96 Ark. 268; 92 Ark. 327; 111 Ark. 37; 123 Ark. 226.

HART, J., (after stating the facts). The first assignment of error is that the court erred in amending and giving as amended the following instructions:

"Under the laws of the State of Arkansas, it is the duty of the president and secretary of an Arkansas corporation to file in the office of the county clerk of the county in which the corporation is domiciled and carrying on business, an annual report, not later than February 15 or August 15 of each year, showing the condition of affairs of the corporation of which they are officers. And the law further provides that, should the president and secretary neglect or fail, whether intentionally or not, to file the said report, then by such failure the said president and secretary become jointly and severally liable for all debts contracted by the corporation after the date of the failure to file such annual report. And if you find in this case, from the preponderance or greater weight of the evidence, that the Farmers' Mercantile Company was an Arkansas corporation, domiciled and carrying on business in Hempstead County, Arkansas, and that E. D. Velvin and R. L. Byers were the president and secretary of the corporation, and failed to file the report required by law,

and that, after the date of the failure to file such report, the account sued on herein was contracted, then your verdict herein should be for the plaintiff, and against the defendants and each of them, for whatever amount of accounts, if any, you find were contracted by the Farmers' Mercantile Company with the plaintiff herein after the failure to file the report required by law, less whatever sum, if any, you may find from a preponderance of the evidence the Farmers' Mercantile Company paid to the plaintiff during 1921."

The amendment consisted in adding the words, "less whatever sum, if any, you may find from a preponderance of the evidence the Farmers' Mercantile Company paid to the plaintiff during the year 1921."

In the first place, it may be stated that this suit is based upon the liability of the president and secretary of a corporation for its contract debts, under the provisions of § 1726 of Crawford & Moses' Digest, for failing to comply with the provisions of § 1715 of the Digest. The debt sued on was a debt by contract, and the uncontradicted evidence showed that the officers of the corporation failed to file the annual report required of them by statute. Hence their personal liability for the debt of the corporation contracted during the period of default was established. *Taylor* v. *Dexter,* 126 Ark. 122, and *Galloway* v. *Stallings,* 154 Ark. 16.

No annual report, as required by § 1715 of the Digest, was filed by appellees as president and secretary of the corporation during the year 1921. Merchandise to the amount of $493.40 was furnished to said corporation by appellant during that year. Under the instructions of the court the payments for the year 1921 were allowed to be credited on the items purchased during that year. This was wrong. There was no application by the debtor of these payments to the goods purchased by the Farmers' Mercantile Company during the year 1921, and nothing to show that the credits were intended to be applied on these items, within the rule announced in *Terry* v. *Klein,* 133 Ark. 366. Hence the appellant had

the right to apply the payments made in 1921 to the earlier items of the account. *Briggs* v. *Steele*, 91 Ark. 458, and cases cited, and *Snow* v. *Wood*, 163 Ark. 280.

It follows that the court erred in amending and giving as amended the instruction set out above. For that error the judgment must be reversed, and the cause will be remanded for a new trial.

PETROLEUM PRODUCERS ASSOCIATION *v.* FIRST NATIONAL BANK.

Opinion delivered July 14, 1924.

1. EXCEPTIONS, BILL OF—TIME FOR FILING.—Where time is allowed for filing a bill of exceptions beyond the term for a given number of days, the rule for computing the period allowed is to exclude the day on which the order granting time is made and to include the last day.
2. EXCEPTIONS, BILL OF—SIGNING AND FILING.—Where time is allowed for filing a bill of exceptions, the bill should not only be signed but should also be filed within that time.
3. APPEAL AND ERROR—FILING BILL OF EXCEPTIONS OUT OF TIME.—Where a bill of exceptions is filed out of time, it does not present the evidence upon which any issues of fact were heard in the trial court.
4. APPEAL AND ERROR—PRESUMPTION FROM ABSENCE OF BILL OF EXCEPTIONS.—In the absence of a bill of exceptions, the Supreme Court will presume that the issues of fact were correctly determined in the trial court.

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

George F. Jones, for appellant.

E. L. Matlock, for appellee.

WOOD, J. Actions were instituted by the First National Bank of Van Buren in the justice court on certain promissory notes executed separately by J. L. McLeroy, J. C. Armstrong and F. L. Greenstreet. Some of the notes were made payable to the Rose City Petroleum Corporation (hereafter called corporation),

and some were made payable to "myself," and the name of the maker indorsed on the notes. The total amount of the several notes was about $400. It is alleged that the notes were given to one Carl Shibley, a stock salesman for the corporation, and that he indorsed the name of the corporation on all of the notes, and that the bank in due course purchased the notes. The Petroleum Producers' Association (hereafter called association), a common-law trust, through its sole trustee, Dr. Fred A. Cook, was made a party defendant. It was alleged that the corporation was the owner of certain lots in the city of Van Buren, and that it sold same to the association with the fraudulent intent to cheat, hinder and delay the creditors of the corporation. Attachments were issued and levied upon certain lots in the city of Van Buren. The several makers of the notes filed no answer. No affidavits were filed controverting the grounds for the attachments.

The corporation defended on the ground that it knew nothing of the indorsement of its name on the notes, and alleged that Shibley had no authority to indorse its name thereon. The causes were tried in the justice court, and judgment was rendered in favor of the appellee, and the attachments were sustained, and the property directed to be sold. The causes were appealed to the circuit court, where they were consolidated for trial. In the circuit court the association, through its trustee, defended on the ground that it purchased of the corporation the attached property in good faith, for a valuable consideration, and knew nothing of the notes upon which the actions were based. The trial resulted in separate verdicts and judgments in favor of the plaintiff against each of the several defendants in the original actions, and the attachments were sustained. The association, by Dr. Fred A. Cook, trustee, through his attorney, filed a motion for a new trial, which was overruled on the 25th day of July, 1923, and the order overruling the motion recites that "the defendant excepts, and prays an appeal to the Supreme Court, which prayer is granted, and ninety days given

in which to file a bill of exceptions." The bill of exceptions was presented to the trial judge and signed by him on the 24th of October, 1923, and was that day filed with the clerk of the circuit court of Crawford County.

"Where time is allowed by the trial judge for filing a bill of exceptions beyond the term for a given number of days, the rule for computing the period allowed is the same as that of any other statute of limitations, and it excludes the day on which the order granting the time is made and includes the last day." *Early & Co.* v. *Maxwell & Co.,* 103 Ark. 569; *Peebles* v. *Columbian Woodmen,* 111 Ark. 435. Computing the time according to the above rule, the bill of exceptions in the case at bar was filed on the ninety-first day after the order was made, and was thus out of time. According to numerous decisions of this court, where time is allowed for filing a bill of exceptions, the bill should not only be signed within the time, but should be filed with the clerk within the time so allowed. *Pekin Stave Co.* v. *Watts,* 95 Ark. 331; *Early & Co.* v. *Maxwell & Co., supra; Peebles* v. *Columbian Woodmen, supra.* Where a bill of exceptions is signed and filed after the expiration of time given for preparing and filing same, it does not present the evidence upon which any issues of fact were heard in the trial court. *Ingles* v. *Oklahoma Oil & Gas Co.,* 163 Ark. 270; *Routh* v. *Thorpe,* 103 Ark. 46.

The errors of which appellant here complains do not appear upon the face of the record, and, in the absence of a bill of exceptions, we must indulge the presumption that the issues of fact in the court below were correctly determined. The record presents no error in the rulings of the trial court, and its judgment is therefore affirmed.

SCOTT v. BROWN.

Opinion delivered July 14, 1924.

PARENT AND CHILD—CUSTODY OF CHILD.—Where defendant, having secured the custody of her child by an abuse of process, was ordered by the court to restore the child to plaintiff's custody, on a subsequent motion by plaintiff to enforce such order defendant was entitled to show that she had performed such decree by restoring the child to plaintiff's custody as ordered, and that the child subsequently came into defendant's custody without fraud or collusion on her part, as in such case she would have a right to trial of the issue as to the right of custody.

Appeal from Crittenden Chancery Court; *J. M. Futrell,* Chancellor; reversed.

Scott & Burnett, for appellants.

George E. Neuhardt, for appellee.

McCULLOCH, C. J. This appeal involves a continuation of the controversy between the parties concerning the custody of a child, Nellie Josephine Brown by name. The facts are recited in the opinion of this court on a former appeal. 160 Ark. 490. Mrs. Brown, the appellee, is the mother of the child, and the child has heretofore been, and is now, in the custody of Mrs. Scott. Mrs. Brown resides in Tennessee, and at one time consented for Mrs. Scott to take the child, but later Mrs. Brown obtained possession of the child in Tennessee, and Mrs. Scott sued out a writ of habeas corpus in one of the courts of Shelby County to obtain the custody of the child. After securing the custody of the child in that way, Mrs. Scott brought the child to Arkansas, where she resides. Mrs. Brown then instituted an action in the chancery court of Crittenden County against Mrs. Scott, and the decree was in her favor, from which an appeal was prosecuted.

In affirming the decree of the chancery court we declined to consider the questions as to the best interests of the child or the rights of the parties with respect to the custody of the child, further than to determine that Mrs. Scott, having secured the custody under process of a Tennessee court, could not litigate her right to the custody of the child here until she had restored the

custody to Mrs. Brown and abided by the judgment of the Tennessee court. In the opinion we said:

"The question therefore as to what the best interests of the child are, and what the rights of the parties are with respect to the child, cannot be adjudicated until there is a restoration of the custody wrongfully obtained through the writ issued by the Tennessee court. A court of this State should not lend its aid to the enjoyment of a benefit secured in that way, and, if the appellants desire to contest for the custody of the child, they must do so after having restored it to the custody of the appellee, Mrs. Brown, within the jurisdiction of the Tennessee court, where the custody was wrongfully obtained."

Appellee filed in the chancery court of Crittenden County the mandate of this court affirming the decree, and moved the court for an order on appellant requiring her to perform the decree by restoring to appellee the custody of the child. Appellant appeared in court and filed her petition, setting forth the fact that she had complied with the court's decree by restoring the custody of the child to appellee in Tennessee and by dismissing her petition for habeas corpus pending in the Tennessee court. Appellant exhibited with her petition certified copies of the records of the Tennessee court showing the dismissal of her action. The prayer of the petition of appellant was that an order be entered showing that the decree of the court had been complied with before the filing of the mandate and that the decree was thereby satisfied. The court refused to entertain appellant's petition, and entered the order, as requested by appellee, requiring appellant to immediately deliver the child to appellee, and, in the event of appellant's failure to do so, directed the sheriff of the court to carry out the order. Appellant saved exceptions, and has prosecuted an appeal to this court.

Appellant filed a petition in this court for a certiorari, which was denied on the ground that any review of the action of the chancery court must be by appeal. The petition alleges the facts to be that appellant com-

plied with the former decree of the chancery court by twice delivering the custody of the child to appellee in the State of Tennessee, but that the child subsequently voluntarily left the State of Tennessee and returned to appellant's home in Crittenden County, Arkansas. We are not at liberty to consider the allegations of the petition filed here, for it was not a part of the record in the court below. But the record does show that, at the time this motion was made by appellee to require appellant to comply with the former decree, the child was then in the custody of appellant, and that appellant offered to show that she had, prior to that time, and prior to the filing of the mandate of this court, fully complied with the decree. We are of the opinion that the court erred in summarily entering an order directing appellant to deliver the child to appellee, and in refusing to hear appellant on her petition alleging that she had theretofore fully complied with the original decree. The judgment of this court was merely one affirming the decree of the chancellor, but, in stating the reasons for affirmance, we said that appellant was not in an attitude to litigate for the possession of the child and could not do so until she had restored the custody to appellee. She had the right therefore to show that she had fully complied with those requirements and had delivered the child to the custody of appellee in Tennessee. According to appellant's contention, she is now in an attitude to contest with appellee her right to obtain the custody of the child. If she restored the child in good faith, and if the child subsequently came into the custody of appellant without any fraud or collusion on the part of the latter, she had the right to a trial of the issues which we decided could not be tried in the other case.

The decree is therefore reversed, and the cause remanded for further proceedings, with directions to hear such proof as may be offered on the question whether or not appellant has complied with the former decree of the court by in good faith restoring the custody of the child to appellee. It is so ordered.

MOSAIC TEMPLARS OF AMERICA v. WOOLFOLK.

Opinion delivered June 16, 1924.

INSURANCE — COMPROMISE OF CLAIM—EVIDENCE.— Where plaintiff's father, having no authority to compromise plaintiff's claim on an insurance policy for $300, signed a receipt for plaintiff, acknowledging receipt of $150, but failed to sign a receipt on another page of the instrument reciting payment in full, a finding that plaintiff did not release his claim for the full amount of the policy will be sustained.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

STATEMENT OF FACTS.

James Woolfolk sued the Mosaic Templars of America to recover $150 alleged to be due him on a policy of insurance issued by that company. The defendant denied liability.

It appears from the record that the Mosaic Templars of America, a fraternal benefit association, issued a policy of life insurance to Gertrude Blount in the sum of $300. She afterwards married James Woolfolk. The policy, by its terms, was made payable to the husband, mother, father, sister, brother, or relative by blood to the fourth degree of the insured, in the order named. Gertrude Blount Woolfolk died on August 24, 1920, and, according to the evidence for the plaintiff, had paid all dues and assessments to the defendant at the time of her death. The proof of death of the insured was made in accordance with the terms of the policy.

The defendant issued what it termed its voucher check, a part of which we copy as follows:

"ENDOWMENT DEPARTMENT.

"July 20, 1921. No. 21788.

"Upon the payee executing in ink the receipt on back of this voucher check, on demand pay to the order of James E. Woolfolk $150, one hundred fifty dollars.

"(Signed) C. E. BUSH,

"National Grand Scribe and Treasurer M. T. A.

"To England National Bank 81-15, Little Rock, Arkansas."

The "voucher check" then recites the death of the insured, the date thereof, and the handing of the check to an officer of the defendant company. Then comes the following:

"VOUCHER CHECK.

"No. 21788. $150.00

"Payable to James E. Woolfolk.

"(Signed) James E. Woolfolk.

"S. L. Woolfolk."

After this the "voucher check" contains, among other things, the following:

"Received the amount stated in this voucher check in full payment of the within account.

"..... Payee."

According to the testimony of the plaintiff, James Woolfolk, his father, S. L. Woolfolk, did not have the authority to accept the voucher in full payment of his claim, and, according to the testimony of S. L. Woolfolk, he did not accept the voucher in settlement of the claim of his son against the defendant company.

According to the evidence adduced by the defendant, the assured was in default for nonpayment of dues at the time of her death, and had forfeited her rights under the policy, and the "voucher check" in question was delivered to S. L. Woolfolk for James E. Woolfolk as a compromise of the amount claimed by the face of the policy, and was intended to be in full settlement of all claims of James E. Woolfolk against the company under the policy sued on.

The jury returned a verdict in favor of the plaintiff in the sum of $150, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Scipio A. Jones and *Thomas J. Price,* for appellant.

The check issued by appellant and accepted and cashed by appellee constituted an accord and satisfaction. The amount of the claim was in dispute; the check stated that it was in full of the amount due, and by cashing same appellee agreed to the condition. See

216 Mass. 204; 94 Ark. 158; 49 Col. 275; 32 App. Cas. (D. C.) 392; 83 Ohio St. 169; 98 Ark. 271. Appellee is estopped from further collection on the claim. 100 Ark. 251; 1 C. J. par. 81.

Sherrill & Mallory, for appellee.

Acceptance of tender or remittance from debtor on a disputed claim does not constitute accord and satisfaction, unless clearly indicated by the facts and circumstances to be in full payment. 148 Ark. 655. Appellee refused to sign the release agreement on the back of the check, and the appellant waived this omission.

HART, J., (after stating the facts). The court instructed the jury that, if it believed from the evidence that all dues of Gertrude Blount Woolfolk were paid to the defendant company in accordance with the terms of the policy, then the plaintiff was entitled to judgment for the amount sued for, unless it should further find that the plaintiff accepted the money previously paid as full settlement of the amount due under the policy.

It is contended by the defendant that it was entitled to a directed verdict. Counsel for the defendant claim that the undisputed evidence shows that the plaintiff accepted the $150 paid him in full settlement of the amount due him under the policy sued on.

We cannot agree with counsel in this contention. It appears from the record that what is called the "voucher check" was folded through the middle, making four pages of it. On one page of the "voucher check" appears the signature "James E. Woolfolk, by S. L. Woolfolk." On a subsequent page, which is the last page of the voucher, is the following: "Received the amount stated in this voucher check in full payment of the within account.

"..... Payee."

It will be noted that this receipt is not signed by any name, and is on the last page of the "voucher check." The signature of James E. Woolfolk by S. L. Woolfolk is contained on a previous page of the "voucher check." James E. Woolfolk testified that S. L. Woolfolk did not

have authority to accept the "voucher check" in full settlement of the amount claimed by him, and the latter testified that he did not accept the voucher in full settlement of the claim of his son against the defendant company.

Under these circumstances we do not think it can be said that the undisputed evidence shows a settlement in full or a release by the plaintiff of his claim of $300 against the defendant, in consideration of the latter paying him the sum of $150.

No other error is assigned for a reversal of the judgment, and it follows that the judgment must be affirmed.

WALKER v. WHITMORE.

Opinion delivered June 16, 1924.

1. MORTGAGES—OTHER INDEBTEDNESS OF MORTGAGOR.—A mortgage which stipulated that it shall be "security for any other indebtedness of whatever kind or character that may be owing by the grantor" to the mortgagee up to the time of foreclosure is not security for any other indebtedness of the mortgagor's transferee, who assumed the mortgage debt.
2. COSTS—SUFFICIENCY OF TENDER.—Where a mortgagor's transferee who assumed the mortgage debt tendered the amount of such indebtedness to the mortgagee bank's vice president and to its attorney, both of whom refused to accept it, the tender was sufficient to stop all subsequent costs if kept good by payment into court.

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

STATEMENT OF FACTS.

Appellants brought this suit in equity against appellees to recover judgment against the adult appellees for the amount sued for, and to have the same declared a lien upon the interest of the minor appellees upon the lots described in the complaint.

It appears from the record that on the 8th day of August, 1918, H. A. Mashburn, for a valuable considera-

tion, executed to J. F. Walker, as trustee for the American Trust Company, as agent, his promissory note, due one year after date, bearing interest at the rate of 7 per centum per annum. On the same day, to secure said note, Mashburn and his wife executed and delivered to said J. F. Walker, as trustee, a deed of trust to certain lots in Little Rock, Pulaski County, Arkansas. The deed of trust was duly filed for record. H. A. Mashburn and his wife then conveyed said property to Mary P. Loughbridge, and, as part of the consideration, as recited in the deed of conveyance, the latter assumed the note executed by Mashburn to J. F. Walker, as trustee aforesaid. On April 6, 1920, Mary P. Loughbridge conveyed by deed the said property to Y. E. Whitmore, and, as part of the consideration for the deed, the latter assumed the payment of the note executed by H. A. Mashburn to J. F. Walker, as trustee aforesaid. Subsequently the American Trust Company changed its name to that of the American Bank of Commerce & Trust Company. On September 9, 1921, Y. E. Whitmore indorsed a note of certain persons to the American Bank of Commerce & Trust Company for $3,600. Since that time the makers of the notes have been adjudged bankrupts.

Y. E. Whitmore also executed certain other notes, which were transferred by the payees thereof to the American Bank of Commerce & Trust Company. All of said notes so due by Y. E. Whitmore to said American Bank of Commerce & Trust Company are now due and unpaid. On December 2, 1921, the defendant, Y. E. Whitmore, was duly adjudicated a bankrupt. Among the provisions contained in the deed of trust from H. A. Mashburn to J. F. Walker, referred to above, is the following:

"This deed of trust shall be security for any other indebtedness of whatever kind or character that may be owing by the grantor to said American Trust Company, up to the time of the foreclosure of this deed of trust, whether then matured or not, but the lien therefor

shall be subordinate to the lien for the indebtedness herein specifically described."

Y. E. Whitmore obtained a decree of divorce from his wife, Eva Whitmore, some time in 1919. By consent, a decree for alimony was entered of record in favor of the wife against the husband, and, by consent also, a specific lien was decreed upon the property in controversy to secure the payment of said alimony. The minor appellees, who were defendants in the court below, are the children of said Y. E. Whitmore and Eva Whitmore.

The chancellor found the issues in favor of appellees, and a decree was entered of record accordingly, except that the costs of the suit were taxed against Y. E. Whitmore, and the facts on that branch will be stated in the opinion. Other facts appear in the record, but the above statement of facts is all that is essential to the issue raised by the appeal.

From a decree against them in favor of appellees appellants have duly prosecuted an appeal to this court.

Sam T. & Tom Poe and *Louis Tarlowski,* for appellants.

The sole question presented by this appeal is whether the provisions in the deed of trust that it shall be security for any other indebtedness, etc., can be construed as affecting or incorporating advancements made by the mortgagee to persons other than the original mortgagor. Is it effective and binding against an assignee of the original mortgagor, who purchased the land described in the mortgage and assumed payment of the note and mortgage? Appellants insist that the indorsing of the note of the Paige Company of Arkansas and Frank L. Reed by the defendant Whitmore over to the plaintiff, the holder of the deed of the original deed of trust, and the fact that the defendant was legally charged with notice of the contents of the deed of trust, is an advance sufficient to bring it within the scope of the orginal deed of trust. 1 Jones on Mortgages, § 373; Pomeroy, Equity Jur., 2nd ed., § 1199. A mortgage securing future advances is valid, if *bona fide* and sufficiently definite.

32 Ark. 598; 33 Ark. 72-75; 66 Ark. 393; 141 S. W. 742; 111 Ark. 362; 128 Pac. 211; 211 S. W. 765; 194 S. W. 867; 6 Mumf. 439; 75 N. W. 458; 9 Atl. 598; 98 Atl. 1002; 73 N. W. 527, 529; 163 S. W. 614; 214 S. W. 500, and cases cited.

John F. Clifford, for appellees.

1. It is useless to discuss the authorities cited by appellant to uphold the rule as to future advances. None were made to Mashburn, and he and his wife were the only grantors. Whitmore assumed nothing, even if advances had been made to Mashburn. The word "grantor," in the deed of trust provision cited by appellant, is not ambiguous, and could not possibly include Whitmore, a second grantee of Mashburn. It means the one executing the instrument, *granting or transferring an interest* in the property to the American Trust Company for the sole purpose of securing the note for $2,000. 4 Ark. 175; 5 Ark. 106; 105 Ark. 518; *Id.* 213. A general agreement to secure future advances must be confined to such as are in the contemplation of the parties at the time the agreement is made. Mortgages of real property to secure future advances are so far *stricti juris* that they cannot be extended by implication to secure any other obligation than that expressly mentioned. 19 R. C. L. 393; 46 Ark. 129; *Id.* 70; 111 Ark. 362; 122 Ark. 460.

2. The court erred in taxing costs against Whitmore. 134 Ark. 84. A tender is not required where it is evident that it will not be accepted. 93 Ark. 497; 76 Ark. 326.

HART, J., (after stating the facts). Counsel for appellants concede that the sole question is whether the deed of trust from H. A. Mashburn to J. F. Walker, as trustee, includes advancements made by the mortgagee to Y. E. Whitmore, who was the grantee of H. A. Mashburn, the original mortgagor.

The clause which is claimed to have that effect is copied in our statement of facts, and need not be repeated here. It recites that the deed of trust shall be security for any other indebtedness that may be owing by the

grantor to said American Trust Company up to the time of the foreclosure of the deed of trust.

Counsel for appellants claim that this language is sufficiently comprehensive to include subsequent advancements made by the mortgagee to Y. E. Whitmore. We do not think so. The word "grantor," as used in the clause in question, both in its legal meaning and in its common acceptation, refers to the persons executing the deed of trust, of which the clause in question is a part. It would be a stretch of the meaning of the word "grantor," far beyond this, to make it refer to Y. E. Whitmore, who was not a party to the original deed of trust, and who simply acquired the property by mesne conveyances from H. A. Mashburn. If the bank had made any other advancements prior to the time of the foreclosure of the mortgage, the clause in question could cover them, because Mashburn is the grantor named and referred to in the instrument. Whitmore could in no sense be said to come within the meaning of the word "grantor," as used in the original deed of trust. Therefore the chancellor properly held that the original deed of trust from Mashburn to the bank could not be foreclosed for subsequent advances made by the bank to Whitmore.

We think, however, the court erred in taxing the costs of the suit against Whitmore. The chancellor properly held that Y. E. Whitmore was liable for the amount due under the deed of trust from H. A. Mashburn to the bank; but the evidence shows clearly that Whitmore borrowed from a friend sufficient money to pay off this mortgage indebtedness, including the interest, and tendered the amount thereof to J. F. Walker, the vice president of the bank, who was handling the transaction. Walker refused the tender.

It appears from the record that, when the amount of said indebtedness was tendered to J. F. Walker, he stated that Mr. Poe was handling the matter, and refused the money. Poe was the attorney for the bank, and Y. E. Whitmore and the assistant cashier of another bank went to Mr. Poe's office. They tendered the money to Tom

Poe, and he said that he had no authority to accept it. He is the son of Sam Poe, and a member of the firm handling the matter for the bank. Tom Poe said that he had no authority to accept the tender. He knew that Mr. Walker would not accept it, and knew that his father, Sam Poe, would not accept it unless the whole debt was paid.

As above stated, Tom Poe was a member of the firm instituting the foreclosure suit for the bank against Y. E. Whitmore and his codefendants. Whitmore, on cross-examination, stated that he was keeping the tender good, and offered to pay the first mortgage at that time. The attorney and agent of the bank refused the tender unless Whitmore would pay the subsequent advances which the bank had made to him. The law never requires a vain or useless thing to be done. The action of the agents of the bank was, in effect, a refusal of the tender. *Dickinson* v. *Atkins*, 132 Ark. 84; *Read's Drug Store* v. *Hessig-Ellis Drug Co.*, 93 Ark. 487; and *Thompson* v. *Baxter*, 76 Ark. 326.

It is evident that the tender was not accepted because Whitmore failed to include in it the amount owed by him to the bank, which, as we have already seen, was not covered by the mortgage.

Therefore the decree of the court below will be modified so as to require appellants to pay all costs accruing after the tender was made, provided the tender is kept good and the money paid into the court within ten days, and, as modified, the decree will be affirmed.

REED v. WEBB.

Opinion delivered June 23, 1924.

1. SALES—WAIVER OF RETAINED TITLE.—A vendor of personal property who reserves the title therein until paid for has a right to treat the sale as absolute and sue for the purchase money, and in aid thereof to procure a specific attachment under Crawford & Moses' Dig., §§ 8729, 8730.
2. JUSTICE OF THE PEACE—JURISDICTION.—In an action on a note for the purchase of goods, which were seized under specific attachment, a justice of the peace had jurisdiction to render a personal judgment by default against the defendant, as the action was one for debt, and not for recovery of property.

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

John Baxter, for appellant.

The judgment of the justice of the peace was void because not responsive to the order of delivery. Of the two remedies available to him, *i. e.*, to treat the sale as canceled and bring suit in replevin for the property, or to treat it as absolute and sue for the unpaid purchase money, plaintiff elected to take the first course. C. & M. Dig., §§ 8729, 8730; 156 Ark. 319; 78 Ark. 369; 100 Ark. 403; 117 Ark. 496. Having sued for the return of the property, he must abide by that election. 23 R. C. L. 924. And it is established law that judgments must conform to the pleadings, otherwise they are void. 104 Ark. 130.

Golden & Golden, for appellee.

HUMPHREYS, J. This is a proceeding by appellant against appellee in the circuit court of Chicot County, under a writ of certiorari asking to quash a personal judgment and garnishment proceedings thereon rendered against him on the 22d day of December, 1921, in the court of K. Dillender, a justice of the peace of Bowie Township, in said county. The alleged ground of attack on the judgment and garnishment proceedings was that the original suit before the justice of the peace was a suit in replevin, and not for the purchase money of the furniture.

Appellee filed a motion to quash the writ of certiorari, which was heard and sustained by the court.

An appeal has been duly prosecuted to this court from the judgment quashing the writ.

The original judgment sought to be canceled is as follows:

"S. B. & J. H. Webb, plaintiffs, v. Rufus Reed, defendant.

"On the 8th day of December, 1921, the plaintiffs filed before me their cause of action against the defendant for $240, as follows, to-wit: Unpaid note, with lien retained.

"Thereupon, a writ of summons and order of delivery was issued against the defendant, returnable on the 22d day of December, 1921, at 10 o'clock A. M., and delivered to the constable of Bowie Township.

"On this date this cause coming on for hearing, court being opened and defendant called three times, and failed to answer.

"After hearing the evidence offered by the plaintiff, it is by this court found, adjudged and ordered that plaintiff recover of defendant, Rufus Reed, the sum of $240, with 10 per cent. interest from September 1, 1921, until paid, and cost of this action, and it is ordered that the articles named in the note, or so much as necessary, be sold to pay this judgment, interest and cost, after being advertised for ten days. K. Dillender."

The unpaid note with lien retained, referred to in the judgment, was an installment contract for the purchase of certain furniture at specific prices, in which the title to the furniture was retained in appellee until appellant should pay the purchase money.

The order of delivery mentioned in the judgment was executed by the constable of the township by delivering a copy thereof to the wife of appellant at his home, and by leaving the furniture in their possession.

Appellant then insured the furniture for his benefit, and it was subsequently destroyed by fire. The loss was adjusted, and, before the amount was paid to appellant by the insurance company, appellee procured a writ of garnishment on the original judgment, and obtained an

order against the insurance company to pay the amount it owed on the policy to appellee on his judgment for the purchase money of the furniture.

Appellant contends for a reversal of the judgment quashing the writ of certiorari on the alleged ground that the justice of the peace exceeded his jurisdiction in rendering a personal judgment by default against him. It is contended that the suit was one for the recovery of property, and not for the recovery of money. Appellant is mistaken in this contention, because the first recital in the judgment is that appellee filed his cause of action against appellant for $240 upon the unpaid note with lien retained. Appellee had a right to treat the sale of furniture as absolute and sue for the unpaid purchase money, and, in aid thereof, to attach the furniture, under §§ 8729 and 8730 of Crawford & Moses' Digest. *Bowser Furniture Co.* v. *Johnson,* 117 Ark. 496; *Olson* v. *Moody, Knight & Lewis, Inc.,* 156 Ark. 319. The order issued in the case was not inconsistent with the proceeding to impound the property for the payment of the purchase money. In fact, this is what was done. The furniture was levied upon and left in possession of appellant, and a lien was subsequently declared thereon by the court for the payment of the purchase money. It was within the jurisdiction of the justice of the peace to render a personal judgment against appellant by default, as the suit was an action for debt.

No error appearing, the judgment is affirmed.

KINDLE v. STATE.

Opinion delivered June 30, 1924

1. RAPE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of assault with intent to rape.
2. RAPE—INSTRUCTION AS TO PRESUMPTION OF CONSENT.—In a prosecution for rape it was not error to refuse to instruct that if the jury found that defendant had carnal knowledge of the prosecutrix the law would presume that she consented thereto.

3. RAPE—INSTRUCTION AS TO RESISTANCE BY PROSECUTRIX.—An instruction that a rape was not committed unless the prosecutrix used every means within her power to prevent defendant from having sexual intercourse with her was erroneous as eliminating the element of fear.
4. CRIMINAL LAW—IMPROPER ARGUMENT—PREJUDICE.—While it was improper in a rape case for the prosecuting attorney to suggest to the jury that "you don't know that he will rape the same color next time," the prejudice was removed where the argument was withdrawn as soon as made, at the suggestion of the court.
5. CRIMINAL LAW—NECESSITY OF OBJECTION TO ARGUMENT.—Objection to an improper argument must be made at the time, and cannot be raised for the first time in the motion for new trial.

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

Eades & Eddy, for appellant.

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

SMITH, J. Appellant, a colored man, was indicted for having raped Etta Tresvant, a colored woman, and, upon his trial, was convicted of an assault with intent to commit rape, and given a sentence of five years in the penitentiary, and has appealed.

For the reversal of the judgment the following errors are assigned: (1) that the evidence is insufficient to support the verdict; (2) that the court erred in giving instruction numbered 8 over the objection of appellant, and in refusing instruction numbered 1 requested by him; (3) that the prosecuting attorney committed prejudicial error in his closing argument.

The testimony of the prosecutrix was to the effect that appellant had frequently sought to visit her, but she had declined to permit him to do so. That one Sunday night appellant met her on her way to church, and insisted on escorting her, but she refused to allow him to accompany her. After leaving the church she saw appellant, who had been waiting for her, and he told her he was going home with her. She went to a restaurant to find some one to accompany her home, but, finding no one, she started home alone. Appellant seized her by the arm

as she left for her home, and said he "would go home with her or else—" She tried to avoid him, and struggled to release his hold on her, when he opened his knife and said he would kill her if she made an outcry. She was a small woman, weighing only 115 pounds. She continued her struggle, when appellant cut her slightly in the side with his knife and said he would cut her damned head off if she did not go along. When she reached her home, which was in the yard of her employer, she pretended to have lost her key, but appellant compelled her to produce it. After unlocking the door appellant took possession of the key and locked the door, and she did not know what he did with the key until he unlocked the door about four o'clock the next morning. Appellant compelled her to go to bed with him and to have sexual intercourse with him. He took his open knife with him to the bed, and he renewed his threat to cut her head off if she made an outcry or if she refused to submit to him. She had heard that appellant had served a term in the penitentiary for shooting a woman who had refused to submit to him, and she believed he would kill her if she did not yield or if she made an outcry. She was asked why she did not call for help when she passed through her employer's yard, and answered that her employer was away from home, and would not have heard her had he been at home, as the family slept upstairs. She also testified that appellant was carrying his knife in his hand, and she was afraid he would execute his threat. She further testified that she was crying, and begged appellant to leave her, and that she pushed and scratched at him, but was afraid to carry her resistance beyond that point. That she did not sleep that night while appellant was in her room, and did not think he could have slept on account of her crying. When appellant left at four o'clock she fell asleep for a short time, but was awake before her employer had got up, and she told him what had happened as soon as he came down from his room, which was about 7:30 in the morning. She was

asked by appellant's counsel why she did not let appellant kill her before she ceased to resist, and she answered that she wanted to live to tell what had happened.

A twelve-year-old colored boy testified that he saw appellant scuffling with Etta on the way to her home; that appellant had a knife in his hand, and that at one time he was almost carrying her on his hip.

Appellant testified that he spent the night with Etta at her invitation, and certain witnesses testified that they saw appellant and Etta going towards her home in a manner which attracted no attention, and there was certain other testimony which tended to corroborate appellant's story, the truth of which was, of course, a question for the jury.

We think this testimony was legally sufficient to support the conviction.

The court told the jury that force was an essential element of the crime, and that the force might be exercised by putting the woman in fear, and that if she did not, in good faith, resist appellant's attempt, appellant was not guilty of any crime, and that, if there was no such force or putting in fear as compelled the woman to yield against her will, appellant was not guilty of any crime. This idea was enlarged upon in a number of instructions, which made it perfectly plain that it was essential that the woman's will was overcome by force or by such putting in fear as caused her to cease to resist for her own safety.

Appellant asked an instruction numbered 1, reading as follows: "The court instructs the jury that, if you find from the evidence that the defendant had carnal knowledge of the woman Etta Tresvant, then consent on her part of such carnal knowledge would be presumed until the State proved beyond a reasonable doubt that the prosecutrix used every means within her power to prevent such intercourse, and something more must be shown than a mere want of consent on the part of Etta Tresvant to the intercourse, if any, with defendant, but

it must appear from the evidence beyond all reasonable doubt that the said Etta Tresvant made and used every exertion and means within her power, under the circumstances, to prevent intercourse, if any, with defendant, and, if the evidence in this case upon this subject is such as to raise reasonable doubt as to whether said woman did use every such exertion within her power, you will give defendant the benefit of such doubt, and acquit him."

Other instructions were also asked by him which elaborated the same propositions.

No error was committed in refusing to give this instruction. It would have been a charge upon the weight of the testimony to have told the jury that there was a presumption of consent. There was, of course, a presumption of innocence which attended appellant until his guilt was established beyond a reasonable doubt, but the instructions given fully covered this phase of the case. The instruction was also erroneous in telling the jury that rape was not committed unless the prosecutrix had used every means within her power to prevent appellant from having sexual intercourse with her. Under this instruction the prosecutrix would have been compelled to continue her resistance as long as she was conscious or had strength to offer any resistance, without regard to the effect of this resistance on her safety. If, for instance, appellant's conduct had induced the fear that an outcry would cost her her life, she was not required to thus imperil her life or safety.

In the case of *Zinn and Cheney* v. *State,* 135 Ark. 342, we said: "The law does not require of the woman who seeks to protect her chastity that she shall resist as long as either strength endures or consciousness continues. It is essential that she shall not at any time consent, but none of the cases on the subject hold that she had consented because, through fear for her life or bodily safety, she had ceased to resist or failed to make an outcry."

No error was committed in refusing to charge the jury as requested by appellant.

In his closing argument the prosecuting attorney said: "Gentlemen, you don't know that he will rape the same color the next time." This argument was, of course, highly improper, but it was withdrawn as soon as it was made, at the suggestion of the court. Moreover, it does not appear that any objection was made or exception saved at the time, and, while this argument is assigned as error in the motion for a new trial, this was not sufficient to save an exception, as it is not the province of the motion for a new trial to raise objection for the first time. *Hall* v. *State*, 113 Ark. 455; *Wolfe* v. *State*, 107 Ark. 29.

The testimony was sufficient, according to the prosecutrix, to sustain the conviction, and appellant is in no position to complain that he was only convicted of an assault with the intent to commit the crime of rape.

No error appearing, the judgment is affirmed.

EDDY v. STATE.

Opinion delivered June 30, 1924.

1. INTOXICATING LIQUORS—UNLAWFUL SALE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of selling intoxicating liquors in violation of the laws of the State.
2. CRIMINAL LAW—CONCLUSIVENESS OF VERDICT.—The verdict of a jury in a criminal case will not be disturbed where the evidence is legally sufficient to support it.
3. CONTINUANCES—DISCRETION OF TRIAL COURT.—Continuances in criminal as well as in civil cases are in the sound discretion of the court, and a refusal to grant a continuance is never ground for a new trial unless it clearly appears to have been an abuse of such discretion and manifestly operates as a denial of justice.
4. CONTINUANCES—ABUSE OF DISCRETION—BURDEN OF PROOF.—Where accused did not ask for postponement of the case for absence of a witness, but asked for a continuance for the term, and made no showing as to any probability of securing his attendance at any time in the future, no abuse of discretion in denying the continuance was shown.
5. INTOXICATING LIQUORS—UNLAWFUL SALE—INSTRUCTIONS.—In a prosecution for unlawfully selling intoxicating liquors, there

was no conflict between an instruction that the allegation in the indictment as to the time of the sale was immaterial if the sale was made within three years, and another that the State was required to prove that the sale was made on a certain occasion relied upon by the State.

6. CRIMINAL LAW—CORROBORATION OF ACCOMPLICE.—As the purchaser of liquor is not an accomplice of the seller, it is not necessary that his testimony be corroborated.

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

Eades & Eddy, for appellant.

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

HART, J. J. D. Eddy prosecutes this appeal to reverse a judgment and sentence of conviction against him for the offense of selling intoxicating liquors, in violation of the laws of the State.

J. A. Patterson was the principal witness for the State. According to his testimony, some time in the summer of 1923 he purchased a half of a gallon of moonshine whiskey from Dr. J. D. Eddy at his office in Blackville, Conway County, Arkansas, and paid him $6 for it. He bought the whiskey to be drunk by himself and two companions named Lake Lewis and Bump Overby. Overby furnished the money with which Patterson purchased the whiskey. Patterson said that he was in no sense the agent of Dr. Eddy, and bought the whiskey for himself and his two companions. He never bought any whiskey from Dr. Eddy at any other time and place.

Dr. J. D. Eddy was a witness for himself. According to his testimony, he never sold any whiskey at any time or place to J. A. Patterson.

Other witnesses for the defendant testified that he was not in Blackville on the occasion Patterson claims to have bought the whiskey from him.

The evidence for the State was sufficient to warrant the jury in finding a verdict of guilty. Under the settled rules of this court we cannot disturb the verdict of

a jury where the evidence is legally sufficient to warrant it.

It is earnestly insisted, however, by counsel for the defendant that the court erred in not granting the motion of the defendant for a continuance. In his motion for a continuance the defendant states that Clyde Donald would testify, if present in court, that he was with J. A. Patterson on the occasion on which he testified that he bought the whiskey from the defendant, and would swear that they got the whiskey from some unknown person outside of the town of Blackville, and that they did not buy any whiskey from the defendant on the occasion in question.

The court heard testimony on the motion. It appears from the record that the indictment was returned into court on the 4th day of March, 1924, and the motion for a continuance was filed on the 10th day of March, 1924.

The sheriff of Conway County was not able to find Clyde Donald and to serve a subpoena on him.

According to the testimony of Dr. J. D. Eddy, Clyde Donald was in the county about three weeks before this, looking for work. He was a single man, and had no fixed place of abode. The defendant did not know where he was at this time.

The general rule is that continuances in criminal as well as in civil cases are in the sound discretion of the court, and that a refusal to grant a continuance is never ground for a new trial unless it clearly appears to have been an abuse of such discretion and manifestly operates as a denial of justice. *Allison* v. *State,* 74 Ark. 444, and *Wood* v. *State,* 159 Ark. 671.

It will be noted that the defendant did not ask for a postponement of the case, but asked for a continuance for the term. The absent witness had no fixed place of abode, and it is not shown that there was any probability of securing his attendance at any time in the future. The burden was upon the defendant to show an abuse of discretion of the trial court in refusing to grant him a

continuance, and this he failed to do. It follows that this assignment of error is not well taken.

The next assignment of error is that the court erred in not excusing for cause juror Guinn. The juror on his *voir dire* stated that he could go into the jury-box and try the defendant according to the law and the evidence, just as he could try him for any other crime. He had said previously that he had a prejudice against the crime of whiskey selling, but none whatever against the defendant. He testified in positive terms that he could give the defendant a fair trial, according to the law and the evidence, and that he had no feeling against him personally because he was charged with the crime of selling whiskey in violation of the statute.

Under the uniform decisions of the court, the circuit court was right in holding that the juror was qualified.

The next assignment of error is that the court erred in giving conflicting instructions to the jury. The instructions complained of are Nos. 10 and 11. These instructions are as follows: "10. Gentlemen of the jury, the indictment in this case charges that the sale was made on the 10th day of June, 1923. The court instructs you that that allegation as to the particular date is immaterial, and if you believe from the evidence that the sale was made at any time by Dr. J. D. Eddy to the witness, J. A. Patterson, at any time within three years before the finding of this indictment, you will find the defendant guilty by your verdict."

"11. Gentlemen of the jury, you are further instructed that the State in this particular case relies upon a sale by Dr. J. D. Eddy to the witness, J. A. Patterson, on the occasion when Bump Overby of Cabin Creek and Lake Lewis of Atkins were with him at Blackville, and, unless you find him to have made a sale on an occasion when they were with him at Blackville, your verdict should be for the defendant. If you find that he did make a sale on such occasion, your verdict would be for the State, finding him guilty."

There is no conflict whatever in the instructions. The prosecuting witness had testified that he bought the whiskey from the defendant some time in the summer of 1923. The indictment was returned in March, 1924. The object of instruction No. 10 was to tell the jury that the date of the commission of the crime was immaterial, provided that it was committed at any time within three years before the finding of the indictment. The object of instruction No. 11 was to advise the jury that the State relied upon only one sale, and that was the occasion testified to by the prosecuting witness in the summer of 1923. This instruction was favorable to the defendant in narrowing the consideration of the jury to the one occasion in question. When the two instructions are read together, they are rather explanatory than contradictory of each other. The court, in substance and effect, told the jury that it must confine its consideration to the one occasion testified to by the prosecuting witness, but that the date when it occurred was immaterial, provided it was within the period of limitations prescribed by the statute.

The next assignment of error is that the court erred in refusing to give instruction No. 10 asked by the defendant. The instruction reads as follows: "Testimony has been offered in this case tending to show, if believed by you, that the prosecuting witness bought whiskey or liquor from the defendant (if you should find beyond a reasonable doubt that he did so buy), that he was a go-between, who took the liquor and gave it to other witnesses who testified in this case, and to other persons along the highway, in this county; if you should find from the testimony offered in this case that J. A. Patterson was such a go-between to take liquor from the defendant and peddle it out to others, then he would be what is known in law as an accomplice, and you could not convict the defendant upon his uncorroborated testimony. In other words, the law will not allow you to convict a man upon the uncorroborated testimony of a person who

is directly or indirectly interested in the perpetration of the offense, unless corroborated by other testimony tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that an offense was committed and the circumstances thereof. There must be other evidence tending to connect the defendant with the commission of the offense."

There was no error in refusing to give this instruction. This court has held that the penalty of the statute is directed against the seller and not the purchaser, and that one who assists the purchaser in procuring the liquor is not an accomplice of the seller, and that therefore it is not necessary that his testimony should be corroborated. *Wilson* v. *State*, 124 Ark. 477.

According to the testimony of the defendant and his witnesses, he did not sell any liquor at any time or place to the prosecuting witness. According to the testimony of the prosecuting witness, he was in no sense interested in the sale of the liquor, but acted solely as the purchaser. Therefore there was no testimony upon which to predicate an instruction upon the alleged fact that the prosecuting witness acted as a go-between in the matter.

There is no reversible error in the record, and the judgment must be affirmed.

HOUSTON v. STATE.

Opinion delivered June 30, 1924.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—In a prosecution for murder, evidence *held* to sustain a conviction of murder in the second degree.
2. HOMICIDE—ADMISSIBILITY OF EVIDENCE.—Where defendant admitted the killing but claimed that the killing was accidentally done on the highway while riding in a car, testimony tending to contradict defendant's testimony by showing that blood was found on the floor of deceased's home and on the ground, and bullet holes in the wall, and the prints of automobile tires near a pool

of blood, was competent as evidence from which an inference might be drawn as to the manner in which deceased came to his death.

3. HOMICIDE—RELEVANCY OF PROOF OF BULLET-HOLES.—Evidence that bullet-holes were found in the wall of deceased's home a week after the killing, and that they were not there before the killing, was not too remote.

4. CRIMINAL LAW—EVIDENCE OF TEST.—Where defendant testified that he accidentally shot deceased with a 32-caliber pistol while both were riding in an automobile, evidence as to a test of a pistol of the same caliber being shot at the same distance into deceased's coat and making a much smaller hole was admissible as tending to prove that the deceased was not killed by some one using a pistol of that caliber.

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

G. M. Gibson, W. P. Smith, H. L. Ponder, for appellant.

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

McCULLOCH, C. J. Appellant was tried under an indictment charging him with the crime of murder in the first degree, committed by killing Claude Anderson, and the trial resulted in appellant's conviction of the crime of murder in the second degree.

Appellant admitted, before and during the trial, that Claude Anderson came to his death as result of the discharge from a pistol in the hands of appellant, who claimed that the killing was accidental. The principal contention here is that the evidence is not sufficient to sustain the verdict.

Appellant and Anderson were young men, near the same age, and both resided in the town of Walnut Ridge. Anderson was married, and he and his wife occupied a residence, consisting of five rooms, in Walnut Ridge. The killing occurred on the night of Sunday, September 16, 1923. Appellant claimed, and so testified in the trial, that, on the night in question, he and Anderson and three other young men, who lived in or about Walnut Ridge, took a ride in a Ford car, driving out on a macadamized

road towards Jonesboro, and that, as they were on the return trip, the pistol was accidentally discharged while in appellant's hand, the bullet taking effect in Anderson's back. Appellant and his companions testified that Anderson's death occurred in that manner. They testified that Anderson was occupying the front seat with the driver; that appellant was sitting on the rear seat, immediately behind Anderson; that appellant had the pistol in his hand, and was snapping it to see whether or not it would fire, when one of his companions remonstrated with him, suggesting that the pistol might go off and hurt somebody; that appellant replied that there was not a shell in the pistol, and at once attempted to put the pistol in his pocket, when it fired, and the bullet struck Anderson. Witnesses testified that Anderson died immediately, and that appellant went to a house near by, the home of one Corcoran, and telephoned to a deputy sheriff at Walnut Ridge, informing the latter that Anderson had been accidentally shot and killed. This was between one and two o'clock in the morning, and Corcoran testified about appellant coming to his house to use the telephone, and he stated in his testimony that appellant was intoxicated at the time. Officers came out from Walnut Ridge, and the body was taken charge of by the coroner and carried to an undertaking establishment, where an inquest was later held.

Appellant admitted at all times that he had fired the shot that killed Anderson, or, rather, that the pistol was in his hand at the time the shot was accidentally fired. Witnesses introduced by the State testified to numerous contradictory statements made by appellant as to the manner in which the killing occurred. Witnesses also testified that they examined the seat of the car on which Anderson's body was found, and that there was no blood on the seat, and also that there were no powder burns on Anderson's coat.

The proof shows that the bullet entered Anderson's body in the back, several inches below the left shoulder-blade, and made its exit in front, on the right side, at

about the same level as the point of entrance. There was testimony of other witnesses besides Corcoran tending to show that appellant was intoxicated at the time the killing was reported.

Early on the Sunday morning in question Anderson took his wife to the country to visit her parents. He procured a man by the name of Williams to drive them out to the country in a car. According to the testimony of Mrs. Anderson, wife of the deceased, she and her husband put the house in order early that morning, closed and locked the doors, and started to the country with Williams, and that, after reaching the home of her parents, she got out of the car and remained there, and Williams and her husband started back to town. Mrs. Anderson remained at the home of her parents until the next morning, when she was informed at an early hour that her husband had been killed during the night, and she then came back home.

The testimony shows that, during the day (Sunday), appellant and these young men with whom he was associated that night, and perhaps other young men, were riding about in a service car, owned and operated by one of the young men—the same car in which they took the ride that night. Between nine and ten o'clock that night appellant, Anderson, and two or three others went to a restaurant to obtain something to eat, and, as they were leaving the place, appellant handed the young lady in charge of the restaurant an automatic pistol and asked her to keep it for him. The young lady testified that, in about fifteen minutes, appellant came back and asked for the pistol, and that she gave it to him, and that appellant at the time said, "The boys won't let me go with them if I don't take my gun." Appellant testified that he had purchased the pistol, which was an automatic, the day before, and he admitted the conversation with the young lady at the restaurant. Appellant and his associates testified that they left town for a ride about eleven o'clock, or a little later. Witnesses testified that, during the day in question, deceased had a watch on his person, and also

twenty-five or thirty dollars in money. There is no showing in the record as to what became of the watch and the money.

Mrs. Anderson testified that, when she returned home early Monday morning, she found the front and back doors open, and the bed in the living room disarranged, as if some one had been lying on the bed. She testified positively that, before she left home Sunday morning, she made up the bed, and that the doors were locked when she and her husband left home. Mrs. Anderson's father testified that, a little earlier than the arrival of Mrs. Anderson, he went to the house and found the front door closed but unlocked, and that the back door was open. Other witnesses who examined the premises Monday morning testified that they found a small pool of blood on the floor in the kitchen at Anderson's home, and also found blood on the back steps, and also a much larger pool of blood under the edge of the front porch. They testified that there was no fence around the yard, and that, near the edge of the front porch, there was the print of the wheels of a car—wheels of narrow tread.

The theory of the State, in introducing testimony to establish these facts, was that Anderson was not killed in the car, as claimed by appellant and his associates, but that he was killed in his own home, and afterwards his body was put in the car and taken out on the highway. One of the witnesses introduced by the State testified that, about a week after the killing, he examined the rooms in Anderson's house and found three bullet-holes in the wall, that the bullets appeared to have been fired from a 32-caliber pistol. Other witnesses testified that, about two weeks before the trial, which was perhaps five months after the killing, they also examined the house, and found and examined the three bullet-holes. Mrs. Anderson testified that, up to the time she and her husband left home on the Sunday morning in question, the bullet-holes were not in the wall. She testified that she went back to the house about a month before the trial, and was shown the bullet-holes, and that they were not

there at the time she and her husband left the house on the Sunday morning in question. Another witness, who lived about two blocks from Anderson's home, testified that, on the night of the killing, he heard three shots in the direction of the Anderson home, shortly after eleven o'clock, and that the shots sounded like they were fired from a revolver or a pump-gun.

We are of the opinion that the evidence was sufficient to sustain the verdict. The statute provides that, when the killing is proved, "the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless, by the proof on the part of the prosecution, it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." Crawford & Moses' Digest, § 2342.

Appellant admitted that Anderson came to his death by a pistol shot fired from appellant's own hand, therefore this statute was applicable. Appellant attempted to meet this burden by showing that the shot was accidental, but the jury has, by the verdict, rejected the explanation of appellant and his associates and found that the killing did not occur in that manner. The evidence justified the jury in reaching that conclusion. The jury could have found from the evidence that the explanation was unreasonable, in that the killing could not reasonably have occurred in the manner claimed. There are three facts established by the State's evidence which are inconsistent with the explanation of appellant and his associates, or could reasonably be so treated. One is that there were no powder burns on the coat of deceased, showing that the pistol was not fired at as close range as claimed; another, that there was no blood found on the seat of the car; and another, that the location and range of the wound are such as to show that the pistol was not fired while in appellant's hands as he sat on the rear seat of the car. We do not mean to say that the testimony shows indisputably that the killing could not have

occurred in the way claimed by appellant, but we do say these facts warranted the jury in drawing the inference that the killing did not occur in that manner—in other words, that the deceased was not accidentally shot while in the car, as claimed by appellant. Appellant's contradictory statements are also of some force in testing the truth of his explanation of the killing.

The testimony adduced by the State showing the condition of the house and premises of deceased immediately after the night of the killing with respect to having been used, blood being on the floor and on the ground, and the bullet-holes in the wall, and the prints of automobile tires near the pool of blood under the edge of the porch, was sufficient to warrant the inference that an act of violence had been committed at the house that night, and, it being the home of the deceased, the inference was warranted that deceased came to his death at that place, and not elsewhere. Appellant objected to the introduction of all that testimony on the ground that he was not shown to have been at the house, or in any other way connected with any occurrence that might have transpired at the house. The testimony was competent, for, after the killing was admitted or proved as the act of appellant, it was competent for the State to introduce proof of any fact or circumstance from which an inference might be drawn as to the manner in which deceased came to his death. These facts and the inference to be drawn therefrom tended to contradict appellant and his associates in their claim that Anderson was killed in the car and that his death resulted from an accident. The proof in regard to the missing money and watch which deceased had in his possession immediately prior to the killing was competent to establish a motive for the killing, so as to enable the jury to determine whether or not the killing was accidental or wilful.

It is contended that the proof in regard to the presence of bullet-holes in the wall of Anderson's house was incompetent for the reason that the finding of the bullet-holes was too remote in point of time from the killing.

The testimony, as before stated, shows positively that the bullet-holes were not in the wall on Sunday morning when Anderson and his wife left there, and that the holes were in the wall and found there by witnesses about a week later. Appellant relies upon the decision of this court in the case of *Darden* v. *State,* 73 Ark. 315, where we held, in a homicide case, that proof of a hole resembling a bullet-hole in the hub of a wagon, found about four or five days after the commission of the homicide, was not competent. In that case the proof was not definite as to its being a bullet-hole in the hub of the wagon, and, there being no account given of where the wagon had been during the intervening time, the decision of the court in that case is not applicable here. The question, of course, in determining the competency of the evidence is whether or not it is shown with reasonable certainty, or whether the jury may infer with certainty, that the conditions were the same as at the time or immediately after the occurrence of the homicide. In *Abston* v. *State,* 154 Ark. 59, we decided that proof of the finding of dynamite in a stump near the scene of an attempted act of violence committed by conspirators, the finding of the dynamite being about two weeks after the unlawful occurrence, was competent on the ground that the circumstances were such that the jury might reasonably have inferred that the dynamite was put there about the time of the commission of the unlawful act. We are of the opinion that, in the present case, the finding of the bullet-holes was not too remote in point of time to make the testimony incompetent. The proof as to the holes being made by bullets was definite, and the fact that three bullet-holes were found in the wall was such an unusual circumstance as might be taken into consideration by the jury in determining whether or not they were put there on the night of the killing, when shots were heard in the direction of the house, no proof being made as to any being fired thereafter. We are of the opinion that the court did not err in allowing the witnesses to testify concerning the presence of the bullet-holes in the wall.

During the progress of the trial the clothing removed from the body of deceased was introduced in evidence, and a hole in the coat, corresponding with the place in the back of deceased where the bullet entered his body, appeared to be a large, jagged hole. Witnesses for the State took the coat outside and placed it around a tree, and fired shots into it from the pistol which appellant admits was used when deceased came to his death; and these witnesses then testified, and exhibited the coat with the new holes in it to demonstrate that the original hole in the coat could not have been made by a bullet fired from a pistol—that it was too large a hole to have been made by a bullet. This testimony was objected to. The ground of objection is that the conditions were different from those under which the original shot was fired; that is to say, that there might be a difference between the effects of a bullet fired through the coat while it was on the body of a man and while wrapped around a rigid substance like a tree. The authorities are unanimous in holding that the result of tests, in order to be competent as evidence, must be made under substantially identical conditions, not absolutely identical but substantially identical. *St. L. I. M. & S. Ry. Co.* v. *McMichael,* 115 Ark. 101. The conditions under which the different shots were fired were not so widely different as to render the tests incompetent. The jury, of course, had the right to, and presumably did, take into consideration slight differences in the conditions under which the shots were fired and the difference in the effect of the shots, if any. The witnesses described to the jury the manner in which the tests were made, and the jury doubtless drew their own conclusions as to whether or not the test constituted a fair demonstration of the effect of a bullet fired from that pistol through the coat. We think there was no error in admitting this testimony, nor is there any other error in the record, so far as we are able to discover.

The judgment is therefore affirmed.

WOOD and HUMPHREYS, JJ., dissent.

CLEAR CREEK OIL & GAS COMPANY *v.* BUSHMAIER.

Opinion delivered July 7, 1924.

1. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING.—While parol evidence is not competent to contradict or vary the terms of a written contract to show what is intended, it is admissible to explain the surrounding circumstances and situation and relation of the parties at the time of the execution of the contract, in order to explain all terms and phrases which are used in a technical, special or local sense.
2. OIL AND GAS—PUBLIC SERVICE COMPANY—OPERATION OF WELLS.—A public service company, operating gas wells on a royalty basis and being required to keep on hand a reserve supply of gas, is not required to operate all its wells at full capacity at all times, but has a right to operate them in such manner that each one shall furnish its proportionate part of the gas used by the consumers.
3. OIL AND GAS—MARKET PRICE AT WELL.—Under an agreement of a public service company to pay a royalty of one-eighth on the basis of the market price at the well, where there was no market price at the well, and the price paid at the nearest market was ten cents per 1,000 feet, the company was liable on that basis, deducting the cost of transporting and distributing the gas to the consumers.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

E. L. Matlock and *Pryor & Miles,* for appellant.

Where there is no adequate market, the value of personal property may be fixed by proof of the value at the nearest available market, with proper additions or deductions for cost and risk of transportation. 53 Ark. 27; 92 Ark. 111; 121 Ark. 150. The acceptance of the checks for the royalties from month to month estops appellees. *Clear Creek Oil & Gas Co.* v. *Bushmaier,* 161 Ark. 26; *Clear Creek Oil & Gas Co.* v. *Brunk,* 160 Ark. 574.

Chew & Ford, for appellee.

HART, J. The Clear Creek Oil & Gas Company prosecutes this appeal to reverse a decree against it in favor of W. S. Bushmaier and wife for an accounting under a gas lease.

It appears from the record that the Clear Creek Oil & Gas Company is a public service corporation furnishing natural gas mainly to industrial consumers in the cities of Van Buren and Fort Smith, Arkansas. W. S. Bushmaier and his wife own a tract of land containing 106 acres in Crawford County, Arkansas. In February, 1919, by a contract in writing, they leased said tract of land to the Clear Creek Oil & Gas Company to be explored for oil and gas for the period of time designated in the lease. The lessee drilled two wells on the premises, and brought in two high-pressure gas wells. The Clear Creek Oil & Gas Company operated twenty-five wells in the gas field during the year 1921. Six of these wells are operated under contracts similar to the one in question. The lease from W. S. Bushmaier and wife to the Clear Creek Oil & Gas Company, with reference to the payment of royalty, contains the following:

"That if the said second party (appellant) shall market any gas from any well producing gas only, then the party of the first part shall receive therefor at the rate of one-eighth of all gas marketed from such wells, payable monthly on the 20th of such succeeding month."

"It is agreed that the market price of royalty gas at the well at the time shall be the basis upon which royalty shall be paid." * * *

"And it is also agreed that a failure to operate any well or wells, mine or mines, on the within described premises, when the same must be done at a loss to said second party, shall not work a forfeiture of this lease."

Some of the wells operated by the Clear Creek Oil & Gas Company in 1921, and used by it in supplying its industrial consumers, were low-pressure wells, and could not be operated in cold weather. For this reason, during the summer months the two wells in question in this case were shut off and the gas was taken from the low-pressure wells. The Clear Creek Oil & Gas Company operated all its gas wells in this field in such a manner as to give each one the proportionate amount of gas which it would furnish. Meters were placed at each

well so that the flow of gas could be measured there, and each well was given its proportionate amount of the gas furnished by the Clear Creek Oil & Gas Company to its consumers. Other owners of gas wells in that field were paid 2½ cents per 1,000 cubic feet as royalty. This was the price that other producing companies were paying for gas in that field. Industrial consumers in Fort Smith and Van Buren paid the Clear Creek Oil & Gas Company 10 cents per 1,000 cubic feet for gas, and it cost the company 3½ cents per 1,000 cubic feet to transport and distribute the gas.

It was the opinion of the court below that the lessor should receive royalty on the basis of 10 cents per 1,000 cubic feet, and that no deduction should be made for transportation and distributing charges.

The chancellor was also of the opinion that the Clear Creek Oil & Gas Company had no right to shut down the gas wells during the summer months, and divide the amount of gas which it furnished industrial consumers proportionately with the owners of the gas wells operated by it.

A decree was entered in accordance with the finding of the chancellor.

It may be stated at the outset that the question of any loss or damage suffered by the landowners by gas being drawn from their wells by reason of wells on adjoining lands does not arise under the facts of this case.

We are of the opinion that the decree of the chancellor was wrong. The lease provides that a failure to operate any well on the premises when the same must be done at a loss to the lessee shall not work a forfeiture of the lease. While parol evidence is not competent to contradict or vary the terms of a written contract to show what is intended, we are of the opinion that it is admissible to explain the surrounding circumstances, and the situation and relation of the parties, at the time of the execution of the contract, in order to explain all terms and phrases which are used in a technical, special,

or local sense. This aids the court in determining what the contract means when its language, either in its literal sense or as applied to the facts, is obscure. *Brown & Hackney* v. *Daubs,* 139 Ark. 53, and cases cited; and *Stoops* v. *Bank of Brinkley,* 146 Ark. 127.

Now, according to the evidence for appellant, which is undisputed, it was a public service corporation engaged in furnishing natural gas to manufacturing plants and other industrial consumers in the cities of Van Buren and Fort Smith. The amount of gas used at different seasons of the year varied, and, in order to supply its consumers, it was necessary to drill or lease wells producing more gas than was actually necessary to supply such consumers. In other words, it was necessary for the public service corporation, in order to properly supply consumers using natural gas furnished by it, to keep on hand at all times a reserve supply of gas. In order to do this, it drilled wells on the lands of various owners in the gas fields, and paid them either a flat rate or a royalty.

Thus it will be seen that, if the public service corporation should pay the owners of gas wells for gas which it never furnished its consumers, it would have to raise the price of gas to its consumers. It will be remembered that the public service corporation is only entitled to a fair equivalent for the service performed by it. It would be only entitled to charge the consumers a fair price for the gas furnished them.

When all these facts and circumstances are taken into consideration, we are of the opinion that the language of the lease referred to a practical operation of the gas wells, and that the company would not be required to operate all its wells at full capacity at all times, but that it might operate them in such a manner as to furnish gas to all its consumers and to keep a sufficient reserve supply on hand to meet future demands or emergencies. It is evident that it could not do this if all the wells were operated at full capacity. The result of such

a policy would be disastrous to manufacturers and other industrial plants using natural gas supplied by it.

Therefore we are of the opinion that the company had a right to operate all its wells in such a manner that each one should furnish its proportionate part of the gas used by the industrial consumers. In this view of the matter, the Clear Creek Oil & Gas Company had a right to shut down the two wells drilled on the land of Bushmaier for such length of time as might be necessary in order to give the owners of its other wells their proportionate part of the gas furnished to industrial consumers.

It is next contended on the part of the Clear Creek Oil & Gas Company that, under the lease contract, it was only required to pay Bushmaier 2½ cents per thousand cubic feet for the gas taken from his wells. This, it contends, is the price paid by other producing companies to owners of gas wells in the same field.

We do not agree with counsel in this contention. It will be noted that the contract provides that the market price of royalty gas at the wells shall be paid. The testimony shows that there was no market for gas at the wells. The Clear Creek Oil & Gas Company furnished gas from its wells to industrial plants in the cities of Van Buren and Fort Smith, which were several miles distant. Its industrial consumers paid it the sum of 10 cents per 1,000 cubic feet for gas. It cost the company 3½ cents per 1,000 cubic feet to transport and distribute the gas at these industrial plants. This left a net price of 6½ cents per 1,000 cubic feet, which we find to be the market price of the gas.

The general rule is that, where a party contracts to deliver goods or other products at a particular time and place, and no payment has been made, the true measure of damages is the difference between the contract price and that of like goods or products at the time and place where they should have been delivered.

On the other hand, if there be no market value at the place of delivery, the value of the goods or other

product should be determined at the nearest place where they have a market value, deducting the extra expense of delivering them there. The prices prevailing at the nearest place where the product can be sold, less transportation and distributing charges, show the value of such product at the place of delivery as nearly as it is possible to show such value. *Jones* v. *Railway,* 53 Ark. 27; *St. L. S. W. Ry. Co.* v. *Kilberry,* 83 Ark. 87; *Kirchman* v. *Tuffli Bros. P. I. & C. Co.,* 92 Ark. 111; *K. C. Sou. Ry. Co.* v. *Mabry,* 112 Ark. 110; and *Allen* v. *Northern,* 121 Ark. 150.

From the views we have expressed it necessarily results that the chancellor proceeded upon the wrong basis in fixing the amount due under the lease by the Clear Creek Oil & Gas Company to W. S. Bushmaier, and, for this error, the decree must be reversed.

Upon the remand of the case the chancery court will be directed to ascertain what amount, if any, is due by the lessee to the lessor for gas furnished under the rule laid down in this opinion, and for further proceedings in accordance with the principles of equity.

ADAMS v. STATE.

Opinion delivered July 7, 1924.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of murder in the second degree.
2. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—It is not reversible error for the prosecuting attorney to make an argument based upon a misunderstanding of the testimony of a witness.
3. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.—Where the prosecuting attorney stated that there were more killings in the county than in England, and that if the juries did not take to convicting somebody there would be still more, the prejudice, if any, was removed where the court told counsel to confine his argument to the evidence.

Appeal from Union Circuit Court; *L. S. Britt,* Judge; affirmed.

Pat McNalley, for appellant.

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

SMITH, J. Appellant was indicted and convicted for killing Jess Jiles on the 7th of October, 1923. Mrs. Jiles had formerly been the wife of appellant, and three children had been born of their union. According to the testimony of appellant, he had been visiting and contributing to the support of these children after being divorced from their mother, and, on the day of the killing, he sought to see the oldest child, a daughter, to ascertain from her what books she would require in school. He testified that Jiles objected to his visiting at the Jiles home to see the children, and his practice was to walk or drive by the house until some one of the children saw him, when the other children would be notified of his presence, and they would come out into the road to see him and receive such gifts as he had brought them. That, on the day of the killing, he desired to see his daughter, and for that purpose drove by Jiles' house. Not seeing any of the children, he drove by the house for a short distance, when he turned his car in the road and returned. He drove back by the house without seeing the children, but saw Jiles in the yard, and, after driving about sixty yards beyond the house, he stopped his car and looked back to see if any of the children were in sight. None of them were, but Jiles saw him stop, and came to the car and began to curse and abuse him, and he drove away. Still desiring to see the children, he returned and stopped his car near Jiles' home, and Jiles stepped from behind a tree and commenced firing at him with a double-barreled shotgun, and fired two shots, one of which broke the windshield of his car and knocked him out of the car, and, believing he was about to be killed by Jiles, he fired at Jiles, and killed him.

Appellant admitted doing his share of the cursing, and that he had his gun in the car during the time he was driving, but said he had borrowed the gun to go hunting

on the following day, in accordance with an appointment which he had made the preceding day.

It is the theory of the State that bad blood existed between the men, and both were willing to shoot it out, and that appellant had armed himself for the purpose of shooting Jiles.

A neighbor named Smith testified that he saw appellant stop at Jiles' house, and that he had heard loud and angry talking, and heard Jiles tell appellant to leave, and heard appellant say he would leave when he was "damn ready." Jiles went to the home of Smith and sought to borrow a gun, and, failing to secure one there, he procured one elsewhere, and, when Jiles left home, appellant drove to Smith's house, where he turned his car around. Smith observed the gun in appellant's car, and saw appellant change its position, and he testified that appellant was "fooling with the gun." Smith thought appellant had mistaken him for Jiles, so he stood up, and, when he did so, appellant put the gun down in the car, but it was near the steering-wheel, and the barrel extended out of the car.

According to Smith's testimony, only a few minutes elapsed between the different trips appellant made by Jiles' home, and, on the third of these trips, appellant stopped his car and commenced cursing the occupants of the house, and announced that if any of them stuck a head out he would shoot it off. Just then Jiles came out of the woods on the other side of the road and stepped behind a tree, and ordered appellant to leave, and, when appellant failed to do so, Jiles commenced firing. Appellant got out of his car, or fell out of it, and lay down behind the car. Jiles went into his house, and, in five or ten minutes, came out of his front door, when appellant, who had by that time got back into his car, fired at Jiles, and killed him.

A number of witnesses gave testimony tending to contradict and to support the respective theories of the case; but we think the testimony set out above is legally

sufficient to support the verdict of the jury, finding appellant guilty of murder in the second degree.

What we have just said disposes of the assignment of error that the verdict is not supported by sufficient testimony.

Special counsel argued that Smith had testified that appellant was fooling with his gun at Jiles' house, whereupon appellant's counsel objected to the argument, and asked the court to reprimand counsel for making it, and to tell the jury that the argument was unsupported by the testimony. The court declined to state what the testimony of the witness had been, but did tell the jury to consider only the testimony of the witness.

It is not reversible error for the prosecuting attorney to make an argument based upon a misapprehension of the testimony of a witness. A different question would be presented had he argued as a fact some proposition about which there was no testimony. But the jury heard the witness testify, and it was their province to determine what the witness' testimony had been. The witness did testify that appellant was fooling with the gun, but he did this at witness' house, instead of at Jiles' house. Still this was a proper circumstance for the prosecuting attorney to argue. The houses were not far apart, and it was fair to argue that appellant, in "fooling with his gun," was getting it ready for convenient and immediate use, although the "fooling" occurred at Smith's house, instead of Jiles'.

During the progress of the argument, counsel for the State said there were more killings in Union County, where the killing in question occurred, than there were in England, and that, if the juries did not take to convicting somebody, there would be still more. Objection was made to this argument, and the court stated to counsel who had made the argument that he should stay within the record, and the court stated to the jury that they would consider only the evidence in the case. It is insisted that this argument was improper and prejudicial, and that the

remarks of the court were not sufficient to remove the prejudice.

It is difficult to say just to what extent prosecuting attorneys may go in appealing to juries to enforce the law, and much must be left to the discretion of the trial judge. A prosecuting attorney would, of course, have no right to appeal to a jury to convict a man, whether he was guilty or not, for any purpose; but such does not appear to have been the purport of the argument here.

It is legitimate argument for the prosecuting attorney to state that a failure to enforce the law begets lawlessness, and this evidently was the interpretation the court placed upon the argument. In any event, the court told counsel to confine his argument to the evidence, and told the jury to consider only the evidence in the case, and we must presume, in view of this admonition, that the jury, as sensible men, knew they could not convict appellant unless the testimony in the case required that this should be done. *Blackshare* v. *State*, 94 Ark. 548.

No error appears, and the judgment is affirmed.

FRANCE v. BUTCHER.

Opinion delivered July 7, 1924.

1. QUIETING TITLE—PLAINTIFF'S TITLE.—In an action to quiet title plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's title.
2. QUIETING TITLE—BURDEN OF PROOF.—In an action to quiet title where the plaintiff relies upon title by adverse possession, the burden of proof is on him to establish the facts which constitute adverse possession.
3. ADVERSE POSSESSION—PAYMENT OF TAXES—PAYMENT BY GRANTOR.—While Crawford & Moses' Dig., § 6943, gives the benefit of the act to a party where "he and those under whom he claims shall have paid such taxes for at least seven years in succession," the persons "under whom he claims" can only be construed to mean persons in the line of title who made payments while they were claiming title, and payments made by a grantor after he had parted with the title do not inure to the benefit of his grantee.

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

R. D. Rascoe, Geo. W. Hays and *William F. Kirby,* for appellant.

1. Appellant and his grantors have been in possession and paying taxes under color of title for 32 years, *i. e.*, since the State deed to Henry in 1875. There is no defect appearing on the face of this deed, and the presumptions are all in its favor. It is *prima facie* valid, and constitutes color of title, as does each of the succeeding deeds. C. & M. Digest, § 6666-6669; 131 Ark. 273; 139 Ark. 211; 48 Ark. 185.

2. Appellant's possession was adverse. Payment of taxes cured all defects and perfected appellant's title. C. & M. Dig. § 6943; 109 Ark. 281; 131 Ark. 22; 131 Ark. 83; 157 Ark. 97; 124 Ark. 379.

3. The State's deed to appellee Butcher is void on its face and does not constitute color of title. 140 Ark. 367; 131 Ark. 273; 135 Ark. 592. A tax sale *en masse* for a lump sum is invalid, and a tax deed which shows on its face that separate lots in an incorporated town were so sold is void. 83 Ark. 74; 138 Ark. 194; 224 S. W. 619; 148 Ark. 653. Appellee holds as a trespasser. 131 Ark. 273. The two-year statute of limitation was not put into operation by such void deed. 93 Ark. 176; 152 Ark. 368; 152 Ark. 315.

4. Appellee was not entitled to recover taxes paid under the void deed, nor the value of improvements. 140 Ark. 367; 131 Ark. 273; 143 Ark. 92; 120 Ark. 620. Having made improvements within two years from the date of his purchase, appellee is not entitled to recover under the provisions of C. & M. Digest, § 10120, and, not having purchased at a tax sale and not having a clerk's deed therefor, he cannot recover under § 10117, *Id.*

C. E. Pettit and *W. A. Leach,* for appellee.

1. On the issue of adverse possession, the burden is always on the party who asserts it. 117 Ark. 579; 110 Ark. 572; 61 Ark. 464. And where payment of taxes is made an element of title by adverse possession

under the statute, the burden of proof is on the party setting up adverse possession to show such payment. 1 Cyc. 1144; 82 Ark. 51; 76 Ark. 426. In a controversy between the true owner and an adverse claimant, where the proof shows payment of taxes by the true owner for a number of years prior and subsequent to a particular year, but is silent as to that year, the presumption is that the true owner paid the taxes for that year. 37 Cyc. 1167. Here the appellant is not shown to have been the owner at the time the payment of the taxes of 1898 was made; and payment for that year by the appellant was necessary to complete his title. If the taxes for that year were paid by any of appellant's predecessors, they were paid by Leslie, and the proof falls far short of showing payment by him. Had the trial court found that he paid the taxes for that year, it could not, under the holding in *Reynolds* v. *Snyder,* 121 Ark. 33, be upheld.

2. If the appellant had been in actual possession and had been dispossessed by appellee, the rule he seeks to invoke would apply; but there is no contention by appellant that appellee ousted or dispossessed him when the latter took possession, and the rule as to trespassers does not apply. Constructive possession always follows the legal title, but not so actual possession. 110 Ark. 534; 39 Ark. 712. Where no legal title is shown in either party, the party showing prior possession in himself or those under whom he claims will be held to have the better right. 15 Cyc. 30.

3. The cases cited in support of appellant's contention that appellee is not entitled to recover for taxes paid and improvements made are not in point. In cases where the deed is void for uncertainty of description, the purchaser at the tax sale may recover for taxes paid and improvements made, if he can show or identify the lands mentioned in his deed as the lands on which the taxes were paid and improvements made. 50 Ark. 484. See also C. & M. Digest, §§ 3703, 3708, 10117.

McCULLOCH, C. J. This litigation involves the title to, and right of possession of, lots in the town of Gillett, described as lots 1, 2, 3, 4, 5, and 6, of block 18. Both parties claim under a tax title. Appellant's claim originated with a tax sale in the year 1872, whilst appellee's claim originated in a forfeiture to the State in the year 1908 for the taxes of 1907, and a conveyance by the State Land Commissioner to appellee May 19, 1911. Appellee also claims title by adverse possession on account of the payment of taxes continuously for seven years. The action was instituted in the chancery court of Arkansas County by appellant against appellee to cancel appellee's tax title and recover possession of the land.

It is alleged in the complaint that the tax sale in 1908, under which appellee claims, was void by reason of the fact that the six lots were sold *en masse*. Appellee answered, denying that the tax sale was void, and alleging that the sale under which appellant claims is void on the same ground as the charge in the attack upon the tax sale under which appellee holds. In other words, each charge of invalidity with respect to the tax sales is based on the same ground, and it is conceded now that each of the sales was void.

Appellee, in his answer, denied that appellant paid taxes for seven years in succession. Appellee took actual possession of the lots immediately after he received the deed from the State Land Commissioner on May 19, 1911, and fenced the lots and remained in possession up to the commencement of this suit, which was less than two years, however, as the action was commenced in April, 1913. Appellee pleaded the statute of limitations, but it is obvious that the plea is not sustained, for the reason that he did not actually occupy the property as long as two years before the commencement of the action.

Appellee has raised no question below as to the jurisdiction of the chancery court. Appellant being out of possession, his proper remedy was to sue to recover

possession, but, if objection had been made below, the action could have been transferred to the law court, and, as no such motion was made, we must treat the question as waived.

We come then to the question whether appellant has shown title by adverse possession on account of payment of taxes for seven years. There is a stipulation in the record, the effect of which is to establish the fact that the lots in controversy were "unimproved" and "uninclosed" within the meaning of the statute (Crawford & Moses' Digest, § 6943), which provides that such land "shall be deemed and held to be in possession of the person who pays the taxes thereon, if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act." Act March 18, 1899. The lots were sold, as we have already seen, for the taxes of 1907, and appellee paid the taxes subsequent to the acquisition of his tax title, hence appellant's adverse possession must have ripened into title, if at all, prior to the year for the taxes of which the sale was made. In other words, there must have been the requisite payment of taxes to constitute adverse possession prior to the year 1907.

The tax sale of these lots in 1872 was to the State. The lots were sold by description as acreage property, being included in a certain subdivision according to the government survey. J. P. Henry purchased that subdivision from the State on June 24, 1875, and that title comes on down to appellant by deeds from Henry to T. H. Leslie January 23, 1879, and Thomas H. Leslie to H. G. Leslie, September 15, 1882; sheriff's deed to Robert Poage under execution sale under judgment against H. G. Leslie, September 25, 1900, and from Robert Poage to appellant April 5, 1913. Appellant also presents a chain of title beginning with a deed from H. G. Leslie to

John Wisdom on June 6, 1904; deed of Wisdom to William Montgomery Brown, Episcopal Bishop, June 30, 1904, and deed from James R. Winchester, Episcopal Bishop, to appellant, dated December 4, 1912. Appellant also shows a deed from Wisdom to himself, dated June 24, 1912.

It is apparent from the above recital that the claim under the tax title passed to H. G. Leslie and then to Poage, under the execution sale in 1900.

We are of the opinion that the payment of taxes by appellant's grantors was not sufficient to constitute an investiture of title by adverse possession, for two reasons. No claim of a payment prior to the year 1898 can be included as a part of the requisite number of payments to constitute adverse possession, as the proof does not show who paid the taxes for the year 1898 or the year 1905. Records were introduced to show that the taxes were paid for those years, but not the individual who made the payments.

The plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of the title of his adversary, and the burden of proof is therefore on him to establish the facts which constitute adverse possession. *Gaither* v. *Gage,* 82 Ark. 51; *Newman* v. *Peay,* 117 Ark. 579; *Cotton* v. *White,* 131 Ark. 273. There is no presumption that any one paid the taxes other than the true owner, even though payments for prior and subsequent years were established.

Another reason why the payment of taxes is not available to appellant as an investiture of title is that. if all the payments for seven years were in fact made by H. G. Leslie, as claimed by appellant, the payments did not inure to the benefit of appellant, for the reason that Leslie was not privy to the chain of title under which appellant claims at the time all of the respective payments were made. Leslie's title was divested by the execution sale in the year 1900, and that title passed under the deed of Poage. Leslie undertook to convey to

Wisdom in the year 1904, and whatever interest he had to convey at that time, if any, passed to appellant under mesne conveyances. Now, the most of the payments made by Leslie which appellant could claim the benefit of would be the payments prior to 1904, for, after that time, Leslie was not privy to the chain of title under which appellant holds. The evidence shows that the taxes were paid by Leslie for the years 1900 to 1904, inclusive, and, if we could indulge the presumption that Leslie paid also for the years 1905 and 1906, these payments would not be available to appellant, for the reason above stated, that Leslie was not privy to the chain of title after his last conveyance under which appellant holds. It is true that the statute gives the benefit of tax payments made not only by himself, but also for payments made by "those under whom he claims," but this can only be construed to mean persons in the line of title who made payments while they were claiming title. After parting with the title, a grantor is a stranger to the title, and payments made by him do not inure to the benefit of grantees under his deed. After parting with title, such a person has no color of title, and therefore his payments avail nothing by way of establishing title by adverse possession.

The decree of the chancery court was correct, and the same is therefore affirmed.

BAYOU METO DRAINAGE DISTRICT v. INGRAM.

Opinion delivered July 7, 1924.

1. DRAINS—DISTRICT LYING IN TWO COUNTIES.—Under Acts 1921, p. 388, amending Crawford & Moses' Dig., § 3607, the circuit court is given jurisdiction in cases where a drainage district embraces lands in more than one county.

2. DRAINS—EXTENSION OF BOUNDARIES.—Crawford & Moses' Dig., §§ 3625, 3628, and 3630, authorize a change of the plans of a drainage district and an extension of the boundaries to include benefited lands at any time before the completion of

the improvement as originally planned; and the improvement is not "completed" until the main channel of the ditch reaches the outlet, so as to carry off the water.

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

Chas. A. Walls, for appellant.

1. The alternative system of drainage districts as provided for in Crawford & Moses' Digest, §§ 3607-3654, authorizes the district to extend its boundaries so as to include the lands lying in Arkansas and Prairie counties. Section 3614 was complied with in every respect, and that section, together with sections 3625, 3628, 3629 and 3630, *Id.,* taken together, authorize the procedure contended for here. See also, with reference to the power of the circuit court to act, C. & M. Digest, § 3607, and act 353, Acts 1921, p. 390, amendatory thereof. The proceeding authorized by this statute does not relate solely to original proceedings. A careful consideration of the act will show conclusively that it was the intention of the Legislature to make such provision applicable at any stage in the proceedings. 11 Ark. 144. See also Acts 1913, p. 738; 103 Ark. 452; 85 Ark. 228; 89 Ark. 598; 117 Ark. 30; 121 Ark. 13; 145 Ark. 505; 130 Ark. 507; 142 Ark. 510; 115 Ark. 437; 86 Ark. 346; 147 Ark. 535.

2. Circuit courts of the State are the repository for all unassigned jurisdiction; and where a procedure is authorized, and no court given special jurisdiction, circuit courts have jurisdiction in such matters. This being true, even if the special statute did not authorize it, the circuit court would have inherent jurisdiction, under the provisions of the Constitution, to act the same as though the authority was expressly conferred. 111 Ark. 144; 96 Ark. 410; 104 Ark. 425; 161 Ark. 334.

Pettit & Leach and *John L. Ingram,* for appellee.

Reading sections 3607, 3613 and 3615, C. & M. Digest, in connection with 3614, it is clear that the latter section covers one of the preliminary steps in the formation of a district; that it has no application after final order confirming assessments has been made and entered; that it

authorizes the assessment of only such lands as might have been included in the original petition and order; that it authorizes the assessment of such benefits as accrue only by reason of the improvement as set forth in the original petition and order, and that it requires this assessment to be made and filed, together with the assessment of lands included in the original petition and order, before the final order confirming assessments of benefits is made. 103 Ark. 452. Neither that section (3614) nor section 3628 has any application to this proceeding. If it be conceded that section 3625 is applicable to the facts in this case, it can not be invoked in this proceeding because it has in no respect been complied with. 154 Ark. 335. But if this section had been fully complied with, it is not applicable to this proceeding. Its operation applies to lands lying only within the boundaries of the district. Under section 3629, relied on by appellant, if it was found necessary, the appellant could cut a ditch or drain across lands lying outside of the district, and could exercise the right of eminent domain to that end, but the cost of construction of such ditch or drain must be borne by the district, and not by lands across which such ditch or drain is constructed. Section 3630, relied on by appellant, presupposes a district fully formed, with its drainage system completed. Its object is to provide ways and means to preserve this completed system, and, to that end, it provides a procedure complete in itself. There is nothing in this statute having reference to lands other than the lands embraced in the district; nothing authorizing the extension of boundaries, and no language that could be so construed. The word "additional" in the phrase "levying of additional taxes," necessarily implies the existence of something to which something (in this instance, taxes) may be added. 53 Miss. 626. None of the cases cited by appellant support the contention that the district, the county court or the circuit court is authorized to extend the boundaries of the district in this proceeding. Two of the cases, 142 Ark. 510, and 155 Ark. 176, discuss the authority to extend the boundaries of a

district, but neither of them had under consideration this act, and they are therefore not in point.

McCULLOCH, C. J. The drainage district which is the appellant in this action is one formed in Lonoke County under the general statutes of the State providing for what is commonly termed the alternative system of drainage districts. Crawford & Moses' Digest, §§ 3607 *et seq.* The organization included a large area in Lonoke County for drainage purposes, and provided for the construction of a main ditch or canal running in a southeasterly direction and emptying into the stream called Bayou Meto near the southeastern boundary of the county. Bayou Meto was to be the outlet for the flow of water from the end of the canal. Numerous lateral ditches were also provided for in the plans. The district was formed of lands lying entirely within the county of Lonoke, and the proceedings were had in the county court of that county. Plans were formed and approved, and assessment of benefits was made, a contract for the improvement was let, and bonds were issued. The work in accordance with the plans progressed nearly to completion. The main canal had been dug within a short distance of the southern termini, and all of the laterals were completed except two. It was then determined that, on account of the circuitous course of Bayou Meto below the end of the main ditch, and the lands on each side of it being low and swampy, the bayou was insufficient as an outlet from that point, and that it was necessary to extend the main ditch or canal a distance of about four and a-half miles, to reach another point on Bayou Meto where the banks were high, and that this would shorten the outlet from about thirteen miles, through which the water would have to flow by going around through the bayou, to four and a-half miles at the point to which the extended main ditch or canal would empty the water into the bayou. Plans were then formed by the commissioners for the extension of the main canal as an outlet, and also for an extension of the boundaries of the district so as to include the additional

lands which would necessarily be benefited by the extension of the main ditch. The report of the commissioners showing the altered plans and the assessment of benefits on the additional property to be added, which was about 8,000 acres in Prairie and 4,000 acres in Arkansas County, was filed with the circuit clerk of Lonoke County, and notice was given in accordance with the statute. After maturity of the notice, appellees, who are residents and owners of property in Prairie and Arkansas counties, appeared and filed their protest against the proceedings. On hearing the matter before the circuit court, it was decided that the court was without authority to make an order extending the bounds of the district and assessing the benefits to the lands in the other two counties. The court decided, however, that the district was entitled, under the statute, to condemn an outlet beyond the bounds of the districts as originally formed, and an appeal has been prosecuted in behalf of the district to this court.

The principal question to be decided in the case is whether or not there is authority in the statute for the change of plans and the extension of boundaries of the district so as to include other territory at the stage of the proceedings arrived at in the present instance. If the statute contains such authority, then the circuit court has jurisdiction to hear the proceedings, for the reason that it involves land lying in different counties, and the statute provides that in such case the proceedings shall be had in the circuit court. Section 3607, Crawford & Moses' Digest, as amended by the act of March 23, 1921 (Acts 1921, p. 388), provides, in substance, that, if land in more than one county is embraced in a district, "the application shall be addressed to the circuit court in which the largest portion of the lands lie, and all proceedings shall be had in such circuit court." The same statute provides that the circuit court shall apportion the costs between the counties in proportion to the benefits, that expenses incurred prior to the time when such assessment is made shall be apportioned between the counties, and that wher-

ever in the statute the words "county court" or "county clerk" are used, the words "circuit court" and "circuit clerk" shall apply in cases where the district contains lands in more than one county. This court, in the case of *Grassy Slough Drainage Dist.* v. *National Box Co.*, 111 Ark. 144, decided that the language of this section was sufficient to give the circuit court jurisdiction in cases where the district embraced lands in more than one county.

We turn then to the question whether or not, regardless of county lines, there is any authority in the statute for the extension of the boundaries of a district under circumstances found to exist in the present case. There are several sections of the drainage statute which have some bearing on the question of authority to do the things undertaken in the present instance. One of the sections of the statute (Crawford & Moses' Digest, § 3629) provides for the condemnation of a proper outlet for the drainage system, and that for that purpose a ditch or drain may be extended beyond the limits of the district; but that section may be put aside as having little bearing, for the reason that this is not merely a proceeding to secure an outlet. It is conceded by appellees that such an outlet may be obtained under the statute, and the circuit court so held, but it is sought in the present proceeding to extend the boundaries of the district so as to tax the land which will be benefited by the extension of the ditch. One of the sections of the statute provides that, on the assessment of benefits and damages after the formation of the plans, if it be found "that other lands not embraced within the bounds of the districts will be affected by the proposed improvement, they (the commissioners) shall assess the estimated benefits and damages to such land, and shall especially report to the county court the assessment which they have made on the lands beyond the boundaries of the district as already established." Crawford & Moses' Digest, § 3614. Other sections affecting the question involved read as follows:

"Section 3625. The commissioners may, at any time, alter the plans of the ditches and drains, but, before constructing the work according to the changed plans, the changed plans, with accompanying specifications showing the dimensions of the work as changed, shall be filed with the county clerk, and notice of such filing shall be given by publication for one insertion in some newspaper issued and having a *bona fide* circulation in each of the counties in which there are lands belonging to the district. If, by reason of such change of plans, either the board of commissioners or any property owners deem that the assessment on any property has become inequitable, they may petition the county court, which shall thereupon refer the petition to the commissioners hereinbefore provided for, who shall reassess the property mentioned in petition, increasing the assessment if greater benefits will be received, and allowing damages if less benefits will be received or if damages will be sustained. In no event shall a reduction of assessments be made after the assessment of benefits has been confirmed, but any reduction in benefits shall be paid for as damages, and the claim for such damages shall be secondary and subordinate to the rights of the holders of bonds which have heretofore been issued. From the action of the commissioners in the matter the property owners shall have the same right of appeal that is herein provided for in the case of the original assessment." Crawford & Moses' Digest.

"Section 3628. In case any land in any drainage or other improvement district is benefited, which, for any reason, was not assessed in the original proceedings, or was not assessed to the extent of benefits received, or in case any corporation, individual or other drainage district organized under this or any other general or special act, outside the limits of any district organized or operating under the terms of this act, shall drain land into any ditch belonging to any district formed or operating under the terms of this act, the commissioners of said drainage district shall assess

the benefits or the enhanced benefits received by such land, and the proceedings outlined in § 3613 for assessing benefits to lands not included within the boundaries of the district shall in all matters be conformed with; providing that this and the following section shall not operate to interfere with vested rights to natural drainage."

"Section 3630. The district shall not cease to exist upon the completion of its drainage system, but shall continue to exist for the purpose of preserving the same, of keeping the ditches clear from obstructions and of extending, widening or deepening the ditches from time to time as it may be found advantageous to the district. To this end the commissioners may, from time to time, apply to the county court for the levying of additional taxes. Upon the filing of such petitions, notices shall be published by the clerk for two weeks in a newspaper published in each of the counties in which the district embraces lands, and any property owner seeking to resist such additional levy may appear at the next regular term of the county court and urge his objections thereto, and either such property owners or the commissioners may appeal from the finding of the county court."

It is the contention of counsel for the district that these three sections last quoted clearly authorize the further proceedings sought to be undertaken, and we are of the opinion that counsel is correct in this contention. On the other hand, it is the contention of counsel for appellees that, in the first place, the statute does not authorize a change of plans and an extension of boundaries of the district after the approval of the original plans and the assessment and confirmation of benefits; and second, that, in the present instance, the improvement as originally planned and executed was substantially complete, and that the so-called additional improvement proposed by the changed plans is, in effect, a new and independent improvement. It is evident, from the broad and comprehensive language used by the law-

makers in framing this statute, and the numerous details set forth in the various sections, that it was intended to give every power necessary to complete drainage schemes. The statute clearly takes cognizance that a drainage scheme is ineffectual and incomplete unless the water is completely gathered up and an outlet provided for carrying it entirely away. In other words, the statute contemplates that a drainage ditch does not drain unless the water is taken care of and entirely carried away. So there is a clearly expressed purpose on the part of the lawmakers to authorize everything that is necessary to get the water off the land and into an outlet which will carry it somewhere into the open channel of a stream. Viewing the statute in that light, we think that the language of the sections referred to is sufficient to authorize a change of plans and an extension of the boundaries at any time before the completion of the improvement as originally planned, and that if, at any time before that point is reached, it is found that the scheme will prove abortive unless there be an extension, and that other lands will be benefited by such extension, further proceedings may be had to that end. A study of the language of § 3625 convinces us that the additional proceedings are not confined to a period anterior to the approval of the original plans and the letting of a contract. The language shows that it contemplates that a change may be made after the original assessment, for it provides for a reassessment in case it is found that the change of plans renders the original assessment inequitable or insufficient. Section 3628 also shows that it was intended to authorize a change after the original assessment, because it provides for the inclusion of land entirely omitted from the original assessment. If the statute authorizes the change of plans and extension of boundaries after the approval of the original plans and the assessment of benefits, then it follows that it may be done at any time before the improvement is completed, for there is no other period in the proceedings at which the authority may be limited.

Counsel for appellees are mistaken in their contention that this improvement was completed; on the contrary, the proof shows that the main channel of the ditch was not quite complete so as to reach the proposed outlet, and that two of the lateral ditches had not been constructed. The scheme was not complete until the outlet was reached so as to fully discharge the water and provide for carrying it off. Nor was this extension of the ditch in any sense an independent improvement; it was merely an extension of the ditch according to the original plans, and constitutes an essential part of the improvement.

It is contended that this case falls within the decision of this court in the recent case of *Indian Bayou Drainage Dist.* v. *Walt,* 154 Ark. 335, but we do not agree that that case has any bearing on the present one. In that case the district had completed the improvement, and it was sought to change the plans so as to dig a parallel ditch, which constituted an independent improvement, and we held that the statute did not authorize that to be done. The proceedings there were sought under § 3670, Crawford & Moses' Digest, and, in disposing of the matter, we said: "It is a new improvement, not in the nature of extending, widening, or deepening the ditches that had been constructed according to the plans originally contemplated in the formation of the district. Specific authority for making an improvement of this character must be found in the law, and it is impossible to find in the language of § 3630, *supra,* giving the words 'extending, widening, or deepening,' their plain and natural meaning, any authority for the construction of a new and independent improvement, such as is shown by the facts of this record."

We have no occasion in the present case to deal with the question of assessment of benefits, or to determine from the facts whether or not there will be a benefit to the lands in Prairie and Arkansas counties which are to be included in the extended boundaries of the dis-

trict. The circuit court did not decide those questions, and it is not proper for us to do so now.

The circuit court erred in holding that there was no authority in the statute for the proceedings set forth in the petition and accompanying papers.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

HART, J., not participating.

CHAMPION v. WILLIAMS.

Opinion delivered July 7, 1924.

1. TAXATION—TAX SALE ON WRONG DAY.—Under act of February 19, 1869, providing that the county clerk, immediately after the list of delinquent lands is returned, shall publish the same for at least three weeks and that the sale shall be held on the Monday next succeeding, a tax deed which recites that the delinquent list was filed on August 1, 1869, and that the sale was had on November 15, 1869, shows that the law was not complied with and that the sale was void.
2. TAXATION—CONSTRUCTION OF TWO-YEARS STATUTE OF LIMITATION. The statute of limitation of two years applicable to possession under a tax deed applies to any tax deed which sufficiently describes the land occupied and purports to convey the same, even though the deed is void on its face.
3. LIMITATION OF ACTIONS—ESTATE IN—REMAINDER.—The rule that the statute of limitation does not begin to run against a remainderman or reversioner until the death of the owner of the particular estate applies, whether the adverse occupant holds under the life tenant, or under an independent claim of title, or as a mere trespasser.
4. TAXATION—ENTRY UNDER VOID TAX DEED.—While a tax sale, if valid, bars the right of all interested parties, those holding remainder interests as well as the life tenant, yet, when the sale is void, one who enters under the sale is a trespasser.
5. TAXATION—TAX SALE—FORFEITURE OF LIFE TENANT'S ESTATE.—Under Crawford & Moses' Dig., § 10054, providing that, if a life-tenant shall neglect to pay taxes on the land and shall not redeem from the sale, "such person shall forfeit to the person or persons next entitled to such land in remainder or

reversion all the estate," no forfeiture of a like estate results from a void sale for taxes.

6. QUIETING TITLE—CONCLUSIVENESS OF DECREE CONFIRMING TITLE.—A decree confirming a title to land, under Crawford & Moses' Dig., § 8362 *et seq.*, is conclusive on collateral attack against all persons, whether named as parties or not, and whether life-tenants or remaindermen, except for jurisdictional defects shown on the record.

7. QUIETING TITLE—NECESSITY OF BOND.—The requirement of a bond in proceedings by constructive process under Crawford & Moses' Dig., § 6261, has no application to proceedings under Crawford & Moses' Dig., § 8362 *et seq.*

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

Lee Seamster, for appellants.

1. Since the deed of J. B. Booth to Mary F. Champion conveyed to her a life estate, with remainder to the heirs of her body, on her death, the land descended to the appellants, her children. 44 Ark. 458; 95 Ark. 18; 116 Ark. 233; 117 Ark. 366; *Id.* 34. The tax deed exhibited by the defendants shows on its face that the tax sale was void because held on a day not authorized by law. 54 Ark. 666. The failure to levy taxes makes a tax sale absolutely void. 100 Ark. 488. And the sale of real estate on a day not fixed by law is "an entire omission to sell." 55 Ark. 549; 90 Ark. 256; 89 Ark. 139; 99 Ark. 500.

An affidavit of tender of taxes paid by the defendants was therefore not necessary in this case, since the complaint does not attack the tax title, and the defendants set it up as a defense and are using it as a shield to protect their possession. 43 Ark. 398, 411. Since the appellants did not acquire title until the death of the life tenant, it was the duty of the life tenant, or those in possession and receiving the rents and profits, to pay the taxes on the place, and that is an additional reason why no affidavit of tender was necessary. 33 Ark. 267; 44 Ark. 504; 98 Ark. 320; Annotated Cases, 1913E, 148; *Id.*, 1916D, 321; 16 Cyc. 632; 137 Ark. 140. A tender is not required where it is known it will not be accepted, or where it is difficult to ascertain the

proper amount, or where it would require an accounting to ascertain the amount. 74 Ark. 343; 52 Ark. 132.

2. The decree quieting title to the tract in controversy was void as to the plaintiffs for the reason that a decree affecting the real estate does not bar the remaindermen where they are not made parties. 23 R. C. L. 582, 583, 69 Ark. 539; 247 S. W. 708; 38 Ark. 167; 123 Ark. 347; 150 Ark. 594; 140 Ark. 367; 128 Ark. 342. The decree was void also for the failure of petitioners or plaintiffs in the decree to give a bond as required by statute. C. & M. Dig., § 6261, second subdivision; 126 Ark. 164.

3. The court erred in holding that the statute of limitations had run against the appellants before they brought this suit. It is elementary that limitations never run against a party until a cause of action accrues. The authorities are uniform to the effect that no statute of limitations begins to run against a remainderman until the death of the life tenant, and, though the life tenant's interest may be acquired by other parties, a remainderman is not required to act until the life tenant's death. Crawford & Moses' Digest, § 10054, contemplates a valid tax sale, and a void tax sale does not work a forfeiture to the remainderman. 80 Ark. 583; 95 Ark. 333. A new cause of action arises upon the death of the life tenant, the same as if no forfeiture had ever happened. 17 R. C. L. 650; 9 Am. St. Rep. 795, 800; 11 Am. Dec. 178; 97 Ark. 33; 140 Ark. 368; 128 Ark. 342; 83 Ark. 196, 200; 87 Ark. 428; 92 Ark. 143; 100 Ark. 399; *Id.* 488; 61 Ark. 36; 55 Ark. 192; 23 R. C. L. 991, § 160; 16 Cyc. 651, 652; *Id.* 567 § 116; R. C. L. 589 § 154; 148 Ark. 216, 219.

Duty & Duty, for appellees.

1. The failure to file an affidavit of tender, as required by C. & M. Digest, § 3708, was a good defense, and, on appellee's motion, the cause should have been dismissed. 23 Ark. 644. *Douglas* v. *Flynn,* 43 Ark. 398, relied on by appellants, has been explained, modified and overruled in a number of subsequent cases. 60 Ark. 499; 116 Ark. 115; 94 Ark. 490. A purchaser under a void deed who pays taxes thereunder and makes improve-

ments is entitled to recover therefor. 99 Ark. 501; 92 Ark. 167; 120 Ark. 249.

2. The tax sale of 1869, so far as the record in this case shows, was valid, and made on a day appointed by law, and after a proper levy. The court heard no evidence as to what was the proper day to make the sale in 1869. 69 Ark. 99.

3. Appellants were barred by both the two-year and the seven-year statutes of limitations. As to the effect of a tax sale on the owner of the life estate, and on the estate in remainder, the effect of the purchaser going into exclusive and adverse possession, holding under a tax deed and paying taxes for over fifty years, see 91 Fed. 602; 29 So. 821; C. & M. Digest, §§ 10109, 10110, 10025, 10054. 84 Ark. 1; 123 Ark. 537; 104 Ark. 108; 123 U. S. 747; 26 R. C. L. 403, § 360; 126 Ark. 86; 84 Ark. 614; 129 Ark. 270; 129 Ark. 324; 77 Ark. 324; 20 Ark. 543; *Id.* 508; 60 Ark. 163; 79 Ark. 364; 78 Ark. 7; 71 Ark. 117; 140 Ark. 367. Two years' adverse possession under a void tax deed will bar an action by the owner of the original title. 152 Ark. 368; 84 Ark. 140; 94 Ark. 490; 76 Ark. 447; 153 Ark. 620; 124 Ark. 379. A tax deed void on its face is also such color of title as will support the seven-year statute of limitations. 124 Ark. 379; 80 Ark. 82. Crawford & Moses' Digest, § 6947, makes no exceptions from its provisions, and there can be none in favor of remaindermen, minors or other persons under disability, except as to the right of infants to redeem within two years after attaining their majority. 53 Ark. 418.

4. The estate of the life tenant in this case terminated long before her death. If the tax sale of 1869 was void, the life tenant was barred two years after the purchaser went into possession under the deed executed by the clerk in 1872. From that time her life estate was terminated, and, if her children had any cause of action, it then accrued. 101 N. W. 195; 29 So. 821. One who has a vested remainder in land has the right to protect the estate, and may maintain an action for any injury to the inheritance committed or threatened, whether by the

tenant in possession or by a stranger, as for taxes paid by the remainderman to protect the estate. 23 R. C. L. 579, § 136; 587, § 158; 556, § 103; 95 Ark. 18. See also 60 Ark. 499; 65 Ark. 70; 58 Ark. 151. The decree quieting the title recites proper notice, and cannot be attacked by appellants in this proceeding. It is conclusive against all parties, except those specifically excepted by the statute. Appellants were parties to that suit. 24 Ark. 519; 91 Ark. 95; 49 Ark. 336; 50 Ark. 188; 72 Ark. 101.

McCULLOCH, C. J. Appellants instituted this action in the circuit court of Benton County against appellees to recover possession of a tract of land in that county containing forty acres. The land in controversy is shown to be in high state of improvement, and appellees and their grantors, immediate and remote, have been in actual possession thereof for more than fifty years, claiming to be the owners. Appellants deraign title back to the United States, and the immediate foundation of that title is a deed executed in the year 1859 by J. B. Booth to their ancestor, Mary F. Champion, the effect of which, under the statute (Crawford & Moses' Digest, § 1499), was to convey an estate for life to Mary F. Champion, with remainder over to appellants. Mary F. Champion died on February 9, 1922, and this action was instituted shortly thereafter.

The material facts of the case are undisputed, being brought into the record either by agreement of counsel or by documentary evidence about which there is no dispute. The land was sold on November 15, 1869, for the taxes assessed against it for the year 1868. James Elam was the purchaser at the tax sale, and he assigned his certificate of purchase to John F. Owen, who received a tax deed from the clerk on December 30, 1872. Appellees deraign title by mesne conveyances back to John F. Owen. In the year 1906 M. L. Burns, who was then the holder of the title under which appellees claim, and who is one of the remote grantors of appellees, instituted an action under the statute (Crawford & Moses'

Digest, §§ 8362 *et seq.*) to confirm her title, and a confirmation decree was rendered in accordance with the prayer of the petition. That decree and the record accompanying it was pleaded by appellees in bar of the right of appellants to recover the land.

It appears from the agreed statement of facts that, at the time the land was conveyed by J. B. Booth in the year 1859, it was wild and unoccupied, and remained so until possession was taken by Owen under his tax deed in the year 1872. Neither Mary F. Champion nor any one claiming in her right ever occupied the land. Mary F. Champion and her husband removed to Texas in the year 1864, and remained there until they died, her husband's death antedating her own death about ten years.

Appellees pleaded that they had a perfect title under the tax sale of 1869, and also pleaded the statute of limitations as a defense—the two-year statute under the tax deed, and the seven-year general statute of limitation. Crawford & Moses' Digest, §§ 6947, 6942.

Appellants attack the validity of the tax sale under which appellees claim title.

The case was tried before the court sitting as a jury, and the court found specifically that the tax sale was void, but found generally in favor of appellees. Appellants' motion for a new trial was overruled, and they have prosecuted an appeal to this court.

The facts of the case upon all the issues presented are undisputed, and the question presented is whether the judgment of the court was correct or whether it was erroneous, irrespective of the particular findings made by the court.

The finding of the court that the tax sale to which appellees deraign title was void was, we think, correct. The validity of the sale was attacked on two grounds—one that it was made on a day not authorized by law, and the other on the ground that the amount for which the sale was made included school taxes, which it does not appear from the record were levied by the county court as provided by the statute in force at that time.

The act of February 19, 1869, under which the tax sale in question was made, specified no fixed date for making tax sales, but, on the contrary, contained provisions which rendered it impossible to determine, as a matter of law, whether the sale was made in accordance with the statute (*McWilliams* v. *Bonner,* 69 Ark. 99); however, the deed now under consideration contains recitals which show affirmatively that it was not made in accordance with the provisions of the statute. The deed recites that the delinquent list was filed with the clerk by the collector on August 1, 1869, and that the sale, after being duly advertised, was made on November 15, 1869. The statute then in force (act of February 19, 1869, *supra*) provided that the clerk, immediately after the delinquent list was returned, should publish the same for at least three weeks, and that the sale should be held on the "Monday next succeeding." The recital in the deed that the collector's delinquent list was filed on August 1, 1869, and that the sale was held on November 15, 1869, shows affirmatively that the provisions of the statute were not complied with, and that the sale was void. *Boehm* v. *Porter,* 54 Ark. 665. In the case just cited the collector had filed his delinquent list on the first day of June, and the court said that "if the clerk had complied with § 14 of the act by publishing the list 'immediately,' the sale would necessarily have taken place in June or July. So far, then, as appears from this record, the sale was at a later day than the law authorized." The sale of the land was also void for the reason that the amount for which the land was sold included school taxes, which were not properly levied by the county court.

The judgment of the circuit court is defended by counsel for appellees on the ground that the right of action of appellants was barred by the statute of limitation—by each of the statutes pleaded. This contention is untenable, for the reason that, as appellants were the owners of the remainder interest in the land, subject to the life estate of their ancestor, Mary F. Champion, their right of action did not accrue until the expiration

of the life estate upon the death of Mary F. Champion, and that neither statute of limitation began to run against them until that time. The two-year statute applicable to possession under tax deed applies to any deed which sufficiently describes the land occupied and purports to convey the same, even though the deed is void on its face for other reasons (*Ross* v. *Royal,* 77 Ark. 324; *Dickinson* v. *Hardie,* 79 Ark. 364; *Black* v. *Brown,* 129 Ark. 270), but the operation of that statute is subject to the restriction that it does not begin to run until a right of action accrues, and it does not begin to run against a remainderman until the expiration of the prior estate. It has long been the recognized rule of this court, reiterated in many decisions, that the statute of limitation does not begin to run against a remainderman or reversioner until the death of the owner of the particular estate. The cases on the subject are cited in the recent case of *Hayden* v. *Hill,* 128 Ark. 342, where we said: "This court has held in a long line of cases that the right of entry, and therefore the right of action, does not accrue to the remainderman or reversioner until the death of the owner of the particular estate." The opinion in that case shows that there is no distinction between an instance where the adverse occupant holds under a life tenant or under an independent claim of title, or as a mere trespasser. This rule was again reiterated in the more recent case of *Kennedy* v. *Burns,* 140 Ark. 367. Other cases not cited in *Hayden* v. *Hill, supra,* are *Killeam* v. *Carter,* 65 Ark. 68; *Gannon* v. *Moore,* 83 Ark. 196; *Harris* v. *Brady,* 87 Ark. 428; *Smith* v. *Scott,* 92 Ark. 143. The decisions in the following cases related to the application of the two-year statute: *Gannon* v. *Moore, supra; Harris* v. *Brady, supra; Smith* v. *Scott, supra; Kennedy* v. *Burns, supra.*

The tax sale, if valid, would have barred the right of all interested parties, those holding remainder interests as well as the life tenant, for the sale operated *in rem,* and all parties were bound by it; but, the sale being void, one who entered under the sale was a mere trespasser.

Cotton v. *White,* 131 Ark. 273. So far as concerns the statute of limitation, it could not be put into operation against the remaindermen prior to the expiration of the estate of the life tenant merely because the entry was under a tax deed. Our conclusion therefore is that the judgment cannot be sustained on the ground that appellants were barred by the statute of limitation.

Attention is called to the statute (Crawford & Moses' Digest, § 10054) which provides, in substance, that, if a life tenant shall neglect to pay taxes on the land so held, and shall not, within a year after the sale, redeem from the sale, "such person shall forfeit to the person or persons next entitled to such land in remainder or reversion all the estate," and it is contended that the forfeiture of the land for taxes operated as a forfeiture of the life estate of the tenant in this instance, which set the statute of limitation in motion, and that appellants are barred for that reason. It has been decided by this court that, under the statute in question, no forfeiture of a life estate results from a void sale for taxes. *Magness* v. *Harris,* 80 Ark. 583. The life estate of Mary F. Champion under the deed was absolute and unconditional, and there was no contingency upon which the life estate ceased except the death of the life tenant, therefore the right of action of appellants as remaindermen did not accrue until the death of the life tenant.

We are of the opinion, though, that the judgment was correct for the reason that the title was duly confirmed by the decree of the chancery court in the proceedings which were brought forward into this record. The proceedings were under the statute heretofore cited, and appear to have been in accordance with the statute. It was not a proceeding to confirm the tax title, but to confirm the title generally under that statute. The record shows that the statute was strictly complied with, and the decree of confirmation recites proper notice. It is true that there were certain parties other than appellants named as defendants, but it was against all claimants of interest in the land, whether named in the proceedings

or not. The statute expressly authorizes such a proceeding, and also provides for the making of parties to the suit all individuals who are known to assert an interest, but this does not lessen the effect as a proceeding against all persons who have an interest in the property. The statute (Crawford & Moses' Digest, § 8363) provides that, if the petitioner for confirmation has knowledge of any person who claims an interest in the land, it shall be so stated, and such person shall be summoned as defendant in the case, and another section (8369) provides that the decree shall not affect adverse occupants or any persons who have paid taxes within seven years, unless such persons are made defendants. Known claimants may be made parties to the proceeding, and, to that extent, it becomes adversary, but, under the statute, as we have already said, the proceeding may be for the purpose of confirming against any and all claimants, whether known or not, and such was the effect of the proceedings in the present case. This is a collateral attack on the validity of the confirmation decree, but the decree on such attack is binding against all parties, except for jurisdictional defects shown on the face of the record. *Clay* v. *Bilby,* 72 Ark. 101. There are no defects in this record, and the decree is therefore conclusive on collateral attack. The confirmation decree is also binding on remaindermen as well as life tenants. Though remaindermen have no right of action for recovery of possession until the expiration of the life estate, yet they have an interest which they can protect from the binding force of a confirmation decree, and they are as much bound by the confirmation decree as one who has a present right of action for recovery of possession.

Appellants contend that the decree was not binding on them for the reason that there was no service of process on them, and that they were not directed to be made parties to the proceeding. The answer to this is that it is not essential that they should have been made parties to the record, as they were not in possession of the land and had not paid taxes on the land within seven years.

Again, it is contended that the decree is void because no bond was given pursuant to the statute, which requires bond in case of judgment against nonresident defendants. Crawford & Moses' Digest, § 6261. The statute just referred to does not apply to confirmation decrees, and no bond was required. The statute prescribing the procedure for confirmation of title (Crawford & Moses' Digest, § 8370) provides that any person interested in the land which is the subject-matter of a decree of confirmation may appear within three years and set aside the decree upon showing a meritorious defense, and that persons under disability of infancy, lunacy, idiocy or coverture may appear and set aside the decree at any time within three years after the removal of such disability. The lawmakers, in framing the statute, manifestly determined that this section gave all the protection that interested parties were entitled to; at least there is no provision in this statute for the giving of a bond, and we cannot read any such provision into the statute by applying the provisions of the general statute with reference to adversary litigation against nonresidents.

Decree affirmed.

HART, J., concurs on ground that limitation applies.

COLLIER COMMISSION COMPANY v. WRIGHT.

Opinion delivered July 7, 1924.

1. ACCORD AND SATISFACTION—JURY QUESTION.—Where statements were furnished showing the net balance due on the purchase of carloads of peaches with check accompanying the statements, but neither the statements nor the check showed on their faces that the check was tendered in full, it was a question for the jury to determine whether, under the circumstances, the tender was conditioned on its acceptance in full.
2. ACCORD AND SATISFACTION—INSTRUCTION.—Where a check was tendered in full payment of a disputed claim and was accepted by the payee with knowledge thereof, it became an accord and satisfaction; and it was error to charge the jury that the accept-

ance of the check would not constitute an accord and satisfaction if accepted by the payee as part payment.

3. SALES—BREACH OF PURCHASER—MEASURE OF DAMAGES.—On a breach by a purchaser of a specified number of carloads of peaches which the seller had arranged to procure from farmers and deliver to the purchaser, the seller is entitled to recover the difference between the net price he would have received from the purchaser and the cost of delivering the peaches under the contract.

4. SALES—TENDER OF PERFORMANCE—WAIVER.—A seller is not bound to make a tender of performance of a contract of sale which has been refused in advance by the purchaser.

5. SALES—PERFORMANCE OF CONTRACT.—Where a contract for the sale of a specified number of carloads of peaches stipulated that the purchaser would send an inspector to inspect the cars at the point of shipment, it was not error to instruct the jury that the purchaser would be liable for the peaches either if they were inspected and accepted by its inspector or if, not having been inspected, they were of the grade, quality and condition called for in the contract.

6. PARTIES—RIGHT TO SUE FOR ANOTHER'S BENEFIT.—Under Crawford & Moses' Dig., § 1092, a party may sue on a contract made in his own name, without making other interested persons or the persons for whose benefit the contract is made parties to the suit.

7. APPEAL AND ERROR—JUDGMENT FOR EXCESSIVE AMOUNT—REDUCTION.—Error in awarding an excessive amount may be cured by reducing same.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; reversed in part.

Hill & Fitzhugh, for appellant.

1. Appellee was the sole plaintiff in the case. Floyd not only testified that he was a partner with appellee, but also testified to all the elements which go to make up a partnership. These facts having developed, appellant was entitled to the requested instruction to the effect that, if it appeared from the evidence that Floyd was interested in the contracts sued upon, either to the extent of an equal interest in the profits and losses, or to the extent of a half-interest in the profits, and would, in the event of a recovery, be entitled to receive a share thereof, he was a necessary party, and the verdict should be for the defendant, unless he had been made a party. C. & M. Digest,

§ 1089; 4 Ark. 616; 151 Ark. 209; 49 Ark. 100; 74 Ark. 54; 91 Ark. 52; 144 Ark. 621; 134 Ark. 368; 143 Ark. 439; 74 Ark. 437; 89 Ark. 412; 93 Ark. 447; 124 Ark. 143.

2. Under the evidence, there was a clear accord and satisfaction as to three of the carloads of peaches involved. The utmost of Wright's testimony as to his receipt of the statements and check in settlement for these cars is that he had a mental reservation that he would take what he got and not treat the check as full payment, but this will not avail him. He not only made no protest, but he accepted and cashed the check, which showed on its face that it was in settlement of the three cars, and was given to him with the statements showing the full amount due him according to these statements. 150 Ark. 197; 94 Ark. 158; 100 Ark. 251; 98 Ark. 269; 122 Ark. 212; 148 Ark. 512; 134 Ark. 36.

3. The rule as to lost profits is predicated wholly upon one party to the contract being prevented from performing the same by the fault of the other. If he is not so prevented, there is no basis for damages for loss of profits, and if he is prevented by the fault of the other, then the loss is to be measured by the rule announced in *Black* v. *Hogsett,* 145 Ark. 178, 182.

Warner, Hardin & Warner, for appellee.

1. There is no defect of parties because of the failure to make Floyd a party plaintiff. There was no partnership existing between appellant and Floyd. *Stone* v. *Riggs,* 163 Ark. 211; 159 Ark. 621; 138 Ark. 281; 152 Ark. 465; 13 C. J. 701, § 805; 6 R. C. L. 882, § 270; 144 Ark. 8-10; 128 Ark. 149-154.

2. The burden was on the appellant to prove an accord and satisfaction, and, in order to do that, it was necessary to show either that there was an express agreement to accept the check as settlement in full, or prove such facts and circumstances as would necessarily lead to the conclusion that there was an agreement between the creditor and debtor, that such check was given and received as a full settlement of the claim. 156 Ark. 370, 374-5; 158 Ark. 512.

3. Plaintiff is entitled to recover for loss of profits. 140 Ark. 73; 136 Ark. 231; 111 Ark. 474; 91 Ark. 180, 192; 9 Exch. 354.

SMITH, J. Appellee instituted this action against appellant to recover on alleged contracts for the sale of peaches—to recover the unpaid price of six carloads of peaches delivered under contract of sale, and to recover lost profits on several other carloads contracted to be sold and delivered, but which appellant is alleged to have refused to accept. There was a recovery below for the full amount prayed for in the complaint.

The principal controversy relates to the nature of the contract between the parties, appellee claiming that the contract was for sale of the peaches directly by appellee to appellant, whereas the claim of appellant is that the contract was that appellant should handle the peaches for appellee merely as broker, and not as purchaser. There was a sharp conflict in the testimony on that issue, and, as it was properly submitted to the jury, we must treat the verdict as conclusive.

The transactions between the parties now under consideration occurred in July, 1922. Appellee was cashier of the Bank of Lavaca, in Sebastian County, and was also interested in farming. Appellant at that time was engaged at Fort Smith in the grain and produce business. The parties entered into an oral contract for the shipment of four carloads of peaches at a stated price, and those cars were inspected, shipped and delivered in accordance with the directions of appellant, and were fully paid for. There is no controversy in the case concerning the payment of the price of those cars. The only controversy is as to the character of the contract between the parties. The sale and shipment of those cars was only brought into the controversy by appellee for the purpose of showing what the contract was. After the delivery of those cars there was another oral agreement for the shipment of more cars, and these were shipped and paid for. Two more cars which were shipped

have not been paid for, and the price of those two cars, one $600 and the other $589, making a total of $1,189, is involved in this suit. The cars were not shipped to appellant, but were shipped to dealers in Kansas City and other places—most of them to Baldwin-Pope Marketing Company, Kansas City.

The claim of appellant is, as before stated, that it acted as broker, and that these cars were shipped to Baldwin-Pope Marketing Company as purchasers.

The claim of appellee is that the sales were to appellant, and were shipped to the consignee under appellant's direction.

Appellant contends, as a further defense to these two items, that there was a defect in the quality of previous shipments to the Baldwin-Pope Marketing Company, and that the price of these two cars was credited on the account of Baldwin-Pope Marketing Company against appellee for such shortage. This is but another way of contending that appellant was not the purchaser, but merely handled the shipments as a broker, and is not responsible as purchaser.

The finding of the jury on the issue as to the nature of the contract between the parties is necessarily conclusive as to the liability of appellant for these two items.

There was still another contract for the sale and shipment of fifteen carloads, and this action includes the balance on the price of four carloads shipped and received under the contract. The net price of three of the cars amounted, according to the contention of appellee, to the aggregate sum of $1,431.25, and, after crediting the sum of $517.88 paid to appellee, it leaves a balance of $913.37. The price of the fourth car amounted, according to the contention of appellee, to the sum of $543.75, and, after crediting the sum of $122.91 paid by appellant to appellee after the commencement of this suit, it leaves a balance of $420.84. The contention of appellant is that the amount paid on the three cars was accepted by appellee under such circumstances as constituted an accord

and satisfaction. The facts with reference to the payment on those three cars were that appellant delivered to appellee an itemized statement as to each one of the cars, showing the number of bushels of peaches, gross price, and the price per bushel, the freight, cost of icing, and commissions on each car, and showing the net balance of the price, after deducting the freight, expenses and commission. These statements were delivered to appellee with a check covering the aggregate of the three net amounts shown by the statements, and appellee received the check and statements without comment, and cashed the check. The present action was commenced a few days thereafter. The payment on the last car was made in the same way, except that it was made after the commencement of this suit. Counsel for appellant contend that the facts stated constituted, beyond dispute, an accord and satisfaction, and that the court should have given a peremptory instruction, at least as to the price of the three carloads embraced in the payment made prior to the commencement of the suit. We cannot agree with counsel in this contention, for neither the statements nor check delivered by appellant to appellee showed on their faces any statement that the payment was tendered in full, nor was any condition imposed on the face of the check or statements. Therefore it was a question of inference for the jury to determine whether, under the circumstances, the tender of payment was made on condition that it be accepted in full. *Longstreth* v. *Halter,* 122 Ark. 212; *O'Leary* v. *Keith,* 134 Ark. 36; *Arkansas Z. & S. Corp.* v. *Silver Hollow Min. Co.,* 148 Ark. 512; *Beeson-Moore Stave Co.* v. *Brewer & Story,* 158 Ark. 512.

It is also contended that the court erred in its charge to the jury on this issue. Appellant requested the court to give instruction No. 9, which reads as follows:

"If you find from the evidence that the defendant, Collier Commission Company, rendered statements to the plaintiff, Lawrence Wright, of each of three cars of

peaches sold by them, which statements purported to give the amount received for the peaches, less the commissions, freight and icing charges, and showed a balance in favor of the said plaintiff, and each of said statements were accompanied by a check showing the identity of the cars for which the statements were rendered, and the said statements and the check were accepted by the plaintiff, Lawrence Wright, the check cashed by him, then you are instructed he cannot recover on account of said three cars for which said statements were thus rendered and check given and accepted by him."

The court refused to give the instruction as asked, and modified it by adding the following: "Unless you find from the evidence that the checks were only accepted by plaintiff Wright as part payment, and, in that event, you should find for plaintiff Wright such sum as the evidence shows is due him, if any." Appellant objected to the modification, and saved exceptions.

The instruction as requested by appellant was erroneous, and the court properly refused to give it, for the reason that it stated in peremptory terms that the delivery and acceptance of the statements and check constituted an accord and satisfaction. This is not correct, for the reason, already stated, that neither the statements nor the check contained any condition that the payment was to be accepted in full, and the issues should have been submitted to the jury whether the payment, under the circumstances, constituted an accord and satisfaction. *O'Leary* v. *Keith, supra.* The court could properly have refused the instruction and have given nothing in its place, for it was the duty of appellant to ask a correct instruction. But this the court did not do. On the contrary, the court modified the instruction by adding the qualification, "unless you find from the evidence that the checks were only accepted by plaintiff Wright as part payment." Appellant objected to this modification, and excepted to the action of the court in giving it. While, as we have said, appellant should have asked a correct

instruction, his failure to do so did not deprive him of the right to object to an incorrect instruction on the subject covered by the instruction which he asked. The court might very well have refused to give an instruction on this question, for the reason that a correct instruction was not asked, but, having attempted to charge the jury on this question by modifying the instruction asked, a correct instruction should have been given.

The instruction as given was not a correct declaration of law, for it made the intention of Wright in accepting the check conclusive of its effect. Under the instruction, the jury would naturally, or very probably, have concluded that it was immaterial that appellant tendered the check in full payment of the item which it purported to cover if Wright did not, in fact, accept it as such, whereas the law is that, if the check was tendered in full payment of the disputed items covered by it, and Wright was so advised, it became an accord and satisfaction upon his acceptance of the check. Such is the effect of the authorities cited above.

The finding of the jury on the issue as to whether the sale was made directly to appellant as purchaser, or merely to other purchasers through appellant as broker, is conclusive as to the liability of appellant for the balance due on these cars after crediting the amounts paid. But the jury's finding as to whether there was an accord and satisfaction as to the three cars referred to in instruction No. 9 is not conclusive of that question, for the reason that this issue was not submitted under an instruction correctly declaring the law.

The remainder of the amount sued for and recovered pertains to the item of lost profits on account of the failure of appellant to accept the remainder of the fifteen cars covered by the last contract. Appellee relies for recovery upon the fact that there was a contract for a specific number of cars at a specified price, that appellant broke the contract by refusing to take any more cars after acceptance of a certain number, and that there was a

difference between the stipulated price which appellant was to pay and the price at which appellee had engaged the peaches from growers in the locality where he was operating, which said difference would have accrued to appellee as profit on the consummation of the sale. It is also shown that there were certain expenses incurred by appellee in the performance of the contract, which constituted a loss to him on appellant's refusal to perform the remainder of the contract. If, as contended by appellee, there was a contract between him and appellant for the sale and purchase of a specified number of cars, which appellee had arranged to procure from farmers and deliver to appellant, and that appellant broke the contract, then appellee is entitled to recover, as his profits in the deal, the difference between the net price he would have received on the sale to appellant and the cost of delivering the peaches under the contract. *Black* v. *Hogsett,* 145 Ark. 178. The principal issue of fact, then, is whether or not, after having determined that there was a contract between the parties, appellant broke the contract by refusing to take the remainder of the carloads specified in the contract. There was a sharp conflict in the testimony on this issue, as upon others in the case. Appellant contended on this branch of the case, as well as on the others, that he did not purchase the peaches at all, but was merely a broker. He also testified that the dealer in Kansas City to whom shipments were being made refused to take any more cars on account of the claim that the peaches were not of good quality. Mr. Collier, who testified in the case, testified that, after this controversy arose, he told his inspector, Plunkett, not to accept any more shipments, that the deal was off. Appellee testified that his contract was solely with appellant, and that he was ready and willing to complete the contract, but that appellant declared the deal off. The jury were warranted in finding from this testimony that there was a breach of the contract on appellant's part.

It is suggested by counsel for appellant, in the argument, that appellee should have shipped the cars, or offered to ship them, in order to put himself in an attitude to recover damages, but this is not true, for the reason that appellant declined in advance to take any more cars, and appellee was not bound to go out and buy the peaches and load them into cars when he was notified in advance that they would not be accepted. It is an elemental principle of law that a party is not bound to make a tender which has been refused by the other party in advance.

There are other assignments with reference to the rulings of the court in giving or refusing or modifying instructions. The evidence adduced in the case shows that, under the contract of sale, appellant was to send an inspector to inspect the cars at the point of loading and shipment. The testimony also shows that appellant did send an inspector, who inspected some of the cars, but that he had to cover a large territory and was not able to be present at the loading of each car. There was evidence tending to show that appellee took this matter up with appellant, and it was agreed that the inspector should instruct the loaders, and should be present as often as possible when loading was being done.

The court gave, over appellant's objection, the following instruction at the request of appellee:

"5. You are instructed that, if you find from the evidence that the defendant entered into a contract for the purchase of peaches from the plaintiff, by the terms whereof it was in part provided that the defendant should inspect said peaches at the loading points, and that, pursuant to the terms of said contract, if any, the defendant appointed an inspector for the purpose of inspecting and examining said peaches, in its behalf, at the time that they were loaded in the cars at the loading points, and that said inspector, acting under the directions of the defendant and as its representative, did inspect said peaches and accepted same, then, even though you may

find that said peaches were defective in quality, the defendant is not entitled to set up such defective condition, if any, in defense to the payment of the purchase price, if any, that remains unpaid for said peaches."

Appellant requested the court to give the following instruction, which was refused:

"2. You are instructed that, if you find from the evidence that the cars numbered A. R. T. 10898 and A. R. T. 11419 were in fact sold to the defendant, and you further find that the peaches loaded therein were not of the grade, quality and condition called for in the contract between the parties, you must find for the defendant."

The court refused to give the instruction as requested, but modified it by adding the following: "Unless you further find that the representative of the Collier Commission Company accepted same for defendant Collier Commission Company; in that event you should find for plaintiff Wright such sum as you think may be due him."

Appellant requested the court to give instruction No. 5, which reads as follows:

"You are instructed that the plaintiff must prove by a preponderance of the testimony the contract as defined in the preceding instruction, and also, before he can recover upon any car sued for in the complaint, that said car was inspected by a representative of the defendant at the point of loading and was accepted by a representative of the defendant at the point of loading, as containing peaches of the grade, quality and condition called for in the contract, and, unless plaintiff establishes this by the preponderance of the testimony, you must find for the defendant, Collier Commission Company."

The court refused to give the instruction as requested, but modified it by adding the words, "unless you should further find from the evidence that Wright had complied with his contract in quality of peaches and in loading the same, then you should find for the plain-

tiff Wright such sum as you may find from the evidence is due him."

It is contended that these instructions as modified erroneously stated the applicable principles of law. We do not think so. It is true that it was agreed as a part of the contract that appellant would send an inspector to accept the cars at the point of shipment, but there was no agreement, so far as the evidence shows, that the decision of the inspector should be conclusive. It is not a case where parties have selected a disinterested third party to settle controversies arising during the progress of the performance of the contract. Appellant was to inspect the peaches for its own benefit, but, if the peaches came up to contract with respect to quality, appellant was bound to accept them. So the law was correctly stated, as a whole, that, if the peaches tendered were actually accepted by the inspector, then appellant was liable for the contract price, regardless of the quality of the peaches; and, on the other hand, if appellant failed to inspect, it was liable, regardless of such failure, if the peaches tendered and shipped were in fact of the quality specified in the contract. We are of the opinion that the case went to the jury upon instructions which were substantially correct.

Finally, it is contended that there was a defect of parties, in that another person—Floyd, by name—was a partner with appellee in the performance of the contract, and that he should have been made a party plaintiff. During the progress of the trial appellee introduced Floyd as a witness to establish the fact that the contract was complied with on his part. On cross-examination the fact was drawn out from him that he had an agreement with appellee whereby he was to share with appellee the work and expense of performing the contract, and was to share equally in the profits or losses. Appellant asked an instruction stating, in substance, that, if Floyd was a partner with appellee, the verdict should be in favor of appellant because of the fact that Floyd had not been made a party. The court refused

to give that instruction. We are of the opinion that the court was correct in its ruling, and that, according to the undisputed evidence, appellee was entitled to sue on the contract without making Floyd a party to it. It is undisputed that, whatever the terms of the contract were, it was one solely between appellant and appellee. Neither party disputes that fact. This being true, appellee had the right to sue without making Floyd a party, even though the latter was interested in the performance of the contract, or even if he had been the sole beneficiary under the contract. Our statute provides that "a person with whom, or in whose name, a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose benefit it is prosecuted." Crawford & Moses' Digest, § 1092. This court has often held that, under this statute, a party may sue on a contract made in his own name without making other interested parties, or the persons for whose benefit the contract is made, a party. *Shelby* v. *Burrow,* 76 Ark. 558; *Beekman Lbr. Co.* v. *Kittrell,* 80 Ark. 228; *Starnes* v. *Boyd,* 101 Ark. 469; *Winter* v. *Lewis,* 132 Ark. 399. If, as some of the evidence tended to show, Floyd was a partner with appellee, he was a proper party in bringing the action and could have been joined, but he was not a necessary party, and his absence did not defeat the right of appellee, in whose name the contract was made, to recover.

The court's error in giving modified instruction number five was prejudicial to appellant only to the extent of the amount found by the jury on the additional price of the three cars which appellant contends was covered by the accord and satisfaction. The additional amount over and above the amount paid on the accord is the sum of $913.37, as shown by the statement hereinbefore set forth, and the error may be eliminated by reducing the judgment to that extent and affirmed as so reduced. The right to recover the price of the three carloads of peaches involved in this part of the controversy may be adjudicated separately on the question of

accord and satisfaction, and the cause will be remanded as to that feature for a new trial. In all other respects the judgment will be affirmed.

WOOD, J., dissents.

HITER v. HARAHAN VIADUCT IMPROVEMENT DISTRICT.

Opinion delivered July 14, 1924.

1. HIGHWAYS—IMPROVEMENT DISTRICT—DESCRIPTION OF BOUNDARIES.—The act creating the Harahan Viaduct Improvement District (Special Acts 1923, p. 1243) in describing the boundaries of the district as including "all of the real property in the limits of the St. Francis Levee District," without a more particular description, contemplates that the boundaries shall be coextensive with the present boundaries of the levee district, and is not void for uncertainty.
2. HIGHWAYS—CHANGE IN ROUTE—APPROVAL OF COUNTY COURT.—The act creating the Harahan Viaduct Improvement District (Special Acts 1923, p. 1243) provided that the new viaduct should be constructed along substantially the route of the existing wooden viaduct, that the adoption of the route must meet with the approval of the county court, and that if, in the opinion of the board of commissioners, it was impracticable to construct a viaduct along the route of the present wooden viaduct they should have power to select another route for the construction of said viaduct. *Held* that the act did not contemplate that material changes in the route could be made without the approval of the county court, and was not invalid as invading the jurisdiction of that court.
3. HIGHWAYS—IMPROVEMENT DISTRICT.—In providing for the construction of a new viaduct to take the place of an old structure, the Legislature could provide that, as a part of the improvement, the old structure should be repaired and maintained at the cost of the improvement district, and that the acquisition of the old structure should be treated as a part of the new improvement to the extent of the unpaid indebtedness on it.
4. HIGHWAYS—IMPROVEMENT DISTRICT—AUTHORITY TO INCUMBER DISTRICT.—Under the act creating the Harahan Viaduct Improvement District, which provides that no liens shall be created "until three-fourths of the improvements shall be paid or provided by the United States Government, the State of Tennessee or some political subdivisions thereof, or some other

outside agency" (Special Acts 1923, p. 1243, § 27), the intent was to forbid the incumbering of the lands of the district with the costs of construction in excess of one-fourth thereof, and that nothing should be done until the other three-fourths should be "paid or provided" from other sources.

5. HIGHWAYS—IMPROVEMENT DISTRICT—PRELIMINARY EXPENSES.—Under the act creating the Harahan Viaduct Improvement District (Special Acts 1923, p. 1243, § 25) the commissioners were authorized to do preliminary work to determine whether or not the improvement can be constructed within the limits prescribed in the act, and may issue certificates of indebtedness therefor, but not negotiable paper; but no separate taxes can be levied for the purpose of paying such indebtedness except in the event that the construction of the improvement is abandoned, in which case a levy of taxes may be made by the chancery court in a suit to wind up the affairs of the district.

6. HIGHWAYS—CONSTRUCTION OF ACT CREATING IMPROVEMENT DISTRICT.—The act creating the Harahan Viaduct Improvement District, in providing in § 6 that the district should repair the old viaduct and pay the remaining indebtedness of Crittenden County thereon, did not contemplate two separate projects, and contemplated only one assessment for the entire project, including the temporary maintenance of the old viaduct and the construction of the new.

7. IMPROVEMENT DISTRICTS—AUTHORITY TO ISSUE BONDS.—Until the assessments have been made in an improvement district, so as to demonstrate that the cost of the improvement will not exceed the benefits, there is no authority to issue bonds or make other contracts looking to the construction of the improvement.

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

L. C. Going, for appellant.

1. The act takes from the county court its original jurisdiction to establish the route of the proposed improvement and lodges the same in the commissioners.

2. The boundaries of the district are indefinite and uncertain, and lands are omitted which would be benefited, making the act an arbitrary exercise of legislative power.

3. The finding of the Legislature that the lands would be benefited to the extent of the cost of the improvement, including the indebtedness of Crittenden County, is arbitrary, unreasonable and capricious.

4. The acts of the commissioners in creating preliminary expenses and issuing certificates of indebtedness and in preparing to make an assessment upon the lands to pay same are void.

J. C. Brookfield and *M. B. Norfleet, Jr.*, for appellee.

The boundaries of the district are definite and certain, and include all lands in the levee district as of the date the present act went into effect. 103 Ark. 452. A district is not invalid because certain lands may be benefited which are not taxed. 139 Ark. 153; 133 Ark. 380; 139 Ark. 534; 141 Ark. 301; 146 Ark. 247; 155 Ark. 176. A legislative finding of benefits is in accordance with law. 239 U. S. 237. The district may lawfully pay the outstanding indebtedness of Crittenden County under the following authorities: 114 Ark. 360; 139 Ark. 347; 154 Ark. 551; 156 Ark. 267. See also 79 Ark. 233. The commissioners have the power to contract for and pay for preliminary expenses. 151 Ark. 47; they may issue negotiable notes. 152 Ark. 422. Section 26 of the act has been complied with in that three-fourths of the total cost has been provided from outside sources.

A. B. Shafer, amicus curiae, for interveners.

McCULLOCH, C. J. There is a bridge across the Mississippi River at Memphis, known as the Harahan bridge. It was constructed and is maintained by a corporation for use primarily as a railroad bridge, but, under the requirements of the act of Congress authorizing its construction, provision is made for other modes of travel by vehicles or by pedestrians, and it is operated for those purposes as a free bridge. The Arkansas terminus of the bridge is in Crittenden County, and that county several years ago constructed a viaduct from the terminus of the wagonway of the bridge to the levee constructed and maintained by the St. Francis Levee District, so as to connect with the public highway and afford means for travelers to approach the bridge. The viaduct is a wooden structure, and Crittenden County still owes a large amount of indebtedness for the cost of the structure, estimated now to be about $100,000. The wooden

viaduct was deemed to be insufficient for travel permanently, and the General Assembly of 1923 (Special Acts 1923, p. 1243) enacted a statute creating an improvement district comprising "all of the real property in the limits of the St. Francis Levee District, which district was organized and established as an improvement district under the act of February 15, 1893," and designated as "Harahan Viaduct Improvement District," for the purpose of constructing and maintaining "a viaduct as a public highway connecting the terminus of the wagonway of the Harahan Bridge spanning the Mississippi River at Memphis with the levee of the St. Francis Levee District opposite the same, and to maintain or have maintained said viaduct in a state of good repair." The statute names the commissioners, provides means for electing their successors, authorizes the employment of attorneys and engineers, and also provides for the assessment of benefits to lands in the district, the levying of taxes thereon, the letting of contracts for the construction of the improvement, and the issuance of bonds to obtain money to hasten the work of constructing the improvement. The statute, in other words, provides a complete scheme for constructing and maintaining the improvement and paying for the same as in similar acts enacted in recent sessions of the Legislature for the improvement of roads and for other improvements. Sections 6 and 7 of the statute read as follows:

"Section 6. The board of commissioners shall have the power to maintain and repair that part of the wagonway of the Harahan bridge situated in Crittenden County, Arkansas, until such time as a new viaduct, contemplated under the terms of this act, is constructed, and the benefits to be derived therefrom by the lands in the district shall be considered and assessed in making the assessment of benefits, and to secure funds therefor the board shall have power to borrow money, issue bonds, and pledge the assessment of benefits conferred by this act for other purposes, and the repair and maintenance

of such wagonway shall be considered as part of the work of improvement in the district.

"Section 7. As the construction of the viaduct authorized by this act will destroy the use of the existing wooden viaduct, the district shall assume and pay the outstanding indebtedness of Crittenden County created in the construction of said wooden viaduct, not yet due and unpaid, but in no event shall said board of commissioners assume and pay any indebtedness created in the construction of said wooden viaduct that is past due and unpaid."

Section 8 of the statute provides that the new viaduct "shall be constructed along substantially the route now occupied by the existing wooden viaduct belonging to the said Crittenden County, if the same be a practicable route, in the opinion of said board, and if the same meet with the approval of the county court of Crittenden County; and if, in the opinion of said board, it is impracticable to construct a viaduct along the route of the present wooden viaduct, they shall have the power to select another route for the construction of the said viaduct."

Sections 25, 26 and 27 read as follows:

"Section 25. If, for any reason, the improvements contemplated by this act are not made, the preliminary expenses of the district shall be a first lien upon all the lands of the district and shall be paid by a levy of a tax thereon upon the assessed value for State and county taxation, which levy shall be made by the chancery court, and shall be collected by a receiver to be appointed by said court.

"Section 26. Said viaduct shall be at all times maintained as a free viaduct, and it shall be unlawful for said board of commissioners or for any agency of the State to establish toll-gates on same, or to charge for passageway over the same. Said board of commissioners are hereby authorized and are hereby given full authority, and it is their duty, to accept from outside sources contributions to the construction cost of said viaduct, including any and all contributions that they may be able to

obtain from the Federal Government, the State of Tennessee, or from any other source. Provided, that no liens shall be created on the lands or improvements made under the terms of this act until three-fourths of the cost of the improvements shall be paid or provided by the United States Government, the State of Tennessee, or some political subdivisions thereof, or some other outside agency.

"Section 27. After determining the cost of construction of said viaduct, and approving the plans, as herein provided, it is the duty of the board of commissioners to determine the amount of outside contributions available for the construction of the improvement, and in making a levy and issuing bonds for the construction of said improvements the said board of commissioners shall credit the construction cost of said viaduct with such contributions, and issue bonds alone for the remainder. Provided, that the total bond issue authorized under this act shall in no event exceed one-fourth of the total cost of construction."

The board of commissioners has organized and has employed engineers, attorneys and other agents and servants, and are proceeding with the preliminary work of preparing plans and specifications, determining the exact route of the viaduct, and have otherwise made preparations to construct the improvement, and have already incurred considerable debt for which certificates of indebtedness had been issued.

Appellant is the owner of real property in the district, and he instituted this action in the chancery court of St. Francis County attacking the validity of the statute creating the district and seeking to restrain the commissioners from proceeding to operate under its provisions. He also alleges that the condition expressed in § 26 of the statute, with respect to obtaining funds from other sources, has not been complied with, and that, notwithstanding, the commissioners are proceeding with the work in violation of that part of the statute. He also alleges that the commissioners are about to make

assessments of benefits and levy taxes to pay the preliminary expenses and to issue bonds in advance of any ascertainment whether the improvement can be constructed.

The answer of appellee admits the truth of the allegations of fact set forth in the complaint except the allegation with respect to failure to comply with the proviso set forth in § 26, and it is alleged in the answer that there has been a compliance with that proviso in that the Federal Government has provided for the payment of one-half of the cost of the improvement and that the State of Tennessee has made provision for the payment of one-fourth of the cost of the improvement. That is the only issue of fact involved in the case.

Appellee took the testimony of two of its officers, who testified in substance that the total cost of the improvement had been estimated at the sum of $1,000,000, and that they "had been assured by Mr. McDonald, chief of the bureau of public roads of the Agricultural Department of the United States, that $500,000 of government aid will be available to us whenever we are ready to begin the work of construction," and that the General Assembly of the State of Tennessee had, at the 1923 session, enacted a statute authorizing the city of Memphis to vote upon the question of issuing $250,000 in bonds for the purpose of securing funds for the construction of the viaduct, and that, on the vote of the electors of the city of Memphis, the bond issue had been approved, and that the commissioners of the district had been notified by the mayor of Memphis that $250,000 would be available on thirty days' notice.

At the final hearing of the cause the chancellor dismissed appellant's complaint for want of equity, and he has prosecuted an appeal to this court.

The statute creating the district provides for the advancement of any case in the Supreme Court involving the validity of the statute or proceedings thereunder, and, in accordance with that statute, this court made an order on June 9, 1924, advancing the case and setting it

for submission on June 30, on which latter date certain owners of real property in the district, other than appellant, appeared in this court and asked leave to intervene for the purpose of showing that the litigation between appellant and appellee was collusive, that the cause had been unduly hastened for the purpose of cutting off opportunity for other property owners to be heard, and that the testimony upon the issue of fact involved in the case had not been fully developed. The interveners asked that the court either dismiss the cause or that its consideration in this court be postponed until the interveners could institute another action raising the issue of fact involved in the controversy, and take additional testimony directed to that issue. Upon consideration of the matter it was concluded by the court that the litigation was not conducted by the parties collusively, and that the cause should not be dismissed for that reason. We passed the case for a week for submission, with leave to the attorneys for appellee to file a brief, and we reserved, at that time, the decision of the question whether or not the issue of fact was fully developed. The attorneys for the interveners filed a brief as *amici curiae,* joining in with appellant in all of the attacks made on the validity of the statute and the attempted proceedings thereunder. In the consideration of the testimony adduced in the case we readily reached a conclusion in favor of appellant and in favor of the contention of the interveners upon the only issue of fact involved in the case, and, as the interveners, through their attorneys as friends of the court, have presented their views upon the questions of law involved, no prejudice can result to any of the parties appearing here from finally determining the case at this time, without any further postponement. We proceed therefore to that task.

It is contended, in the first place, that the act is void for uncertainty, in that it merely describes the boundaries of the district to include "all of the real property in the limits of the St. Francis Levee District," without a more particular description. It is suggested in the

argument in support of appellant's contention that, after the creation of the St. Francis Levee District by the act of February 15, 1893, prescribing the boundaries, some of the lands were eliminated because not found to be benefited from the construction of the levee, and that the statute now under consideration does not show whether the present district is to be coextensive with the original boundaries of the district or whether it shall exclude the lands which were excluded from the district because not benefited. It is plain from a consideration of the language of the present statute that its framers meant to make the boundaries of this district coextensive with the present boundaries of the St. Francis Levee District, and that it does not include lands heretofore excluded from the St. Francis Levee District. The act of April 15, 1893, creating the St. Francis Levee District (Acts 1893, p. 24) describes the boundaries of the district as follows: "Beginning on the left bank of St. Francis River, at its confluence with the Mississippi River, thence in a northwesterly direction along said left bank of the St. Francis River to the southern boundary line of Lee County, to extreme high water line on the base or slope of the highlands, thence in a northerly direction with the meanderings of the said highlands to the north boundary line of Craighead County, thence east along said north boundary line to the north line of Mississippi County, thence along said line to the Mississippi River, thence in a southerly direction along said right bank of the Mississippi River to the place of beginning, containing all that area which has heretofore at any time, either directly or indirectly, overflowed by water from the Mississippi River."

It will be noted from the language of the act of 1893, *supra,* that definite means were prescribed and pointed out for ascertaining the boundaries of the district; still the boundaries were not accurately described, and the lines remained to be ascertained by a survey following the directions prescribed in the statute. The boundaries of the district were ascertained by determining, from

proper surveys and other investigations, "the extreme high-water line on the base or slope of the highlands," and the boundaries as thus ascertained and established and as now existent were declared by the present statute to be the boundaries of the Harahan Viaduct Improvement District. The fact that the boundaries are described merely by reference to the boundaries of the St. Francis Levee District does not render the description indefinite. Our decision in the recent case of *Britt* v. *Laconia Circle Special Drainage District, ante,* p. 92, is decisive of the question now presented. In that case the drainage district known as the Laconia Circle Special Drainage District was created, and the boundaries were described as embracing all lands within what is "generally and historically known as Laconia Circle, in Mississippi Township, in Desha County, Arkansas," and we decided that the description was sufficient. We think that the principle announced in that case is decisive of the present case, and that this attack is unfounded.

The validity of the statute is next assailed on the ground that it constitutes an invasion of the jurisdiction of the county court, in conferring authority upon the commissioners of the district to select the route of the viaduct without the approval of the county court. This attack is also unfounded. Section 4 of the statute refers to the viaduct as a "public highway," and, for the purpose of this discussion, we may as well treat it as such, without stopping to consider whether it is in fact a part of the bridge or a part of the highway. But, in either event, any change of route authorized by the statute is necessarily slight and immaterial, for the statute itself fixes the location of the viaduct by prescribing that it must connect the end of the wagonway of the Harahan bridge "with the levee of the St. Francis Levee District opposite the same." Giving this language a practical interpretation, it necessarily means that the route of the viaduct shall be from the end of the bridge to a point on the levee substantially opposite the end of the bridge. From this specification there could be no substantial

change in the route, and any attempt on the part of the commissioners to make a substantial change would be beyond the authority conferred under the statute, and such attempt could be restrained. We have held that immaterial changes in the route of a public highway to be improved could be made by commissioners without the approval of the county court. *Wimberly* v. *Road Imp. Dist. No. 7,* 161 Ark. 79. The statute provides that the adoption of the route of the existing wooden viaduct must meet with the approval of the county court, and the obvious reason for that was that it is a structure which was built by the county, and for which there was an outstanding indebtedness, and it was deemed wise not to permit that structure to be disturbed without the consent of the county. But this provision necessarily meant that whatever route was selected would supersede the old wooden structure, and that the approval of the county court should be obtained. As we have already said, any change in the route would necessarily be immaterial, and the construction of the new viaduct would necessarily supersede the old structure, therefore the only reasonable interpretation to put upon the language of the statute is that any route adopted, even though it deviated from the route of the present structure, must be approved by the county court.

The case of *Haley* v. *Sullivan,* 162 Ark. 59, relied on by counsel, is not applicable, for the reason that the language of the statute involved in that case is very different from that used in the statute now under consideration. In that case the statute plainly, according to the view of a majority of the court, authorized the commissioners of the district to adopt, without the approval of the county court, a new route for a road wholly different from the public road described in the statute.

We have not considered, in this connection, the statute enacted by the General Assembly at the extraordinary session in September, 1923, which contains a

provision that all plans for the improvement must be made subject to the approval of the county court. The validity of that statute is challenged by counsel, but we find that the question of its validity or invalidity is not really involved in the present controversy, and we will not therefore consider that question at the present time.

The next ground of attack on the validity of the statute is that it gives authority to the commissioners to repair and temporarily maintain that part of roadway of the bridge in Crittenden County and to assume and discharge the indebtedness incurred by Crittenden County in the construction of the old viaduct. It will be remembered that § 6 of the statute provides that the commissioners "shall have the power to maintain and repair that part of the wagonway of the Harahan bridge situated in Crittenden County, Arkansas, until such time as a new viaduct, contemplated under the terms of this act, is constructed;" that "the benefits to be derived therefrom by the lands in the district shall be considered and assessed in making the assessment of benefits;" that the repair and maintenance of the wagonway "shall be considered as a part of the work of improvement in the district," and that, in order to secure funds, the commissioners "shall have power to borrow money, issue bonds, and pledge the assessment of benefits conferred by this act for other purposes." Section 7, as we have already seen, recites that the construction of the new viaduct "will destroy the use of the existing wooden viaduct," and provides that "the districts shall assume and pay the outstanding indebtedness of Crittenden County, created in the construction of said wooden viaduct, not yet due and unpaid." We perceive no valid reason why the Legislature cannot prescribe, in giving authority for the construction of the new improvement, that, as a part of the improvement, the old structure, which is to be supplanted by the new, shall be repaired and maintained at the cost of the new district, and that the acquisition of the old structure shall be treated as a part of the new improvement to the extent of the

unpaid indebtedness on it. The statute constitutes a legislative determination that the old structure shall be supplanted by the new, and that its value is equal to the unpaid part of the cost of construction. *McClelland* v. *Pittman,* 139 Ark. 341; *Southern Crawford Road Imp. Dist.* v. *Brown,* 156 Ark. 267; *Wagner* v. *Lesser,* 239 U. S. 207; *Valley Farms Co.* v. *Westchester,* 261 U. S. 155. It is not essential to the validity of this provision of the statute that the old structure should actually enter into and become a part of the new. On the contrary, the fact that the old structure is to be destroyed and supplanted is sufficient to authorize the provision for the payment to the county, by way of compensation, of the present value of the old structure, which, as before stated, is estimated to be the unpaid amount of the cost.

We next come to a consideration of the attacks upon the acts of the commissioners in exercising the authority conferred by the statute. The first is that the condition prescribed in § 26 of the statute with respect to contributions of three-fourths of the cost of the improvement from the United States Government or from the State of Tennessee had not been complied with, and that the commissioners are about to proceed, notwithstanding, to levy assessments, make contracts and issue bonds for the construction of the improvement. It is conceded by the commissioners that they are preparing to proceed with the construction of the improvement, but they contend that the condition of the statute has been performed. Testimony was adduced on that issue, but we are of the opinion that the evidence shows that there had been no performance of the condition. All that the testimony establishes is that Mr. McDonald, chief of the bureau of public roads of the Agricultural Department of the United States, has "assured" the commissioners that $500,000 of Government aid would be available whenever needed. This is far from showing a compliance with the requirements of the statute, which requires that no lien shall be created until three-fourths of the cost of the

improvement "shall be paid or provided by the United States Government, the State of Tennessee, or some political subdivision thereof, or some other outside agency." There is no mistaking the meaning of this language of the statute. The plain purpose of the lawmakers was to forbid the incumbering of the lands of the district with the cost of construction in excess of one-fourth thereof, and that nothing should be done until the other three-fourths should be "paid or provided" from other sources. This states a condition precedent which must be performed before the lands can be incumbered with any of the cost of construction. It is not claimed that anything has been paid, and the evidence does not show any legal provision from any other source. The testimony on this subject is only hearsay—the witnesses only state what Mr. McDonald said, and, even if that be treated as an official statement, it does not show any authority on the part of that official to bind the United States Government. We think this language means that there must be some actual and enforceable provision made for the contribution of this fund—not a mere promise from any source, but an actual provision, a setting apart so that the fund will be available when called for, and official evidence of it must be established before the commissioners of this district are authorized to proceed. Being forbidden to construct the improvement unless three-fourths of the expense is provided from other sources, the commissioners have no right to incumber the lands with taxes for construction, when the scheme would prove abortive unless the remainder of the funds should be furnished. Certainly one-fourth construction without the completion of the project would be of no benefit to the lands in the district, and the commissioners have no power to burden the district unless a benefit may be anticipated. Our conclusion therefore is that the attempt of the commissioners is unauthorized, and that, as no provision has been made for the contribution of the remaining cost of the improvement, they have no right to

proceed with the construction of the improvement or with the sale of bonds.

It is also contended by counsel that the commissioners have no right to proceed with the preliminary work or to issue certificates of indebtedness for the cost of such work until the conditions of the act have been complied with, but we are of the opinion that counsel are mistaken in this respect in their interpretation of the statute. The conditions prescribed in § 26 manifestly relate to the construction of the improvement, and not to the preliminary work for the purpose of determining whether or not the improvement can be constructed within the limits prescribed in the statute. Preliminary plans and specifications must be made and estimates must also be made of the cost, so as to determine whether outside funds of sufficient amount are available, and to ascertain whether or not the benefit to the property will be sufficient. These are matters which necessarily must be attended to in advance, and it was not the purpose of the statute, we think, to prevent this preliminary work being done until three-fourths of the funds are provided from other sources. Section 25, hereinbefore quoted, provides for the payment of preliminary expenses in the event that the effort to construct the improvement shall prove abortive, and this shows that it was not in contemplation of the lawmakers that the other three-fourths of the cost of the improvement should be obtained before preliminary work is begun. The commissioners have a right to make contracts for preliminary work. *Southern Crawford Road Imp. Dist.* v. *Brown, supra.* Any such contract made by the commissioners is, of course, subject to review by the courts on a charge of improvidence or fraud, but such contracts, if fairly and not improvidently made, are binding on the district. Having such authority to incur liability on the part of the district, the commissioners may issue evidences of indebtedness therefor, but not negotiable paper. *Altheimer* v. *Board of Directors Plum Bayou Levee Dist.*, 79 Ark. 229. The theory entertained by the commissioners, however, in determining their

powers and duties, seems to be that they have the right to levy assessments to pay preliminary expenses before the ascertainment of the question whether or not the improvement can be made. We think this theory is unsound, and that the authority to impose assessments on the lands, independently of the construction of the improvement, can only be exercised under § 25 of the statute after it is determined that the scheme will prove abortive and the improvement cannot for any reason be made. If the conditions are all performed and the improvement is constructed, then preliminary expenses are merged into the general cost of the improvement as a part thereof, and are paid out of the funds received from the sale of bonds and the collection of assessments. There is no provision for a separate levy of taxes to pay preliminary expenses except in the event that the construction of the improvement is abandoned, in which case there is a provision in § 25 for the levy of taxes to be made by the chancery court in a proceeding to wind up the affairs of the district. The commissioners concede that they are about to make such a levy, and, as the improvement had not been abandoned, nor have the conditions upon which they are proceeding with the improvement been performed, they should be restrained from levying any assessment at this time.

Another theory contended for by the commissioners is that the repairing of the old viaduct and the payment of the indebtedness owing by Crittenden County together constitute a project separate and apart from the construction of the new viaduct, and that they may proceed with the performance of that part of the work without waiting for the conditions to be performed with respect to the construction of the new viaduct. They are mistaken in this theory, for there is no indication in the language of the statute of an intention to create two separate projects. On the contrary, it is manifest that the whole thing is treated as one project; that is to say, the repair and maintenance of the old viaduct until the new one is ready for use, the payment of the indebtedness

of Crittenden County, and the construction of the new viaduct all form a part of a single project. The language of § 6, we think, is plain on that subject. Only one assessment is provided for, and that is for the whole improvement, including the temporary maintenance of the old viaduct and the construction of the new, and also the payment of the Crittenden County debts for the cost of the old viaduct. The commissioners concede that they are about to proceed with that work, issue bonds and levy assessments, and they should be restrained from doing so until the conditions are performed with respect to the construction of the whole improvement, that is to say, until three-fourths of the total cost of the improvement shall be paid or provided as prescribed in § 26 of the statute.

We have refrained from any discussion of the question of the method of assessments, as that would be premature, in view of the fact that the assessments have not been made or actually attempted.

In conclusion, we call attention to the oft-repeated rule of law announced by this court in such cases, that, until all the conditions imposed by law have been performed by ascertaining whether or not the improvement can be made within the bounds set by the statute, that is to say, until the assessments have been made so as to demonstrate that the cost of the improvement will not exceed the benefits, there is no authority to issue bonds or make any other contract looking to the construction of the improvement. Until those conditions are performed, the authority of the district is limited to preliminary work.

The conclusion therefore reached in this case is that the statute is valid, but that the commissioners are about to exceed their powers in the respects hereinbefore mentioned.

The decree is therefore reversed, and the cause remanded with directions to enter a decree in accordance with this opinion, restraining the commissioners of the

district from proceeding with any work of construction as defined in this opinion, including the temporary repairs to the old viaduct, and the payment of the indebtedness of Crittenden County and the issuance of bonds and the levying of taxes, until three-fourths of the funds have been provided from other sources, in accordance with the terms of the statute.

HART, J. Mr. Justice HUMPHREYS and myself think that the hearing of this case should have been postponed until the court reconvenes in the fall, to the end that the interveners might have time to present the issues raised by their intervention in the manner in which they are advised to do so by their attorneys.

This suit was filed by appellant on June 3, 1924. An answer to the complaint was filed on the same day. Again on the same day a decree was entered of record in the case. The transcript was filed in this court on June 9, 1924. The interveners are landowners in the proposed district, and did not know of the proceedings in the court below or of the filing of the transcript on appeal in this court until some time after the appeal had been lodged here. The issues raised by the appeal involve a construction of our Constitution and of the statute creating the district. The interveners had only one week within which to file their brief. They did not even have time to have it printed under the rules of the court. No reason is given for the undue haste in bringing the case here, and no reason is assigned why the postponing of the hearing of it until next September should not have been done without prejudice to any one.

The building of the proposed improvement will necessarily place special taxes upon the lands of the district, and we think that the interveners, as landowners in the district, should have had a reasonable time in which to have presented the issues in the manner advised by their attorneys. We do not think that special taxes, which often prove to be grievous and burdensome to the landowners, should be placed upon their lands without their having a reasonable opportunity to present the

issues involved in the manner advised by their own attorneys, provided they proceed in an expeditious manner, and only ask a postponment for a reasonable time.

McKEE v. HENDRICKS.

Opinion delivered July 14, 1924.

1. FRAUDULENT CONVEYANCES—RIGHT OF GRANTOR'S HEIRS AND CREDITORS TO SET ASIDE.—Intestate's mortgages to an innocent purchaser and conveyances of land to a friend, neither piece of property being required to pay his debts, *held* not subject to be set aside at suit of heirs and creditors, under Crawford & Moses' Dig., § 70, as made to hinder and delay creditors.
2. FRAUDULENT CONVEYANCES—RIGHT TO SET ASIDE.—In a suit by heirs and creditors of an intestate, to set aside an alleged gift of a certificate of deposit, testimony as to intestate's acts of dominion over the certificate after delivery thereof *held* to show that the transfer was intended to hinder and delay creditors and not to pass title.
3. EVIDENCE—STATEMENT OF DONOR.—In a suit by heirs and creditors to set aside an alleged gift by intestate of a certificate of deposit, a *prima facie* showing being made of a conspiracy to hinder and delay creditors, testimony of intestate's sister and brother as to his statements to them after the gift was completed *held* admissible.
4. EVIDENCE—SHOWING OF CONSPIRACY.—Evidence *held* to make a *prima facie* showing of a conspiracy in regard to a gift made to hinder and delay creditors, so as to render statements of the donor admissible against the donee.
5. GIFTS—INTENT TO PASS TITLE.—While it is essential that possession be delivered in a gift, mere delivery without an intent to pass title is insufficient to complete a gift.

Appeal from Howard Chancery Court; *C. E. Johnson,* Chancellor; reversed.

DuLaney & Steel, and *Will Steel,* for appellants.

1. This suit is brought under C. & M. Digest, § 70, and, as to the creditors, also under §§ 4874 and 4876, *Id.* The mortgage was a fraudulent conveyance, under the first named statute. The term "or otherwise" used therein, is sufficiently broad to include a fraudulent con-

veyance by mortgage. The court will look to the substance of the transaction rather than to the form, and will not permit that to be done indirectly which it would declare void if done directly. 52 Ark. 43; 106 Ark. 411; 136 Ark. 56. A subsequent grantee with notice of fraud stands in the attitude of the original grantee. 55 Ark. 116; 57 Ark. 573; 113 Ark. 101. The burden of proof is on the grantee to show sufficient property retained to pay debts. 55 Ark. 59. And a voluntary conveyance by one in debt is *prima facie* fraudulent. 91 Ark. 394; 124 Ark. 74. A gift to one occupying confidential relations will be scrutinized with the most jealous care (40 Ark. 28), and the evidence to establish such a gift must be clear and convincing. 93 Ark. 548. Evidence as to subsequent possession and acts of ownership on the part of the vendor or donor is admissible on the point whether or not the gift was made. 10 Ark. 211. Likewise, prior and subsequent declarations of the donor are admissible on that issue. 14 Ark. 505; 50 Ark. 283; 15 Ark. 246; 59 Ark. 303.

2. The delivery of the certificate of deposit, if made, was not a gift. The burden of proof was on the defendant to show that a gift in fact was made. 142 Ark. 308. As to the conveyance of the fifteen acres to Hendricks without consideration, the presumption, in the absence of evidence, is that he now holds as trustee for the heirs. And the preponderance of the evidence shows that in putting the money in the bank at Hope in the name of John B. Hendricks, it was the purpose of Lou Jones to use him merely as his bailee, and at all times thereafter to control the title and use of the money. The decision in *Moore* v. *Waldstein*, 74 Ark. 275, indicates that the purpose of the act of 1895 is to cover not only the immediate grant, but also those holding under the original grantee, and that, so long as one takes with notice of the fraud, the remedy is provided against such person. The mortgage was executed with intent to delay creditors, and, so long as the funds can be traced in to the hands of holders with notice, the heirs, in the name

of the administrator, can recover it. Hendricks, in the beginning, was clearly the bailee for Lou Jones. That relation, once having been shown to exist, is presumed to continue. 22 Ark. 466. See also 93 Ark. 548; 13 S. W. 1101; 107 Ark. 581; 12 R. C. L. 469; *Id.* 470; 52 Ark. 459. Under these authorities, since the grantee in the mortgage was an innocent taker, the loan, which was the property in a changed form, stood in substitution for the property fraudulently conveyed.

3. The execution by Lou Jones of the $12,000 mortgage was the first step in conveying lands with intent to delay creditors. 12 R. C. L. 477.

O. A. Graves and *W. P. Feazel,* for appellee.

1. There was no fraud in the mortgage. There can be no fraud in the transfer of property if, at the time of the transfer, the grantor retains sufficient property to pay all his debts then existing. 8 Ark. 470; 29 Ark. 407. The contention that the mortgage was executed with a fraudulent design is inconsistent with the proof of the value of the farm mortgaged, which is shown by their own witnesses to be worth much less than the sum secured by Jones on the mortgage. The substitution of one asset for another as valuable by an insolvent debtor cannot prejudice or defraud the creditors, and is not a fraud upon them. 132 Ark. 268. Section 70, C. & M. Digest, relied on as authority for the administrator and heirs to bring suit, is in derogation of the common law, and should be strictly construed. It has been construed as conferring no right upon an administrator to bring suit for the benefit of heirs of a fraudulent grantor of personal property. 77 Ark. 60. If a creditor has not been injured or damaged by an alleged fraudulent transaction, he cannot complain. 30 Ind. App. 73, 63 N. E. 881. See also 31 Ark. 554; 20 Cyc. 413; 18 Ark. 172.

2. Under the authorities above cited, there was no fraud in the gift of the $9,500 by Lou Jones to Hendricks.

3. The creditors are not sincere in this case. It is apparent by the record that they have entered into an

alliance with the administrator and heirs for the use of their names and their rights to thwart a disposition by Jones of his own property in the manner in which he desired it to go, and to divert it to uses that he tried to hedge against in his lifetime. They have no right, either in law or in equity, under the guise of enforcing their rights, to divert property to other uses than the payment of debts. 20 Cyc. 718; 19 Ga. 401.

4. There was a completed gift to Hendricks. When Jones deposited the $9,500 in the bank at Hope in the name of John B. Hendricks, and gave him the certificate of deposit, the title to said money by that transaction passed out of Jones and vested in Hendricks. 79 Ark. 24; 43 Ark. 318; 93 Ark. 562; 59 Ark. 191; 152 Ark. 343; 155 Ark. 593.

5. If the gifts were invalid as to creditors, they should not be disturbed except in so far as to protect them. 20 Cyc. 617, par. IV; 20 *Id.* 819; 59 N. W. 977; 66 S. W. 790; 74 Tex. 28; 109 Cal. 662; 118 Iowa, 238; 38 Barb. 302; 40 N. C. 47; 5 Fed. 752.

Smith, J. This suit was instituted in the chancery court of Howard County by the creditors and heirs of L. H. P. Jones and the administrator of his estate, for the benefit of the creditors and the heirs, to recover certain lands and the proceeds derived from the mortgage of others alleged to have been conveyed and mortgaged for the purpose of hindering and delaying his creditors in the collection of their just demands. The suit was instituted under § 70, C. & M. Digest.

There was an amendment to the complaint alleging that there was never a completed delivery of the $9,500 hereinafter referred to, and that the possession thereof by appellee Hendricks was that of a mere bailee.

The intestate, Jones, referred to by the witnesses as Lou Jones, owned a farm of 600 acres, and he also owned a 15-acre tract of land and two lots in the town of Mineral Springs. In addition, he owned certain personal property, which the inventory of the administrator of his estate showed to be worth $1,300.

Jones had been a stockholder and director of a bank in Mineral Springs, which failed in May, 1921. He owed the bank, at the time it closed its doors, $850, evidenced by a note payable to the bank's order. He owned $850 of the capital stock of the bank, against which a stockholder's liability for that amount was being asserted by the State Bank Commissioner, who had taken over the bank.

There was some testimony that a suit was threatened by certain of the stockholders against the officers of the bank for mismanagement, and Jones appeared to have consulted a lawyer in regard to his possible liability on that account. This suit was never brought, however.

The bank was the depository for a large amount of public funds, consisting principally of money belonging to some road districts, but certain officers of the bank made good this deposit. This was not done, though, until after Lou Jones had mortgaged his farm.

Jones was shown to have felt resentful about the bank's failure, and to have said that he would not pay his stockholder's liability until he was compelled to do so, but he stated that he would pay if the court said that he must. A suit to enforce this liability and one on his note to the bank were pending at the time of his death, but judgments on these demands were not recovered until after his death.

Certain demands were probated against Jones' estate, and these, with the judgments in favor of the bank, totaled $2,066.28.

Jones had never been married, and was survived by a brother, who was in impecunious circumstances, a sister, and the widow of a deceased brother, who left surviving him two infant children, and his stepmother. Jones was on the most cordial terms with all these persons, and he spent a portion of the summer before his death in the fall with his sister-in-law, who resided in Oklahoma, and discussed with her the question of her accompanying him on his trip west for his health.

Jones was suffering from consumption, and had been for about two years before his death, and he finally died from this disease. He lived principally with a Mrs. Hendricks, whose son, a young man twenty-two years old, named John B. Hendricks, the defendant below, had been very attentive to him, and who had devoted much of his time to nursing and caring for Jones during the last two years of Jones's life.

Jones applied for and obtained a loan on his farm amounting to $12,000, to secure which he gave a mortgage on the farm, and he also executed a second mortgage on the farm to secure a loan of about $2,000. The testimony is very conflicting as to the value of this land. Certain witnesses testified that the mortgages on the land equaled its value, and that the equity of redemption was worth nothing. According to other witnesses, the land had not been mortgaged for more than half it value. After considering this testimony we have concluded that the equity of redemption was worth as much as $5,000.

After executing this mortgage, Jones gave John B. Hendricks a deed to the fifteen acres of land, and, shortly before his death, he also gave Hendricks $850 in cash. About the same time he conveyed one of the lots in Mineral Springs to his sister and the other to his stepmother. He also paid a small mortgage indebtedness due by his brother, Manning S. Jones, and he assigned to his brother's daughter a life insurance policy having a value of about $800.

After securing the $12,000 loan, Jones took a check for $11,982.41, which apparently represented the net proceeds of the $12,000 loan, to the Citizens' Bank at Hope, Arkansas, where he had never before had any business of any kind. He there took a certificate of deposit payable to John B. Hendricks for $9,500, and deposited $500 to his own credit, and took a cashier's check payable to his own order for the balance.

Hendricks accompanied Jones to the bank when this was done. They returned to the home of Mrs. Hendricks, with whom her son, John B. Hendricks, lived. A sister of

John B. Hendricks testified that, upon the arrival of Mr. Jones and her brother, Mr. Jones delivered the certificate of deposit to her brother, and stated at the time that he gave it to him. A number of other witnesses testified that Jones had told them that he had given the certificate of deposit to Hendricks, and there appears to be no doubt that he made this statement to a number of persons. The certificate of deposit was dated May 31, 1922.

Judge Feazel testified that Jones' stepmother was his wife's aunt, and that Mrs. Jones had lived with him as a member of his family for fifteen years, and in this way he became very intimate with Lou Jones. A business matter called Judge Feazel to Mineral Springs, and, after attending to this matter, he called on Mr. Jones. This was about ten days before Mr. Jones died. After a visit of about a half-hour's duration, Judge Feazel started to leave, when Jones called him to the sick-bed and said, "I have given a party some money, and I want to know whether it will stick or not." Judge Feazel advised him that he could not tell unless he knew the manner in which it had been consummated. Jones told him that he had deposited the money in Hendricks' name, and had given Hendricks the certificate of deposit, and that he afterwards had Hendricks convert the certificate into Liberty bonds. Judge Feazel advised Jones that he thought the transaction would be good against everybody except creditors, when Jones expressed his satisfaction by saying, "That is all I wanted to know."

It will be observed that Judge Feazel had not called on Mr. Jones in a professional capacity, and his opinion was not sought until the visit was at an end, and no attempt was made to explain the details of the transaction to Judge Feazel; indeed, Judge Feazel testified that Jones was coughing to such an extent that Jones' conversation was broken and was carried on with difficulty.

The testimony is conflicting as to Jones' opinion as to his own condition. His physician had advised him that he was in no condition to go west, as he contemplated

doing, and, while Jones may have despaired of final and complete recovery, we do not think the testimony shows he was anticipating immediate death.

Jones went to Mineral Wells, Texas, and, on August 26, 1922, he wrote the following letter:

"Mineral Wells, Texas, August 26, 1922.

"Hon. O. A. Graves, Hope, Arkansas.

"Dear sir: In regard to the $9,500 on time deposit at the Citizens' National Bank of Hope, Arkansas. I have this, the 26th day of August, released all of my interest and claim to the above amount to John B. Hendricks.

"I want you to keep this as evidence in case anything ever comes up in court about the above.

"Witness my hand this the 26th day of August, 1922.

"(Signed) L. P. Jones."

Jones called a notary public, before whom he subscribed and swore to the letter. After doing this, the notary suggested that the matter might be put in better form, and the notary prepared the following statement:

"First State Bank & Trust Company

"Capital One Hundred Thousand.

"Mineral Wells, Texas, August 26, 1922.

"For value received I hereby transfer and convey all right, title and interest to John B. Hendricks of Mineral Springs, Ark., in a time certificate of deposit given by the Citizens' National Bank of Hope, Ark., for the sum of $9,500, made payable to John B. Hendricks.

"Witness my hand this the 26th day of August, 1922. By (signed) L. P. Jones.

"Subscribed and sworn to before me this the 26th day of August, 1922. (Signed) W. I. Smith, notary public, Palo Pinto County, Texas." (Seal).

A Mrs. Hood was present when these instruments were signed and sworn to, and she and the notary testified that Jones stated at the time that he had given Hendricks the money referred to because Hendricks had rendered him long and faithful services.

Manning Jones, a brother, and Ola Jones, a sister-in-law, of Lou Jones, testified to substantially the following effect: The relationship between them and their brother was intimate and affectionate. Their brother had never despaired of recovery. He talked with them frequently and freely about his business affairs, and told them about the mortgages on his land, but did not mention the alleged gift to Hendricks. Lou Jones expressed to them the fear that the bank failure might impoverish him, and he stated to them that he derived a fund by mortgaging his farm which would enable him to go west for his health, and by the purchase of the Liberty bonds he had provided an income upon which he could live.

The mortgages to the loan company cannot be set aside, because it is conceded that its attitude is that of an innocent purchaser, and it is the opinion of the majority that the deed to Hendricks for the fifteen-acre tract cannot be set aside because it is not required to pay the debts of the intestate. The same thing may be said of the deeds to the town lots. It may also be said in regard to the deeds to the lots that they were not embraced in this suit, and there was no prayer that they be set aside.

The majority are of the opinion, however, that the alleged gift of the certificate of deposit should be set aside, for the reason that Jones never intended to pass title thereto.

It is, of course, conceded that Jones had the right to select the beneficiary of his bounty, and that, except as to creditors, he had the right to give his property to whom he pleased, and his heirs-at-law would have no right to complain that property had been given to a person who was not related in any degree to the donor.

It is true that Jones resided for the last two years of his life at the home of Hendricks' mother; but he was there as a boarder, and no contention is made that he did not pay full board. It is true also that Jones was under obligations to Hendricks, who had rendered him attentive

and constant service. The relation between Jones and Hendricks was close and intimate, and Jones unquestionably regarded Hendricks with a feeling of gratitude and affection. But it is also true that there was no estrangement between Jones and his brother and his sister and his sister-in-law, who was the mother of his deceased brother's infant children.

It is the opinion of the majority that the conduct of Jones was as much influenced by the pending and threatening suits against him as by the condition of his health. The testimony shows that, long after the alleged gift of the certificate to Hendricks, Jones still entertained hope of recovery, or, at least, of prolonging his life, and, on the day of his death, spoke of going west for his health.

We have no doubt that Jones frequently stated he had given the money represented by the certificate of deposit to Hendricks, and we doubt not that the conversation with Judge Feazel occurred just as Judge Feazel detailed it, but, as we have said, Jones did not attempt to detail the circumstances to Judge Feazel.

In the opinion of the majority of the court, Jones had given the certificate to Hendricks, but he had not done so for the purpose of passing the title. There was confidence and understanding between Jones and Hendricks, and there was compensation to Hendricks, for he was given a deed to the fifteen acres in the town of Mineral Springs and $850 in cash, and what else may have been given him the testimony does not disclose.

If there was ever a gift, it was consummated at the home of Mrs. Hendricks, in the presence of Hendricks' sister. Jones then and there stated he had given the certificate to Hendricks and delivered it to him. If there had been an intention to pass the title, that intention became irrevocable on the delivery of the certificate, yet the testimony is that, on more than one occasion after that, Jones spoke of the government bonds, which had been purchased with the proceeds of this certificate, after it was cashed, as his own, and he stated why he

bought them and the use he intended to make of the interest derived from them. It is true also that, when Jones decided to cash the certificate, he told his brother Manning that he was going to do so, and, at his request, Manning Jones went with Hendricks to Hope to cash the certificate and bring the proceeds to Mineral Springs. This was done September 20, 1922, which was, of course, subsequent to the execution of the instruments at Mineral Wells, Texas, set out above, the date of those instruments being August 26, 1922.

Notwithstanding the circumstances detailed, we would feel that there was such doubt about Jones' intention in delivering the certificate to Hendricks that we would not disturb the finding of the chancellor as being clearly against the preponderance of the evidence; but there was offered in evidence a letter, which admittedly was written by Jones, which tips the scale and makes the finding of the chancellor appear to the majority to be clearly against the preponderance of the evidence.

As we have said, the deposit was made May 31, 1922, and that night the certificate was delivered to Hendricks at the home of his mother, in the presence of his sister, yet on June 16, 1922, he wrote the following letter:

"6-16-22.

"John Burton: I call Gus Graves at Hope the night I was there and told him to write you or me at M. S. about the matter we have been talking about. If he has got the kind that he thinks is best for us, I want you to go to Hope and take the slip of paper, you know, and have them to wire for the full amt. you have; and if it costs more than 100 cts. on the $1, that you draw on my act. for the dif.

"You may be sure to take this and let Gus Graves see it, and he will understand what I mean. I also want to rent a safe deposit box, and when they come you can go down to Hope and put them in it. You be sure and understand just what I mean. I think I want the 4 and a quarter B's of 1936, but Gus will advise you best. (Signed) Lou.

"Don't let anybody know anything."

We think this letter is incompatible with the idea that Jones had relinquished dominion and control of the certificate, although he had parted with its possession. He knew what the certificate was, but he did not refer to it as such; it was called a slip of paper, manifesting a purpose to conceal what he had done and was intending to do. The postscript was an additional admonition to secrecy.

Fearing that he might not be able to buy $9,500 in bonds for the $9,500 certificate, he proposed to pay out of his own funds the "dif.," which manifestly meant difference. He gave detailed directions as to the kind of bonds he desired to buy, and, recognizing their value, he gave directions about renting a safe deposit box, obviously for the purpose of keeping them securely, and this box was to be rented for himself, and not for Hendricks. It is true the bonds, when purchased, were registered in the name of Hendricks, but the majority think this was done pursuant to the understanding that Hendricks should hold them as bailee for Jones.

The transaction was to be explained, so the letter directed, to Jones' friend and attorney, who would understand the transaction between the parties. No reflection of any kind is implied in this statement, as the attorney referred to was serving his client in a legitimate and proper manner. This attorney, who is also an attorney of record in the case, but not a party to the litigation, did not testify, as he might have done, and have refuted the testimony of other witnesses that Jones was seeking to provide a fund which creditors could not reach, and which would enable him to go west for his health. If Jones had in fact given the certificate to Hendricks on the day he delivered it to him, the instruments signed and sworn to by Jones in Mineral Wells on August 26, 1922, were unavailing. Those instruments recite that he that day — August 26 — gave the certificate to Hendricks, whereas, if there was a gift at all, the gift had been consummated four months before. And while it is true that

the notary who took the affidavits to the instruments executed in Mineral Wells, Texas, as well as Mrs. Hood, who was present at the time, both testified that Jones stated he was giving the money to a friend who had rendered him invaluable service, Jones also stated to the notary that he had a friend who was a lawyer who would understand the letter and transfer.

Another circumstance in the case which shows that Jones was contemplating putting his property beyond the reach of his creditors, if judgments were recovered against him, which he was not willing to pay, is that he took his leases and other contracts with his tenants on his farm for the year 1922 in the name of Hendricks, and no contention is made that Hendricks was given any interest in the farm itself.

It is urged that the testimony of Manning Jones and that of Mrs. Ola Jones, as to statements made to them by Jones after the alleged gift, was inadmissible, and should not be considered; but we are of the opinion, however, that these statements are admissible upon the theory that a *prima facie* showing of a conspiracy between Lou Jones and Hendricks had been made, and that this conspiracy was to cover up assets of Lou Jones until the pending and threatening suits were disposed of, and this conspiracy had not been consummated at the time of Lou Jones's death.

The case of *Cox* v. *Vise,* 50 Ark. 283, was an action by the assignee of an insolvent merchant against an officer to recover a stock of goods assigned for the benefit of creditors, and subsequently seized by the officer under an order of attachment obtained against the assignor by one of his creditors on the ground of fraud in disposing of his property. There was evidence having a tendency to show that the assignor and the plaintiff confederated together to defraud the former's creditors. Certain declarations of the assignor tending to show fraudulent intent, made after the assignment but while the assignor was engaged in the prosecution of the conspiracy, were

objected to; but the court held these declarations were admissible, although made after the execution and delivery of the deed of assignment. The court there said: "The statements made by Hamilton (the assignor) testified to by Childs, were made after the execution and delivery of the deed of assignment. It is well settled that the declarations of a party to a sale, transfer, or assignment, going to impair the vested rights of one claiming under him, and made after the sale, transfer, or assignment, are inadmissible. The reason of the rule is: 'After a vendor has parted with his property he has no more power to impress the title, by either his acts or his declarations, than a mere stranger.' But there is an exception to this rule. It is 'that when a fraudulent combination is established, the acts and declarations of any one of the parties thereto, while engaged in the prosecution of the common design, may be proved against the others.' They are competent evidence to show the intention of the parties. Before such declarations are admissible under the exception to the rule, 'a foundation must be first laid, by proof, sufficient, in the opinion of the judge, to establish, *prima facie*, the fact of a conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact.' Evidence of 'a very slight degree of concert or collusion' will be sufficient. Mr. Greenleaf, in treating of this subject, lays down the rule as we have stated it, and adds: 'Sometimes, for the sake of convenience, the acts or declarations of one alleged conspirator are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the judge, and is not permitted, *except under particular and urgent circumstances,* lest the jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers.' It is obvious, from the rule and exception, as stated, that no reversible error, or error prejudicial to an appellant, can be committed, if, subse-

quent to the admission of the evidence of the declarations. evidence tending to establish the conspiracy or confederacy were afterwards introduced. If evidence of the declarations was admissible in any order, as shown by the evidence, no injury could have been done by not having observed the order. But, as said by Mr. Greenleaf, the ordinary practice should not be departed from, 'except under particular and urgent circumstances.' (Numerous cases cited)."

It is the opinion of the majority that, when the testimony is considered in its entirety, a valid gift was not shown. While it is essential that possession be delivered, mere delivery is not sufficient. There must be an existing intention accompanying the act of delivery to pass the title, and, if this does not exist, the gift is not complete. *Carter* v. *Greenway,* 152 Ark. 339; *Ammon* v. *Martin,* 59 Ark. 191; *Hatcher* v. *Buford,* 60 Ark. 169; *Lowe* v. *Hart,* 93 Ark. 548; *Harmon* v. *Harmon,* 131 Ark. 501; *Gordon* v. *Clark,* 149 Ark. 173; *Lehman* v. *Broyles,* 155 Ark. 593.

The majority do not think that Lou Jones ever surrendered or intended to surrender dominion and control of this certificate or of the bonds into which it was converted, and the gift was therefore never consummated, and the court below erred in holding to the contrary.

The court below, after deciding there was a valid gift, directed Hendricks to deposit in the registry of the court the sum of $2,000 in cash to insure the payment of the debts. This was done, and that sum is available for that purpose. In addition, the administrator in his inventory shows assets of the value of $1,300.

Thus there is available a sum more than sufficient to pay all the debts, and, this being true, the creditors are not concerned about the deeds or the mortgages, and the heirs have no right to complain about the deeds or the mortgages. This is true now because the $2,000 refunded by Hendricks, which was a part of the alleged gift of $9,500, together with the assets in the hands of the

administrator and the value of the equity of redemption in the lands, suffices to pay the debts. In other words, Jones was in fact a solvent man, and, as such, had the right to dispose of his property in the manner herein stated. But his apprehensions about the suits, which were never brought, to enforce a possible contingent liability, caused him to conspire with appellee Hendricks to conceal the certificate of deposit and the proceeds thereof, and, in the opinion of the majority, there was never any intention to vest in Hendricks the title to the $9,500.

The decree upholding the gift to Hendricks of the certificate is reversed, but, in all other respects, it is affirmed, and the cause will be remanded with directions to set aside the finding that there had been a gift of the $9,500 to Hendricks, and to enter a decree directing Hendricks to pay the $9,500 over to the administrator of the estate of Jones.

The relief here awarded is not granted under the provisions of § 70, C. & M. Digest, but under the allegations of the amended complaint (which the majority thinks the testimony sustains) that there was never in fact a gift of the $9,500, and that such possession thereof as Hendricks had was that of a mere bailee.

McCulloch, C. J., (dissenting). I am unable to agree with the conclusions of law announced by the majority, that the testimony of certain witnesses introduced by appellants tending to prove the statements of the donor, Jones, after the consummation of the alleged gift, was admissible. It is elemental in the law of evidence that the declarations of a party to a sale or gift or other transfer of property, made after its consummation, tending to impair vested rights under such transfer, are, with certain exceptions which I do not think apply to the present case, inadmissible. It is unnecessary to cite authorities in support of that proposition, for the principle is clearly announced in the very decision on which the majority rely. *Cox* v. *Vise,* 50 Ark. 283. The exception to the rule found in that case does not apply to the

present one, for that was a contest between the assignee and the creditors of an alleged fraudulent grantor concerning the validity of the assignment. Creditors of a fraudulent grantor do not, after the grant, stand in privity with the grantor, but their relation is a hostile one, and they have the right to prove, as long as there exists a conspiracy between the fraudulent grantor and his grantee, declarations of the former tending to impeach the good faith of the transaction.

In the present case, however, appellants are heirs of the donor, Jones, and do not stand in any such relation, for they can assert only such rights as Jones himself could have asserted if alive. If Jones were alive and was suing for the recovery of the personal property involved in this controversy on the ground that it was a bailment and not a gift, it would scarcely be contended that proof of his own declaration after the consummation of the gift would be competent evidence against his alleged donee. Since it is seen that appellant stands in no better attitude that Jones himself would have stood, it necessarily follows that this testimony was not competent.

This testimony is conceded to be important, and is considered by the court as turning the scales in favor of appellants. Without this testimony in the case, I am clearly of the opinion that the weight of the evidence is not against the finding of the chancellor on the issues of fact, but that the preponderance is clearly in favor of the chancellor's finding.

The letter of Jones to appellee, dated June 16, is not without some force as tending to show that the money was turned over to appellee pursuant to a plan to defraud Jones' creditors, but whatever appears from the recitals of that letter tending in that direction is entirely overcome by the other testimony as to subsequent declarations of Jones, clearly manifesting his intention to make a gift to appellee, rather than a mere bailment for the purpose of hiding the property from creditors. Whatever may have occurred theretofore, the written declara-

tions of Jones in his sworn statement, dated August 26, 1922, evidences in the most solemn manner his intention to make an absolute gift to appellee of the property in controversy.

My conclusion therefore is that the decree should be affirmed, and I am authorized by Mr. Justice HART to say that he shares the views here expressed.

LOMAX v. STATE.

Opinion delivered July 14, 1924.

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—INDEFINITENESS.—A motion for new trial upon the ground of testimony "which was incompetent, irrevelant and immaterial to the issues involved," not naming witnesses nor pointing out evidence, was too indefinite to present any question for review on appeal.
2. HOMICIDE—INSTRUCTION AS TO BURDEN OF PROOF.—In a prosecution for murder, an instruction that, if defendant killed deceased, the burden was upon him to establish self-defense, unless the State's evidence showed it, was not erroneous, in the absence of a specific objection.
3. HOMICIDE—ABSTRACT INSTRUCTION.—In a murder prosecution refusal of defendant's instruction that, if deceased fell against his knife, causing his death, defendant would not be guilty, was not erroneous where there was no evidence on which to base such instruction.
4. HOMICIDE—SELF-DEFENSE—INSTRUCTION.—In a prosecution for murder, an instruction that, if defendant voluntarily entered into a combat and killed deceased, he could not take advantage of a necessity brought about by his own unlawful act, was not objectionable as assuming that defendant unlawfully and wrongfully killed deceased.
5. HOMICIDE—INSTRUCTION AS TO SELF-DEFENSE.—In a murder case, an instruction that, if defendant was the aggressor, he could not plead self-defense unless he first, in good faith, undertook to withdraw from the combat and avoid the danger and avert the necessity of the killing, was not erroneous, where the evidence would have sustained a finding that either one of the parties was the aggressor.

Appeal from Mississippi Circuit Court, Blytheville District; *George E. Keck,* Judge; affirmed.

E. E. Alexander and *Orville Zimmerman,* for appellant.

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

HART, J. Walter Lomax prosecutes this appeal to reverse a judgment and sentence of conviction against him for voluntary manslaughter. His punishment was fixed by the jury trying him at six years in the State Penitentiary.

It is first insisted by counsel for the defendant that the court erred in allowing certain questions to be asked and answered by the defendant on cross-examination.

We need not set out this testimony, because the assignment of error with regard to it is too indefinite. The only ground in the defendant's motion for a new trial upon which an assignment of error with regard to the admission of testimony could be based is the following: "Because the court erred in admitting testimony which was incompetent, irrelevant, and immaterial to the issues involved in said cause."

This court has frequently held that a motion for a new trial on the ground that the court erred in admitting evidence on the part of the defendant, without naming the witnesses or pointing out the evidence, is too general, and does not present any question for review on appeal. *Edmonds* v. *State,* 34 Ark. 720; *Western Union Tel. Co.* v. *Duke,* 108 Ark. 8, and cases cited; and *Black* v. *Hogsett,* 145 Ark. 178.

The next assignment of error is that the court erred in giving instruction No. 21, which reads as follows:

"You are instructed that, the killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the defendant, unless, by the proof on the part of the prosecution, it is sufficiently manifest that the offense only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

No specific objection was made to this instruction. The instruction follows the language of the statute, and, in the absence of a specific objection, it only amounts to telling the jury that, if it should find that the defendant killed the deceased, then the burden of proof was upon him to establish self-defense, unless the evidence for the State showed it. *Wilson* v. *State,* 126 Ark. 354, and *Sheppard* v. *State,* 160 Ark. 315.

The next assignment of error is that the court erred in refusing to give instruction No. 7 requested by the defendant. The first part of the instruction deals with the subject of drunkenness as a defense to crime, and there is no objection to the instruction in this respect. The instruction, however, concludes with the following:

"Or, should you find from the evidence that, while defendant so held his open knife in his hand as aforesaid, if you so find, that deceased, in fighting the defendant, rushed or fell against said knife, causing his injury and death, as shown by the evidence, you will then acquit the defendant."

There was no testimony upon which to predicate such an instruction. To have given it to the jury would only have served to confuse and mislead them. The proof on the part of the State, briefly stated, is that the defendant, the deceased, and two companions took an extensive automobile ride in Mississippi County, Arkansas, on the night of the 8th of March, 1924. They all drank freely of moonshine whiskey, and the defendant and the deceased both became very drunk. The defendant was thirty-five and the deceased twenty-two years of age. They were warm friends, and the defendant had lived for a time at the home of the deceased's mother. One of them, it does not appear from the evidence which one, demanded that the car should stop so that they might fight. The car was stopped, and the deceased got out of it first. The defendant immediately followed him, and in a short time came around and thrust his hand through the curtain on the front seat of the automobile. He had an open knife in his hand, and the occupants of the front

seat took it away from him. The driver then got out, and called the deceased a few times. He failed to answer, and they drove on without him. On the next morning the body of the deceased was found where he had got out of the car, and it was discovered that the deceased's throat had been cut in the fray, and that he died as the result of it a few minutes afterwards. A great quantity of blood was found on his clothes and body, and it seems that he must have bled to death a short time after he was cut in the neck.

According to the testimony of the defendant, he was so drunk that he did not remember having cut the deceased, or even of having a fight with him. In fact, he says that he did not remember anything after he got out of the car. When he returned to the car, there was a bruise on his lips, which had evidently been inflicted by the deceased. This brief summary of the evidence shows that the question of the deceased's falling on an open knife in the hands of the defendant was not in the case. The parties engaged in a mutual combat, and the jury, by returning a verdict of manslaughter, evidently thought that the fight was the result of their drunken quarrel, and not on account of any previous ill-will or malice towards each other. This view is strengthened by the fact that the deceased and the defendant had been warm friends and associates. There was room for dispute about which one was the aggressor, but there was no testimony from which a fair legal inference could have been drawn that the deceased was killed as the result of accidentally falling upon the knife in the hands of the defendant. The place where he was cut, the severity of the blow, and all the attending circumstances show that this view of the matter could not be supported by any fair legal inference from the evidence.

It is well settled in this State that courts are not required to give instructions upon questions about which there is no evidence, and thus divert the minds of the jury from the real issues in the case. In this connection it may be stated that the court gave the jury proper

instructions on the question of drunkenness as a defense to crime.

It is next insisted that the court erred in giving instruction No. 26, which reads as follows:

"Gentlemen, this instruction that I gave you a few minutes ago, which had in it, 'if the defendant sought out the deceased for the purpose of bringing on the difficulty,' I am withdrawing from you about 'seeking out the deceased for the purpose of bringing on the difficulty,' for there is no testimony to that, that he sought out the deceased, and that part of the instruction would be abstract. The instruction would read, 'if you find from the evidence in this case, beyond a reasonable doubt, that the defendant provoked or brought on, or voluntarily entered into, the difficulty, and, when he did so, killed his assailant, he cannot shield himself on the plea of self-defense; he cannot take advantage of the necessity produced by his own unlawful or wrongful act.'"

It is contended by counsel for the defendant that the clause "he cannot take advantage of the necessity produced by his own unlawful or wrongful act," unqualifiedly tells the jury that the defendant acted unlawfully and wrongfully in killing the deceased.

We cannot agree with counsel in this contention. The instruction, when considered as a whole, does not assume any fact, but it leaves it to the jury to find whether the defendant voluntarily entered into the difficulty, and also whether or not he killed the deceased. The instruction simply tells the jury that, if he voluntarily entered into the difficulty and killed the deceased, he cannot avail himself of the plea of self-defense, and cannot take advantage of the necessity brought about by his own unlawful act. In other words, it tells the jury that, if the killing resulted from a voluntary quarrel and mutual combat entered into by the parties, this would be a wrongful act, and the defendant could not avail himself of the plea of self-defense.

The next assignment of error is that the court erred in giving instruction No. 20, which reads as follows:

"You are further instructed that, if you find from the evidence in this case, beyond a reasonable doubt, that the defendant was the aggressor, then you are told that he cannot shield himself on the plea of self-defense unless he first, in good faith, undertook to withdraw from the combat and avoid the danger and avert the necessity of the killing."

It is claimed that this instruction is erroneous because there is no evidence that the defendant was the aggressor. We cannot agree with counsel in this contention. The deceased and the defendant were on the back seat of the automobile. Their companions on the front seat testified that they began quarreling, and that one of them told the driver of the car to stop it; that they were going to fight. The deceased got out first, and then the defendant got out. The driver then saw the defendant reel back in the light, as if he had received a blow. They both disappeared from his sight, and then the defendant came around to the side of the car and said, "Where is the son of a bitch?" At the same time he thrust his hand through the curtains of the car, and had an open knife in it. The knife was taken away from him.

Under this state of the record the jury might have inferred that either one of the parties was the aggressor. Hence there was no error in submitting this question to the jury. The court gave proper instructions on the various degrees of homicide and on the question of reasonable doubt. As above stated, it also gave proper instructions on the question of drunkenness as a defense to homicide.

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

FLY v. FORT SMITH.

Opinion delivered July 14, 1924.

1. CRIMINAL LAW—CONVICTION OF TWO OFFENSES.—Where appellant was convicted in municipal court on a dual charge of being drunk and transporting whiskey, the amount of the fine indicating that it was imposed for the latter offense, he could not, on appeal to the circuit court, be convicted of transporting whiskey and also for drunkenness.
2. CRIMINAL LAW—MISDEMEANOR—NECESSITY OF WRITTEN CHARGE.—In a prosecution for transporting whiskey, in which appellant was arrested for an act committed in an officer's presence, and the charge in the municipal court was for being drunk and for transporting whiskey, on appeal to the circuit court, demurrer on the ground that the charge was indefinite was properly overruled, as an information setting forth the facts in detail was unnecessary.
3. INTOXICATING LIQUORS—TRANSPORTATION—EVIDENCE.—Evidence *held* sufficient to warrant a finding of illegal transportation of whiskey.
4. CRIMINAL LAW—FAILURE TO INTRODUCE CITY ORDINANCE IN EVIDENCE.—Where appellant was convicted in municipal court of transporting whiskey, failure of the prosecution on appeal in the circuit court to prove a municipal ordinance was immaterial, since a conviction could be sustained under Crawford & Moses' Dig., § 6165.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum*, Judge; reversed in part.

T. S. Osborne and *E. M. Ditmon*, for appellant.

George W. Dodd, for appellee.

McCULLOCH, C. J. Appellant was arrested on a street-car in the city of Fort Smith by one of the police officers of the city, and, after being lodged in jail, he was taken into municipal court by the officer, and the charge preferred against him of "being drunk, and transporting whiskey." The record of the municipal court recites the above facts, and also recites that appellant "pleaded not guilty, whereupon he was tried, convicted and fined $110, and the further sum of $7.50 as cost in the said case." Appellant filed his affidavit and bond for appeal, and prosecuted an appeal to the circuit court. When the cause came on for hearing in the circuit court, the attorney for the city put appel-

lant on trial on the charge of transporting whiskey. The trial was before a jury, and the jury found appellant guilty and imposed a fine of $125. Appellant was, over his objection, then put on trial on the further charge of drunkenness, and that trial resulted in appellant's conviction and the imposition of a fine of $25. He has prosecuted an appeal from both judgments.

We think that the court was without jurisdiction to put appellant on trial in the circuit court for two offenses, inasmuch as there had been only one judgment of conviction in the municipal court. The city might have preferred two charges against appellant, one for drunkenness and the other for transporting whiskey, but there was only one trial and one conviction, hence the circuit court acquired jurisdiction to hear and determine but one charge. This was necessarily the charge of transporting whiskey, because the fine imposed in the municipal court was in excess of the authorized fine for drunkenness.

There was a demurrer filed in the circuit court on the ground that the charge was indefinite, but the court overruled the demurrer, and that ruling is assigned as error. The ruling was correct because, the arrest having been made by an officer for an offense committed in his presence, it was unnecessary to file any information setting forth in detail the facts constituting the offense.

At the commencement of the trial the city attorney announced that appellant was on trial on the charge of transporting whiskey, and proceeded to introduce testimony to support that charge. The officer who made the arrest testified that he found appellant on a street-car in an intoxicated condition, and that he had a bottle of whiskey in his pocket. Appellant denied that he was intoxicated at the time he was arrested, and undertook to explain the presence of the bottle of whiskey in his pocket by saying that he found the bottle under a seat in the street-car, and put it in his pocket, and that he had no knowledge of the contents of the bottle. We think that the evidence was sufficient to warrant the jury in

finding that appellant was transporting whiskey in violation of law.

It is also contended that the record does not sustain the conviction in that the city ordinance was not introduced in evidence. It is sufficient answer to that contention to call attention to the fact that the charge against appellant constituted a violation of the statutes of the State (Crawford & Moses' Digest, § 6165) against transporting liquor, and, even if there was no ordinance of the city, the conviction could be sustained under authority of the statute. *Marianna* v. *Vincent,* 68 Ark. 244.

It is also insisted that the evidence falls short of being sufficient to sustain a conviction for the reason that it fails to show that appellant was transporting the liquor from one place to another. In other words, the contention is that he merely picked up the liquor and was carrying it along with him without any intention of transporting it to any definite point. Counsel rely on the case of *Locke* v. *Fort Smith,* 155 Ark. 158, as sustaining their contention. In the Locke case the proof showed only that the accused was in an automobile with a friend, and picked up a bottle of whiskey and put it in his pocket, and there was nothing to show that he intended to transport it to any given place, the inference being that he was merely carrying it around to drink as he rode about with his friends. We held that, under the statute, there must be a transportation of the intoxicant from place to place. The facts in the present case are different. Appellant was in a street-car, presumably destined to some point, and he had the whiskey in his pocket, so the jury had the right to infer that he was transporting the whiskey to his place of destination from some other point. The inference might have been drawn, in other words, that the transportation of the liquor was from place to place, and not merely for the purpose of carrying it along with him to drink as he pursued his journey.

We find no error in the record with respect to the charge of transporting liquor, and the judgment of the court on that charge is affirmed.

The judgment of the court on the charge of drunkenness is, however, reversed, and the cause dismissed as to that charge.

ÆTNA LIFE INSURANCE COMPANY OF HARTFORD CONN., v. DUNCAN.

Opinion delivered July 14, 1924.

1. PLEADING—MOTION TO MAKE MORE SPECIFIC PROPERLY DENIED.—In an action on a life insurance policy, the court did not err in denying insurer's motion to make the complaint more specific where it alleged the issuance of the policy, payment of premiums, insured's death, and beneficiary's compliance with the policy as to notice of death and demand of payment, which was refused.
2. INSURANCE—MODE OF PROVING DEATH.—Where a life insurance policy did not require that proof of death should be made in any particular manner or at any particular time, any method is sufficient which serves to furnish insurer with notice and proof of insured's death.
3. INSURANCE—PROOF OF DEATH—SUFFICIENCY.—Evidence that beneficiary's attorney had written to insurer at its home office, notifying it of insured's death, together with a telegram of insurer to its general manager, *held* to show that insurer had notice of insured's death.
4. INSURANCE—WAIVER OF PROOF OF DEATH OF INSURED.—Where an insurer had actual notice of insured's death, its denial of liability, not predicated on a failure to furnish proof of loss, and its failure upon request to indicate that further proof would be required, waived any right to other or further proof of death.
5. INSURANCE—REINSTATEMENT OF POLICY.—Where insured had permitted a life insurance policy to lapse because of nonpayment of premium, his offer to pay part of premium in cash and to sign a note for the balance if insurer would reinstate his policy, when accepted by the insurer and executed by him, reinstated the note.
6. INSURANCE—WAIVER OF PROVISIONS OF POLICY.—Provisions in a policy made for the benefit of the insurer may be waived by it.
7. INSURANCE—DEATH OF INSURED BEFORE DELIVERY OF NOTE.—Where insured was killed after he had executed a note in part payment of a premium of life insurance but before he had delivered it, such fact was immaterial, since, in signing the note pursuant to the agreement to reinstate it, he bound his estate for its payment as if he had delivered it to insurer before his death.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

J. A. Sherrill, for appellant.

The court erred in giving a peremptory instruction in favor of the plaintiff. Where the insurer and the insured, by their acts, indicated that they considered a policy of insurance as having lapsed, the court will follow the construction of the contract adopted by the parties themselves. 109 Ark. 17; 6 R. C. L. 616. Authority to solicit insurance, receive and write applications, forward them to insurer's general office, receive and deliver policies and collect premiums, would not empower an agent to continue in force a policy which, by its terms, had become null and void because of nonpayment of premium when due, nor to waive proof of loss within the time and manner prescribed by the policy. 85 Ark. 337; 14 R. C. L. 986. Death of a party before acceptance of an offer is communicated to offerer is invalidated by lapse. 9 Cyc. 293. If payment of premium has not been made before the death of the assured, the policy is forfeited, and no tender to or acceptance by an agent authorized only to receive premiums will defeat the forfeiture. 90 Ill. App. 576. If check is given as conditional payment only and is not in fact paid until after the death of the insured, there can be no recovery. 7 Ont. A. M. 171. There can be no reinstatement after the death of the insured, while the policy is suspended on account of default. 90 Ill. App. 576; 86 S. W. 618; 93 S. E. 60; 95 Va. 579; 29 S. E. 328, 83 Fed. 631. An offer to restore on receipt of a premium in default, if sent at once, is not a continuing offer, and delay in taking advantage of the offer defeats the privilege. 24 N. W. 604. Intention to deliver, not carried out, will not constitute a delivery. 54 S. W. 414. Delivery is necessary to divest the title of the legal owner of a note. 7 Ark. 376; 17 Ark. 96. Though a contract is signed by a party, it is not executed until delivered. 122 S. W. 384. The theory that the premium as it becomes due is a debt is a fallacious one and leads to erroneous conclusions. A

debtor is under obligation to pay. Here no obligation exists. Payment of premium is entirely optional with him who is to pay. 41 Conn. 372; 73 N. Y. 480.

Gray & Morris and *Emerson & Donham,* for appellee.

The court will not explore the record to discover an error of the trial court where the appellant neglects to set it out in his abstract. 88 Ark. 449; 100 Ark. 328. No matter what the form of the notice of loss may be, if it operates to bring the attention of the insurer to the loss it is sufficient, and, where the nature of the notice is not prescribed, it may be oral. 14 R. C. L. 1338; 33 C. J. 16; 195 S. W. 535; 5 Joyce on Insurance, § 3277, p. 5470. A denial of liability, not predicated upon the failure to furnish the proof of loss, is a waiver of a defense upon that ground. 94 Ark. 21; 79 Ark. 266; 121 Ark. 422; 58 So. 345. Where the minds of the insured and insurer, for a valuable consideration, have met upon all terms of the contract, the contract is complete and enforceable. 66 Ark. 612; 149 Ark. 257; 149 Ark. 517; The general agents did not exceed their authority. 76 Ark. 328; 126 Ark. 360; 94 Ark. 578.

WOOD, J. This is an action by Mrs. Rozell Duncan against the Ætna Life Insurance Company (hereafter called company), on a policy of life insurance issued by the company on November 11, 1920, insuring the life of her husband, Jerry C. Duncan, in the sum of $6,000, in which policy she was named as the beneficiary. She alleged the death of her husband on June 17, 1922, set up the policy, and alleged that the premiums had been paid; that the company had due notice and proof of death, and had refused to pay the amount due on the policy. The company moved to make the complaint more definite and certain by stating the date on which the last premium was due and the date upon which it was paid, if paid, and the date and manner of delivery of said payment, and whether the consideration was other than cash, and moved to require the plaintiff to exhibit all original letters

from the company, or to state their substance, or to state the substance of the agreement, if verbal, to accept the consideration for the premium. The court overruled the motion.

The company answered, admitting the issuance of the policy, but denied due notice and proof of death, and denied that the premium necessary to keep the policy in force had been paid before the death of Duncan, and averred that the policy therefore had lapsed, and had never been reinstated, and denied liability on the policy. The policy was introduced by the plaintiff. Without setting forth all of its provisions *in haec verba,* those material to this controversy are in substance as follows:

In consideration of an annual premium of $134.76 to be paid in advance, at its home office or to its agent, on the 11th day of November in each year, during the life of the assured, it insures the life of Duncan in favor of his wife in the sum of $6,000, payable upon receipt at the home office of due proof of the death of Duncan. If any subsequent premium was not paid when due, then, after the grace period of thirty-one days, the policy lapsed. The policy provided that, within five years after default in any premium payment, it could be reinstated upon evidence of insurability satisfactory to the company and the payment of arrears of premiums, with interest at the rate of six per cent. per annum.

The policy contained these further provisions: "No renewal premium shall be considered paid unless a receipt shall be given therefor, bearing the original or lithographed signature of the secretary or assistant secretary of the company, and countersigned by the agent."

"All agreements made by the company are signed by its president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer. No other person can alter or waive any of the conditions of this policy or make any agreement which shall be binding upon the

company." There was a provision making the application for insurance and the policy the entire contract between the parties. In the application is a statement by the assured acknowledging that all policies and agreements made by the company are signed by one or more of its executive officers, and that "no agent or other person not an executive officer can grant or waive any condition of its policies, or make any agreement which shall be binding upon said company."

The undisputed facts are as follows: The first premium was paid, and the policy was in force from November 11, 1920, to November 11, 1921. The premium was not paid on the latter date. On April 20, 1922, Duncan wrote Campbell & Hart, State agents and managers of the company, a letter in which he acknowledged receipt of their letter of April 18 in regard to the reinstatement of his policy. In this letter he stated that the soliciting agent, Harmon, had told him that he could renew by making a note, and he requested the managers, if this were satisfactory, to send him a note due November 15, 1922. In reply to this letter Campbell & Hart wrote: "Beg to advise that your policy was reinstated on April 11. We inclose herewith extension note, which, if you will sign and return to us with partial payment of $25, will extend the balance of your premium to June 11. When this note falls due, by making another partial payment of $25 we can extend the final balance to August 11."

On April 24, 1922, Duncan wrote in reply to this letter, stating that he could not send the money, and if the company would not take his note he would let his insurance drop. In reply to this, the managers wrote on April 26, telling Duncan that, if he was unable to make the payments as outlined in the previous letter, that was the only way they could handle the matter, and it would be best for him to wait until fall and then advise if he could make the payments, and they would give the matter prompt attention. On May 20, 1922, the managers

wrote Duncan that his policy, which had been *recently reinstated, had again lapsed* for the nonpayment of the reinstatement premium, and inclosing a form for reinstatement for Duncan to fill out and return, if he was ready to pay the premium and reinstate the policy, and concluded by saying, "We will make an effort to get the company to reinstate it." On May 23, 1922, Duncan answered, acknowledging receipt of letter and blank form, and stated, "Am sending you check for $25, dated June 1," and requesting the managers to send him a note to sign for the balance. The application for reinstatement referred to in the letter of May 20, above, was introduced, and is as follows:

"Approved.....

"Brief Reinstatement Application No. 266970 S

Jerry C. Duncan.

Ætna Life Insurance Company, Hartford, Conn.

Lapsed November 11, 1921.

Canceled Lap. May, 1922.

Date reinstatement June 7, 1922.

Unpaid premiums due (See margin) $134.76.

Premium Int. $1.35.

Net payment $136.11.

Agent, Campbell & Hart, managers.

Examined by Pearl.

Application received, record made June 1, 1922.

No record—L. B., June 1, 1922, A. G. P."

Then follow questions with reference to the health of the assured and his occupation, and various other questions, on which no issue is based in the case, and then the following recital: "I further agree that said contract shall not be considered reinstated by reason of any cash paid or settlement made in connection with this application unless this application is approved for reinstatement by an executive officer of the company at its home office, and the payment of the full amount of all unpaid

premiums and interest made within thirty-one days from the date of the company's reinstatement receipt, and before said receipt, properly signed by an executive officer, is actually delivered to me, and then on the express condition that I am in sound health on the date of said delivery, which I expressly represent myself to be by accepting said receipt. It is hereby understood and agreed that, if this application is declined, or if the company's reinstatement receipt is delivered to me while I am not in sound health, any payment made on account of this application is to be returned to me upon demand, and the said receipt shall be surrendered to the company.

"(Signed) J. C. DUNCAN.

"P. O. Address, England, Ark. Dated May 23, 1922."

On June 10, 1922, the managers wrote Duncan the following: "The company has agreed to reinstate your policy No. 266970, the amount due being $136.11. We will hold your check for $25 to apply on this amount, as soon as we have received the remittance for the balance, when receipt will be forwarded and your policy will be put in full force and effect."

In answer to this letter, Duncan wrote, June 12, 1922, saying: "Your letter of the 10th just received, and will say you wrote me if I would send $25 you would take a note for the balance, and you have not sent the note. Now if you can't take a note, just return my $25, as I have no more money to pay out now." The agents answered this letter on June 16 as follows: "In reply to your letter, we inclose herewith extension note covering the balance of *your reinstatement premium,* which, if you will sign and return to us, will extend this balance to August 7. When this note falls due, by making a partial payment of $25 we can extend the balance to October 7."

Mrs. Duncan testified that her husband was killed instantly on June 17, 1922, between 12:30 and 1 o'clock. She identified a note which her husband had signed on that day about 12 o'clock, which note is as follows:

"Form No. 71A.

Must be signed by same person who signs the form No. 71.

Net premium	$136.11	Number of policy S-266970.
Cash pay't. (if any)	25.00	Premium fell due 6/7/1922.
Balance	111.11	Ext'sion matures 8/7/1922.
Interest added	1.11	I have this day 6/15/1922
Amount due	112.22	signed form as described hereon.

"General Insured or
"Attest..... Agent..... Beneficiary
(Sign here)

(Indorsed on face in red ink "Reinstatement").

"IMPORTANT—This form must be signed on or before the days of grace expire. Interest is added for extension of time hereby authorized.

"Form No. 71 Edition Feb. 1922.

"$112.22.

"In consideration of an extension of time for payment of reinstatement premium due 6/7/1922 under policy No. S-266970, I agree to pay said premium and interest, amounting to one hundred twelve and 22/100 dollars, to Campbell & Hart, agent of the Ætna Life Insurance Company of Hartford, Conn., at its office in Little Rock, Ark., on or before August 7, 1922.

"This agreement, with a cash payment of $25, being given to extend time for payment of said renewal premium, it is understood that, if the sum named is not paid when due, said policy shall then cease and determine, except for the nonforfeiting provisions (if any) to which said policy was entitled when the premium fell due, and this agreement shall be canceled; and it is also understood that this extension shall not exceed sixty days from the date when said premium fell due, anything to the contrary herein notwithstanding.

" x J. C. Duncan Insured or Beneficiary.

" x Must be signed on both lines marked x

(Indorsed on face in red ink) "Reinstatement."

(Indorsed on back in red ink).

"Insured (or beneficiary) must sign his name in two places."

She identified her husband's signature to the note, and testified that she delivered the same to Harmon, the local agent of the company, the day her husband was killed. Her husband had intended to mail the note. She further testified that Mr. Hart, one of the managers of the company, came down to her home about a month or six weeks after her husband's death to get the details, and she told him all about it.

Harmon testified in substance that he was agent of the company, and that he solicited Duncan's application for the insurance in controversy; that he went to Duncan's on the day he was killed, shortly after the killing, and received the note above mentioned from Mrs. Duncan, which he forwarded to the general managers, explaining the circumstances of Duncan's death, and requesting them to forward the necessary blanks, and that he would attend to the matter to the best of his ability. He identified the telegram which was sent by the company from Hartford on September 22 to Campbell & Hart. The telegram stated, "Will advise you fully Duncan case in few days." The witness made the contents of the telegram known to Mrs. Duncan. Witness testified, on cross-examination, that he accepted the note mentioned from Mrs. Duncan, and sent the same to the managers, because of his friendship for the Duncan family and at Mrs. Duncan's request. He was a soliciting agent, and had no authority to act as an agent for the company in settling the claim. It was not his duty to collect premiums, though sometimes, as an accommodation to his friends, he did so, and remitted same to the company. All the business of the company in the State was handled through Campbell & Hart, by whom witness was employed.

Witness Morris testified that he was employed as an attorney for Mrs. Duncan to collect her insurance. He wrote two letters to the company at its home office, concerning the policy in controversy, and stating that he understood that proof of death had been furnished, and that the beneficiary desired to know if the claim would

be paid without litigation. He testified that he offered to make any proof of death demanded, and requested the company to send him a form so that he might make the proof in the usual course. He did not get a reply to his letters.

Hart testified for the company that he was a manager, and that he made a personal investigation of the case in controversy; that he was informed by Mrs. Duncan as to all the facts with reference to the death of her husband. He received the note signed by Duncan which had been introduced in evidence, and also received a check for $25, dated June 1, and inclosed in Duncan's letter of May 23. He retained the note and check until after the suit was brought. He was authorized to and did solicit Duncan to reinstate his lapsed policy. The application for reinstatement had to be submitted to the company for its decision. The general managers are authorized to reinstate when the company sends down a reinstatement receipt. The managers then advise the policyholder to send in his premium and that the reinstatement will then be sent him. The application for reinstatement of Duncan went to the home office of the company, and they sent witness a reinstatement receipt, with instructions that, upon collecting the premium, he could then send the reinstatement receipt to Duncan, at which time the policy would be reinstated. The only agreement witness ever made with Duncan was that, if he would pay the premium, either by note or cash, the policy would be reinstated. Witness had to hold the check until he could tell whether the company would approve the application or not, and, when the company approved the application for reinstatement, he demanded the remainder of the premium, and never cashed the check because the balance of the premium was never paid. Witness identified and introduced in evidence the reinstatement receipt which was sent witness, to be delivered to Duncan when the premium was paid, which is as follows: "Reinstatement receipt. Ætna Life Insurance Company, Hartford, Conn., June 7, 1922. In consideration of the application

for the reinstatement of Contract No. S-266970 on the life of J. C. Duncan, England (herein called the insured), which reinstatement application is dated May 23, 1922, and is hereby referred to and made a part of this contract, and of $136.11 to be paid within thirty-one days from this date, and before the delivery of this reinstatement receipt, the Ætna Life Insurance Company reinstates said contract from the date this receipt is actually delivered to the insured, on the express condition, and the representation by the insured, that the insured is then in sound health, otherwise this reinstatement to be null and void. Not binding without date of payment and signature of agent here. Received payment this —— day of ——, 192—, subject to the above terms.

"Agent. Payment for November 11, 1921. L. R."

Upon the above facts the plaintiff prayed the court to instruct the jury to return a verdict in her favor, which prayer the court granted. The court instructed the jury to return a verdict in favor of the plaintiff in the sum of $6,000, with interest at the rate of 6 per cent. per annum from October 31, 1922, and twelve per cent. of the $6,000, less the sum of $136.11, with interest from November 11, 1921, at the rate of 6 per cent. per annum. The defendant also prayed the court to instruct a verdict in its favor, which prayer the court refused, to which ruling the defendant duly excepted. The defendant also prayed for other instructions, which the court refused, and to which rulings the defendant duly excepted. The jury returned a verdict in favor of the plaintiff as directed. Judgment was entered in accordance with the verdict. from which is this appeal.

1. The court did not err in overruling the appellant's motion to require the appellee to make her complaint more specific. The allegations of the complaint, showing the policy issued, the premiums paid, the death of the assured, and a compliance of the appellee with the requirements of the policy as to notice of the death and demand of payment, which was refused, definitely state a cause of action against the appellant, and its answer

admitting the issuance of the policy and denying the other allegations of the complaint raised the issue upon which the testimony was adduced covering all the grounds of appellant's motion. The complaint was sufficiently specific to call for the proof which was adduced to support the appellee's contention, and it was unnecessary and improper to set forth in the complaint the proof or evidence to be adduced.

2. The policy required the appellant to pay the amount named therein "upon receipt at its home office of due proof of death of Jerry C. Duncan." The policy does not require that proof of death shall be made in any particular manner, or at any particular time. No method is specified for making the proof. In the absence of a specific requirement of the policy as to a particular method to be pursued, any method is sufficient which serves to bring home to the insurer notice and proof of the death of the assured. The testimony of the appellee's attorney to the effect that he had written the appellant at its home office, notifying it of the death of Duncan and offering to make proof of death in any way demanded, and asking the company if it intended to resist the payment to the beneficiary of amount claimed under the policy, together with the telegram of the company to its general managers stating that it would advise them fully within a few days what to do with the Duncan case, show conclusively that the company had notice of the death of Duncan at its home office. "No matter what the form of the notice may be, if it operates to bring the attention of the insurer to the loss, it is sufficient, and, where the nature of the notice is not prescribed, it may be oral." 14 R. C. L. 1338, § 507; 33 C. J. 16, § 664; see also *Jackson* v. *Life & Annuity Assn.*, 195 S. W. 535; 5 Joyce on Insurance, p. 5470, § 3277. The appellant having notice of the death of Duncan, its denial of liability, not predicated upon a failure to furnish proof of loss, and its failure, upon request, to indicate that further proof of loss would be required, constituted a waiver of any right to any other or further proof of loss. *Dodge*

v. *Thomasson,* 94 Ark. 621. See also *Security Mut. Ins. Co.* v. *Woodson,* 79 Ark. 266; *Equitable Surety Co.* v. *Bank of Hazen,* 121 Ark. 422.

3. The real crux of this lawsuit is involved in the contention of the appellant that, at the time of the death of Duncan, the contract of insurance had lapsed because of the nonpayment of the premium due November 11, 1921, and that the policy had not been reinstated, and was not in force, on the 17th day of June, 1922, when Duncan was killed, and therefore that appellant was not liable. The undisputed testimony shows that the premium due November 11, 1921, was not paid, and therefore the policy, by its express terms, lapsed after the thirty-one days of grace period. The policy provides that, after default in premium payment, it may be reinstated upon evidence of insurability satisfactory to the company, and by payment of arrears of premium, with interest at the rate of six per cent. per annum. We are convinced that the undisputed testimony shows that there was a completed contract for reinstatement of the policy, according to its terms, before Duncan was killed. Learned counsel for appellant contends that there was no receipt of the renewal premium signed by the secretary of the company and countersigned by the agent; that there was no agreement signed by the president, vice president, secretary, assistant secretary, treasurer or assistant treasurer, showing the reinstatement of the policy; that no one of the executive officers of the company signed or approved any application or agreement for a reinstatement of the policy, and that therefore the requirements of the contract of insurance in these respects were not complied with. But all of the above provisions were made for the benefit of the appellant company, and they could be waived by the company. The undisputed testimony shows that these provisions were waived. The testimony of Hart, of Campbell & Hart, appellant's general agents and managers for the State of Arkansas, shows that they were authorized to solicit the reinstatement of policies, and to reinstate the same when the company sent down a

reinstatement receipt showing that the application for reinstatement had been approved by the company. The correspondence in the record between the appellant's general agents and Duncan, set out above, shows that, prior to May 20, 1922, Campbell & Hart had solicited Duncan to reinstate the policy, and had reinstated the same on April 11 until June 11, on condition that he pay $25 in cash and sign a note for the balance of the unpaid premium. But Duncan wrote them that he could not send the money, and that, if they could not take his note, he would let his insurance drop. The result of these negotiations was that Duncan permitted the reinstatement of April 11 to lapse because he failed to comply with the conditions prescribed for the payment of the premium. On May 20 the general agents renewed their solicitation to Duncan to again reinstate, and inclosed him a blank for that purpose, stating that they would endeavor to get the company to reinstate the policy. Duncan, in answer to this letter, wrote the agents, on May 23, acknowledging receipt of the letter and blank, and inclosed a check for $25, dated June 1, and requesting them to send him a note to sign for the balance. While the letter does not so state, the indisputable inference is that he also returned the application duly filled out and signed. This letter of May 23 contained a definite offer on the part of Duncan to pay the company $25 in cash and to sign a note for the balance of the premium if they would reinstate his policy. The subsequent correspondence and the record made on this application in the office of the company shows that the company accepted Duncan's offer and reinstated the policy. This record shows that the policy had lapsed on November 11 and was canceled, and the clear inference was that it had been reinstated, and again lapsed in May, 1922; that an application was received for reinstatement and a record made thereon June 1, 1922; that the application was examined and the policy reinstated June 7, 1922. The correspondence and testimony of Hart show clearly that the company had accepted Duncan's offer and reinstated the policy on

condition that he pay the balance of the premium, and it sent its general agents a reinstatement receipt; that the general agents were authorized, after getting this receipt, to further negotiate with Duncan as to when and to whom he should pay the balance of the premium. This they did, as shown by their letters of June 10 and 16, 1922, in which they told him that they would hold his check for $25 and take his note for the balance. The last act of Duncan immediately before his death was to comply with the request of the general agents of the appellant to evidence his indebtedness to the company for the balance of the premium by signing a note therefor to Campbell & Hart. True, this note was not delivered to the company or its general agents until after Duncan's death, but, when he signed it, he evidenced his obligation to pay the balance of the premium in that form, and there was no revocation of this note prior to his death. After his death it was delivered to the general agents of the company, who retained both the note and the check for $25 without offer to return same until after this action was instituted.

Now, the above undisputed testimony shows that Duncan's offer to the company was to pay $25 in cash and to sign a note for the balance of the premium if the company would reinstate his policy. The company accepted the $25 and reinstated the policy, and Duncan signed the note for the balance of the unpaid premium. Thus the minds of the parties had fully met on the terms of the contract of reinstatement, and this contract had been consummated before Duncan's death. The company, on its part, had reinstated the policy, and, in consideration of this reinstatement, Duncan, on his part, had paid $25 in cash and executed his note for the balance. But, even if he had not executed the note, he would have been bound for the balance of the premium. The signing of the note simply evidenced his indebtedness for the amount which he was due, even before he signed the note. Because the company, as the record shows, had carried out its part of the contract in reinstating his policy, and he was due,

in consideration therefor, the balance of the premium to be evidenced by the note. The death of Duncan before the note was actually delivered was wholly immaterial, because his act in agreeing to sign the note and in signing same as effectually bound his estate for the payment of the unpaid premium as if the same had been delivered to the company before, and not after, his death.

The case is controlled on the facts by the doctrine of our cases to the effect that, where the minds of the insured and the insurer, for a valuable consideration, have met upon all the terms of the contract, the contract is complete and enforceable, even though it was intended by the parties to be evidenced by a writing, which writing, because of some fortuity, was not delivered before the death of the insured. *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612; *Jenkins* v. *International Life Ins. Co.,* 149 Ark. 257. To be sure, if the appellant had not accepted the insured's application for reinstatement on the terms offered by him, and had not actually reinstated his policy on June 7, 1922, the case would be entirely different. But the record shows that the company did accept his terms, and that the policy was actually reinstated on June 7, 1922. The very last letter written by the general agents to Duncan on June 16, 1922, the day before he died, shows that they considered that the policy had already been reinstated. They speak of the note which Duncan was to sign as the note "covering the balance of your reinstatement premium," all of which shows conclusively that the general agents themselves, who were authorized to accept the note for the balance of the unpaid premium on reinstatement, considered the contract for reinstatement as already consummated.

There are no errors in the rulings of the trial court, and its judgment is therefore affirmed.

McDONALD v. STATE.

Opinion delivered September 29, 1924.

1. LARCENY—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of having stolen cattle.
2. LARCENY—RECENT POSSESSION OF STOLEN PROPERTY.—Recent possession of stolen property by the accused, unexplained, is sufficient to warrant the jury in returning a verdict of guilty.
3. LARCENY—INSTRUCTION—WEIGHT OF EVIDENCE.—An instruction that "the possession of property recently stolen without reasonable explanation of that possession, is evidence which goes to you for your consideration under all the circumstances in the case, to be weighed as tending to show the guilt of the one in whose hands such property is found, but such evidence alone does not imperatively impose upon you the duty of convicting, even though it be not rebutted," is not objectionable as an instruction upon the weight of evidence or as making it the imperative duty of the jury to convict upon proof of unexplained possession of recently stolen property.
4. CRIMINAL LAW—INVITED ERROR.—The accused will be deemed to have waived any error from the State going into a collateral matter where he had already gone into proof of the same matter with great particularity.

Appeal from Greene Circuit Court; *G. E. Keck,* Judge; affirmed.

Jeff Bratton, for appellant.

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

HART, J. Sandy McDonald prosecutes this appeal to reverse a judgment of conviction against him for the crime of stealing cattle, in violation of the provisions of § 2490 of Crawford & Moses' Digest.

The first assignment of error is that the evidence is not legally sufficient to support a verdict of guilty. On the part of the State it was proved that M. G. Garmoth delivered a carload of cattle at the stock-pens of the Missouri Pacific Railroad Company in Paragould, Arkansas, to be shipped to St. Louis, Missouri. The cattle were delivered in the stock-pens on July 23, 1923, and on that night six head of the cattle were stolen. The owner of the cattle described them to the jury, and none

of the stolen cattle had horns except a brindle steer. About four days afterwards the owner found four head of the stolen cattle in the slaughter-pen of Ray Hester in Paragould. He also found the hides of the other two in the slaughter-pen.

Several witnesses for the State saw the defendant, Sandy McDonald, and Ray Hester driving some cattle in a westerly direction in the city of Paragould about 5:30 or 6 o'clock on the morning of July 28, 1923. There were five or six head of the cattle, and there had been a rain the night before. Most of the witnesses who saw the defendant and Hester driving the cattle on the morning in question were unable to describe the cattle. One of the witnesses stated that they were mostly red, but that there was one black one. Another witness stated that she did not remember the color of the cattle, but that some of them were dark, and that one of them was of a Jersey color.

Another witness testified that he helped deliver some cattle at the slaughter-pen of Ray Hester on the morning that the cattle in question were found there. When the witness got to the slaughter-pen with the cattle, there were already six head of cattle there. He did not remember the color of the cattle, but there were possibly one or two black ones in the bunch.

Two other witnesses testified that they went with the owner of the cattle when he found four of them and the hides of two others in the slaughter-pen of Hester.

The above is a summary of the testimony introduced by the State and relied upon for a conviction in this case. When it is considered in the light most favorable to the State, together with all legal inferences that may be drawn from it, we think that the evidence is legally sufficient to warrant a conviction.

It clearly appears that six head of cattle belonging to M. G. Garmoth were stolen from the cattle-pens of the Missouri Pacific Railroad Company at Paragould, Arkansas, on the night of July 23, 1923. Some time during the morning of July 28, 1923, four head of these cattle and

the hides of two others were found at the slaughter-pen of Ray Hester in Paragould, Arkansas. Between five and six o'clock on the same morning the defendant and Ray Hester were seen driving five or six head of cattle along the streets of the city of Paragould.

Another person testified that he delivered some cattle at the slaughter-pen later in the morning, and traveled along the same route as that said to have been traveled by the defendant and Hester. There were already six head of cattle in Hester's slaughter-pen when he got there with his bunch.

This testimony shows that Hester in some way got possession of the stolen cattle. The uncontradicted evidence also shows that the defendant and Hester were seen driving five or six head of cattle through the streets of Paragould. It is fairly inferable that the cattle they were driving were stolen cattle. It is true that the witnesses who saw them driving the cattle were not able to describe them accurately. One of the witnesses, however, said that he thought that there was one or two black ones in the bunch. Another witness said that some of them were dark and one of them was a Jersey color. The owner described the stolen cattle as being one black white-faced steer, one black white-faced heifer with white streaks, one roan speckled cow, one red cow, one brindle steer, and one whose description he did not remember.

It had rained the night before, and the witnesses who delivered the second bunch of cattle on the morning that the stolen cattle were found in Hester's slaughter-pen testified that they had traveled over the same route that the defendant and Hester had traveled the same morning. Six head of cattle were in the slaughter-pen when they brought in the second bunch. It is not claimed that any of the second bunch were the stolen cattle. The only other bunch of cattle in the slaughter-pen on that morning were the stolen cattle. Hence it is fairly inferable, when all the facts and circumstances of the case are considered together, that the cattle that the defendant and

Hester drove in the direction of the slaughter-pen early in the morning of the 28th day of July, 1923, were the stolen cattle. This was only four days after the cattle had been stolen. No attempt whatever was made by the defendant to explain his possession of the cattle.

We have repeatedly held that the recent possession of stolen property by the defendant unexplained, when taken in connection with the other circumstances similar to those proved in this case, is sufficient to warrant the jury in returning a verdict of guilty. *Spivey* v. *State,* 133 Ark. 314; *Johnson* v. *State,* 161 Ark. 111, and *Papan* v. *Nahay,* 106 Ark. 232.

The next assignment of error is that the court erred in giving instruction No. 3, which reads as follows: "You are instructed that the possession of property recently stolen, without reasonable explanation of that possession, is evidence which goes to you for your consideration under all the circumstances in the case, to be weighed as tending to show the guilt of the one in whose hands such property is found, but such evidence alone does not imperatively impose upon you the duty of convicting, even though it be not rebutted."

It is insisted that the use of the words, "evidence which goes to you for your consideration under all the circumstances in the case, to be weighed as tending to show the guilt" of the defendant, was an instruction on the weight of the evidence.

This court has held that similar language in an instruction means no more than telling the jury that such evidence may be considered for the purpose of determining the guilt or innocence of the defendant. *Hogue* v. *State,* 93 Ark. 316.

The next objection to the instruction is that it is upon the weight of the evidence because it instructs the jury that the possession of property recently stolen, without explanation of the possession, makes it the imperative duty of the jury to convict, and thus becomes a charge upon the weight of the evidence. We do not think so. A fair interpretation of the instruction would warrant the

jury in convicting the defendant, but does not tell it as a matter of law that it must convict if it should find that the stolen cattle had been recently found in the possession of the defendant, without explanation on his part. In fact, the instruction tells the jury that the finding of such fact does not make it the imperative duty of the jury to find the defendant guilty. The court has no right to tell the jury what effect it should give the evidence, and it did not do so in this case.

On the other hand, instead of pointing out what inferences the jury should draw from particular facts or circumstances, it left the whole matter of the guilt or innocence of the defendant to the jury, and left the jury free to draw whatever inference it should see fit from the fact that it might find that the stolen cattle were found in the possession of the defendant soon after the larceny was committed, without explanation on his part. *Spivey* v. *State,* 133 Ark. 314, and *Pearrow* v. *State,* 146 Ark. 182.

It is next insisted that the court erred in not giving certain instructions asked by the defendant. We do not deem it necessary to set out these instructions. The matters embraced were either covered by instructions given by the court, or the instructions as drawn were argumentative in form and calculated to mislead the jury. The court gave full and fair instructions upon the question of reasonable doubt and the weight and credibility to be given to the witnesses. It also gave an instruction on circumstantial evidence, and read to the jury § 2490 of Crawford & Moses' Digest relating to the stealing of cattle.

The jury was specifically told that it must find from the evidence, beyond a reasonable doubt, that the defendant, on the night in question, unlawfully and feloniously stole and carried away the cattle in question, before it could find him guilty.

Finally it is insisted that the court erred in allowing the State to prove that Ray Hester was charged with grand larceny, and on that account had fled the State.

Under the circumstances of this case, this amounted to no more than what is generally called invited error. The defendant had already shown by one witness that he had seen Ray Hester buy some cattle from a stranger about the time of the transaction in question. He was allowed to tell how much Hester paid the stranger for the cattle, and everything that he knew about the transaction. Then T. C. Hester was put upon the stand by the defendant and was allowed to describe in detail the movements of Ray Hester during the whole of the early morning of July 28, 1923. He testified that Ray Hester had bought some cattle on that morning.

On cross-examination the prosecuting attorney asked this witness if Ray Hester did not leave immediately after his trial in the examining court and had not been back in the State since. The witness stated that Ray Hester was in the State of California at the time of the trial, and had been there ever since; that he left the State on the same day that he had been discharged in the examining court.

Thus it will be seen that the testimony in question was first elicited on cross-examination, after the defendant had introduced testimony describing with particularity the movements of Ray Hester on the morning that he was seen with the defendant driving cattle in the streets of Paragould in the direction of his slaughter-pen.

He was also permitted to testify that Hester had bought some cattle from a stranger on that morning. It will be remembered that this was the same morning that the stolen cattle were found in Hester's slaughter-pen. Under these circumstances the defendant will be deemed to have waived any error which resulted from going into collateral matters, because he had already gone into proof of these same matters with great particularity. *Mitchell* v. *State,* 86 Ark. 486, and *Tarkington* v. *State,* 154 Ark. 365.

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

CRANK v. STATE.

Opinion delivered September 29, 1924.

1. INDICTMENT AND INFORMATION—CONVICTION OF ANOTHER OFFENSE.—Under an assault with intent to commit rape, defendant cannot be convicted of assault and battery, unless the indictment alleges a battery.
2. CRIMINAL LAW—HARMLESS ERROR.—Though defendant was erroneously convicted of assault and battery under an indictment which would have sustained a conviction of a simple assault, no prejudice resulted if the fine imposed did not exceed the maximum penalty which might have been imposed for the latter offense.
3. WITNESSES—RIGHT TO ASK LEADING QUESTIONS.—It is within the discretion of the court to permit a party to ask his youthful witness leading questions if it appears proper and necessary to do so to elicit the truth.

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

John D. Arbuckle, for appellant.

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

SMITH, J. Appellant was convicted of assault and battery, on a trial under an indictment the charging part of which reads as follows: "The said defendant, A. W. Crank, in the county, district and State aforesaid, on the 10th day of September, 1923, did unlawfully, forcibly and feloniously make an assault upon Beatrice Mathews, with the unlawful and felonious intent to then and there forcibly, unlawfully and feloniously and against her will and consent to rape, ravish and carnally know the said Beatrice Mathews, she, the said Beatrice Mathews, being a female under the age of sixteen years, against the peace and dignity of the State of Arkansas."

The girl alleged to have been assaulted was twelve years old, and appellant was fined $100, and it is first insisted that he could not be convicted of assault and battery because the indictment contains no allegation of a battery.

This is true. This court has uniformly held that, in cases of this kind, and in prosecutions for assault with

intent to kill in which an assault is charged, there can be no conviction of a battery unless the indictment contains allegations to that effect. In other words, a battery must be charged to sustain a conviction for that offense. *McAlister* v. *Gunter,* 164 Ark. 611; *Jones* v. *State,* 100 Ark. 195; *Bryant* v. *State,* 41 Ark. 359.

It is true, in the case of *Moreland* v. *State,* 125 Ark. 24, the defendant was indicted for assault with intent to rape, and a conviction for assault and battery was sustained, but no point was made that the indictment did not allege a battery, and it does not appear from the opinion in that case that the indictment omitted that allegation.

It does not appear, however, that there was any prejudice to appellant in the verdict returned. The punishment for simple assault is a fine not exceeding $100, and the punishment for assault and battery is a fine not exceeding $200, and for either offense a fine as low as one cent might be imposed. The jury might therefore have assessed appellant's fine at less than $100, although they found him guilty of assault and battery, if they had thought proper to do so, yet it was fixed at that sum, thus clearly evidencing a purpose to impose a fine of a hundred dollars, for a fine either lower or higher might have been imposed for that offense.

Now, as we have said, a fine of a hundred dollars is authorized by law upon a conviction for simple assault, and the jury must necessarily have found appellant guilty of simple assault to have convicted him of assault and battery, for, if he was guilty of assault and battery, he was necessarily guilty of simple assault, as the lesser offense is embraced in the greater, and, having found that the punishment should be fixed at a hundred dollars, that finding will not be disturbed, because it is a punishment which could have been imposed for the lesser offense as well as for the greater one.

It is next insisted that the court erred in permitting the prosecuting attorney to ask leading questions in the examination of the girl alleged to have been assaulted. It does appear that some of the questions were some-

what leading, but it will be remembered that the witness was only twelve years of age, and the court has a discretion to permit leading questions to be asked if it appears proper and necessary to do so to elicit the truth, and the action of the trial court in so doing will not be disturbed unless there appears to have been an abuse of this discretion, and there appears to have been no abuse of discretion here. *Murray* v. *State*, 151 Ark. 331; *Bullen* v. *State*, 156 Ark. 148.

No error appearing, the judgment is affirmed.

ALMOND v. STATE.

Opinion delivered September 29, 1924.

PROSTITUTION—PANDERING ACT—EVIDENCE.—Under an indictment under the pandering act (Crawford & Moses' Dig., § 2703), for taking and detaining a female person for the purpose of sexual intercourse upon a pretense of marriage, evidence that defendant, a married man, induced a female person to leave her home and go with him upon a promise of marriage, upon his subsequently securing a divorce, is insufficient.

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

C. D. Atkinson, for appellant.

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

HUMPHREYS, J. Appellant has prosecuted an appeal to this court to reverse the judgment in the circuit court of Washington County against him for violating § 2703 of Crawford & Moses' Digest, commonly known as the "pandering act." The body of the indictment is as follows:

"The grand jury of Washington County, in the name and by the authority of the State of Arkansas, accuse Archie Almond of the crime of pandering, committed as follows, to-wit: The said Archie Almond, in the said county of Washington and in the State of Arkansas, on or about the 16th day of March, 1924, being then and

there a male person, did unlawfully and feloniously and by means of promises, artifice and fraud, and upon a pretense of marriage, inveigle, induce and persuade one Delia Huber, a female person, to leave her home, and, not being the husband of the said Delia Huber, did unlawfully and feloniously take and detain her, the said Delia Huber, for the purpose of sexual intercourse, against the peace and dignity of the State of Arkansas."

Appellant's first assignment of error is that the indictment does not sufficiently charge an offense under said section of the statute. There is a provision in the pandering statute making it an offense to take or detain a female person for the purpose of sexual intercourse on the pretext of marriage, and the indictment sufficiently charged this offense.

Appellant's next assignment of error is that the evidence was insufficient to sustain the charge, and that the court erred in refusing to direct a verdict in favor of appellant. The undisputed facts are that appellant was a married man, and so informed the prosecutrix, Delia Huber, who was staying with her grandmother, four or five miles southwest of Lincoln, in Washington County, Arkansas.

Appellant and Delia Huber became acquainted on the 9th of March, 1924, and a short courtship ensued, to which the grandmother objected when appellant informed them that he was a married man. On March 16, 1924, after the grandmother interposed an objection to the courtship, appellant wrote Delia a letter in which he stated that he wanted her, and requested that she meet him at the lane. After dark she met him at the appointed place, whereupon they agreed to go to Fayetteville, where he would get a divorce and marry her. They immediately set out on foot for Fayetteville, traveling most of the night and next day. During the night they engaged in sexual intercourse. They spent the second night, under the claim of being husband and wife, at the home of Anna Strickler, where again they engaged in sexual inter-

course. The following morning they were arrested, and appellant was lodged in the county jail.

We agree with appellant that the evidence was insufficient to sustain the charge. The meaning of the clause, "upon the pretense of marriage," as employed in the statute, contemplates the procurement of sexual intercourse by a male with a female through a fictitious, fraudulent or pretended marriage, and has no relation to a promise of marriage in the future. The undisputed facts show that appellant practiced no artifice or fraud through a pretended marriage upon the prosecutrix. He told her, before they started to Fayetteville, that he was a married man, and would not marry her until he obtained a divorce. He simply made a promise to marry her in the future upon the contingency that he secured a divorce, and made no misrepresentations to her of any fact having a present existence. The trial court should have directed a verdict for appellant, and, on account of the error in not doing so, the cause is remanded, with directions to dismiss the indictment and discharge the defendant.

HILL v. WILLIAMS.

Opinion delivered September 29, 1924.

ELECTIONS—CONTEST OF PRIMARY ELECTION—SUFFICIENCY OF COMPLAINT.—Where a complaint in a contest of a primary election for the nomination of sheriff alleged irregularities and fraud in general terms, and challenged the legality of certain votes, but failed to set out the number of votes received by each of the four candidates, a demurrer to the complaint was properly sustained, as it failed to show that plaintiff received a plurality of the legal votes cast at such election.

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

Edward Gordon, for appellant.

The court erred in sustaining the demurrer to the complaint. To determine whether there is a cause of action stated, the face of the complaint must alone be

looked to. 123 Ark. 505. A complaint must be tested on demurrer by its own allegations. 87 Ark. 418. In determining whether or not a demurrer to a complaint should be sustained, every allegation made therein, together with every inference deducible therefrom, must be considered. 122 Ark. 502. Where a demurrer to a declaration is filed in which no special cause of demurrer is assigned, this court will consider it only as a general demurrer. 2 Ark. 128; 160 Ark. 273.

J. W. Johnston, Calvin Sellers and *W. P. Strait,* for appellee.

The court did not err in sustaining the demurrer. Section 1096, 1097, C. & M. Digest; 33 Ark. 497. A necessary party to an action is one without whose presence a substantial judgment cannot be made. 58 N. Y. Supp. 748; Hun. 606; 17 Pac. 751; 9 Am. St. Rep. 245; 47 Pac. 1; 75 Mass. 313; 75 N. E. 313; 988 Pac. 16. All parties having an interest adverse to the contestant should be brought in as contestees. 20 Corpus Juris 223; 77 So. 996; 42 N. W. 401; 111 N. E. 980; 90 N. E. 203.

HUMPHREYS, J. This suit was filed in the circuit court of Conway County by appellant against appellee, under authority of § 3772 of Crawford & Moses' Digest, for the purpose of contesting the election of appellee as sheriff and collector of said county and the certificate of nomination issued to him by the Democratic Central Committee in the primary election of August 12, 1924. The complaint is quite lengthy, and it could serve no useful purpose to set it out in full. Suffice it to say that it contained many allegations of irregularities and fraud in general terms, partaking of the nature of conclusions. It specifically challenged the legality of certain votes, and charged that, if all illegal votes were thrown out, appellant was, and should be declared, the nominee of the Democratic party for sheriff and collector of said county. It alleged that there were four candidates for the office of sheriff and collector, including appellant and appellee, but failed to set out the number of votes received by each.

A demurrer was interposed to the complaint, which, upon hearing, was sustained by the court, and, upon failure to plead further, the complaint was dismissed, from which judgment of dismissal an appeal has been duly prosecuted to this court.

Appellant contends that the trial court erred in ruling that no recoverable cause of action was alleged in the complaint and in sustaining the demurrer thereto. We cannot agree with appellant in this contention. It was incumbent upon appellant to allege facts, and not conclusions, which would disclose, if true, that he received a plurality of all the votes cast for sheriff and collector in said county. The allegation that certain votes were cast for and accredited to one of his three opponents would not of itself show that he received the highest number of votes in the election for said office. There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee, that appellant would then have more votes than either one of his opponents.

The demurrer to the complaint was properly sustained, as the general allegations therein of irregularities and fraud were mere conclusions, and the specific allegation failed to show that appellant received a plurality of all the legal votes cast for sheriff and collector at said election.

No error appearing, the judgment is affirmed.

EVANS v. STATE.

Opinion delivered September 29, 1924.

CRIMINAL LAW—ADMONITION TO JURY TO AGREE UPON VERDICT.—Where the jury appeared in court room to report their inability to reach a verdict, and the court asked how they stood numerically, to which the foreman replied that the jury stood ten to two for conviction, whereupon the court admonished the jury as to their duty to make every reasonable effort to agree upon a verdict, *held* no error.

Appeal from Mississippi Circuit Court, Chickasawba District; *G. E. Keck,* Judge; affirmed.

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

McCULLOCH, C. J. Appellant was convicted on the trial below under an indictment charging him with the offense of selling alcoholic liquor. He perfected his appeal, but there has been no appearance by counsel, and we must look to the motion for a new trial to determine the assignments of error. The first relates to the sufficiency of the evidence.

It is not difficult to determine that the evidence is legally sufficient, for one of the witnesses testified positively and unequivocally that she was present when appellant made a sale of whiskey to another person. There was a conflict in the testimony, but, as there was testimony of a substantial nature to support the verdict, we will not disturb the finding of the jury.

The other assignment of error relates to an incident in the proceedings when the jurors appeared in court to report their inability to reach a verdict. The court asked how the jurors stood numerically, but did not ask for a statement as to the side on which the majority stood. The foreman, however, responded that the jury stood ten to two for conviction. The court thereupon, on its own motion, delivered to the jury an admonition as to their duty to make every reasonable effort to agree upon a verdict. We have held that it does not constitute reversible error for the court to elicit a statement as to how the jury

stood numerically. *Murchison* v. *State,* 153 Ark. 300; *Phares* v. *State,* 158 Ark. 156. In neither of those cases was there a statement made as to the side on which the majority was arrayed, but we think the fact that the information is made public on that subject does not constitute prejudicial error. There was nothing in the remarks of the court calculated to operate as an invasion of the province of the jury or to unduly influence the jury. The court admonished the jurors that it was their duty not to yield their convictions, but to endeavor, in conference with each other, to reconcile their conflicting views and reach a verdict consistent with their conviction as to the law and testimony in the case.

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

JONES v. SMITH.

Opinion delivered September 29, 1924.

1. ELECTIONS—RIGHT OF ABSENTEE ELECTORS TO VOTE.—Crawford & Moses' Dig., § 3810 *et seq.*, providing that electors unavoidably absent on the day of a general or primary election may cast their votes in any other county and have their ballots forwarded to the county of their residence, to be there counted, does not violate § 1 of art. 3 of the Constitution, which prescribes the qualifications of electors.
2. STATUTES—RULE OF EJUSDEM GENERIS.—Where a detailed enumeration embraces all the things capable of being classed as of their kind, and general words are added, they must be applied to things of a different kind from those enumerated.
3. ELECTIONS—CONSTRUCTION OF ABSENTEE VOTERS STATUTE.—Under Crawford & Moses' Dig., § 3810, authorizing "any employee of any railroad company, traveling salesman, student of any college of this State, or other person," who may be unavoidably absent from the county in which he resides, to deposit his vote at any voting precinct within the State, the words "or other person" are general and not limited to the classes of persons specifically named.
4. ELECTIONS—VOTERS UNAVOIDABLY ABSENT.—In authorizing electors "unavoidably" absent from the county of their residence to vote

at any voting precinct in the State, the statute has reference to unavoidability on account of ordinary duties, occupation or business.

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

W. C. Rodgers, for appellant.

1. The absentee voters in this case do not come within the statute, C. & M. Digest, § 3810, allowing absentees to vote in certain instances. The object to be attained and purpose of the Legislature must be kept in mind in construing the statute. 109 Ark. 556, 563; 132 Ark. 1, 7. Under the well established rule of construction which confines the meaning of additional and general descriptive words to the class to which the preceding specific words belong, the words "or other person," clearly belong to the class of persons coming within the the terms "employee of any railroad company, traveling salesman, student of any college in this State." 73 Ark. 600, 602; 95 Ark. 114, 116.

2. The statute itself is unconstitutional. Art. 1, § 3, Const. 1874. We are necessarily dealing with a legal election, since primary elections are made such by statute, C. & M. Digest, § 3780. That the statute in question, C. & M., § 3810, is unconstitutional, is shown, we think, by the opinion in *Jones* v. *Floyd,* 129 Ark. 185, 191. See also 50 Ark. 85.

George R. Steel and *W. P. Feazel,* for appellee.

1. If it had been the intention of the Legislature to limit the right to vote under the absentee law, to the three classes named, railroad employees, traveling salesmen and students, it would certainly have omitted the words "or other person." Appellant's contention would render that phrase meaningless and superfluous. The Legislature clearly had in mind persons other than those specified. 133 Ark. 587; 136 Ark. 533; Century Dict., "Other"; 106 Ark. 376. We do not think the statute is susceptible of the construction that it refers to persons who are far away from their homes on election day, as is contended by appellant. Absence from his

county because of his duties and employment brings the voter within the purview of the statute, without reference to the distance.

2. The statute is not unconstitutional. *Jones* v. *Floyd,* 129 Ark. 185, cited by appellant, bears no analogy to this case. The procedure prescribed by this statute does not, where complied with, constitute voting in the county where the absent voter happens to be on the day of the election, but merely furnishes the voter, who is unavoidably absent, a method of voting in his own county and precinct, notwithstanding his physical absence. Moreover, constitutional provisions do not apply to primary elections. 159 Ark. 207; 160 Ark. 274.

McCULLOCH, C. J. Appellant and appellee were rival candidates at the primary election of the Democratic party on August 12, 1924, for the office of circuit clerk of Howard County, and appellee was, by the canvassing board of that county, returned as the party's nominee for that office by a majority of six votes. Appellant instituted a contest against appellee for the nomination in the circuit court of Howard County, and a final judgment was rendered, after hearing testimony, in favor of appellee, upon a finding by the court that appellee had received a majority of nine votes.

Under the statute authorizing absentee residents of a county to vote (Crawford & Moses' Digest, § 3810 *et seq.*), there were forty votes cast, most of them for appellee, and the result of this contest turns upon the question of the validity of those votes. The facts with reference to the casting of each of these votes were the same, and, if the ballots are valid, appellee has won the nomination; but, on the other hand, if the ballots are invalid, appellant has won the nomination.

The absentee voters were severally residents of various townships in Howard County, but, on the day of the election, they were in Pike County, which adjoins Howard, and were engaged as laborers in the harvesting of peaches in a large orchard in Pike County. It has been shown that this orchard where the voters in question

worked was located about four miles from the Howard County line.

It is contended that the statute, in attempting to confer the right on absentees to vote in elections, is violative of that clause of the Constitution (art. 3, § 1) which prescribes, among the qualifications of an elector, that he must have "resided in the State twelve months, and in the county six months, and in the voting precinct or ward one month next preceding any election where he may propose to vote." The statute authorizing absentees to vote at elections applied both to general and primary elections. It provides that "any employee of any railroad company, traveling salesman, student of any college of this State, or other person, being a qualified elector of the State of Arkansas, who may, on the occurrence of any general or primary election, be unavoidably absent from the county in which he resides and is a qualified elector therein, because his duties, occupation or business require him to be elsewhere within the State on the day of any general or primary election," may vote for any township, county, district or State officer, etc. The statute further provides a method whereby an absentee from his county may vote. It provides that the voter shall present himself to the election officers of any precinct where he may be on the day of the election, and tender his ballot, together with an affidavit in prescribed form, and that the ballot shall be received by the election officers, sealed in an envelope and delivered to the county clerk of that county, who is to forward the same to the county clerk of the voter's residence, and that the latter shall preserve the ballot and deliver it to the canvassing board of the county when the same is convened for the purpose of canvassing the returns. The statute further provides that the ballot, if found to be legal, shall be returned among the ballots of the township in which the absent voter resides.

The argument of counsel for appellant is that the statute attempts, in violation of the Constitution, to permit a person to vote outside of the county of his residence,

but we are of the opinion that this argument is unsound. A ballot cast pursuant to this statute is, in effect, one cast in the county, township and voting precinct of the absent voter, even though the voting process begins in another county. The Constitution does not specify the method of conducting an election, except that the election shall be by ballot, that the election officers shall be sworn not to disclose how any elector shall have voted, except when required to do so in a judicial proceeding, and that each ballot "shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters opposite the name of the elector who presents the ballot." Art. 3, § 3. Aside from those constitutional restrictions, the Legislature has power to devise the method for conducting an election, and to provide for election officers charged with the duty of complying with the constitutional requirements, so this statute does not violate those limitations mentioned above by allowing absent voters to deliver their ballots to election officers in other counties, to be forwarded to the county of the voters' residence and there returned as a part of the ballots in that county. We have nothing to do with the question of the wisdom or policy of granting this privilege to absent voters, but we find nothing in the Constitution which prohibits the Legislature from authorizing ballots to be cast in that manner, for the effect is to allow the ballot to be cast in the voting precinct where the absent voter resides, and all of the requirements of the Constitution are thus complied with with respect to the election being by ballot and each ballot numbered and recorded. This is all done by the machinery provided in the statute which authorizes absentees to vote.

Counsel relies on the case of *Jones* v. *Floyd,* 129 Ark. 185, as a decision in favor of his contention, but we find nothing in that case which has any bearing on the question involved in the present one. In that case we dealt with a statute which provided that, where any person was transferred by order of the county court from one school district to a school district in another county,

he should have the right to vote in the district to which he had been transferred, and we held that the statute was in conflict with the constitutional provision hereinbefore referred to. The Constitution prescribes residence as a qualification, and the statute under consideration in that case attempted to grant the elective franchise to a person who was not a resident of the county or district, and we decided that the statute was void. The statute under consideration in the present case does not attempt to permit a voter to cast his ballot outside of the county or precinct of his residence. On the contrary, the statute merely permits him, in case of absence from the county, to deposit his ballot, to be forwarded to the county of his residence and there to be treated as one of the ballots cast in the township where the voter resides.

It is also contended that these voters did not come within the class of persons mentioned in the statute who may take advantage of the privilege of voting when absent from the county. It is not shown that the voters in question were employees of "any railroad company, traveling salesmen, student of any college of this State," and it is insisted that the words "or other person" should be construed, under the rule of *ejusdem generis,* to apply only to the same class of persons specifically mentioned. We have often held that the rule referred to should be employed only to aid in construing a statute rather than to control the construction in the face of the expressed meaning of the lawmakers, and that, "where the detailed enumeration embraces all the things capable of being classed as of their kind, and general words are added, they must be applied to things of a different kind from those enumerated." *Wallis* v. *State,* 54 Ark. 611; *American B. & L. Assn.* v. *State,* 147 Ark. 80; *Mason* v. *Inter-City Terminal Ry. Co.,* 158 Ark. 542. In the present instance, if the words "or other person" be construed to have reference alone to persons of the class specifically enumerated, then no meaning whatever is given to them, and they are entirely eliminated from the effect to be given to the statute.

It is further contended that the voters in the present instance were not entitled to the privilege of casting their ballots as absentees, for the reason that they were only a short distance away from the county line, and are not shown to have been in fact unavoidably absent from the county. It is unnecessary to decide in this case to what extent there may be a judicial determination of the question of unavoidability of the absence of such a voter from his county, for the evidence shows that these voters were in fact absent on account of being laborers in an orchard where peaches were being harvested, and their duties as such laborers brought them within the terms of the statute. The language of the statute has reference to unavoidability on account of ordinary duties, occupation or business. It is a relative term when thus employed, and its extent cannot be accurately measured or defined, therefore in any judicial review much latitude must at least be allowed the voter in determining whether or not his absence is unavoidable.

Our conclusion upon the whole case is that the decision of the trial court was correct in allowing the ballots of the absent voters to be counted, and the judgment is therefore affirmed.

McFARLAND v. STATE.

Opinion delivered September 29, 1924.

1. CRIMINAL LAW—BURDEN OF PROOF.—Where accused objected to a witness testifying on the ground that she was his wife, it devolved upon him to prove such fact.
2. CRIMINAL LAW—FAILURE TO SUBMIT QUESTION TO JURY.—Failure of the trial court to submit the question of the competency of a witness to the jury was not reviewable in the absence of a request therefor.
3. CRIMINAL LAW—HARMLESS ERROR IN EXCLUDING EVIDENCE.—While it was error to exclude testimony of accused in a murder case that a witness who testified in the case against him was his wife, such error was harmless where the jury, by their verdict, gave him the benefit of the sentimental reason that his home had been invaded

by deceased in his absence by finding him guilty of manslaughter only.

4. HOMICIDE—INSTRUCTION AS TO RIGHT TO DEFEND HABITATION.—An instruction as to accused's right to kill in self-defense, or in defense of his habitation, was properly refused where, at the time of the killing, accused was neither defending his habitation nor resisting an assault.

Appeal from Lee Circuit Court; *E. D. Robertson,* Judge; affirmed.

R. D. Smith and *Mann & McCulloch,* for appellant.

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

McCULLOCH, C. J. The grand jury of Lee County returned an indictment against appellant for the crime of murder in the first degree, alleged to have been committed by shooting and killing Theodore Williams. On the trial of the cause appellant was convicted of manslaughter, and his punishment fixed at four years in the penitentiary.

The killing occurred at night, in a house in Marianna, where appellant lived with a women named Velma, whom he claimed to have married. They had lived together for about seven years, but Velma testified that she had never been married to appellant. They were all negroes, and the shooting occurred in a room that had been rented to another woman named Annie Taylor, adjoining the room occupied by appellant and Velma.

At the beginning of the trial the State offered to introduce Velma as a witness, and appellant objected on the ground that she was his wife. The court permitted testimony to be introduced on the preliminary question as to the competency of the witness, but ruled that the burden was on appellant to show that the woman was his wife, and therefore incompetent. This ruling is assigned as error, but we are of the opinion that the court was correct. Appellant interposed an objection to the competency of the witness on the ground of his alleged intermarriage with her, and it devolved upon him to establish the grounds of incompetency. This required affirmative

testimony, and the State was not bound to prove the negative. The court overruled the objection, and, as before stated, permitted Velma to testify. She gave an account of the killing, and her testimony coincided with the testimony of the other woman, Annie Taylor, who lived in the adjoining room.

It appears from the testimony that appellant and Velma had rented the house in question and had been living there for nearly a year. Appellant worked on a farm and lumber camp several miles from town, and usually came to town on Saturday and stayed over until Monday with Velma. They shared the expenses of the house jointly, and, according to witnesses, they appeared to be living together as husband and wife, and Velma bore appellant's name of McFarland.

On the night that the killing occurred, according to the testimony of Velma, appellant came home about ten o'clock and knocked on the door, and, on being admitted, had a pistol in his hand, and stated that some one was in the room with her. She testified that Theodore Williams had been in the room a short time before, but had not been in bed with her, and that he had been accustomed to coming there when appellant was at home. Williams had, a short time before, gone into the adjoining room occupied by Annie Taylor. Appellant went into one of the rooms occupied by Annie, and, not finding Williams there, he went to the door of the other room and tried to push it open, but it was propped, and he fired through the door, and the shot took effect in Williams' body. Williams got out of the house through a window and fled from the premises, but died from the effects of the wound.

Appellant himself gave a different account of the story. He testified that, when he knocked on the door, he had to do so repeatedly, and finally his wife, as he called Velma, answered and told him to wait a minute, and when she finally opened the door he saw that something was wrong. He said that he did not have a pistol, but that he found a pistol lying on the center-table in the room, and he discovered that some one had recently

left the room. He testified that he went into the room of Annie Taylor, and that Williams, who was in another one of Annie's rooms, threatened to shoot if he entered, and that he fired a shot through the door.

During the examination of appellant as a witness he was asked to state whether or not he was married to Velma, but the court sustained the objection of the prosecuting attorney to this question. Throughout his testimony, however, appellant referred to Velma as his wife, and no further objection was made.

The court properly decided, as a preliminary, the question of the competency of Velma as a witness. It is unnecessary to determine whether or not appellant, notwithstanding the court's decision, had the right to have that question submitted to the jury, for no request was made for the submission of that question. Counsel for appellant were content with saving an exception to the court's refusal to allow appellant to testify that Velma was his wife. This was after she had been permitted to testify and give her version of the circumstances attending the killing. We are of the opinion that appellant was entitled to make the statement to the jury that the woman was his wife, for it had a bearing on the issues in the case as to the rights of the parties in enjoying the premises, and the motive of appellant in attempting to expel Williams from the house. Our conclusion, however, is that no prejudice resulted from this ruling of the court. The verdict of the jury found appellant guilty only of the crime of manslaughter, though the punishment was fixed at more than the minimum. The jury evidently gave appellant the benefit of the established fact that the killing occurred at the home of appellant, where he and Velma were living apparently in the relation of husband and wife, even though they were not legally married, and the jury evidently gave appellant the benefit of the sentimental reason that his home had been invaded in his absence. The jury evidently took these facts into consideration in finding appellant guilty of a lower offense of homicide and fixing the punishment at a

period of imprisonment not up to the maximum allowed by law. Appellant's own testimony is hardly sufficient to show a legal justification for the killing, for it was not done in necessary self-defense. It is true he states that Williams cried out in the back room of Annie Taylor's part of the premises that he would shoot if appellant went into the room, but there was no effort made to shoot, and it is not shown that Williams was armed. The room where Williams was at the time he was shot was not one over which appellant had any control, for it had been rented to Annie Taylor, and appellant had no legal right to go into that room to expel Williams therefrom, even though the latter had previously violated appellant's rights by being in the room with the woman whom he claims to be his wife. Considering all of these circumstances, our conclusion is that there was no prejudice in the court's refusal to allow appellant to testify directly that the woman was his wife.

Error is assigned in the refusal of the court to give the following instruction:

"1. You are instructed that, if defendant had reason to believe that he would probably be attacked by the deceased in defendant's own home, then, as a matter of law, he had a perfect right to arm himself and prepare for his defense; and if the defendant, situated as he was, viewing the facts and circumstances as they appeared to him and from his viewpoint, and had reason to believe and did believe that he was in imminent and immediate danger of losing his life or receiving some great bodily harm at the hands of the deceased, and in good faith, without negligence on his part, he shot and killed deceased, then such killing would in law be justified, and you should acquit the defendant."

This instruction is based, it will be observed, upon the hypothesis that the killing was done in defense of habitation, but the instruction is not applicable, for such are not the facts of the case. According to the undisputed evidence, when appellant went into his own part of the premises, Williams had retired from the room and was

then in a room occupied and controlled by Annie Taylor, over which appellant had no control. Appellant was therefore not engaged in the defense of his home at the time he attempted to follow Williams into another part of the premises. Nor is it claimed that he was resisting an attack at the time he fired the shot at Williams. All that he claims is that, while he was attempting to get into the room where Williams was, the latter threatened to kill him if he came in. This did not give him the right to fire the shot, for, as before stated, he was neither defending his habitation nor resisting an assault.

The court gave another instruction at the request of appellant, telling the jury that it was not essential, to justify the killing, that it should appear to the jury to have been necessary, but that, if it appeared to the accused, without fault or carelessness on his part, that the danger was so urgent and pressing as to make the killing necessary, to save his own life, then he would be justified. This instruction was sufficient.

These are the only assignments of error that are argued in the brief, and we assume that there are no other assignments relied on.

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

WARREN v. McRAE.

Opinion delivered September 29, 1924.

1. OFFICERS—ELECTION COMMISSIONERS.—County election commissioners are public officers, with definite term, duties and emoluments prescribed by the statutes.
2. ELECTIONS—REMOVAL OF COUNTY COMMISSIONERS.—The position of county election commissioners being a public office with a fixed term, and there being no power of removal conferred by statute, the State Board of Election Commissioners had no authority to remove county election commissioners after their appointment and qualification.
3. CERTIORARI—REVIEW OF ACTS OF STATE ELECTION BOARD.—Where the State Board of Election Commissioners, without authority,

attempted to remove a county board of election commissioners, their act, being *quasi*-judicial, may be quashed on certiorari.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; reversed.

J. C. Marshall, for appellants.

The lower court did not dispute the proposition that a removal from an office like this is a judicial act, but said that the only way the board could remove was by a new appointment, and that an appointment being a ministerial act, the removal was also. This position is erroneous, first, because the complaint alleges a positive order of removal, which the demurrer necessarily admits; second, if the appointment is relied on as a removal, it is as much a removal as one made by positive order; and third, the board has no power to remove. The removal of these appellants being a judicial act, it becomes a question of law, reviewable on certiorari. 126 Ark. 125; 11 C. J. 108. And the order of removal may be quashed for want of jurisdiction on the part of the State Board of Election Commissioners to make such order. 61 Ark. 605; 165 S. W. 746; 109 Ark. 100; 86 Ark. 555. The claim that, because the State board appointed the county board, the latter held at the will of the former, and were, and are, removable at pleasure, etc., overlooks the fact that the county election commissioners are regular officers of the county; that they have judicial powers such as fixing precinct boundaries, removing election judges, etc; that it is an office of honor, with fixed term, duties imposed, and some emoluments. All these are characteristics of an office, as has frequently been held by this court. 134 Ark. 514, and cases cited. The decision in *Bruce* v. *Matlock,* 86 Ark. 555, is controlling here on the question of removal, for, while the statute, C. & M. Digest, § 3711, does not in words state that the appointment shall be made biennially, it is impossible to escape the conclusion that this statute limits the appointment of county boards to the time stated, and creates an office for two years. A vacancy is never created by appointment of a successor except

where there is no term attached to the office. 21 L. R. A., 545. There is no vacancy if there be an incumbent, even a *de facto* incumbent. *Id;* 72 Ark. 99. A judgment void on its face may be quashed on certiorari. 82 Ark. 330, and cases cited. The remedy suggested by the appellees as the proper course to pursue in lieu of certiorari, an action for usurpation of office, would not lie. It could not be brought by the Attorney General, because he is a party to the suit, and a suit by the plaintiffs themselves would not lie because, even if the new appointees had taken over the office, it would be under color of title, and not usurpation. 133 Ark. 516. That action would not lie also because the new board allowed its rights or claims to lapse by failing to take the oath of office within the time prescribed by the statute, C. & M. Digest, § 3712, which provides that the county board shall meet and organize at least twenty days before the election. 42 Ark. 93.

J. S. Utley, Attorney General, and *Emerson & Donham,* for appellees.

The statute, C. M. Digest, § 2237, does not enlarge the scope of the writ of certiorari at common law, and under it certiorari is limited to the review of judicial or *quasi*-judicial proceedings. 62 Ark. 196. It is the office of certiorari to quash irregular proceedings, but only for errors apparent on the record. It will not go beyond the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding upon facts. 20 Ark. 523. The action of the appellees in appointing new commissioners to succeed appellants, was a ministerial act, and not judicial or *quasi*-judicial. Nothing in the statute, C. & M. Dig. § 3712, indicates the length of time the commissioners should hold, and it was apparently the intention of the Legislature to leave that optional with the State Board of Election Commissioners. There is no provision anywhere for removal for misconduct in office, or hearing upon a removal, before any board or body. The action of the appellees in appointing successors to the appellants, being solely a ministerial act and not judicial or *quasi*-judicial, their action is not re-

viewable on certiorari. 2 Ark. 494; 70 Ark. 568; 109 Ark. 100. In the case of *Hall* v. *Bledsoe,* 126 Ark. 125, the board acted as a tribunal, pursuant to charges preferred in accordance with the statute, and their action was therefore *quasi*-judicial; but in this case there was no hearing, and no authority upon which a hearing could have been based, so that this board could have acted in a *quasi*-judicial capacity. 152 N. Y. Supp. 113; 11 C. J. 1108; 5 R. C. L. 263; 37 Atl. 725; 42 Atl. 837; 157 Ark. 186. The statute in providing that the State board shall appoint county boards of election commissioners not more than ninety, nor less than thirty, days before the general election, is not mandatory, as is contended by appellants. It clearly provides that the commissioners shall hold office until their successors are appointed and qualified. It nowhere intimates that an election will be invalid, or that an appointment within thirty days before the election shall be invalid, because the statute is not strictly complied with. Statutes regulating the manner of conducting elections are directory, unless a non-compliance is declared fatal. 43 Ark. 63; *Id.* 257; 30 Ark. 31; 34 Ark. 491; 42 Ark. 46; 159 Ark. 199.

MCCULLOCH, C. J. Appellants instituted this proceeding in the circuit court of Pulaski County by filing a petition praying for a writ of certiorari, directed to the State Board of Election Commissioners, to quash an order made by that board attempting to remove appellants as members of the board of election commissioners for St. Francis County. The members of the State Board of Election Commissioners appeared in court and filed a demurrer to the complaint of appellants, which the court sustained, and a final judgment was rendered dismissing the complaint, from which an appeal has been prosecuted to this court.

It appears from the allegations of the complaint—which must be accepted as true in testing the sufficiency of the complaint on demurrer—that, within the time prescribed by law (not more than ninety days, and not less than thirty days prior to the regular biennial election to

be held on the 7th day of October, 1924), the State Board of Election Commissioners, composed of the Governor, Secretary of State and the Attorney General, held the regular biennial meeting for the appointment of county election commissioners, and, at that meeting, appellants were appointed as the election commissioners of St. Francis County. Written evidence of the appointments, in the form of notices required by statute (Crawford & Moses' Digest, § 3711), was delivered to appellants, and a certificate of their appointments was forwarded to the clerk of that county. Appellants appeared before the clerk of the county and took the oath of office, and proceeded to organize the board by electing one of their number as chairman and another as clerk. The commissioners also, according to the allegations of the complaint, proceeded to the discharge of their duties by the appointment of election officers, judges and clerks, to hold the election at the approaching biennial election. The State Board of Election Commissioners held another meeting on September 13, 1924, and, without charges or proof, made an order purporting to remove appellants as commissioners and attempted to appoint three other persons as election commissioners for St. Francis County.

The question presented on this appeal is therefore whether or not the State Board of Election Commissioners was authorized, under the statute, to remove county election commissioners.

The first question presented, and the point upon which the decision of the case really turns, is whether or not the position of county election commissioner is a public office, and, upon consideration of the legal tests prescribed in various decisions of this court and by text-writers for the determination of the question whether a public functionary is an employee or an officer, we have reached the conclusion that county election commissioners are public officers. *Vincenheller* v. *Reagan*, 69 Ark. 460; *Lucas* v. *Futrall*, 84 Ark. 540; *Bruce* v. *Matlock*, 86 Ark. 555; *Middleton* v. *Miller County*, 134 Ark. 514; *McClendon* v. *Board of Health*, 141 Ark. 114.

In the case of *Lucas* v. *Futrall, supra,* we approved the test laid down by the Supreme Court of the United States, which details the elements of an office as distinguished from mere employment, depending on the question of "tenure, duration, emoluments, and duties" of the position as fixed by the law creating it. *United States* v. *Hartwell,* 6 Wall. 385. Applying this test, it is clear that the position of county election commissioners is a public office, for the tenure of office and the duties and emoluments thereof are fixed by statute, which provides in substance that, at a meeting of the State Board of Election Commissioners, held not more than ninety days nor less than thirty days before any general election for State and county officers, the said board shall "appoint three qualified electors as commissioners in each county to select election judges for each voting precinct," and perform the other duties prescribed by law; that the appointment of county commissioners "shall be in writing, under the hands of the State Board, and the said board shall immediately mail to each county commissioner, at the county seat, a notice of his appointment, and, in addition thereto, shall mail to the clerk of the circuit court in such county a certificate of the appointment of such commissioners." Crawford & Moses' Digest, § 3711. It is also provided by the statute that county commissioners "shall hold office until their successors are appointed and qualified," and that the commissioners shall meet at the courthouse at least twenty days prior to the general election and take the oath of office prescribed by the Constitution, and organize themselves into a board by electing one member chairman and another clerk. Section 3714 of the Digest provides that any vacancy in the county board of commissioners shall be filled by appointment by the State Board of Commissioners. The statute also imposes certain other duties upon the county election commissioners with respect to holding elections and canvassing the vote, and the statute also fixes the compensation of the commissioners on a *per diem* basis.

It is contended by counsel for appellees that there is no definite term of office fixed by the statute, but we are of the opinion that this contention is unfounded. It is true the statute does not in so many words specify the term of office of county election commissioners, but the effect of the statute is to prescribe the duration of the term, for it specifies that appointments shall be made biennially, not more than ninety days nor less than thirty days prior to the election. Our decision in *Bruce* v. *Matlock, supra,* is, we think, decisive of the question. There was involved in that case the question whether or not membership on the board of trustees for the charitable institutions of the State was a public office, and whether or not the Governor, who appointed the members, had the power to remove them. The statute authorizing the appointment of the trustees did not in so many words prescribe the duration of the term, but merely specified that the Governor should "biennially" appoint the board. We held that the use of that word necessarily implied a term of office of two years. We held that the position constituted a public office, with durative term, duties and emoluments specified, and that the Governor had no power of removal.

The position of county election commissioner being a public office with a fixed term, and there being no power of removal conferred by statute, it follows from our decision in *Bruce* v. *Matlock, supra,* that the State Board of Election Commissioners has no authority to remove election commissioners after their appointment and qualification. There are other decisions of this court to the effect that, where the duration of an office is prescribed by law, the appointing power has no authority to remove at pleasure an incumbent of the office. *Patton* v. *Vaughan,* 39 Ark. 211; *Lucas* v. *Futrall, supra.*

The order of the State Board of Election Commissioners attempting to remove appellants from office was void. It is contended, however, that certiorari is not the appropriate remedy to review the acts of the board. The decision in *Hall* v. *Bledsoe,* 126 Ark. 125, is conclusive of

that question. The void act of the State Board of Election Commissioners was a *quasi*-judicial one, and we held that, under the statute, certiorari was the proper remedy. It is true in that case there was a special statute authorizing that remedy, but the result would have been the same under general statutes. *Pine Bluff Water & Light Co.* v. *Pine Bluff,* 62 Ark. 196; *State* v. *Railroad Commission,* 109 Ark. 100. Other decisions of this court bearing directly upon the question are: *Mitchell* v. *Directors School Dist. No. 13,* 153 Ark. 50; *Acree* v. *Patterson,* 153 Ark. 188; *Mitchell* v. *School Dist.,* 162 Ark. 277; *Clardy* v. *Winn,* 163 Ark. 320.

The order of the State Board of Election Commissioners being void, the circuit court should have granted the writ of certiorari for the purpose of quashing the same, and it erred in sustaining the demurrer to the complaint.

The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

WOODSON *v.* FORT SMITH.

Opinion delivered September 29, 1924.

1. CRIMINAL LAW—FORMER ACQUITTAL—SEPARATE OFFENSES.—An acquittal of the common-law offense of "running a disorderly house" is not a defense to a charge against a female under a city ordinance providing that "every person who shall in said city suffer or permit any room or tenement in his or her possession or control to be kept, used or occupied for any such purpose (prostitution) shall be deemed guilty of a misdemeanor," etc., as the two offenses are separate and distinct.
2. PROSTITUTION—SUFFICIENCY OF EVIDENCE.—Proof that defendant used a room on one or more occasions for the purpose of illicit sexual intercourse does not establish that she was keeping a room for the purpose of prostitution or assignation.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum,* Judge; reversed.

Holland, Holland & Holland and *Roy Gean,* for appellant.

Geo. W. Dodd, for appellee.

WOOD, J. The appellant was convicted under an ordinance of the city of Fort Smith which provides as follows:

"Every bawd, prostitute, or loose woman who shall, in said city, occupy or use any room or tenement for the purpose of prostitution or assignation, and every person who shall in said city suffer or permit any room or tenement in his or her possession or control to be kept, used or occupied for any such purpose, and every male person who shall frequent or visit any room or tenement so kept, used or occupied for the purpose of illicit intercourse, shall be deemed guilty of a misdemeanor and a violation of this ordinance."

1. The appellant had been formerly tried and acquitted on a charge of "running a disorderly house" in the city of Fort Smith, and she pleaded former acquittal. "In order to support a plea of former conviction or acquittal it is essential to show that the two offenses are identical." *Johnson* v. *State,* 101 Ark. 159. The common-law offense of keeping a disorderly house is entirely separate and distinct from the specific offenses enumerated in the ordinance under which the appellant was convicted. The keeping of a disorderly house "may consist in its drawing together idle, vicious, dissolute or disorderly persons engaged in unlawful or immoral practices, thereby endangering the public peace and promoting immorality." *Thatcher* v. *State,* 48 Ark. 60-64. One might be convicted of the common-law offense of running a disorderly house without any testimony whatever as to the specific acts necessary to constitute the offenses embraced in the ordinance, and one might be acquitted of the offense of running a disorderly house and yet be convicted on the same proof of some one of the specific offenses named in the ordinance. "The safest general rule," says Corpus Juris, "is that the two offenses must be in substance precisely the same, or of the same nature,

or of the same species, so that the evidence which proves the one would prove the other. Or, if this is not the case, then the one crime must be an ingredient of the other." 16 C. J., p. 264, § 444. The court did not err in overruling appellant's plea of former acquittal.

2. The testimony for the city on which the appellant was convicted tended to prove that the prosecuting witness and the sheriff went to the house where the appellant lived, on June 15, 1923, and found her at home. She had on a slip, and did not have on her shoes. Leo Bercher, a married man, was also in the front room of the house, with his shoes off. He had on his trousers. He was sitting on the side of the bed. It was seven or eight o'clock at night. The blinds were down in the front room. Bercher was in the farthest room from the landing of the stairway. The appellant came out of that room. This was not the first time that the witness went with the officer to visit the house. The first time he went there some one was sick in bed. Witness supposed it was Leo Bercher. Bercher at that time told the witness to come in. Witness never saw anything wrong in the conduct of Mrs. Woodson up there, only she was in the house with Bercher. Bercher claimed to own the house. He saw nothing wrong in the conduct of Bercher, only he and appellant were there, and they had their shoes off. The immoral purpose which witness saw was that she was barefooted and wearing a house-dress with short sleeves and low neck, made straight all the way down. The bed in the room where Bercher was sitting looked as though some one had been sitting down or wallowing on it. Bercher claimed that he was boarding there. In entering the house the witness had to go up the back stairway. The parties were in the room at the end of a hall. The room Bercher was in was not locked, but the door that barred his room from the hallway was locked before they got there. It was three minutes after they knocked before they were admitted. The appellant said that Bercher had supper there. The dining-table was in the same room, and the table had not been cleared. The

appellant testified to the effect that, on the occasion mentioned, she had called Bercher to see about some plumbing; that when he came, she had supper ready, and he ate with her. She denied that she was in the room with Bercher at all, and stated that she was guilty of no immoral act with him.

The appellant asked the court to instruct the jury in effect that, before the defendant could be convicted upon the charge, they must believe beyond a reasonable doubt, from the evidence, that the defendant is a bawd, prostitute, or loose woman; that one act of sexual intercourse in the room mentioned would not be sufficient to sustain the charge. The court refused to so instruct the jury, to which the appellant duly excepted.

The warrant upon which the appellant was arrested is not set out in the record, but the record recites that appellant was "brought before municipal court, charged with the offense of using a room for immoral purposes." It will thus be seen that the appellant was not charged with the offense of occupying and using the room as a bawd, prostitute, or loose woman, for the purpose of prostitution or assignation, and there was no testimony to sustain such a charge, if it had been made. Therefore the court did not err in refusing to grant appellant's prayers for instructions above mentioned.

The charge against the appellant comes under that provision of the ordinance which provides that "every person who shall, in said city, suffer or permit any room or tenement in his or her possession or control to be kept, used or occupied for any such purpose (prostitution) shall be deemed guilty of a misdemeanor," etc. To sustain this charge, it was necessary for the State to show that the appellant suffered or permitted the room in her possession or control to be used or occupied for the purpose of prostitution or assignation.

In the case of *Batesville* v. *Smithey,* 138 Ark. 276, we had under consideration a precisely similar ordinance. In that case, construing the ordinance, we said: "It is thus seen that there are two elements constituting the

offense; one, the character of the woman as a prostitute or loose woman, and the use or occupancy of the room for the purpose of prostitution. It was therefore not sufficient to show merely that the room was used in a single instance for illicit sexual intercourse, without further proof that the woman using the room was a prostitute, and that she was using the room for the purpose of prostitution or place of assignation." And further: "The word 'prostitute' means a woman given to indiscriminate lewdness, and the word 'prostitution' means a state of existence for that purpose, and does not include merely the act of a woman occupying the relation of concubinage with one man." Citing *Sisemore* v. *State,* 135 Ark. 179.

Under the doctrine announced in these cases the testimony was not sufficient to sustain the verdict, because it does not tend to prove that the appellant was using the room or house designated for the purpose of prostitution as that term is defined in *Sisemore* v. *State, supra.* There is nothing in the testimony to establish the fact that the appellant used, suffered, or permitted any room in her possession or control to be kept, used or occupied for the purpose of prostitution or assignation. Giving the evidence its strongest probative force in favor of the city, the most that can be said of it is that it tended to show that the appellant might have occupied the room one or more times with Bercher for the purpose of illicit intercourse, but this was not enough to meet the requirements of the law, and does not constitute the offense against which the ordinance is leveled. The judgment is therefore reversed, and, inasmuch as the testimony seems to have been fully developed, the cause is dismissed.

MELTON v. STATE.

Opinion delivered September 29, 1924.

1. CRIMINAL LAW—WEIGHT OF TESTIMONY.—The credibility of witnesses and the weight to be given their testimony are entirely within the province of the jury.
2. INTOXICATING LIQUOR—EVIDENCE OF SALE BY DEFENDANT'S WIFE AND SON.—In a prosecution for selling whiskey, where a witness testified that she saw defendant sell whiskey at his home, testimony of the witness that she saw defendant's wife and son at the same place, and near the same time, sell whiskey, was competent as tending to show that defendant was engaged in the business of selling liquor at his home, and an instruction that the testimony was admitted for that purpose only was proper.
3. CRIMINAL LAW—INSTRUCTION AS TO EFFECT OF TESTIMONY.—In a prosecution for selling liquor, an instruction not to consider testimony as to sales by defendant's wife and son at his home, unless made with his knowledge and consent, and then only in so far as it shed light on the business he was engaged in, *held* correct and not prejudicial to defendant.
4. INTOXICATING LIQUORS—UNLAWFUL SALE—EVIDENCE.—Evidence, in a prosecution for selling whiskey, that officers searching defendant's wagon after the indictment was found discovered a gallon of whiskey therein was competent to shed light on the business defendant was engaged in.

Appeal from Greene Circuit Court, Second Division; *G. E. Keck,* Judge; affirmed.

Jeff Bratton, for appellant.

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

WOOD, J. This is an appeal from a judgment sentencing the appellant to imprisonment in the State Penitentiary for a period of one year for the crime of selling liquor. Mrs. Ollie Waters, a witness for the State, testified that, in the spring of 1922, she saw the appellant sell liquor to one Dink McCullough. The sale was in the presence of appellant's wife and daughter. She stated that it was white mule whiskey. The sale took place at appellant's meat-house, and appellant got the whiskey out of a jar which he kept in the meat-house. Witness saw McCullough pay the appellant for the whiskey. She thought it was whiskey because she smelled it.

Over the objection of the appellant, Mrs. Waters testified that, close to the same time and at the same place, she saw Mrs. Melton, appellant's wife, sell some liquor to one Dalton Hardy. On cross-examination the witness stated that the meat-house was the place where Dink McCullough delivered the bills to appellant and received whatever he did receive from the appellant. Whether it was whiskey or not witness did not know. She had smelled it there before when she was at appellant's house.

Over the objection of appellant, deputy sheriffs testified that they got a search warrant to search appellant's wagon, and made a search of the same, in the summer of 1923, and found a gallon of whiskey in a glass jug. Appellant was on his way from home to town. Witness Joe Waters testified for the State, over the objection of appellant, that he bought liquor from Edward Melton, son of appellant, at the same place where appellant was accused of selling liquor to Dink McCullough. This sale was in the summer of 1922.

Dink McCullough and Dalton Hardy, witnesses for the defendant, testified and denied that they bought liquor, as testified to by Mrs. Waters, a witness for the State. Mrs. Melton and Jewell Melton, wife and daughter of appellant, testified denying the sale as testified to by witnesses for the State. The appellant also testified that he did not sell any whiskey.

Over the objection of appellant, the court, among others, gave the following instruction:

"No. 3. There is certain evidence that has been offered with reference to an alleged sale of liquor by the defendant's wife and also by his son. You are instructed again that this testimony should not be and will not be considered by you for any purpose, unless you find that the alleged sales made by the wife and son, if made, were made at the residence of the defendant and with his knowledge and consent, and, unless you so find, you will not consider that testimony for any purpose, and if you find that it was made with his knowledge and consent by them, then you will consider it only for the purpose of

shedding light, if you find that it does shed light, upon the kind and character of business that the defendant might have been engaged in, and not as evidence against him in this case of the sale which he is charged with here."

1. The appellant contends that the judgment should be reversed because the jury, in crediting the testimony of Mrs. Waters, arbitrarily disregarded the testimony of the appellant and his witnesses, four in number, all of whom flatly contradicted the testimony of Mrs. Waters. The credibility of witnesses and the weight to be given their testimony was entirely within the province of the jury. The testimony of the witness for the State did not have to be corroborated, and it was for the jury to determine whether the same was overcome by the testimony of the witnesses for the appellant. *Meeks* v. *State,* 161 Ark. 489. The testimony of Mrs. Waters to the effect that she saw the appellant sell whiskey was sufficient to sustain the verdict.

2. The appellant next contends that the court erred in allowing the testimony of Mrs. Waters, to the effect that she saw the wife of appellant, at the same place and close to that time, sell liquor to Dalton Hardy, and also erred in allowing Joe Waters to testify that, in the summer of 1922, he bought liquor from the son of appellant at appellant's home. The testimony tending to prove the sale of liquor made by appellant's wife and son at appellant's home, and near to the time when appellant is alleged to have made the sale, was relevant, as it tended to prove that appellant, who was the head of the house, kept liquor therein, and was a circumstance proper to be considered in connection with the testimony of Mrs. Waters, as tending to prove that appellant was engaged in the business of selling liquor at his home. *Ketchum* v. *State,* 125 Ark. 275; *Larkin* v. *State,* 131 Ark. 445; *Murchison* v. *State,* 153 Ark. 300; *Miller* v. *State,* 162 Ark. 45; see also Blakemore on Prohibition, p. 148.

3. The court did not err to the prejudice of appellant in giving instruction No. 3, set out above. In that

instruction the court told the jury that they could not consider the testimony concerning the sales made by the appellant's wife and son for any purpose, unless they were made with his knowledge and consent, and, if made with his knowledge and consent, the jury could then only consider the testimony in so far as it tended to shed light upon the kind and character of business that the appellant might have been engaged in. The instruction was in harmony with the law announced in the above cases, and was certainly not prejudicial to the appellant. "The husband is the head of the family, and, as such, has the general right, at common law, to regulate the household, its expenses and its visitors, and to exercise the general control of the family management." 21 Cyc. 1147. If sales were being made by appellant's wife and son at appellant's home, this certainly tended to prove the character of the business which appellant was allowing to be conducted there. See Blakemore on Prohibition, p. 148; *People* v. *Sybisloo,* 184 N. W. 410, 19 A. L. R. 123.

4. The appellant urges, in the last place, that the court erred in admitting testimony of the officers to the effect that, in the summer of 1923, they searched appellant's wagon and found a gallon of whiskey. In admitting this testimony the court told the jury that it was admitted solely for the purpose of shedding light, if it does shed light, on the kind of business appellant was engaged in, and for no other purpose. The testimony was relevant to the issue as to whether the appellant was engaged in the business of illegally selling whiskey, as charged in the indictment.

In *Casteel* v. *State,* 151 Ark. 270, we said: "On the trial of manufacturing intoxicating liquors it was admissible to prove that whiskey was found in defendant's possession, and that he was convicted of transporting liquor after the indictment herein was returned." The court told the jury that they could consider such testimony only as tending to show that defendant was engaged

in the business of illegally manufacturing intoxicating liquors. The same principle applies here.

There is no error in the rulings of the trial court, and its judgment is therefore affirmed.

MORRIS v. STATE.

Opinion delivered September 29, 1924.

1. CRIMINAL LAW—EVIDENCE OF ANOTHER CRIME.—In a prosecution for assault with intent to kill certain officers it was competent to prove by a witness that defendant criminally assaulted her just before he shot at the officers, as her testimony tended to explain how she recognized defendant as the man who shot at the officers.
2. CRIMINAL LAW—PROOF OF ANOTHER CRIME.—Guilt of an assault with intent to kill cannot be established by proof that defendant committed other and disconnected crimes at different times and places.

Appeal from Pulaski Circuit Court, First Division; *John W. Wade,* Judge; reversed.

Ray E. Griffin, Geo. W. Ellis, and *Robt. E. McClintock,* for appellant.

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

SMITH, J. Appellant was convicted of the crime of assault with intent to kill, and his punishment fixed at a term of eight years in the penitentiary, and he has appealed. For the reversal of the judgment it is insisted that the court admitted certain incompetent testimony.

The first testimony objected to is that of Pensacola Jones, who testified that appellant broke into her room and assaulted her on the night of the shooting. She was heard to scream, and the police were called to see about the disturbance. When the officers entered and spoke to appellant, he fired twice at them, and ran out of the door. The witness was permitted, over the objection of appellant, to detail the circumstances of the assault upon her.

The appellant sought to prove an alibi, and the testimony of Pensacola Jones was competent as it tended to

show the identity of the witness' assailant. Her testimony about the assault showed her opportunity for recognizing and identifying appellant. She testified that the man who assaulted her was the same man who fired at the officers, and it was competent for her to show how she recognized him as the man who had fired the shots, and, the testimony being competent for this purpose, it could not have been excluded because it also tended to show that appellant was guilty of another offense. *Davis* v. *State,* 117 Ark. 296.

The shooting and the assault on Pensacola Jones occurred about May 1, 1924. In addition to this testimony, Fannie Wells was permitted, over appellant's objection, to testify that, at another time and place, appellant entered her room and, with a pistol in his hand, robbed her of twenty-five cents which she had on a dresser.

Reetha Piggee, another witness for the State, was permitted to testify, over appellant's objection, that, at still another time and place, appellant entered her room, and, with a pistol in his hand, assaulted her.

The testimony of these last two named witnesses was objected to when offered, and a motion to exclude it was overruled and exceptions saved. In overruling the motion the court in each instance stated: "The jury will understand that the defendant is not on trial for anything that was done to the witness. You may consider her evidence for what you may think it is worth, if anything, for considering the motive of the defendant in shooting at the officers, if you find he did shoot at them." An exception was saved in each instance to the ruling of the court.

The testimony of Fannie Wells and Reetha Piggee was erroneous and necessarily prejudicial. There was no question about the motive of appellant in shooting at the officers. He denied that he was the man who had fired the shots, and the man who did fire them did so for the purpose of effecting his escape.

The testimony of Fannie Wells and Reetha Piggee is defended upon the grounds that it tended to show motive upon the part of appellant, the motive being a desire to avoid arrest, and that it was proper for the purpose of identifying appellant as the man who had shot at the officers.

The testimony was not admissible for either purpose. The offenses testified about by the three women were entirely separate and distinct offenses, committed at different times and different places, and neither witness was present at more than one time or place, and no one of the witnesses knew anything about the offenses except the one committed in her presence. Neither Fannie Wells nor Reetha Piggee were present at the time appellant is alleged to have assaulted Pensacola Jones and to have shot at the officers, and they could not, of course, testify, and did not offer to testify, that appellant was the man who fired the shots at the officers.

The admission of this incompetent testimony was therefore erroneous and prejudicial, and for that reason the judgment must be reversed, and the cause remanded for a new trial, and it is so ordered. *Mays* v. *State,* 163 Ark. 232; *Middleton* v. *State,* 162 Ark. 530; *Wood* v. *State,* 157 Ark. 503; *Williams* v. *State,* 156 Ark. 205; *Cain* v. *State,* 149 Ark. 616; *Sneed* v. *State,* 143 Ark. 178; *Beck* v. *State,* 141 Ark. 102; *Murphy* v. *State,* 130 Ark. 353; *Davis* v. *State,* 117 Ark. 296; *Billings* v. *State,* 52 Ark. 303; *McGuffin* v. *State,* 156 Ark. 392; *Cole* v. *State,* 156 Ark. 9; *Cook* v. *State,* 155 Ark. 106; *Spier* v. *State,* 130 Ark. 457; *Johnson* v. *State,* 152 Ark. 218; *Nichols* v. *State,* 153 Ark. 467; *Casteel* v. *State,* 151 Ark. 69; *Powell* v. *State,* 149 Ark. 311; *Blumensteil* v. *State,* 148 Ark. 421; *Hettle* v. *State,* 144 Ark. 564; *Parks* v. *State,* 136 Ark. 562.

STOREY v. LOONEY.

Opinion delivered October 1, 1924.

ELECTIONS—CONTEST OF PRIMARY ELECTION.—As the right to contest a primary election does not exist independently of statute, Crawford & Moses' Dig., § 3772, providing that "a right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee," confines the right of contest to a candidate at the primary election who claims to be the rightful nominee, and a contestant who fails to show that he is the nominee, instead of the contestee, fails to show a cause of action.

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

Ben B. Williamson and *Casey & Pate,* for appellant.

The failure of the county collector to file with the county clerk on the first Monday in July a certified list of all persons who paid poll tax up to and including that day, rendered the entire vote illegal and void. C. & M. Digest, § 3740. The name of the voter must either be on the certified and published list or the evidence of his qualifications must be filed with the election officers, to entitle him to vote legally. 159 Ark. 199. It is a fundamental rule that no man shall profit by his own negligence. 53 Ark. 161. The county collector had no power to assess a poll tax. 160 Ark. 275.

Samuel M. Casey and *Ben F. Williamson,* for appellee.

The agreed statement of facts was not properly brought into record. 46 Ark. 17; 82 Ark. 242; 64 Ark. 483. Where the statute expressly declares a particular act to be essential to the validity of the election or that its omission will render the election void, the courts must enforce the provisions of such statute, but, where the statute simply declares that certain things shall be done within a particular time or in a particular manner, and does not declare their performance essential to the validity of the election, they will be regarded as mandatory if they affect the actual merits of the case, but they will be considered directory only, and not vital to the elec-

tion, unless they are such, in themselves, as to change or render doubtful the result. McCrary on Elections, 4th ed. §§ 221 *et seq.;* Ann. Cas. 1916A, p. 707; 265 Ill. 39; 106 N. E. 504. While the legal safeguards which are thrown around the ballot must be faithfully observed, the will of the people as expressed at the polls is not to be defeated by mere technicalities. 99 Ill. 553; 91 Ill. 525; McCrary on Elections, 4th. ed., § 243.

McCULLOCH, C. J. This case involves an election contest concerning the nomination of the Democratic party for the office of sheriff of Stone County. Appellant and appellee were the opposing candidates, and appellee was returned as being the successful candidate by a majority of 157 votes, and a certificate of nomination was awarded to him by the party committee, which constituted the canvassing board. Appellant instituted a contest in the circuit court. His complaint contains numerous charges of fraud and illegal voting, but all of those charges have been abandoned, and appellant rests his contest solely on the ground that appellee, who was the sheriff and tax collector of the county at the time of the election, failed to comply with the duty imposed on him by statute (Crawford & Moses' Digest, § 3740), of filing with the county clerk a list of the names of all persons who had paid a poll tax, so that the list could be published as required by the statute. Appellant alleged in his complaint that the sheriff wilfully and wrongfully failed to file the list, and that, as a result, there was no publication of the list of voters in the county, and also alleged that none of the persons who voted at the election were required by the election officers to present any evidence of their legal qualifications as electors.

The statute referred to above provides that the collector shall file a list, verified by affidavit, on the first Monday in July, that the county clerk shall record the list and deliver the record to the election commissioners on or before July 15, and that the election commissioners

shall cause the list to be printed and furnished to the judges of election, at any election to be held thereafter.

The case was tried on an agreed statement of facts, which recited that appellee did not, prior to July 14, 1924, file the list of persons who had paid a poll tax, but that his deputy filed an unverified list with the clerk on that day, and immediately withdrew the same and did not return it to the clerk's office until August 21, 1924, after the primary election; and that the clerk did not at any time deliver to the county election commissioners a certified copy of the list as required by law, nor did the commissioners publish such a list. The court decided in favor of appellee, and rendered judgment accordingly.

The statute (Crawford & Moses' Digest, § 3777) provides that no person shall be allowed to vote at any primary election in this State who shall not exhibit a poll-tax receipt, or other evidence that he has paid his poll tax within the time prescribed by law, and that such other evidence shall consist of a copy of the receipt, certified by the clerk of the county, or that such person's name shall appear upon the list of persons certified by the collector and printed by the election commissioners. The statute further provides as follows: "In any contest arising upon any election held under this act, it shall be a ground of rejection of any ballot cast by an elector whose name (a) does not appear upon the certified list of poll-tax payers; or (b) who has not filed with the judges of election his original or certified copy of poll-tax receipt, or written affidavit of the attainment of his majority; or (c) if such original or certified copy of such poll-tax receipt or written affidavit has not been returned by the judges of election; or (d) the name of such person listed separately and certified as required by this act."

We decided in the case of *McLain* v. *Fish,* 159 Ark. 199, that the provisions of the statute quoted above are mandatory, and that, in the contest of an election, where a list was published as required by statute, the qualification of voters not on the list must be proved in accordance with the statute or be excluded.

It is the contention of appellant that, since there was no published list of the persons who paid poll tax furnished to the election officers, and as none of the persons who voted at the election furnished to the election officers other evidence of their qualifications as electors, the election was totally void, and that there was no legal nomination made.

The question necessarily presents itself in the beginning, whether or not appellant is in an attitude to contest the certificate of nomination awarded to appellee. Appellant's contention being that there was no valid nomination at all, he is not a claimant himself for the nomination, and all that can be done by the court is to cancel the certificate of nomination awarded to appellee. This is therefore not really a contest for a nomination as contemplated and authorized by the statute. In order to make a contest for the nomination, appellant must show that he is entitled to the nomination himself, which he fails to do. The statute (Crawford & Moses' Digest, § 3772) declares that a right of action is conferred on any candidate to contest the certificate of nomination or the certification of vote as made by the county central committee." This confines the right of contest to a candidate at the primary election, and to one who claims to be the rightful nominee. He must show that he is the nominee instead of the contestee, and he fails to show a cause of action unless he so states in his complaint. *Hill* v. *Williams, ante,* p. 421.

The right to contest a party primary election does not exist independent of statute, and the right is confined to the authority found in the statute. A court of equity will not afford relief in such a contest (*Walls* v. *Brundidge,* 109 Ark. 250), and, as before stated, the right to contest is limited by the statute which confers that right. *Ferguson* v. *Montgomery,* 148 Ark. 83.

If a certificate of nomination is wrongfully awarded to a person, and there is no person with the right of contest under the statute, then the only remedy to correct the error is the political remedy of correcting it at the

polls. Such is the case here, since appellant himself does not claim to be the nominee, and is therefore in no position to object to the certificate of nomination awarded to appellee. It is unnecessary therefore to consider anything else in the case.

Judgment affirmed.

HART and HUMPHREYS, JJ., concur on the ground that the failure to file the certified list of voters by the sheriff as recited in the agreed statement of facts did not invalidate the primary election, and appellee, having received the plurality of votes cast at said election, was properly declared the nominee.

CLARKSON v. STATE.

Opinion delivered October 6, 1924.

CRIMINAL LAW—RIGHT TO CHANGE OF VENUE.—As an accused has the right, at any time before the commencement of a trial, to obtain a change of venue by complying with the requirements of the statute, a rule of the trial court which attempted to restrict the exercise of that right to the presentation of an application at least one day in advance of the time set for trial is invalid, even though it leaves it to the court's discretion to determine whether or not the petition may be filed and presented later.

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

John P. Roberts and *Robert A. Rowe,* for appellants.

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

McCULLOCH, C. J. One of the appellants was convicted in six consolidated cases, and the other appellant was convicted in one case. All of the appeals are heard together, as they involve the same question, and will be disposed of in one opinion.

All of the cases had been set down for trial on January 31, 1924, and on the morning of that day each of the appellants filed a petition for change of venue. The cases were not taken up during that day, for the reason

that other cases ahead of them were on trial, but, on the morning of the next day, February 1, 1924, the cases were called, and, on presentation to the court of the motions for a change of venue, the court overruled the motions, for the reason that they had been filed too late, under a rule of the trial court, which reads as follows:

"In all cases set for a day certain, any motion for continuance, change of venue or other cause must be filed at the motion hour of the court next day preceding the day set for trial, and not thereafter, and no motion will be considered by the court if presented thereafter, unless good reason be shown for such default."

We decided in the case of *Maxey* v. *State*, 76 Ark. 276, that a rule of court requiring a notice of three days before the presentation of an application for change of venue was void, and that it was error to refuse such an application on the ground that the rule had not been complied with. The right to obtain a change of venue is one conferred not only by the statute but by the Constitution of the State (art. 2, § 10; Crawford & Moses' Digest, § 3088 *et seq.*), and the court has no power to restrict that right by rules.

Under the statute an accused has the right, at any time before the commencement of a trial, to obtain a change of venue by complying with the requirements of the statute. The rule in question established by the court attempted to restrict the exercise of that right to the presentation of an application at least one day in advance of the time set for the trial, though the rule leaves it to the discretion of the court to determine whether or not the petition may be filed and presented later. The right to obtain a change of venue is not dependent upon the discretion of the court further than in determining the credibility of the persons who give their affidavits in support of the application, and the court has no power to establish a rule which makes the right to present a petition for change of venue at any time dependent upon the court's discretion.

Our conclusion therefore is that the court erred in refusing to consider and pass upon the sufficiency of the application for change of venue.

The judgment is therefore reversed, and the cause is remanded for a new trial and for other proceedings in accordance with this opinion.

HAWKINS v. SIMMONS.

Opinion delivered October 6, 1924.

1. JUDGMENT—PARTIES—MODE OF RAISING OBJECTION.—Objection to a judgment in favor of G. G. S. & Company that it fails to show whether G. G. S. & Company constitutes a partnership or a corporation is waived where no objection was raised in the proceedings in which the judgment was rendered, either by demurrer or answer.
2. JUDGMENT—PARTIES—VALIDITY.—A judgment in favor of G. G. S. & Company, where G. G. S. & Company is a corporation, is a valid judgment in favor of such corporation; but if G. G. S. & Company is a partnership, the judgment is a valid judgment in favor of G. G. S., the partner named in the judgment.

Appeal from Union Circuit Court; *L. S. Britt,* Judge; affirmed.

Wilson & McGough, for appellants.

Certiorari was the proper remedy for appellant to pursue. 68 Ark. 207; 44 Ark. 509; 54 Ark. 375. Appellant did not sign the note, nor was she properly served with summons. The evidence shows collusion between the justice of the peace and the plaintiff, such as would entitle appellant to the relief asked. 30 Ark. 17; 82 Ark. 415. The justice had no jurisdiction over the appellant since she was not properly summoned as a party, but only as a witness. 43 Ark. 232. Plaintiffs were not entitled to maintain the suit, since they failed to show whether they constituted a partnership or a corporation. 150 Ark. 398; 148 Ark. 323; 94 Ark. 55.

S. E. Gilliam, for appellee.

Certiorari was not the proper remedy. 20 Ark. 573; 21 Ark. 475; 47 Ark. 511; 55 Ark. 200. The defect com-

plained of by appellant, that it was not shown whether or not appellee was a corporation or a partnership, could only be reached by appeal. 92 Ark. 63; 66 Ark. 582; 96 Ark. 344; 17 Ark. 580; 114 Ark. 304. A plaintiff may sue for a less sum than his debt, thereby remitting the excess, to bring the case within the jurisdiction of the justice court. 7 Ark. 260; 10 Ark. 328; 60 Ark. 146. The granting of writs of certiorari by the circuit court directed to justices of the peace are matters within the sound discretion of the court. 52 Ark. 213; 192 S. W. 887.

McCULLOCH, C. J. Appellees instituted an action for debt against appellant, Mrs. F. W. Hawkins, and also against her husband, before a justice of the peace in Union County, and on January 20, 1923, the return day of the summons, all the parties appeared in person, the case was heard by the justice of the peace, and judgment rendered against both of the defendants. After the expiration of ten days from the date of said judgment, execution was issued on the judgment and returned by the officer *nulla bona,* and thereafter, on February 21, 1923, a copy of the judgment was filed in the office of the circuit clerk and execution issued thereon. Mrs. Hawkins, the appellant, thereupon brought the record before the circuit court of Union County on certiorari and sought to quash the judgment on the ground that it was rendered after the action had been dismissed as to her and without any further notice to her. The case was tried before the circuit court upon oral testimony, and there was a finding and judgment against appellant. Each party introduced several witnesses in support of their respective contentions as to the course of the proceedings before the justice of the peace.

It is conceded that appellant and her husband, who were both defendants in the action, appeared before the justice of the peace on the return day of the summons, and that appellant's husband moved for a continuance of the case or account of the absence of his attorney, and that, upon the overruling of the motion for a continuance, he left the room where the court was being

held. Appellant remained in the room, and, at the trial, took the witness stand in her own behalf, and testified as a witness.

Appellant contends, and so testified in the trial below, that, after she had testified in the case, the justice of the peace announced that the action against her was dismissed, that there was no further notice to her of an attempt to hold her liable in the case, and that the judgment rendered on that day by the justice of the peace was solely against her husband. The testimony of other witnesses introduced by her tended to support her contention that the action against her was dismissed, or rather, that she was "discharged," as some of the witnesses expressed it.

The justice of the peace and several other witnesses introduced by appellees testified that the action against appellant was not dismissed, but that the trial of the cause proceeded to a final judgment in her presence, and that judgment was rendered in her presence against her as well as against her husband.

Some of the witnesses testified that appellant, after she had completed her testimony, remained in the witness chair until the justice of the peace told her that she was discharged, meaning that she was discharged from the witness stand. But it was a question for the decision of the trial court whether or not, under the circumstances, appellant was led to believe that the action against her was dismissed. There was a sharp conflict in the testimony, and we are not at liberty to disturb the finding of the trial court on an issue of fact about which there was a conflict in the testimony. There being sufficient testimony to sustain the finding of the trial court, we must treat the issue as settled against appellant's contention that the action against her was dismissed, or that she was so led to believe, to her prejudice.

It is further urged that the judgment is void because it does not affirmatively show whether appellees, G. G. Simmons & Company, constitute a partnership or a corporation. Such a defect in the judgment is not avail-

able unless raised directly by demurrer or answer in the proceedings in which the judgment was rendered, for the judgment is not void. *Spaulding Mfg. Co.* v. *Godbold,* 92 Ark. 63. In addition to that principle, which is conclusive against the contention of appellant, it may be said that the fact that the initials of one of the copartners, if there exists a copartnership and not a corporation, is sufficient to obviate any defect in the judgment. If there is a corporation, the judgment is valid, and if there is a copartnership, there is a valid judgment in favor of the partner named in the proceedings. *Percifull* v. *Platt,* 36 Ark. 456; *Cooper* v. *Newton,* 68 Ark. 150.

It appearing that the findings of the trial court on the issues of fact are supported by sufficient evidence, and there being no error in the proceeding, the judgment must be affirmed, and it is so ordered.

WASHUM v. WILSON MERCANTILE COMPANY.

Opinion delivered October 6, 1924.

EQUITY—MULTIFARIOUSNESS.—A bill in equity is multifarious which seeks to unite in one action a suit to foreclose a mortgage against two defendants, and a cause of action at law against a third person, in the absence of a connection in interest among the defendants, creating a joint liability.

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

L. L. Gibson and *W. P. Smith,* for appellant.

G. G. Dent and *Pope & Bowers,* for appellee.

WOOD, J. This action was instituted in the chancery court of Randolph County by the appellant against the appellee. The appellant alleged in substance in his complaint that J. J. and J. G. Brooks were indebted to him on notes in the sum of $550, which notes were secured by mortgage on certain property, which is described in the complaint; that the notes were past due and unpaid, and that the conditions of the mortgage had been broken; that these notes were held for collection by the Wilson

Mercantile Company (hereafter called company), as agent for the appellant; that the Brooks owed the company a large debt; that the company rendered to the Brooks a statement of their indebtedness, which statement is set forth in the complaint. The statement included the notes executed by the Brooks to the appellant; that, as an excuse for refusing to pay said indebtedness or to deliver the property to be sold under the power contained in the mortgage, the Brooks claimed that they had paid the amount of the notes to the company under a certain agreement which is set out in the complaint; that, if the notes were collected or settled for with the company, as claimed by the Brooks, the appellant is entitled to judgment against the company for the amount of the notes with interest; that, not knowing the merits of the claim of the Brooks, the appellant makes the company a party to the action in order to prevent a multiplicity of suits.

The appellees demurred to this complaint on the ground generally that it did not state a cause of action, also on the ground specifically that there was a misjoinder of parties. The court sustained the demurrer on the ground that there was a misjoinder of parties, and offered to allow the appellant to elect which of the parties defendant he would pursue. The appellant refused to make an election, and refused to plead further, standing upon his complaint. Whereupon the court rendered judgment dismissing the action as to the company, from which judgment the appellant duly prosecutes this appeal.

The appellant seeks to join a cause of action in equity against the Brooks for a decree on notes and the foreclosure of a mortgage to secure the same with an alleged cause of action against the company for money had and received by it as appellant's agent which it failed to pay over to him. This cannot be done, in the absence of an allegation in the complaint showing a connection between the Brooks and the company that would make them jointly liable to the appellant. Such is not the case here at all. If the Brooks paid the company as appellant's

agent, then appellant has no cause of action against them in equity to foreclose his mortgage. His sole and only remedy in such case would be a cause of action at law against the company for money had and received as appellant's agent. There is no connection whatever in interest between the Brooks and the company. The causes of action alleged in the complaint against the company and the Brooks are entirely separate and distinct. The one involves purely an action at law and the other in equity. There are no allegations of fact to justify joining these actions. The action against the company is purely one at law, in which the company would be entitled to a trial by jury, whereas the action against the Brooks is one in equity, in which they would not be entitled to a jury.

The law applicable to the facts alleged in the complaint is accurately stated in 21 C. J. 422, as follows: "A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants, who may be respectively liable, but not as connected with each other. There must be some connection in interest among defendants against plaintiff." See also *Thornton N. Motley Co.* v. *Detroit Steel, etc., Co.* 130 Fed. 396; *Booneville National Bank* v. *Blakey,* 166 Ind. 427, 76 N. E. 529.

The decree of the court is correct, and it is therefore affirmed.

HART and SMITH, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BROOKS.

Opinion delivered October 6, 1924.

TRIAL—IMPROPER ARGUMENT OF COUNSEL.—In an action for the negligent killing of a dog by defendant's freight train, where there was neither allegation nor proof that the running of a fast freight train through a town at twenty miles an hour was excessive speed, it was error for plaintiff's attorney to contend in argument that the trainmen were negligent in running the train that fast.

Appeal from Hot Spring Circuit Court; *Thomas E. Toler,* Judge; reversed.

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

Albert W. Jernigan and *D. E. Waddell,* for appellee.

WOOD, J. On the 22d of April, 1923, one of appellant's trains ran over appellee's pointer dog, in the town of Malvern, and killed the same. Appellee instituted this action against the appellant, alleging that the dog was negligently killed by the appellant, and that she was damaged in the sum of $100. The answer denied any negligence on the part of appellant, and alleged that the killing of the dog was an unavoidable accident. It also denied that the dog was of any value.

A witness for the appellee testified that he saw the dog killed: "This dog was trotting along down by the switch and, when the train got right up close to it, it ran across the track right in front of the engine, and the engine hit it. The train was right close up to the dog when it ran on the track. It was running right on down the track there, ahead of the locomotive. It was down grade where the accident happened. The train was coming about as fast as usual. It was coming at a pretty good clip. These long trains do not stop except when they are going to take water. It was a through freight train, and running about twenty miles an hour."

There was some testimony on behalf of the appellee to the effect that the market value of the dog was from forty to seventy-five dollars. The testimony for the appellant was to the effect that the dog was worthless.

The appellant asked the court to instruct the jury to return a verdict in its favor, which request the court refused, and to which ruling the appellant duly excepted.

During the argument of the attorney for the appellee, he made this statement: "This was a through freight train, running down grade and around a slight curve. It was running twenty miles an hour, and it was negligence for them to be running that fast. If they had been acting as prudent men, they would have brought

that train around there so they could have stopped if anything got on the track." The appellant excepted to this argument, and asked the court to exclude it on the ground that there was no proof that the train was running at an excessive speed. The court overruled the motion, and appellant duly excepted. The jury returned a verdict in favor of the appellee in the sum of $50. Judgment was rendered in her favor for that sum, from which is this appeal.

The complaint does not allege that the appellant was negligent because it was running its train at an excessive rate of speed, and there is no testimony to the effect that the running of a fast freight train through the town of Malvern at twenty miles an hour was excessive speed, and therefore negligent. There was absolutely no testimony to warrant the inference that appellant was negligent because it ran its fast freight train on a down grade and through the town of Malvern at a speed of twenty miles an hour; there was no testimony to warrant the inference that the appellant's employees in charge of the train were negligent if they were running the train at a speed that the train could not be stopped if anything got on the track. Nor was there any testimony to warrant the inference that the running of the train at the rate of twenty miles an hour was the proximate cause of the killing of the dog. The argument therefore assumed the existence of facts which were not in evidence, and was improper and highly prejudicial to the rights of the appellant. *St. L. I. M. & So. Ry. Co.* v. *Earle,* 103 Ark. 356, and cases there cited.

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

HACHMEISTER v. POWER MANUFACTURING COMPANY.

Opinion delivered October 6, 1924.

1. MORTGAGES—AFTER-ACQUIRED PROPERTY.—A mortgage which undertook to convey "machinery now or hereafter put upon said premises for the conduct hereof, whether attached or detached," necessarily referred to machinery which the mortgagors had or might thereafter have title, and therefore had the right to include in the mortgage.
2. SALES—RESERVATION OF TITLE.—When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title though he buys in good faith for a valuable consideration.
3. SALES—RESERVATION OF TITLE.—Where the title to machinery was reserved in the seller until the purchase price was paid, the vendee could not divest the vendor's title before paying for the machinery by affixing it to real estate which he had previously mortgaged to another.
4. SALES—CONDITIONAL SALE.—WAIVER.—Where a seller, at the time it sold machinery with reservation of title, knew that it was to be used to repair machinery permanently attached to land which was subject to a mortgage, and that it could not be detached without destroying the use of such machinery, the seller will be held to have consented to such use, and the mortgagee's lien thereon will be held to be superior to the seller's reservation.

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

Trimble & Trimble, for appellant.

C. W. Norton, for appellee.

WOOD, J. B. F. Thompson, Sarah T. Walton and M. R. Crandall owned a tract of rice land in Arkansas County. Prior to March 1, 1922, they executed a deed of trust to Herman Hachmeister, trustee for Charles Forman, named as beneficiary in the deed of trust. This deed of trust was to secure the sum of $148,000. On March 1, 1922, Thompson, Sarah Walton and Crandall executed to Hachmeister, trustee for Charles Forman, beneficiary, two additional deeds of trust on the same lands, securing fourteen and nineteen thousand dollars, respectively. These additional deeds of trust were duly recorded on April 19, 1922. One of the deeds of trust,

after describing the real estate, contains the following language: "together with the tenements, hereditaments, etc.," and "machinery now or hereafter put upon said premises for the conduct hereof, whether attached or detached."

After the additional deeds of trust were executed and recorded, Thompson, Walton and Crandall formed a corporation designated as Walton-Arkansas Rice Company (hereafter called rice company), and deeded the lands to that company, subject to the deeds of trust above mentioned. On May 22, 1922, and at subsequent dates, the Power Manufacturing Company (hereafter called Power company) sold to the rice company new stationary engines, and two crank shafts, a governor, and a spider clutch for engines already on the land. All this machinery was necessary to the irrigation of the rice land. The contract of sale between the Power company and the rice company contained this provision: "The title to the machinery or material furnished under this agreement is to be and remain in the Power Manufacturing Company, and does not pass to the purchaser until full purchase price hereunder (including any modifications or extensions of payments, whether evidenced by notes or otherwise) shall have been fully paid in cash, and the purchaser is to do all acts necessary to perfect and maintain such retention of title in the company." The contract contained the further provisions that, in case of failure to pay the purchase money or any note given therefor, the Power company might collect same by action or repossess itself of the property. And further: "It is understood that the machinery hereunder shall retain its personal character and shall not become a fixture by being placed in any building or in any manner whatsoever annexed to any land." And further: "If said machinery is placed upon mortgaged or incumbered premises, it shall be without prejudice to the company's retention of title thereto as herein provided. It is understood and agreed that, under the foregoing conditions

and stipulations, the aforesaid engine is to be located and placed upon the following described lands," etc.

Neither the mortgage notes nor the notes given for the purchase of the machinery were paid by the incorporators of the rice company individually, or the company itself. The trustee and the beneficiary in the deeds of trust instituted this action to foreclose the second and third deeds of trust, and asked that the first deeds of trust be adjudged a lien against the land and the improvements. They alleged that the engines and parts were fixtures and were covered by the deeds of trust, and they prayed that the first deed of trust be adjudged a first lien against the land and improvements.

The Power company, in its answer, denied that the deeds of trust created a lien on the engine and parts, and prayed that its right and title retained in the purchase money notes be declared superior to the rights and liens of the beneficiary in the deeds of trust. The parties agreed that the engines and parts were affixed to the soil in a manner approximately as follows: "That is, a pit is excavated about 8′ x 20′ in size and 6 or 7 feet deep (that the hardpan in the soil is at a depth of three or four feet), which excavation is filled with concrete to ground level, and imbedded in this block are iron bolts, which extend above the surface of the block for about two feet. Around these bolts a second concrete block is built, and the engine is bolted thereto and held in place on the same by iron washers and nuts or taps, the bolts coming up through the concrete and through holes prepared in the base of the engines. The second concrete block is approximately the same in size as the base of the engine. After the engine is bolted down, fresh concrete grouting is poured about the base of the engine, and in some cases may come up to the top edge of the base, but does not cover it, nor does it cover the heads of the bolts and taps."

It was further agreed "that the mechanics and other employees of the Power Manufacturing Company would testify, if called, that engines so affixed to the soil are easily and readily removable by unscrewing the taps, and

lifting the engine off the base, and that it is a common occurrence for engines to be so removed. That the same witnesses would testify further that such removal of an engine causes no damage, it being usual for such engine houses to be provided with doors large enough to admit an engine. That the foundation, however, would remain on the land, and would, of course, prevent the use of the soil for agricultural purposes, but the same engine base would be usable for another like engine, and that in locating engines on rice land it is customary to choose the site of the same with regard to serving the land with water."

It was further agreed that neither the trustee nor the beneficiary in the deeds of trust had any knowledge of the purchase of the engines or parts and the placing of the same on mortgaged premises by the mortgagors. The trustee and the beneficiary in the deeds of trust knew nothing about the purchase money contracts in which there were deferred payments and notes given in which the vendors retained title until the purchase money was paid. It was further stipulated that Arkansas County is a large and leading rice-growing county, its principal crop being rice, for the growth of which steam oil engines are installed on the lands, and that there are five or six steam or oil plants on the land in controversy, part of them having been erected thereon several years prior to the erection of the plants sued on herein; that the assessor's records show no pumping plants assessed as personalty in Arkansas County, but the taxes are extended on the lands covering all improvements thereon as realty, and a total tax assessed against the lands and improvements as realty.

In addition to the above, there was testimony adduced for the Power company tending to show that Primm oil engines and the repair parts, such as are in this controversy, could be removed, after being affixed to the soil, without damage or destruction to the house in which they were situated, or without damage to the real estate, and that the parts could be removed from the engines

without damage to the remaining machinery. But there was testimony on behalf of the plaintiffs tending to prove to the contrary. There was testimony to the effect that it was not customary for an oil engine to be removed after it was once installed, and it was not practical to move the same from place to place; that, if such were done, it would result in damage to the realty; that, upon the removal of an engine, the foundation upon which it rested and the building housing it would be useless and that the removal of engines would cause the land to depreciate in value.

It would unduly extend this opinion, and we deem it unnecessary, to set out and discuss this testimony. The chancery court found from the testimony that the engine and parts were fixtures, in the absence of an agreement to the contrary; that the engines in controversy were purchased from the Power company, which retained title thereto, and were installed on the lands some time after the execution of the mortgage sued on; that the mortgagor made his loan in the absence of these engines; they were not considered as part of the security; that very slight damage would result by reason of their removal from the premises; that the crank shaft, the governor and the spider clutch were repairs or parts installed on engines at the time the loan was made, and when these parts were attached to the engines they became a part of them. The court entered a decree based upon these findings in favor of the Power company, giving it a superior right to the engines in controversy, and in favor of the plaintiffs, giving them the superior right to the engine parts mentioned. The plaintiffs appealed from the decree in favor of the Power company as to the engines, and the Power company cross-appealed here from the decree in favor of the plaintiffs as to the engine parts.

1. We will dispose first of the appeal. It was wholly beyond the power of the makers of the deeds of trust or the mortgagors to pass title to, or to place a mortgage lien upon, chattels which they did not own at

the time the deeds of trust were executed and the title to which they did not have at the time these chattels were attached to the freehold embraced in the mortgages. By the clause in the deeds of trust which specifies "machinery now or hereafter put upon said premises for the conduct hereof, whether attached or detached," the parties could not have contemplated machinery to which the mortgagors had no title at the time the deeds of trust were executed and to which they would have no title when the machinery was attached to the land embraced in the mortgages. The above clause of the mortgage necessarily refers to machinery on the land to which the makers or mortgagors had title and therefore the right to include in the deeds of trust.

In *McIntosh & Beam* v. *Hill,* 47 Ark. 363, we held (quoting syllabus): "When a chattel is sold with a reservation of title in the vendor until the price is paid, the title remains in him until the condition is performed, and a purchaser from the vendee acquires no title, though he buys in good faith for a valuable consideration and without notice of the condition." See also *Triplett* v. *Mansur-Tibbetts Co.,* 68 Ark. 230; *Cullin-McCurdy Const. Co.* v. *Vulcan Iron Works,* 93 Ark. 342; *Starnes* v. *Boyd,* 101 Ark. 469, 473; *Clinton* v. *Ross,* 108 Ark. 446; *Garner Mfg. Co.* v. *Cornelius Lbr. Co., ante,* p. 119.

The appellants contend that the appellee has the same rights, and no more, as the rice company would have had, had it paid for the machinery in full and had set up its title against the lien of the mortgagees. To support this contention, they cite the case of *Thomas Cox & Sons Machinery Co.* v. *Blue Trap Rock Co.,* 159 Ark. 209. In that case the Trap Rock Company leased its quarry to one Fulton, and, as a part of his contract, Fulton agreed to operate the plant and make necessary repairs at his own expense. Fulton bought certain machinery from Cox & Sons Machinery Company. The lessor company notified the vendor company of the conditions under which Fulton was operating the plant, and indorsed the notes of Fulton, in which the vendor company retained

title, and at the same time warned the vendor company that Fulton was obligated to make the repairs and not authorized to bind the lessor company. In that case we held that, if the vendor sold to the lessee machinery and reserved title thereto, which machinery the vendor knew at the time that the lessee intended to attach to the realty of the lessor, and knew at the time that the machinery was of a character that, when attached, would become a fixture, and could not be removed without injury to the freehold, and if the lessor was ignorant of the fact that the vendor had reserved title to the machinery, then the vendor would not be entitled to recover as against the lessor, the owner of the freehold. That case is wholly distinguished on the facts from the facts of this record, and has no application whatever. The holding in that case against the conditional vendor in favor of the lessor, the owner of the freehold, was predicated solely upon the fact that the vendor had been actually notified and warned by the owner of the freehold that the vendee, the lessee, had made a contract to repair the premises and that the machinery purchased was for that purpose.

In the case at bar there is no proof that the conditional vendor of the machinery knew that the conditional vendee had entered into a contract with the owner of the freehold to buy machinery for the purpose of making repairs, and that the conditional vendor had expressly acquiesced in, and consented to, such contract. Nor was there any testimony tending to prove that the conditional vendor knew that, under the contract, the machinery purchased would be attached to the freehold in such manner as to become a fixture. We conclude therefore that the mortgagors or the makers of the deeds of trust had no power to vest title or lien in the trustees or beneficiary in the deeds of trust in the engines in controversy for which the vendees at that time had not paid, nor could the vendees, by affixing these engines to the freehold before they had paid the purchase money and acquired title thereto, vest title in the owners of the freehold and deprive the conditional vendor, the Power company, of

its title and right to such machinery. *Fears* v. *Watson,* 124 Ark. 341.

2. On the cross-appeal, it appears that there were two one-hundred-horse power crank shafts with counterweights for engine No. 885 and engine No. 886; also one governor and clutch spider for engine No. 885, and a governor for engine No. 886. The total value of these articles was $2,030. The court found that these parts were attached to engines Nos. 885 and 886, which were on the lands at the time the loans were made, and that, when they were so attached, they became a part of the engines. There was testimony to warrant a finding that these engines, which were on the land at the time the loan was made, were fixtures, and that therefore the mortgagors had title thereto and that they were included in the deeds of trust. These parts, the Power company knew at the time, were to be used to repair the engines which were fixtures, and, when so attached, would become parts of those fixtures, and therefore a part of the freehold, and that the parts could not be detached from the engines without destroying the use of the engines and injury to the freehold. The Power company therefore, as to these parts, is in the attitude of having consented in advance that the parts should become fixtures and that the owners of the freehold and the beneficiaries under the mortgages or deeds of trust would have the superior right or title to these parts. *Thos. Cox & Sons Mach. Co.* v. *Blue Trap Rock Co., supra.* Besides, so far as the parts are concerned, the Power company is precisely in the same attitude as if these parts had been attached to the engines at the time the deeds of trust under which the appellants claim were executed.

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

BROOKS v. WILSON.

Opinion delivered October 6, 1924.

1. SCHOOL LANDS—TITLE OF STATE.—While the trust created by a compact between the United States and this State that sixteenth section lands should be used for school purposes is a sacred obligation imposed on the good faith of the State, the obligation is honorary, and, the legal title to such lands being vested in the State, its power over the same is plenary and exclusive.
2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT.—A statute passed by a State disposing of lands conveyed in the enabling act by the United States to be used by the State for school purposes does not impair the obligation of a contract, and the State has the right to subject such lands in its hands to the ordinary incidents of title.
3. SCHOOLS—DISPOSITION OF SCHOOL LANDS.—Even if §§ 9108, 9110 and 9285 of Crawford & Moses' Digest, providing for disposition of the fund derived from the sale of sixteenth section lands, be unconstitutional, their invalidity in nowise affects the validity of other statutory provisions for the sale of such lands.
4. STATUTES—EFFECT OF PARTIAL INVALIDITY.—If any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done, and the remainder of the act allowed to stand.

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

T. J. Crowder, for appellant.

Under the compact, approved June 23, 1836, C. & M. Digest, p. 200, the legal title to the 16th section lands vested in the State as trustee for the use of the inhabitants of the township in which the section 16 was located. The act 344, Acts 1919, C. & M. Digest, §§ 9108, 9287, is violative of the compact, *supra,* and void, in this: in providing for the sale of the lands under an order of the county court, upon a petition of any person desiring to purchase, without obtaining the consent of the inhabitants and without notice to them; and in providing that the proceeds derived from the sale of the land be deposited in the State Treasury to the credit of the common school fund of the State. We are not unmindful of the case of *Mayers* v. *Byrne,* 19 Ark. 308, but attention is called to the fact that the act under which the sale was

made required the proceeds from the sale to be "employed for school purposes in the township," Acts 1844-45, p. 85, whereas the present statute, C. & M. Digest, § 9108, requires the sheriff, after the costs are paid, to transmit the balance of the purchase price to the Treasurer of the State "for and on account of the permanent school fund." See also *Id.*, § 9287, and *Id.*, 8808. But the above case, as well as the later case, *Special School District No. 5* v. *State*, 139 Ark. 263, recognized the trust feature of the compact and the sacredness of the obligation assumed by the State to preserve the use of the lands for the benefit of the inhabitants of the township in which the lands lie.

Little, Buck & Lasley, for appellees.

The question as to the legal title to the lands involved has been settled by the court's decision in *Mayers* v. *Byrne*, 19 Ark. 308, against appellant's contention, wherein it was held that the legal title to the land vested absolutely in the State. The question here involved is the sale of the land, not the use of the proceeds. If depositing the proceeds of the sale to the credit of the common school fund is to deprive the inhabitants of the township of the use of the land within the meaning of the compact, that may be prevented in a proper proceeding instituted for that purpose, but not in this case. 263 U. S. 361; 127 U. S. 182; 107 U. S. 557.

HART, J. J. Mell Brooks, a taxpayer and an inhabitant of a certain school district in Mississippi County, Arkansas, brought this suit in equity against R. E. Lee Wilson and D. H. Blackwood, as sheriff of Mississsippi County, to enjoin the sheriff from issuing and delivering to R. E. Lee Wilson a certificate of purchase of sixteenth section school land situated within the limits of said school district.

The statute regulating the sale of sixteenth section lands for the use of schools was in all respects complied with by the sheriff, whose duty it was, under the statute, to make the sale.

The sole ground upon which the sale was sought to be defeated was that the act regulating the sale of such lands violated the compact between the United States Government and the State of Arkansas.

The chancellor ordered the complaint dismissed for want of equity, and the case is here on appeal.

It appears from the record that the sale of the sixteenth section land involved in this suit was made in conformity with the provisions of §§ 9104-9112 of Crawford & Moses' Digest regulating the sale of such lands.

This fact is conceded by counsel for appellant, and his sole reliance for a reversal of the decree is that the act of the Legislature under which the sale was made is unconstitutional, because it is violative of the compact between the United States and the State of Arkansas whereby the former granted to the latter, by act of Congress, the sections numbered sixteen in every township, "for the use of the inhabitants of such township for the use of schools." The legal title to these lands could not be vested in the inhabitants of the township, because they had no corporate existence, and none could be conferred on them by the act of Congress. It is plain from the language of the act of Congress that the legal title to the lands was intended to be vested in the State, and it did so vest by the acceptance of the conditions by the Constitutional Convention under which the State was admitted into the Union. *Cooper* v. *Roberts,* 18 How. U. S. 173; *State of Alabama* v. *Schmidt,* 232 U. S. 168, and *King County, Washington,* v. *Seattle School District No. 1,* 263 U. S. 361, 44 S. C. Rep. 127, 68 L. ed. 138.

Thus it will be seen that the Supreme Court of the United States has expressly held that, while the trust created by a compact between the United States and the State that sixteenth section lands be used for school purposes is a sacred obligation imposed on the good faith of the State, the obligation is honorary, and the power of the State, where the legal title has been vested in it, is plenary and exclusive. The court further held that a statute passed by a State disposing of lands conveyed

in the enabling act by the United States to be used by the State for school lands, does not impair the obligation of a contract created by the acceptance of the enabling act; and that the State has the right to subject such lands in its hands to the ordinary incidents of title.

This doctrine was also recognized by this court in the case of *Mayers* v. *Byrne,* 19 Ark. 308. In that case it was held that, by the act of Congress supplemental to the act for the admission of Arkansas into the Union and the ordinance of the State accepting the provisions of the supplemental act, the title to the sixteenth section lands granted for the use of common schools vested absolutely in the State, and that the act of Congress imposing conditions upon the power of sale was not binding upon the State.

It follows from the principles of law decided in these cases that the title to the land in question was in the State of Arkansas, and passed to the purchaser at the sheriff's sale, under the provisions of the act regulating the sale of the same.

But it is contended that the act is unconstitutional because § 9108 of Crawford & Moses' Digest provides that, after the payment of the costs of the sale, the balance of the purchase price shall be transmitted by the sheriff to the State Treasurer, for and on account of the permanent school fund of the State of Arkansas.

To sustain his contention in this behalf, counsel relies upon *Special School District No. 5* v. *State,* 139 Ark. 263. We do not think that case is authority for his contention. On the other hand, it reaffirms the rule that the title to the sixteenth section lands has vested in the State. The court expressly said that the act of Congress was declared by this court in *Mayers* v. *Byrne,* 19 Ark. 308, not to be binding upon the State as to the disposition of the lands. In that case the title to the lands was not involved, but the court had only under consideration the disposition of the funds derived from the use of the sixteenth section school lands, or from the use of the proceeds of the sale of such lands. In this connection it may

be stated that the disposition of the purchase price of the sixteenth section school lands is referred to in §§ 9108, 9110 and 9285 of Crawford & Moses' Digest.

Section 9108 is a part of the act of March 22, 1919. Section 9110 is a part of the act of March 31, 1885, and § 9285 is a part of act of May 8, 1899. The constitutionality of these sections is not involved and is not passed upon at all. If they should be deemed unconstitutional, it would in no wise affect the validity of the acts of which they are a part with regard to the sale of the lands. They deal with the disposition of the fund derived from the sale of the sixteenth section lands, and the remainder of the respective acts deals with the manner of the sale of such lands. If the legal title to the lands is in the State of Arkansas, as decided by the Supreme Court of the United States and by this court, the Legislature had full discretion to provide for the manner in which such lands might be sold, and the fact that a part of the act providing for the disposal of the funds arising from the sale of the lands should be held to be unconstitutional would in no wise affect the remainder of the act. The only ground upon which the disposition of the proceeds of the sale could be held to be unconstitutional would be that the Legislature has violated the compact between the United States and the State. If that compact unalterably fixed the disposition which should be made of the proceeds arising from the sale or lease of the lands, an act of the Legislature fixing a different method might be unconstitutional, and still not render unconstitutional the remaining portion of the act providing the machinery for the sale of the lands.

The rule is that, if any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done, and the remainder of the act allowed to stand. *Cribbs* v. *Benedict*, 64 Ark. 555; *State* v. *New York Life Ins. Co.*, 119 Ark. 314; *State* v. *Woodruff*, 120 Ark. 406; and *Davis* v. *State*, 126 Ark. 260.

Therefore the decree will be affirmed.

BURON v. LITTLE RIVER COUNTY.

Opinion delivered October 6, 1924.

1. COUNTIES—DEMURRER TO CLAIM.—While ordinarily a demurrer does not lie to a claim filed against a county, since the statute does not require formal proceedings in presenting demands against counties, it was not error to sustain a demurrer to a claim against a county which sets out fully the facts upon which the claim is based, and such facts are insufficient to sustain the claim.
2. COUNTIES—LIABILITY FOR AUDIT OF BOOKS OF IMPROVEMENT DISTRICT.—The county court has no authority to employ an accountant to audit the books of an improvement district.

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

DuLaney & Steel, for appellant.

1. The original claim filed by the appellant in the county court, and the amendment thereto filed in the circuit court, stated a cause of action, and the court erred in sustaining a demurrer thereto. The facts pleaded should have been investigated and the law applicable thereto should have been put into effect. 61 Ark. 76.

2. It is within the province and the power of the county court to pay out of the county general funds for the expense of auditing the books and finances of this road improvement district, under the contract made with the appellant, and under the facts shown and admitted by the demurrer. Art. 7, § 28, Constitution; C. & M. Dig., §§ 5301, 2982, 2984; act 494, Acts 1921, § 11; 122 Ark. 114; 72 Ark. 334; 107 U. S. 356.

Shaver, Shaver & Williams, for appellee.

1. The court was correct in sustaining the demurrer. Having elected to formally plead, and having specifically pleaded all the facts, and the contract on which he relied, appellant subjected himself to the rule of pleading that his cause of action could be tested on demurrer. There is a clear distinction between the rule announced in *Wiegel* v. *Pulaski County,* 61 Ark. 76, where no formal pleadings are filed, and that in a case where such pleadings are filed. See also 76 Ark. 265. Moreover, the con-

tract relied on by appellant is pleaded, yet there are no allegations to show that any amount had been previously appropriated for the purpose evidenced by such contract. Act 192, approved March 9, 1917, § 9.

2. Act 292, Acts 1919, creating Road Improvement District No. 7 of Little River County, gave such district a separate, distinct and corporate existence, with full power to manage and control its fiscal affairs, and the right to sue and be sued, but nowhere does the act confer any jurisdiction on the county court to control or in any manner interfere with the fiscal affairs of said district. The attempt by the county court to audit the books and accounts of the district was therefore without authority of law, and the county cannot be held to pay the expense thereof. *Leathem & Co.* v. *Jackson County,* 122 Ark. 124, has no application here. See 122 Ark. 119; 84 Ark. 539; 155 Ark. 402.

SMITH, J. In the year 1922 appellant entered into a contract with Little River County, through its county judge, to audit the books and accounts of Road Improvement District No. 7 of that county. Appellant performed the service called for by the contract, and filed a claim for the compensation agreed upon, and the same was allowed. A citizen of the county made himself a party to the proceeding, and prayed and perfected an appeal to the circuit court, where he appeared and filed a demurrer, which was sustained and the cause dismissed, and this appeal is from that order of the circuit court.

The claim filed by appellant was not a mere statement of his demand. On the contrary, it contained a detailed history of the circumstances of his employment. He alleged there was disaffection among the taxpayers over the management of the affairs of the road improvement district, and that the grand jury undertook an investigation of its affairs, and caused the records and files of the district to be brought before the grand jury, but the investigation thus made was not satisfactory, and the grand jury, in its final report to the circuit court, recommended that the county court employ an expert

accountant to make an audit of the books and affairs of the district, and that a copy of this report be filed with the county court and another copy with the prosecuting attorney of the judicial district of which Little River County was a part. The statement of appellant's demand further recited that the report of the grand jury was transmitted to the county court and there filed, and, pursuant to this recommendation, the county court entered into the contract here sued on. This contract was copied in full and made a part of the demand, and there was also attached a detailed statement of the services which appellant had rendered under the contract and the expense which he had incurred which the contract required the county to reimburse.

For the reversal of the judgment in the circuit court it is first insisted that a demurrer will not lie to a claim filed against a county, and the cases of *Wiegel* v. *Pulaski County*, 61 Ark. 76, and *Hempstead County* v. *Phillips*, 79 Ark. 263, are cited in support of this contention.

In those cases it was said that a demurrer would not lie to a claim filed against the county. But those decisions must be read in the light of the facts to which the decisions apply. In both of those cases there was a mere statement of the claim against the county, verified as the statute required. There was no attempt in either case to state the facts on which the county's liability depended; but the cause of action was held not to be demurrable on that account, for the reason that the statute did not require formal pleadings in presenting demands against counties, and it was therefore not necessary that a formal cause of action be stated.

Here, however, the claimant has set out in full the facts upon which he predicates liability against the county. If the case had been fully heard in the court below, he would, no doubt, have proved the matters alleged. There is no contention that he would have offered to prove any fact not alleged. The demurrer concedes the truth of these allegations, but questions their sufficiency to sustain liability against the county.

This is the real question in the case, and one which both parties have fully argued and desire us to decide, and we proceed therefore to consider it.

We think the facts recited fail to show a valid claim which the county should be called upon to pay, and the demurrer was therefore properly sustained.

The case of *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, is cited as authorizing the county court to employ an accountant to audit the books of an improvement district. But we do not think that case upholds that authority. There the accountant was employed to audit the books and accounts of certain county officers. These were officers who were required to report to and to settle with the county court. The matters audited related to the fiscal affairs of the county, and the purpose of the audit was to enable the county court to more intelligently exercise a jurisdiction conferred upon it by law. No such duty or jurisdiction is conferred upon the county court in regard to the affairs of the improvement district. The officers of the district were not required to report to or make settlement with the county court, and that court had no function to perform in this behalf, and the court had therefore no authority to incur this expense as an obligation to be paid by the county.

The right of the grand jury to inspect the records of the district is not questioned, and as much time could have been consumed by that body as was required for that purpose; but the recommendation of the grand jury added nothing to the jurisdiction of the county court.

It is insisted that the authority to have this audit made is necessarily implied to make effective the provisions of act 494 of the Acts of 1921, page 490. This act provides for the registration of motor vehicles, and fixes the fees for registering and licensing such vehicles, and § 11 thereof apportions the revenue so derived. This section provides that seventy per cent. of such money shall be paid by the collector thereof into the treasury of the county in which the collections were made, to the credit of a fund to be known as the county highway

improvement fund, and that the same shall be expended by the county court upon the public highways of said county, and that the county court shall apportion these funds among the various road districts and the road improvement districts for the purpose of constructing and maintaining roads, the apportionment to be made by the county court after taking into account the relative importance of said roads. The argument is made that, having thus apportioned funds to a particular improvement district, the county court has the inherent right to audit the affairs of such district to ascertain the uses of the money so apportioned.

It appears, however, that such was not the real purpose of the audit, as the information desired related to the disbursement of the proceeds derived from the sale of bonds of the district. Moreover, act 494 does not contemplate that the funds derived pursuant to these provisions shall be turned over to the improvement districts. They are paid into the county treasury, and are disbursed by the county treasurer. The county court itself has control of these funds and their apportionment, and we think there is nothing in this act 494 which confers authority on the county court to have a general audit of the improvement district's affairs made at the expense of the county.

The claim presented seeks to impose a liability on the county not authorized by law, and the demurrer was therefore properly sustained, and the judgment of the circuit court is affirmed.

CONWAY v. COMMISSIONERS OF BOARD OF IMPROVEMENT DISTRICT NO. 20.

Opinion delivered October 6, 1924.

HIGHWAYS—PLANS FOR IMPROVEMENT—DEFINITENESS.—Plans for the improvement of certain streets which provide for a brick, asphalt or other suitable wearing surface laid on a concrete base, and states definitely the estimated cost of the proposed improvement, is not so indefinite as to avoid the assessment based thereon.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

H. M. Barney, for appellant.

The plans for the improvement filed with the city council do not meet the requirements of the statute, C. & M. Digest, § 5656. They are too indefinite and uncertain to enable property owners to tell what thickness the concrete base was to be, or of what material, whether of brick, asphalt, or, indeed, what other material was to be laid on such concrete base. Moreover, as to the repair of defective places, whether that is to be done with brick, asphalt or gravel. It was therefore impossible for the commissioners to make a valid assessment of benefits. 154 Ark. 38; 134 Ark. 318. Since no definite plans had been made, the assessment is invalid and of no effect.

Henry Moore, Jr., for appellee.

1. This district was legally organized under the general law, C. & M. Digest, §§ 5649 to 5668 inclusive. Because of the failure of the gravel base, laid under the original contract, to support the concrete asphalt wearing surface, and at the instance of the commissioners of the district, act No. 643, Acts 1923, was enacted, to the end that a proper and suitable pavement might be put down. Attention is called to §§ 1, 2, 3, 4, and 5 thereof, and to the fact that this act changes somewhat the procedure from that prescribed by the general law. It will be noted that, under the general law, the majority petition is signed before the assessment is made, and therefore before the property owners can tell what amounts they will be required to pay; but under the special act,

each property owner, in signing the majority petition, knew from the plans filed the character of the paving that would be put down by the commissioners, and also knew the amount of the assessment of benefits against his property for such paving. There is no merit in appellant's contention that the assessment is void for uncertainty in the plans, etc. They were filed pursuant to § 2 of the special act, and the assessors thereupon proceeded to make the assessment of benefits. It has frequently been held that the commissioners, in making plans and carrying them out, are vested with a wide authority and discretion, and need only put in an improvement of the general kind and character petitioned for. 97 Ark. 338; 105 Ark. 69. Appellant contends that this court has held, in 134 Ark. 315, that a *definite* plan should be made. Crawford & Moses' Digest, § 5656, uses only the word "plans" and does not specify how definite same shall be. It is certain that the word "*definite,*" as used by the court in above case, means a plan of the general kind and character called for by the original petition, not detailed plans and specifications such as are necessary in letting a contract. See also 155 Ark. 327; 150 Ark. 444.

2. This is an attack upon the assessment of benefits, and the suit not having been brought within 30 days after publication of the ordinance required by statute, C. & M. Digest, § 5668, the action is barred. 150 Ark. 447; 158 Ark. 191.

SMITH, J. Street Improvement District No. 20 of the City of Texarkana was organized in 1913. Bonds were sold, the contract was let, and more than one-third of the district paved with the type of pavement called for by the original plans. The pavement originally contracted for was a gravel base with a wearing surface of two-inch concrete asphalt. The war and the litigation detailed in the case of *Burke Construction Co.* v. *Bd. of Improvement of Paving District No. 20,* 161 Ark. 433, affecting this district, delayed the completion of the work, and it developed that the pavement was not suitable for the

city of Texarkana, as the water percolated through and under the gravel base, the gravel broke and raveled away, causing the wearing surface to fail because of the lack of support from the gravel base. Relief was needed, and this was sought to be afforded by the introduction and passage of an act in the General Assembly of 1923, which became Act 643. Special Acts 1923, p. 1574.

Section 1 of this act authorizes changes to be made in the plans theretofore adopted.

Section 2 requires that any change or alteration of the plans be filed with the city council of Texarkana, and that, when so filed, the assessors of the district must readjust and revise the assessment of benefits in accordance with the changed plans.

Section 3 authorizes the district to borrow money to the extent of the cost of the improvements.

Section 4 requires that a petition of the majority in value of the property owners must consent to the revised and readjusted assessments of benefits before the same shall become effective, if the revised assessments exceed twenty per cent. of the assessed value of the real property in the district for the year 1913.

Section 5 requires publication of notice of the meeting of the council to ascertain if a majority in value of the property owners have petitioned for the improvement, and provides a limitation of thirty days on the time for instituting suit to question the finding of the council.

Appellant is the owner of property in the district, and filed a bill in the chancery court questioning the validity of the assessments made against his own and the other property in the district. The ground of his attack is that the proposed amended plans were void because they were not sufficiently definite and certain to form the basis of an assessment and to advise the property owners of the improvement to be made.

The commissioners made the report to the council contemplated by act 643 of the Acts of 1923. This report named the streets to be paved, and gave the width of the proposed pavement, and, after doing so, concluded with

this statement: "The pavement to be put down on the streets above described will be brick, asphalt, or other suitable wearing surface, laid on a concrete base. On streets in the district not described above, and already improved, the defective places are to be relaid and streets put in condition, using materials suitable to the type of pavement already in place."

The report gave the estimated cost of the proposed improvement at $302,838.25.

After the coming in of this report the assessors made the revised assessment, and the property owners thereafter petitioned that the improvement be made.

A demurrer to appellant's complaint was filed and sustained, and this appeal raises the question whether the assessment of benefits is void on account of the indefiniteness of the plans.

Appellant insists that the entire assessment was void, and in support of his contention relies chiefly on the cases of *Nelson* v. *Nelson,* 154 Ark. 36, and *Mo. Pac. Rd. Co.* v. *Waterworks Imp. Dist.,* 134 Ark. 315.

The last mentioned case was one in which no plans for the proposed improvement—a waterworks system—had been prepared, and we held that the city council was without authority to appoint a board of assessors until the board of improvement had made definite plans and had ascertained the cost of the improvement according to the plans.

In the other case, that of *Nelson* v. *Nelson,* the ordinance creating the improvement district was held void because the petition therefor was so vague that it was impossible for the property owners in the district to determine from the petition the character of the improvement to be made. It was there said: "The property owner could not determine whether the improvement contemplated was both draining and grading, or whether it was simply draining without grading, or grading without draining; or whether it was simply by curbing without guttering, or guttering without curbing; or whether it was simply by paving; or, in other words, whether it

contemplated only one of the methods mentioned, or one or more, or all of them, combined; or by some other method, not mentioned, if the commissioners deemed such method to the best interest of the district."

In the case of *Kempner* v. *Sanders*, 155 Ark. 321, the case of *Nelson* v. *Nelson, supra,* was cited as authority for holding void the assessments there attacked. We declined to so hold, and, in reviewing and distinguishing the Nelson case, it was pointed out that, in the Nelson case, "the ordinance establishing the district left it entirely optional with the commissioners as to whether they would do draining or grading, or curbing or guttering, or simply paving. 'In other words, whether it contemplated only one of the methods mentioned, or one or more, or all of them combined, or, by some other method not mentioned, if the commissioners deemed such method to be the best interest of the district."

We think there was no such uncertainty or indefiniteness here as existed in the cases cited.

The defective places which had developed in the pavement were to be repaired with a suitable material, the character of which was not specified; but this was mere repair work. The new work was to be put down on the designated streets and was to be brick, asphalt, or other suitable wearing surface, to be laid on a concrete base. These plans and the petition of the property owners based thereon did leave the character of the surface to the determination of the commissioners; but this discretion did not materially affect the cost of the improvement, which was definitely stated.

We think these plans were not rendered void for uncertainty because this discretion was conferred on the commissioners, and the case is controlled by the doctrine of the case of *McDonnell* v. *Imp. Dist. No. 145, Little Rock,* 97 Ark. 334. There the petition specified that the improvement should be made "by grading, draining, construction of curbing and paving, and that the paving be done by construction of macadam, bitulithic, wooden blocks, brick, or asphaltum pavements, as the commissioners of

said district to be hereinafter appointed may select as being most substantial and economical for the benefit of the district, and that the curbing be built of such material as the commissioners hereinafter appointed may determine."

In holding that specification sufficient we said: "The statute, it will be observed, does not require a specification in the petitions of the kind of material to be used. All that is required is that the nature of the improvement be specified in general terms, so that the purpose of the organization may be set forth in the proceedings. Much must, of course, be left to the discretion of the commissioners in forming the plans for the improvement and making the estimates of the cost thereof. *Fitzgerald* v. *Walker,* 55 Ark. 148; *Boles* v. *Kelly,* 90 Ark. 37.

"The property owners may undoubtedly limit the powers of the commissioners in that respect by specifying with particularity the kind of material to be used and the cost of the improvement. *Watkins* v. *Griffith,* 59 Ark. 359. But when the petition of the property owners describes the character of the improvement only in general terms, or expressly leaves to the commissioners the decision as to what kind of material shall be used, the validity of the organization is not impaired thereby, and the commissioners may exercise the discretion thus left to them. Decisions in other States under different statutes are of no force here as precedents. The question must be determined in the light of the statutes on the subject."

The commissioners here were vested with a wide discretion, but it was not so wide as to constitute the roving commission to do as they please, which we have said, in cases cited and in other cases, could not be conferred. *Bd. of Imp.* v. *Brun,* 105 Ark. 65; *Baird* v. *Street Paving Imp. Dist. No. 1,* 148 Ark. 246.

We conclude therefore that the proposed plans were not so indefinite as to invalidate the assessment of benefits, and the demurrer was properly sustained. Decree affirmed.

LEE COUNTY NATIONAL BANK v. HUGHES.

Opinion delivered October 6, 1924.

1. TRIAL—ABSTRACT INSTRUCTION.—A cause will not be reversed because the trial court refused to submit an issue not raised by the allegations and proof.
2. LIMITATION OF ACTIONS—RECOVERY OF BAILMENT.—In bailments an action for the property does not accrue nor the statute of limitations begin to run until demand is made therefor and delivery is refused.

Appeal from Lee Circuit Court; *E. D. Robertson,* Judge; affirmed.

Daggett & Daggett, for appellant.

The bank was a gratuitous bailee, and was liable only for gross negligence. 140 Ark. 484; 103 Ark. 12. The court, in instruction No. 2 given on behalf of plaintiff, erroneously placed the burden of proof on defendant to explain the loss of the bonds, and made it the absolute legal duty of defendant to return the bonds or their value, regardless of the contract. 101 Ark. 75; 134 Ark. 76; 157 Ark. 167.

Mann & Mann, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Lee County to recover the value of $2,000 in government bonds alleged to have been purchased by appellant bank for appellee's testate, and not delivered to him or his executor when demand was made for same. The complaint, in substance, alleged that appellee was the executor of the estate of G. B. Daniels, deceased, who, prior to his death, deposited with appellant $15,000 to be invested in Liberty bonds; that thereafter appellant returned to appellee $13,000 in bonds, but refused to deliver the remaining $2,000, after demand had been made for same; that said bonds were of the value of $2,000, with accrued interest, and prayed judgment in said sum.

Appellant filed an answer denying the material allegations of the complaint, and, by way of further answer, alleged that on the 16th day of June, 1917, G. B.

Daniels deposited with it $10,000 to purchase for his account Liberty bonds of the first issue in said sum, which it purchased and delivered to him; that on the 9th day of November, 1917, G. B. Daniels deposited with appellant $5,000 to purchase for his account registered Liberty bonds, and that on the 17th day of April, 1918, it purchased and delivered said bonds to G. B. Daniels. Appellant also interposed the three-year statute of limitations as a bar to a recovery.

The cause was submitted to a jury upon the pleadings, the testimony introduced by the respective parties, and instructions of the court, which resulted in a verdict and judgment for $2,000 and interest against appellant, from which is this appeal.

The undisputed testimony shows that appellant purchased two lots of government bonds for G. B. Daniels, who placed them in a safety deposit box in the bank, one lot for $5,000 and one lot for $10,000; that the bank permitted this with the understanding that it would not be responsible to its customers in case the bonds were lost; that, on account of robberies of other banks, appellant notified its customers, including Daniels, to transfer the bonds to a compartment in the burglar-proof safe in the front part of the bank building; that this was done, and the bonds of all the customers were put in separate envelopes and placed in said compartment; that the $5,000 lot of bonds was returned.

The testimony was in conflict as to whether $2,000 of the $10,000 lot of bonds belonging to Daniels was contained in the envelope deposited in the burglar-proof safe, or, if so, whether they were thereafter obtained by Daniels or his executor before demand was made for the $10,000 lot of bonds. This conflict in the testimony was determined by the jury, under proper instructions, adversely to appellant.

Appellant contends for a reversal of the judgment, however, because the court sent the cause to the jury upon the sole issue of whether the $2,000 in bonds had been left in the custody of the bank, and, if so, whether

they had been returned to Daniels or his executor. This contention is based upon the theory that appellant bank received the bonds under an agreement not to be responsible for the loss, and, in any event, were deposited with appellant as a gratuitous bailee. It is argued that the case was submitted on a theory which ignored appellant's two defenses, viz: first, the agreement exempting the bank from liability, and secondly, in the absence of such an agreement, that the bank occupied the position of a gratuitous bailee and was liable only in the event of gross negligence in the care of the bonds. We do not think the two defenses referred to were embraced in the pleadings or testimony. There was no allegation or proof that the bonds were lost by robbery, fire, or other cause against which the bank is alleged to have contracted, or on account of which it was not liable as a gratuitous bailee. The allegations and proof presented the sole issue of whether the bonds were left in the custody of the bank and afterwards returned by the bank to Daniels or his executor. The theory upon which the case was submitted was correct, because responsive to the allegations and proof.

Appellant also contends for a reversal of the judgment on the ground that the action was barred by the three-year statute of limitations. The contention is based on the claim that the action accrued when it was first discovered that the bonds were not in the safe. In bailments an action for the property does not accrue until demand is made therefor and delivery is refused. This issue was submitted to the jury on a correct instruction if the three-year statute applied, which it is unnecessary to decide.

No error appearing, the judgment is affirmed.

DOVER v. STATE.

Opinion delivered October 6, 1924.

1. CRIMINAL LAW—WAIVER OF OBJECTION.—Error in not sustaining a demurrer to an indictment will be waived on appeal where no ruling of the trial court was asked or obtained.
2. CRIMINAL LAW—ARREST OF JUDGMENT.—Under the statute providing that a judgment in a criminal case can be arrested only on the ground that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, every material fact constituting the offense must be alleged in the indictment, but in determining this question the language used will be construed in favor of the validity of the indictment unless such interpretation is contrary to the plain and usual meaning of the words in this indictment.
3. BANKS AND BANKING—SUFFICIENCY OF INDICTMENT FOR RECEIVING DEPOSITS WHILE INSOLVENT.—An indictment of one as director of a certain bank which alleges that at a certain time and place, after having knowledge that this bank was insolvent, he did assent to the reception of a deposit in said bank, is not defective in failing to allege specifically that said bank was in fact a bank or engaged in the banking business.
4. BANKS AND BANKING—RECEIVING DEPOSITS WHILE INSOLVENT—LIABILITY.—Under Crawford & Moses' Dig., § 697, providing that it shall be a crime for any director of any bank, after having knowledge that it is insolvent, to assent to the reception of any deposits, a director of a bank is guilty where, knowing the bank to be insolvent, he assents to the reception of deposits, though he was not personally present in the bank when any particular deposit was made, and did not in any wise advise or consent to the cashier receiving such deposit.
5. BANKS AND BANKING—POWER OF LEGISLATURE TO DEFINE INSOLVENCY.—As the business of banking is affected by a public interest and subject to regulation, the Legislature is authorized to define what will constitute insolvency within the meaning of the act regulating banks.

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.

HART, J. Mark Dover prosecutes this appeal to reverse a judgment of conviction against him for the

crime of assenting to the reception of a deposit by a bank of which he was director, after having had knowledge of the fact that it was insolvent.

The first assignment of error is that the court erred in not sustaining a demurrer to the indictment. It does not appear from the record that a ruling of the court on the demurrer was asked or obtained, and, under the settled rules of practice of this court, the alleged error cannot be considered on appeal. *Kiernan* v. *Blackwell,* 27 Ark. 235; *Pratt* v. *Frazier,* 95 Ark. 405; and *Harbottle* v. *Central Coal & Coke Co.,* 134 Ark. 254. The defendant did, however, file a motion in arrest of judgment. Under our statute (Crawford & Moses' Dig., § 3224), a judgment can only be arrested on the ground that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. Under this statute every material fact constituting the offense must be alleged in the indictment; but in determining this question the language used will be construed in favor of the validity of the indictment unless such interpretation is contrary to the plain and usual meaning of the words of the indictment. *Loudermilk* v. *State,* 110 Ark. 549.

The body of the indictment is as follows: "The grand jury of Polk County, in the name and by the authority of the State of Arkansas, accuse Mark Dover of the crime of receiving deposits in an insolvent bank, committed as follows:

"The said Mark Dover, in the county and State aforesaid, on the 16th day of October, 1923, being then and there a director in the Bank of Hatfield, a corporation, did unlawfully, knowingly and feloniously permit, connive at and assent to the receipt on deposit in the said Bank of Hatfield, $40 in gold, silver and paper money, of the value of $40, from Boyd Coleman, the said Mark Dover then and there well knowing at the time that said Bank of Hatfield was insolvent and in a failing condition, against the peace and dignity of the State of Arkansas."

The indictment charges that Mark Dover, as a director in the Bank of Hatfield, a corporation, did, at a certain time and place, assent to the receipt of a deposit in said bank of $40 from Boyd Coleman, knowing at the time that the bank was insolvent.

The defendant was indicted under § 697 of Crawford & Moses' Digest. The section reads as follows: "It shall be a crime 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. And if any such officer, employee, member of firm or individual shall knowingly receive a deposit or cause a debt to be created, or assent thereto, or in any manner is accessory to such crime, he shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than one year."

Thus it will be seen that the language of the indictment contains a statement of the facts constituting the offense under the statute in ordinary and concise words and in such manner as to enable a person of common understanding to know what is intended. But it is insisted that the indictment does not charge that the Bank of Hatfield was in fact a bank or engaged in the banking business. We think that this fact is charged by necessary intendment from the language used in the indictment. The corporation of which the defendant was a director is called the Bank of Hatfield, and it is charged that the defendant assented to receiving a deposit of $40, knowing at the time that the Bank of Hatfield was insolvent. A bank is usually defined to be an association or corporation whose business it is to receive money on deposit, etc. 7 C. J., p. 473. Therefore we think the indictment meets the requirements of the law under a motion in arrest of judgment. See *Wilkins* v. *State,* 121 Ark. 219, and *Collman* v. *State,* 161 Ark. 351.

A reversal of the judgment is also urged because the evidence is not legally sufficient to support the verdict,

and because the court erred in giving certain instructions to the jury. Both of these alleged errors may be disposed of together, for the reason that they are based upon the same state of facts. The facts summarized make it clear that the Bank of Hatfield was a corporation engaged in the banking business in the town of Hatfield, Polk County, Arkansas; that the defendant, Mark Dover, was a director in the bank during the year 1923; that Boyd Coleman deposited $40 in the bank on the 16th day of October, 1923, and that the deposit was accepted by Roy Holder, the cashier of the bank; that the defendant, Mark Dover, was not present in the bank at the time; that the bank was insolvent at the time the deposit was received, and had been for some time prior thereto; that the bank suspended business on October 17, 1923, and the State Bank Commissioner took charge of it, and that several witnesses testified that the defendant had told them, some time before the deposit in question was received, that he knew the bank was insolvent.

It is the contention of counsel for the defendant that the instructions complained of are erroneous, and the facts relied upon for a conviction are insufficient in law, because the defendant did not receive the deposit, was not personally present in the bank when it was made, and did not in any wise advise or consent to the cashier's receiving the particular deposit in question.

We have copied above the section of the statute under which the defendant was indicted and convicted. It provides that it shall be a crime for any director of any bank, after knowledge that it is insolvent, to assent to the reception of any deposit. The purpose of this statute is to protect the depositors in a bank by punishing its officers for assenting to the receiving of deposits when the bank is insolvent. By necessary implication, it makes it the duty of the directors to refrain from receiving deposits or assenting to their receipt when they know that the bank is insolvent. It is the duty of the directors to give personal supervision to the affairs of the bank, and its solvency or insolvency should be a matter peculiarly within their knowledge. On the other hand, depositors

have no means of accurately informing themselves on the subject. It is a matter of common knowledge that bank deposits are made upon a wholly different reliance as to security than in the loan of money. Generally when money is lent, security is expected and demanded. Money is deposited in a bank because of confidence in its solvency and ability to repay because it is a bank. The business of a bank is not confined to the property owned by the bank, but includes and involves all deposits and other property passing through its hands or intrusted to its keeping. While the bank continues in business, it holds out to the public the assurance of its solvency and ability to meet its obligations. To construe the statute as applicable only to the agent of the bank who actually receives the deposit, or connives at the receipt of it, would have the practical effect of nullifying the statute. If the directors, knowing the bank to be insolvent, could make use of the teller to receive the deposit for the bank, and escape civil and criminal liability because they had nothing to do with the actual receipt of the deposit or connived at its receipt, then the statute might as well not have been passed. They could leave the receipt of deposits wholly in the hands of a teller, and, by keeping him in ignorance of the insolvency of the bank, they all could escape responsibility under the statute.

The reasonable construction is that, when the receiving teller of a bank accepts a deposit for it, it is an act performed for the bank on the authority of the directors. Statutes imposing criminal liability on officers of insolvent banks, who receive or assent to the receipt of deposits, have been generally sustained. The reason is that the right to engage in banking may be regulated by legislation, and the business must be carried on in strict accordance with such statutes. This view of similar statutes is sustained by the following authorities: *State* v. *Mitchell*, 96 Miss. 259, 51 So. 4, Ann. Cas. 1912B 309; *State* v. *Eifert* (Iowa), 38 L. R. A. 485; *Baker* v. *State*, 54 Wis. 376; 12 N. W. 12; *Carr* v. *State* (Ala.), 16 So. 150; *State* v. *Caldwell* (Iowa), 44 N. W. 700; *State*

v. *Sattley* (Mo.), 33 S. W. 41; and *McClure* v. *People* (Colo.), 61 Pac. 612. The constitutionality of the statute in question has been upheld by this court in *Collman* v. *State,* 161 Ark. 351 and cases cited.

In the present case it clearly appears that the bank was insolvent at the time the deposit in question was made. Several witnesses testified that the defendant, a short time before the bank closed its doors and before the deposit in question was made, stated to them that he knew that the bank was insolvent. As we have just seen, the mere fact that he was not personally present when the deposit was received by the cashier did not relieve him from responsibility under the statute. The gist of the offense was in the defendant's assenting to the receipt of a deposit, knowing that the bank was then insolvent. If he intended to relieve himself of responsibility under the statute, he should have protested against the receipt of any deposits by the bank after he knew that it was insolvent.

It is true that there is testimony in the record tending to show that a former officer of the bank caused its insolvency, and that the defendant became a director of the bank for the purpose of protecting the interests that he and his business associates had in the bank, and was trying to work out a method of relieving the stockholders of its financial difficulties. These facts, however, did not relieve the defendant from criminal liability under the statute, but such testimony was proper to go to the jury to be considered by it in mitigation of his punishment.

Section 717 of Crawford & Moses' Digest provides that a bank shall be deemed insolvent within the meaning of the act upon the existence of certain stated facts. No objection can be made to the validity of this section of the statute. As we have already seen, the gist of the offense was in receiving the money on deposit, with the knowledge on the part of the defendant that the bank was insolvent, and the proviso of the statute as to what constitutes insolvency is merely a rule of evidence.

There is some conflict in the authorities as to whether the closing of the doors of a bank by a State Bank Commissioner, just after the receipt of a deposit, could be made *prima facie* evidence by the statute not alone of the insolvency of the bank at the time the money was received, but of the knowledge of the officers of the bank of that fact. *State* v. *Buck,* 120 Mo. 479, and cases cited; *Meadowcroft* v. *People* (Ill.), 35 L. R. A. 176, and cases cited; and *People* v. *Cannon,* 139 N. Y. 32. We need not decide this question, however, for it is plain from reading these cases and the opposing authorities that the general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. All of the authorities agree that, in statutes of this sort, the Legislature might have the power to define what would constitute insolvency under the banking law. The business of a banker is affected by a public interest, and therefore subject to public regulation. As a part of the regulatory act, the Legislature would have the undoubted power to define what would constitute insolvency within the meaning of the act. The definition by statute would inure, not only to the benefit of the general public doing business with banks, but also to the banks themselves.

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

JORDAN v. STATE.

Opinion delivered September 29, 1924.

1. WITNESSES—IMPEACHMENT ON CROSS-EXAMINATION.—While the accused could not be asked on his cross-examination about a mere accusation or an indictment, he could be asked whether he had committed a similar offense or had been convicted of it.
2. RAPE—EXCLUSION OF TESTIMONY AS TO CONDUCT OF PROSECUTRIX.—Where there was no issue in a prosecution for assault with intent to rape, as to the prosecutrix having consented to sexual intercourse, it was not error to exclude testimony tending to show that she had taken improper liberties with other young men.

3. CRIMINAL LAW—INVITED ERROR.—Where defendant undertook to prove that he was being persecuted, and that there was an attempt to blackmail him, it was not error to permit the State to contradict such testimony in rebuttal.

4. CRIMINAL LAW—ORDER OF INTRODUCTION OF TESTIMONY.—It rests within the sound discretion of the trial courts to permit testimony to be adduced out of time, and the exercise of that discretion will not be disturbed unless an abuse is shown.

Appeal from Pope Circuit Court; *J. T. Bullock*, Judge; affirmed.

Hays, Priddy & Hays, for appellant.

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

SMITH, J. Appellant was convicted of an assault with the intent to commit rape, alleged to have been committed upon the person of Neulion Spann. He denied having made the assault, and, while the testimony upon this issue is in sharp and irreconcilable conflict, it is conceded that the testimony is legally sufficient to support the verdict.

Error is assigned in the admission and in the exclusion of certain testimony and in giving an instruction numbered 7, over appellant's objection.

It is insisted that the court erred in permitting the prosecuting attorney to interrogate appellant on his cross-examination. This testimony related to a prior assault upon another female, and it is insisted that the effect of this cross-examination was to show that appellant had been indicted for a similar offense and accused of another of like nature.

It appears, however, that the judge had before him at the time this question arose the opinion of this court in the recent case of *Parnell* v. *State*, 163 Ark. 316, to which he referred and to which his ruling conformed, and this was that appellant could not be asked on his cross-examination about a mere accusation or an indictment, but that he could be asked if he had committed the offense or had been convicted of it.

The court excluded testimony tending to show that Miss Spann had fondled certain young men, yet gave

instruction numbered 7, reading as follows: "Gentlemen of the jury, you are instructed that you may take into consideration any acts of Neulion Spann tending to lewdness, if any such acts are shown by the testimony, and also the general reputation of the said Neulion Spann for chastity; this evidence is to be considered by you for the purpose of determining whether the said Neulion Spann did or did not consent to the alleged attempt of the defendant to have intercourse with her."

The court properly excluded this testimony, as there was no issue in the case of consent. *Maxey* v. *State,* 66 Ark. 523. Having excluded this testimony, instruction numbered 7 should not have been given, as it was abstract; but we do not think it was prejudicial, for the reason, as we have stated, that no contention was made that Miss Spann had consented. In the case of *Brust* v. *State,* 153 Ark. 348, we quoted from the case of *Lockett* v. *State,* 136 Ark. 473, as follows: "'Now, it was competent, of course, to impeach the credibility of the prosecuting witness on cross-examination by interrogating her concerning particular instances of immorality on her part, but appellant was bound by her answers on that subject, and could not introduce witnesses to contradict her. *McAlister* v. *State,* 99 Ark. 604.'"

It is next insisted that the court erred in permitting the State to interrogate W. M. Burnett in regard to a difficulty between appellant and Miss Spann's father, which occurred at appellant's home about a month after the commission of the alleged assault, and the day before appellant was arrested on that charge. Appellant had closed his case when this witness was called, and it is insisted (a) that the testimony was incompetent for any purpose, and (b) that, if competent at all, it was not proper as rebuttal.

We do not think either objection is well taken. It was the theory of the defense that the prosecution was a "frame-up," designed to extort money from appellant, and that it culminated when appellant insisted that the father of Miss Spann pay him a debt secured by a mort-

gage on certain live stock, and his refusal to release this mortgage. A fight occurred at the time and place mentioned, the circumstances of which were detailed by appellant as a witness, and, according to his version, Mr. Spann was the aggressor. According to the testimony of Burnett, appellant was the aggressor in this difficulty, and we think no error was committed in permitting him to so testify. Appellant had attempted to show that he was being persecuted, and that there was an attempt to blackmail him, and, having offered testimony to establish that defense, there was no error in permitting the State to rebut it. Moreover, it rests within the sound discretion of trial courts to permit testimony to be adduced out of time, and the exercise of that discretion will not be disturbed unless an abuse is shown, and there appears to have been no abuse of this discretion here. *Wells* v. *State,* 151 Ark. 221.

No error appearing, the judgment is affirmed.

REEVES v. REEVES.

Opinion delivered October 6, 1924.

TRUSTS—RESULTING TRUST—CREATED HOW.—In order to constitute a resulting trust, the purchase money or a specified part of it must be paid by another, or secured by another at the same time or previously to the purchase, and must be a part of that transaction.

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

STATEMENT OF FACTS.

Appellees brought this suit in equity against appellant to settle the title to two tracts of land and to have partition of the same.

Appellees, A. J. Reeves and Rosie Haller, and appellant, John Reeves, are the children and sole heirs at law of J. L. Reeves, who died intestate many years ago, owning 90.78 acres of land in the Northern District of Ark-

ansas County, Arkansas. The land was his homestead, and his widow and three minor children continued to reside thereon after his death. In the year 1904 his widow, Martha H. Reeves, exchanged the timber on the homestead for forty acres of land adjoining it. The title to the forty-acre tract was taken in the name of Martha H. Reeves; but it was understood that it was to become a part of the estate of J. L. Reeves, and to go to his children after the death of his widow. In other words, it was understood that the forty-acre tract should become a part of the homestead and go to the children after the death of their mother. There were three children, and the object of buying the forty acres was to enlarge the bounds of the homestead so that each child should get about forty acres of land after the death of their mother.

At the time the depositions were taken in this case in 1922, A. J. Reeves was forty-six, Rosie Haller forty-four, and John Reeves was forty years of age. In 1913 Martha H. Reeves conveyed the forty-acre tract to John Reeves, and he has been in possession of it ever since.

It is the contention of appellees that the forty-acre tract was conveyed to John Reeves as his share of the land belonging to his father's estate, and that he had accepted it.

Appellant John Reeves denies this to be the fact, and claims his share in the homestead owned by his father at his death.

The testimony on this point will be stated more at length in the discussion of this branch of the case in the opinion.

After hearing the testimony, the chancellor found that, in the year 1904, Martha H. Reeves, the widow of J. L. Reeves, deceased, with the consent of her children, exchanged the timber on the homestead for forty acres of land adjoining it; that the purpose of the exchange was to provide about forty acres of land for each of her three children at the date of her death; that, in 1913, the mother conveyed the forty-acre tract to John Reeves as

his share of the land owned by his father, and that he went into possession of said forty-acre tract, and has been in possession of it ever since; that A. J. Reeves and Rosie Haller are entitled to have the land which comprised the homestead at the date of the death of their father as their share of his estate, and that John Reeves is entitled to the forty-acre tract as his share of said estate.

A decree was entered in accordance with the finding of the chancellor, and John Reeves has duly prosecuted an appeal to this court.

M. F. Elms, for appellant.

The removal and conveyance by Martha H. Reeves of the timber and timber rights on the homestead tract of land, did not constitute her a trustee for the heirs of J. L. Reeves in the purchase of the additional tract; but, if appellees suffered any depreciation in their estate by reason of this transaction, their remedy would be by an action for damages against the estate of Martha H. Reeves for waste committed by removing the timber or making sale of same. 27 R. C. L. 1047, 1050; 95 Ark. 246; 85 Ark. 208. The deed to Martha H. Reeves, and from her to appellant, were both absolute in form. 110 Ark. 389. Appellant's possession and exercise of ownership of this tract of land have been entirely inconsistent with any trust relation. Even if a trust relation ever existed, it was repudiated, and appellees are barred by his adverse possession. 110 Ark. 389; 101 Ark. 230; 103 Ark. 58. It is settled that one co-tenant may hold adversely to the others. 99 Ark. 446; *Id.,* 84; 1 R. C. L. 741, 742.

John L. Ingram, for appellees.

The testimony shows a general agreement and understanding among the parties interested, the widow and the heirs at law, that the timber on the homestead was traded for the forty-acre tract, in order to carry out the desire of the mother that the children should have forty acres each. Hers was a life estate only in the homestead, and she could not dispose of it without the con-

sent of the children. 73 Ark. 329; 92 Ark. 261; 63 Ark. 10. Such being the agreement as shown by the testimony, appellant, in accepting a deed to the forty-acre tract, took it as his share of the land.

HART, J., (After stating the facts). In order to constitute a resulting trust, the purchase money or a specified part of it must be paid by another, or secured by another at the same time, or previously to the purchase, and must be a part of that transaction. In short, the trust must arise by virtue of the purchase and not afterwards. *Pumphrey* v. *Furlow,* 144 Ark. 219, and *Brownfield* v. *Bookout,* 147 Ark. 555.

Martha H. Reeves died in 1921, and the complaint in this suit was filed in 1922. A written contract was made on the 23d day of May, 1904, whereby Martha H. Reeves agreed to convey the timber on the homestead which her husband owned at the date of his death, to W. B. Bynum in exchange for forty acres of land owned by him. On the back of the contract appears the signatures of A. J. Reeves and John Reeves, with a notation that they agreed to the contract.

A. J. Reeves and Rosie Haller, his sister, both testified that the timber on the homestead was exchanged by their mother for the forty-acre tract with the consent of all her children, and that the title to the forty-acre tract was taken in the name of the mother; but that it was understood that the forty-acre tract was to become a part of the homestead and go to all three of the children in equal parts after the death of their mother. John Reeves does not contradict this part of their testimony.

The growing trees or timber on the homestead constituted a part of the realty, and the heirs at law of J. L. Reeves, deceased, were necessary parties to a valid conveyance thereof. *Chicago Land & Timber Co.* v. *Dorris,* 139 Ark. 333.

The children and heirs at law of J. L. Reeves, deceased, were parties to the contract, and although, by agreement, the title was taken in the name of the mother, there was a resulting trust in their favor, because the

purchase money was paid by them. It was understood that Martha H. Reeves was exchanging the timber on the homestead for the forty acres of land, and that the forty acres would belong to her husband's estate at her death. In August, 1913, she conveyed the forty acres of land to John Reeves, who took possession of it and has remained in possession of it ever since.

According to the testimony of A. J. Reeves, his mother died at his house on the 2d day of November, 1921. She was eighty-six years of age, and had been partially paralyzed for five or six years. Some time in the month of May preceding her death, she had divided her personal property between her three children, at his house. John Reeves was present. At that time Martha H. Reeves could hardly talk on account of being partially paralyzed. Ed Stokes, who was present and assisting them in the division of the personal property, said to John Reeves: "Isn't it a fact that your mother deeded you the forty-acre tract as your part of the estate?" John nodded his head that she did. He testified further that his mother could not say anything, but nodded her head to give them to understand that she intended for John to have this forty-acre tract as his part of the land.

According to the testimony of Ed Stokes, he was present to assist Mrs. Reeves in the division of her personal property. She first wanted her debts and funeral expenses paid out of her own money in the bank, and the balance to be divided equally among her three children. She did not want any disputes over her personal property. She stated to witness that her husband had died a good many years ago, leaving a fractional eighty acres of land; that she and her children had sold the growing timber on the homestead for forty acres of land; that it was the intention of herself and of all her children that this additional forty acres would give each one of the three children forty acres of land after her death. She further stated that the title to this additional forty acres was vested in her and later conveyed by her to John Reeves. She stated in effect that the conveyance to

John Reeves was accepted by him as his part of the estate; and that John Reeves was present when this conversation was had.

According to the testimony of John Reeves, the forty acres in question were not conveyed to him as his part of the estate, and the conveyance was not so accepted by him. His mother had given to A. J. Reeves and to Rosie Haller other tracts of land, and the forty acres was conveyed to him so that his share might be equal to what had been given them.

They denied this, however. Rosie Haller admitted that she had an additional tract of land, but testified that she had purchased it with her own means, and that her mother had nothing to do with the purchase whatever. A. J. Reeves admitted that his mother had donated a tract of land for him and had paid $10 of the donation fee. He stated, however, that the donation was in the name of his mother, because at the time he was only twenty years of age, and on that account he could not take the donation certificate in his own name. He performed the necessary work and did everything in order to perfect his title and to receive the donation deed.

The chancellor found all the issues of fact in favor of the appellees, and a careful consideration of the evidence in the record leads us to the conclusion that the finding of the chancellor is not contrary to the weight of the evidence. The chancellor expressly found that John Reeves accepted a deed to the forty-acre tract as his part of his father's estate, and that the other two children were entitled to the homestead, which comprised about ninety acres. Under the settled rules of practice in this State, the finding of the chancellor on this point, not being against the weight of the evidence, must be affirmed on appeal.

Again, it is insisted by counsel for appellant that the house on the homestead burned down, and that John Reeves rebuilt it, and also paid the taxes on the homestead and cleared a part of it. Therefore they insist that he is entitled to a lien on the homestead for the amount so expended by him.

On this branch of the case the testimony shows that John Reeves resided on the homestead during all of this time with his mother as a member of her family. It was the duty of the life tenant to pay the taxes. The rents were sufficient for this purpose, and also for the purpose of rebuilding the homestead when it burned down. The new home consisted of three rooms, and it only cost about $125 to build it. While the tax receipts were taken in the name of John Reeves, as above stated, he resided with his mother as a member of the family, and, according to the testimony of A. J. Reeves, the rents on the land were more than sufficient to support his mother in the style in which she lived, and to rebuild the homestead and pay the taxes and make the necessary repairs on the homestead. In fact, he testified that his mother furnished the money to pay for the new home.

It follows that the decree will be affirmed.

STARR v. STATE.

Opinion delivered October 13, 1924.

1. POISONS—POSSESSION OF NARCOTICS—INDICTMENT.—An indictment charging that the accused on a certain day "unlawfully and feloniously did have morphine in her possession" *held* sufficient under Acts 1923, p. 177, without negativing the exceptions contained in the proviso of that act.
2. POISONS—POSSESSION OF NARCOTICS.—Under Acts 1923, p. 177, making it unlawful for any person "to have in his possession or to sell, barter, exchange or give away any opium, morphine," etc., the mere possession of the narcotics mentioned, with the exceptions mentioned, was made unlawful, although the possession was not for the purpose of sale, barter or exchange.
3. POISONS—POSSESSION OF NARCOTICS—EVIDENCE.—While it was competent, on indictment of defendant for having morphine in her possession, to show that she also had a quantity of cocaine in her possession for the purpose of showing for what purpose she had the morphine, it was error in admitting such testimony to tell the jury that her possession of cocaine was admitted "for the purpose of showing that she had narcotics in her possession."

4. POISONS—POSSESSION OF NARCOTICS—INSTRUCTION.—Where, in a prosecution for having morphine in her possession, defendant was shown to have had cocaine in her possession it was error to refuse an instruction that she could not be convicted of having cocaine in her possession.

5. POISONS—POSSESSION OF MORPHINE—INSTRUCTION.—In a prosecution for having morphine, an instruction to convict if defendant unlawfully and feloniously did have morphine in her possession was in conflict with other instructions telling the jury that defendant was not guilty if she merely purchased and kept the morphine for her own use under a prescription of a physician, and was erroneous.

Appeal from Sebastian Circuit Court, Fort Smith District; *John E. Tatum*, Judge; reversed.

G. L. Grant, for appellant.

The indictment is demurrable: (1) Because the purpose of the act was to prevent the barter, sale or giving away of the drug named. It does not prohibit the possession of the narcotic. Possession, to be unlawful, must be for sale. 133 Ark. 491; 150 Ark. 486; 68 Ark. 251; 111 Ark. 214; 136 Ark. 46; 143 Ark. 593. (2) Because it does not negative the instances set forth in the statute by which the appellant might possess narcotics. 37 Ark. 409; 38 Ark. 563. The statement of the prosecuting attorney "that she was in the habit of selling dope" was erroneous and prejudicial because there was no evidence on which to base it. 70 Ark. 305; 58 Ark. 473; 72 Ark. 461; 71 Ark. 415; 58 Ark. 353; 72 Ark. 138; 143 Ark. 523; 151 Ark. 515. The court erred in instructing the jury that, if defendant was in possession of morphine, she was guilty, since the instruction ignores the defense. 154 Ark. 608.

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

An act must be read in its entirety to extract its meaning. 156 Ark. 169; 133 Ark. 1. A departure from the language of the statute on the part of the court is in effect an assumption of legislative power. 151 Ark. 519; 11 Ark. 44; 151 Ark. 428. Unless the exceptions to the act prohibited are set out in the enacting clause of the statute, it is not necessary to negative them in the

indictment. 77 Ark. 321; 90 Ark. 344; 155 Ark. 16. In his opening statement counsel is allowed great latitude. 101 Ark. 51; 34 Ark. 649; 94 Ark. 558; 157 Ark. 283. The first part of the testimony objected to by appellant was competent to explain the reason for the officers being at her house. 155 Ark. 443. If it tends to prove the issue, it is admissible. 14 Ark. 555; 161 Ark. 263. Evidence that she possessed cocaine was admissible for what it was worth. 129 Ark. 106; 146 Ark. 77. Evidence as to the associates of appellant was admissible. 104 Ark. 162; 53 Ark. 387. Before appellant may be heard to complain of an incorrect instruction she must request a correct one. 150 Ark. 299; 157 Ark. 51; 125 Ark. 263. Instructions on the same point need not be multiplied. 156 Ark. 459.

McCULLOCH, C. J. Appellant was convicted, under an indictment charging her with having in her possession a certain quantity of morphine, in violation of the statute, which reads as follows:

"It shall be unlawful for any person, firm or corporation to have in his or its possession, or to sell, barter, exchange or give away any opium, morphine, codine, heroin, laudanum, cocaine, cannabis indica, or other potent narcotic drug, or any derivative, preparation, or compound thereof. Nothing in this section shall apply: (a) To the possession, prescribing, dispensing or administration of any of the aforesaid drugs to a patient by a licensed physician, dentist, or veterinary surgeon in the course of his professional practice only; and to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend. (b) To the possession, sale, dispensing or distribution of any of the aforesaid drugs by a registered pharmacist to a customer, under and in pursuance of a written prescription issued by a licensed physician, dentist or veterinary surgeon." Acts 1923, p. 177.

The indictment charges, in the language of the statute, that the accused, on a certain day, "unlawfully and feloniously did have morphine in her possession." There

was a demurrer to the indictment, which the court overruled, and it is now insisted that the indictment was defective in that it failed to state the purpose for which the accused had the morphine in her possession. There are exceptions in the statute, but it is not necessary to negative these exceptions, for they are contained in the proviso and not in the enacting portion of the statute, and can only be brought into the case as a matter of defense. *Richardson* v. *State,* 77 Ark. 321.

It is also argued that, under a proper interpretation of the language of the statute, it does not make it unlawful for a person to have morphine or other narcotics in possession, unless the possession be for the purpose of sale, barter or exchange. We cannot agree with counsel in this contention, for the word "possession" is connected disjunctively by the word "or" with the words "to sell, barter, exchange or give away," therefore it was the clear design of the lawmakers to make it unlawful to have narcotics in possession for any purpose except for those mentioned in the proviso. The exceptions extend only to physicians, dentists or veterinary surgeons in prescribing, dispensing or administering the prohibited drugs, and to the patient "upon whom such physician, dentist or veterinary surgeon shall personally attend." The exceptions also extend to the possession or sale of narcotics by a registered pharmacist to a customer on a written prescription from a licensed physician, dentist or veterinary surgeon. It is therefore unlawful for a person to have any of the narcotics mentioned in the statute in his or her possession for any purpose other than those mentioned in the proviso of the statute. We are of the opinion that the indictment was sufficient.

Appellant admitted that she had three grains of morphine in her possession, but defended on the ground that she procured the drug from a certain druggist in Fort Smith on the prescription of a physician. She testified that she so obtained the morphine, and that she kept it solely for her own use. She produced a prescription, and

proved by the druggist that he had sold it to her under that prescription.

On the other hand, the proof adduced by the State tended to show that appellant was what is ordinarily termed a "dope peddler," and that she had in her possession the morphine and also a lot of cocaine for the purpose of selling and administering it. The State also adduced testimony tending to show that appellant had in her possession, and carried around with her, a spoon and a hypodermic syringe for use in administering morphine to those who habitually used it and were willing to pay for it. There was evidence which justified the finding of the jury that appellant kept the drugs for the purpose of sale, or at least for the purpose of administering same to other persons. This brought the facts of the case within the terms of the statute, and warranted a conviction. On the other hand, we think there was enough testimony to justify a submission to the jury of the question whether or not appellant obtained the morphine on a prescription from a licensed physician and that she kept it for her own personal use, which would have been a defense to the charge if the jury found those to be the facts.

The State was permitted to prove, over the objection of appellant's counsel, that the officers found, behind a trunk in appellant's room, a package containing ten grains of cocaine. We are of the opinion that this testimony was competent for the consideration of the jury in determining the purpose for which appellant had the morphine in her possession—whether for personal use or for other purposes. Possession of a quantity of cocaine at the same time has some tendency to show what the purpose was in having the morphine in her possession. *Springer* v. *State,* 129 Ark. 106; *Marsh* v. *State,* 146 Ark. 77.

It was also competent to prove the conduct of appellant and other persons in the house, and also the possession by appellant of the spoon and hypodermic syringe which she carried around with her, for the consideration

of the jury in determining what the purpose was in having the morphine in her possession. There was no error in the court's ruling in admitting this testimony.

In admitting the testimony about appellant's possession of the cocaine, the court made this statement: "The court states she cannot be tried under this indictment for possessing cocaine, but it will be admitted for the purpose of showing she had narcotics in her possession." When the court charged the jury, appellant requested the following, among other instructions, which was refused:

"No. 7. You are instructed that the indictment does not charge the defendant with unlawfully possessing cocaine. Therefore you cannot convict her of the offense of possessing cocaine, even though you find from the evidence that cocaine was in her possession."

The testimony concerning the finding of the cocaine in appellant's possession was, as before stated, admissible, but the court was not accurate in stating to the jury the purpose for which it was admitted, for it was admitted, not to show that appellant had narcotics in her possession, but to show what her purpose was in having it in her possession—whether for her own use or otherwise. The explanation of the court was calculated to confuse the jury in determining what effect to give to this testimony if they found, as they might have found, that the cocaine belonged to appellant and was in her possession. The court should have given the requested instruction of appellant telling the jury emphatically and unequivocally that she could not be convicted of having cocaine in her possession. We think the court erred therefore in not giving the correct explanation to the jury of the purpose for which they might consider this testimony, also in refusing to give the requested instruction.

It is also contended that the court erred in its first instruction to the jury, which reads as follows:

"The court instructs the jury: If you believe from the evidence beyond a reasonable doubt that the defendant, Lucile Starr, in the Fort Smith District of Sebastian

County, and within three years next before bringing the suit, unlawfully and feloniously did have morphine in her possession, you should convict the defendant; otherwise you should acquit her."

It will be noted that this instruction makes the guilt of appellant depend entirely upon having morphine in her possession, and it excludes altogether the exceptions contained in the statute, which the jury might have found to exist; that is to say, that appellant had the morphine for her own use, and that she had obtained it under a prescription from a licensed physician. It is true the court gave other instructions requested by appellant, telling the jury that appellant was not guilty of the offense if she merely purchased and kept the morphine for her own use under a prescription of a physician, but these instructions were not in any way connected up so as to explain instruction No. 1 and harmonize them. In other words, the instructions were conflicting and calculated to mislead the jury.

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

DISSENTING OPINION.

HUMPHREYS, J. I dissent from the conclusion reached by the majority because the instructions are in perfect harmony when read together. The first instruction makes the guilt of defendant depend upon whether she had morphine in her possession, and the others give her the benefit of the exceptions contained in the statute.

Her proof did not show that she obtained the prescription from a licensed physician.

For these reasons, in my opinion, the judgment should have been affirmed.

DAVISON v. HARRIS.

Opinion delivered October 13, 1924.

EVIDENCE—RES INTER ALIOS ACTA.—In an action for the price of coal delivered, where the defense was that the coal was sold at prices to be determined from time to time according to the market, and that defendant had notified plaintiffs of a reduction in price, evidence that plaintiffs bought some of the coal from a third person to supply defendant at a price which exceeded the reduced price offered by defendant and that defendant had likewise bought coal from such person, for which he had never paid, was incompetent and prejudicial.

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

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

The court erred in admitting the testimony of C. R. Harris and Mr. McCoy as to the purchase of coal from Kregger & Brannon. The testimony was incompetent, irrelevant and prejudicial. 140 Ark. 408; 67 Ark. 112. When incompetent evidence is introduced, prejudice is presumed, and the burden is upon the party introducing it to show no prejudice resulted. 77 Ark. 431; 89 Ark. 556; 105 Ark. 205. Incompetent evidence tending to strengthen a case is necessarily prejudicial. 108 Ark. 387.

Geo. W. Johnson, for appellee.

McCULLOCH, C. J. This is an action instituted by appellees against appellant to recover a balance of $1,757.23, alleged to be due on the price of coal sold under contract in carload lots by appellees to appellant. Appellant pleaded full payment of the price of the coal as per contract, and also pleaded accord and satisfaction. A trial of the cause resulted in a verdict in favor of appellees for the recovery of $850, and an appeal has been prosecuted from the judgment.

Appellees alleged in their complaint, and proved at the trial, that appellant entered into an oral contract with them whereby he agreed to purchase all of the output of a coal mine by appellees near Midland, Arkansas, at the price of $4.50 per ton f. o. b. cars at the mine, "until

notified by the defendant to stop the mining of coal." This contract was entered into, according to the testimony, on August 25, 1922, and appellees furnished coal under the contract from time to time from that date until October 11, 1922, after which date no further deliveries were made. This action is to recover the price of coal delivered at $4.50 per ton.

Appellant claims that he contracted for the coal at prices to be determined from time to time according to the market, and that he notified appellees by letter dated September 1, 1922, that the price thereafter would be $3.75 per ton. The controversy relates to the amount to be paid after the date of this letter, but appellees contend, and attempted to prove by their testimony, that they did not receive this letter, nor did they receive any other notice of the reduction in the price of coal until after the delivery of the cars in controversy.

Testimony adduced by appellant tended to establish the fact that, when the controversy finally arose, a check was tendered to appellees in full settlement, according to the contention of appellees, concerning the price, and that the check was accepted by appellees in full settlement.

Appellees were permitted to prove by the testimony of one of them, over the objection of appellant, that several of the cars of coal delivered to appellant were purchased by appellees from Kregger & Brannon, the operators of an adjacent mine, and also were permitted to prove, over appellant's objection, that they paid Kregger & Brannon $4.25 per ton for this coal. Appellees were also permitted to prove, over appellant's objection, by Ed McCoy, the bookkeeper for Kregger & Brannon, that the latter concern had also sold several cars of coal to appellant and had had trouble in getting a settlement; that, in fact, they had never been able to obtain settlement from appellant. Exceptions were duly saved to each of these rulings, and they are now assigned as error.

We are of the opinion that the court erred in admitting this testimony, for it related entirely to transac-

tions between parties other than appellant. These transactions had no relation whatever to the transactions between appellees and appellant, and, for that reason, the testimony was incompetent. *Hamburg Bank* v. *George,* 92 Ark. 472.

The error was prejudicial, for the controversy related solely to the price of the coal, and the jury may have been influenced by the fact that appellees paid more for coal delivered than appellant claimed was the reduced price according to the notice alleged to have been mailed to appellees. The fact that the jury allowed appellees only one-half of their claim indicates that they may have been influenced by evidence which induced them to allow more than the price claimed by appellant and less than the price claimed by appellees.

Counsel for appellees contend that the error was invited by testimony elicited by the latter's counsel in the cross-examination of one of the appellees, drawing out the fact that appellees had sold some of the coal from their mine to another party and had purchased coal from Kregger & Brannon to deliver in lieu of that sold to another party. We fail to find any such matter in the cross-examination, but, even if it so appeared, it did not invite an inquiry into the price paid by appellees to another party for the coal delivered. We find in the cross-examination some inquiry concerning a controversy about a carload of coal sold to one Caudle, and it was entirely proper and competent for appellant to inquire of the witness concerning their failure to furnish all of the output of the mine, and this did not constitute an invitation to appellees to go into the question of prices paid to other persons, nor did it justify appellees in proving by witness McCoy the difficulties of Kregger & Brannon in obtaining settlement from appellees for the coal they had sold to them. These errors call for a reversal of the judgment.

It is also contended that the evidence is not sufficient to sustain the verdict, but, inasmuch as there is to be another trial of the case, and the testimony may be dif-

ferent, we will not determine at this time the question of the sufficiency of the evidence.

There are other assignments of error with respect to the court's charge, but it is unnecessary to determine those questions at this time, as they are not vital, and the instructions may not be the same on another trial.

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

WACASTER v. HOT SPRINGS.

Opinion delivered October 13, 1924.

1. STATUTES—SPECIAL STATUTE—PUBLICATION OF NOTICE.—Although a proof of publication of notice of an intention to apply for a special act, which is attached to the original bill and is on file with such bill in the office of the Secretary of State, fails to show compliance with Const. 1874, art. 5, § 26, in regard to giving 30 days' notice of such intention, such proof of publication is not properly a part of the bill nor a record of which the courts may take judicial notice.
2. STATUTES—SPECIAL STATUTE—PRESUMPTION.—The passage of a special act is conclusive of the fact that due notice was given of the intention to apply for its passage, unless the contrary is shown by some record of which the courts take judicial notice.

Appeal from Garland Chancery Court; *J. P. Henderson,* Chancellor; affirmed.

R. G. Davies, for appellant.

Courts will take judicial notice of the original bill, its indorsements, and all rolls, records, etc., which have been properly signed and deposited with the Secretary of State. See C. & M. Dig., § 4121. The Constitution, art. 5, § 26, requires evidence of publication of notice to be exhibited in the General Assembly before the passage of the act. If the record is silent, there is of course a presumption of its having been exhibited, but, if the record shows plainly that the notice was not published for thirty days before the act was introduced, it should he held void. 132 Ark. 240. The court will not look

beyond the records, etc., of the General Assembly in determining whether an act has been properly passed. 139 Ark. 595. If the errors appear on the engrossed bill, they will be considered. 216 S. W. 31. Judicial notice of the record will be taken. 216 S. W. 500; 218 S. W. 389. It is the duty of the court to look to all the records in the office of the Secretary of State. 130 Ark. 503.

Calvin T. Cotham, for appellee.

WOOD, J. This is an action by the appellants, who alleged that they were citizens, taxpayers, and owners of animals and places of business where they were carrying on a dairy and stock raising business upon their own or leased property in the vicinity of the city of Hot Springs. The action was instituted in the chancery court of Garland County against the city of Hot Springs to enjoin it from enforcing the provisions of act 542 of the Special Acts of the General Assembly of 1923 (Acts of 1923, page 1168), on the ground that the act was unconstitutional and void because it was a special act, and that article 5, § 26, of the Constitution of 1874 was not complied with in the passage of such act.

To sustain their contention the appellants introduced, through the Secretary of State, the original bill, and attached thereto was the proof of publication of notice of the intention to apply for its passage, signed and verified by E. Marion Riggs, publisher of the The New Era, a newspaper published in the city of Hot Springs, Garland County, Arkansas. This proof of publication states that the notice had been published in the newspaper thirty times upon the following dates, to-wit: The first insertion on January 25, 1923, the last insertion on February 26, 1923. The bill was introduced in the lower house of the General Assembly on the 19th of February, 1923, and was passed by the House and finally by the Senate on March 2, 1923, as shown by the indorsements on the bill.

The appellees denied the allegation that the provision of the Constitution as to the notice of intention had not been complied with, and set up and offered to prove

that notice of intention to apply for the passage of the bill had been given thirty days before the bill was introduced, and the publisher, E. Marion Riggs, who was a witness to that effect, asked that his certificate of proof of publication be corrected to show that fact. The trial court, however, ruled that the testimony offered by the appellees concerning the proof of publication was incompetent, and also held in effect that the proof of publication attached to the original bill was not competent to prove that article 5, § 26, of the Constitution of 1874 had not been complied with. Upon the whole case the court entered a decree dismissing the complaint for want of equity, from which decree is this appeal.

1. In *Booe* v. *Road Imp. Dist.,* 141 Ark. 147, we said: "It would not do to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature upon admission in pleadings by agreement of the parties, or by proof introduced of facts not required to be made a matter of record by the Constitution. To hold otherwise would make the validity of special laws depend upon the action of the parties, and might make it valid as to one person and invalid as to another in the locality affected by it. Such a course would not only be ruinous to the people in such localities, but might unsettle every special act passed since the adoption of the Constitution."

Article 5, § 26, of the Constitution, *supra,* requires that evidence of the notice of the intention to apply for the passage of a special bill shall be exhibited in the General Assembly before such act shall be passed. There is nothing in the Constitution, nor is there any statute requiring that the proof of publication of this notice shall be spread upon the journals of the General Assembly or otherwise preserved as a record in connection with the passage of the bill. Attaching such proof to the original bill did not make it a part of the bill. There is no provision of the Constitution or statute requiring that it be attached to the original bill. Such proof of publication of notice is not a roll, record, document or paper required

by law to be kept in the office of the Secretary of State, and therefore such proof of publication does not come within the provisions of § 4121 of Crawford & Moses' Digest. As is said in *Booe* v. *Road Imp. Dist., supra*: "The passage of the act is conclusive of the fact that due notice was given, unless the records of which the courts may judicially take notice show otherwise." See also *Booe* v. *Sims,* 139 Ark. 595.

The decree is correct, and it is therefore affirmed.

HILL v. RALPH.

Opinion delivered October 13, 1924.

1. STATUTES—CONSTRUCTION.—A statute must be viewed as a whole, and every word and every part considered and compared and given some sensible meaning if possible, in order to arrive at the intent of the Legislature in the enactment.
2. SCHOOLS AND SCHOOL DISTRICTS—LOCATION OF HIGH SCHOOL—CENTER OF DISTRICT.—In requiring that a high-school building to be erected by a school district should be "geographically located in the center of the district so as to best serve the greatest number of children of scholastic age in the district," the legislative purpose was to require the location to be as near the geographical center of the district as possible, taking into consideration all of the factors that would best serve the greatest number of children of scholastic age in the district.
3. ARBITRATION AND AWARD—CONCLUSIVENESS OF AWARD.—Where an act providing for the location of a high school building provided that, if the directors of the school district disagreed as to its location, the matter should be submitted to a board of arbitration, whose decision fixing the location of said school building should be conclusive, the decision of such board is conclusive, in the absence of actual fraud or such gross mistake as to be tantamount thereto.

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

J. T. Coston, for appellant.

The act is mandatory. An act must be so construed as to give every section a meaning, so as not to render such section nugatory. 109 Ark. 60. A material depar-

ture from the plan laid down by the Legislature renders such action void. 113 Ark. 491. See also 102 Calif. 642, 36 Pac. 949; 288 Ill. 240; 13 Okla. 285. The site selected was not the one to "best serve the greatest number of children."

Chas. E. Sullenger, for appellee.

In order to set aside an award of a board of arbitration it must be shown that the award was fraudulently made or that the arbitrators made a mistake in making their award. Fraud is never presumed, but must be specifically charged. 106 Ark. 156; Pomeroy's Equity Juris. 2, 871, 1797. The presumption is in favor of the validity of the award, and its invalidity must be clearly shown. 5 C. J. 289, p. 123; 5 C. J. 389, p. 160. See also 5 C. J. 463, p. 180. Where the Legislature has erected a tribunal for a specified purpose, its decision is final, and cannot be reviewed by the courts. 96 Ark. 424.

WOOD, J. The Shawnee Special School District No. 10 was created by act 143 of the Acts of 1923. Section 15 of that act provides for the support and maintenance of schools at the places where they were formerly taught throughout the territory which was brought into the Shawnee Special School District No. 10 "until such time as a suitable building may be erected, centrally located in said district, with ample facilities for the proper care of all the children of scholastic ages in said district, then, at any annual school meeting held thereafter, the said qualified electors of said Shawnee Special School District No. 10 may, by a majority vote, abolish said schools, or any of them, provided, however, that the board of directors shall, at all times, have the right to provide for and maintain schools in any part of the district when, in their discretion, the public welfare of the children of the district demands same."

Section 18 of the act provides as follows: "The location of all buildings for school purposes in said district shall be left to the discretion of the board of directors, provided, however, that any high-school building erected in the district shall be geographically located in

the center of the district so as to best serve the greatest number of the children of scholastic age in the district, taking into consideration the accessibility of said building, roads, means of transportation, and all other factors to be considered; but, in the event said directors cannot unanimously agree upon a suitable location for a high-school building, they shall report such disagreement to the State Superintendent of Public Instruction of the State of Arkansas, and request that he appoint a board of arbitration, to consist of not less than three persons connected with the public schools of the State of Arkansas, and residing without the boundaries of Mississippi County, and, upon the appointment of such board of arbitration and their acceptance of such appointment, the State Superintendent of Public Instruction shall immediately notify the board of directors of said Shawnee Special School District No. 10, and fix the time and place when said arbitrators shall meet the said board of directors and arbitrate the differences of said board and announce their findings; the decision of said board of arbitrators fixing the location of said school building shall be conclusive and final. The expense of such board of arbitration shall be paid by the district, provided, however, that such expense shall not exceed the sum of $250."

The directors of Shawnee Special School District No. 10, hereafter called district, could not unanimously agree upon a suitable location for the high-school building, and a board of arbitration was appointed under the authority of the act. They met with the board of directors of the district, according to the provisions of the act, and heard the differences of the directors, and viewed the locations about which the members differed, and rendered their unanimous decision in writing, fixing the location of the high-school building and describing the same. The directors of the district acquired the land and issued bonds in the sum of $75,000, under the authority of § 7 of the act, and were preparing to erect a building on the site selected, when this action was instituted by the appel-

lants, forty-eight patrons and taxpayers in the district, against the directors, to enjoin the erection of the building. They alleged, among other things, that the site selected by the board of arbitration was not the geographical center of the district; that it was a distance of only 3½ miles from the south end of the district, a distance of only four miles from the southeast corner, four miles from the southwest corner, seven miles from the north end, eight miles from the northeast corner, and about 12 miles from the northwest corner of the district. They further alleged that the building was intended for white children only; that the white children of scholastic age were all living north of the site selected, except twenty-five, who were scattered through the south end of the district, and that no children lived within one mile of the building site. It was alleged that the geographic center of the district was high and dry, having an elevation of twelve or fifteen feet above the site selected by the board of arbitration, with roads radiating in all directions therefrom, making it convenient for all schoolchildren within the district; but that the site selected by the board of arbitration was low, wet, and swampy, and a fit breeding place for mosquitoes, malaria and chills, and that a school maintained there would endanger the health and even the lives of the children.

The appellees, the directors of the district, answered, denying, among other things, that the site selected was not authorized under the act and that the place designated by appellants in their complaint as the geographic center of the district was a more suitable location than the one selected by the board of arbitration, and denying that the place selected was low, wet, and swampy, and a fit breeding place for mosquitoes, malaria and chills, and that a school maintained there would endanger the health and even the lives of the children.

The testimony tended to prove that the directors of the district had differed over two proposed locations for the high-school building, one on the Dickenson place, which was described by the witnesses for the appellants

as about the geographic center of the district, considering the shape of the district and the accessibility of the site. They state that it was high and dry and well drained into a running stream; that the location selected by the board of arbitration, on the contrary, was much lower than the Dickenson lot, and was surrounded by lagoons and swamps that could not be drained; that, because of this fact, it was very unsanitary, and would be a breeding place for mosquitoes, and subject the children to malaria, typhoid, dysentery, and other miasmatic diseases. Such was the effect of the testimony of several witnesses for the appellants, including four physicians, who resided and practiced medicine in that community. One of these, after describing the two proposed locations, stated that the location on the Dickenson place would be much more convenient to all concerned—the most central. "The Dickenson place would make it about equal all the way through to all parties. It would give these people where the majority is, the same interest as where there are a few. The white children live in the north end, closer to the Dickenson place, and the south end of the district is a negro settlement."

On the other hand, the president of the board of directors of the district testified to the effect that he and two other members of the board wanted to locate the building where the site was selected by the board of arbitration, while two of them wished to locate it on the Dickenson place. As they could not agree, they asked that the Superintendent of Public Instruction appoint a board of arbitration, which was done, and the members of such board viewed the proposed sites and heard the statement of each of the directors, explaining the advantages and disadvantages of the respective sites, and the board of arbitration selected a site upon which the directors proposed to erect a building, located on the scenic highway and accessible to all parts of the district; that most of the white children of the district lived not over two and a-half miles from the site selected; that the location is a high, dry, sandy ridge, with splendid drainage, the best

in the county. The directors realized the fact that the building had to be located as near the center of the district as was practical, and they did not think it practical to put the building off of the highway, which ran parallel to the Frisco Railroad. They intended to drain the territory around the location selected before building, and the canal and road with the sewer drainage would drain it.

Two other witnesses testified substantially to the same effect, and one of them stated he was familiar with the location on the Dickenson place, and that water stood on it, and it was entirely too low; it was buckshot land, and not good for the children to play on—low and wet.

After hearing the testimony, the court found generally in favor of the appellees, and entered a decree dismissing the complaint for want of equity, from which is this appeal.

1. The decision turns on the meaning to be given the word "centrally," in § 15 of the act, and the word "center," in § 18 of the act. It is a well-recognized canon of statutory construction that some meaning should be given to every word contained in the statute, if possible. The statute must be viewed as a whole, and every word and every part considered and compared and given some sensible meaning, if possible, in order to arrive at the intent of the Legislature in the enactment. *State* v. *Boney,* 156 Ark. 169; *Carville* v. *Road Imp. Dist. No. 2,* 152 Ark. 487; *Nixon* v. *Allen,* 150 Ark. 244; *State* v. *Embrey,* 135 Ark. 262; *Cypress Creek Drainage Dist.* v. *Wolf,* 109 Ark. 60.

The primary meaning of the word "center" is, according to Funk & Wagnall and Webster, "the point or place equally distant from the extremities or from the different sides of anything. The middle, as the center of a town—the center of a throng," etc. "Central" means "relating to the center; situated in or near the center or middle." These words, "centrally" and "center," as used in the statute, must be construed with reference to the context. Observing these rules of construction, we

are convinced that it was not the purpose of the Legislature to require the high-school building to be located in the exact center of the district, for the district was neither in the form of a circle, square, or parallelogram, but was of odd shape—it had no mathematical center, and a geographical center could not be accurately ascertained. The evident purpose of the Legislature, as shown by the language with which the words "centrally" and "center" are associated and which qualified and limited their meaning, was to provide a location for a high-school building for the proper care of all children of scholastic age in the district—a location that would best serve the greatest number of children of scholastic age in the district, taking into consideration the accessibility of said building, roads, means of transportation, and all other factors to be considered. The language of § 18 clearly indicates that the Legislature contemplated that the directors, in considering the various factors entering into the selection of a suitable site for the building, might not agree, and, unless they did agree unanimously, a board of arbitration should be appointed to arbitrate the differences between the directors and fix the location for the school building.

Taking the language of the act as a whole, we conclude that it was the purpose of the Legislature to give the directors, in the first place, and the board of arbitration, in the second place, the power to locate the school building somewhere as near the center of the district geographically as could be ascertained, taking into consideration all of the factors that would make it an eligible site for a high school that would best serve the greatest number of children of scholastic age in the district. It was not the purpose of the Legislature to require the location of the building on the exact geographical center, if that could be ascertained. But the act does require that the geographic center be taken into consideration, and that the location of the building be placed thereon, or as near thereto as possible, all of the factors of eligibility mentioned in the statute being considered. Therefore

we conclude that it was within the power or jurisdiction of the board of arbitration to fix the location for the school building at the site designated by it.

2. The act, in express terms, makes "the decision of the board of arbitration fixing the location of said school building conclusive and final." There is no attack made upon the regularity of the proceedings of the board of arbitration, nor is there any allegation that there was fraud upon the part of the arbitrators. The allegation of appellants that the location selected by the board of arbitration "is low, wet, swampy, and a fit breeding place for mosquitoes, malaria and chills, and to place the school building there would jeopardize the health and even the lives of the children," is denied by the appellees. If the above allegation had been admitted or proved conclusively, it might be said that the decision of the board of arbitration was a gross mistake, and so arbitrary and unreasonable as to amount to a fraud on the inhabitants of the district and the patrons of the proposed high school. But the chancery court, after hearing the testimony, did not reach this conclusion, nor did the testimony justify such conclusion. The Legislature erected this special tribunal to determine the location for the high-school building in Shawnee Special School District No. 10, and, in the absence of actual fraud, or such gross mistake as to be tantamount thereto in law, its decision cannot be overturned. 2 Pomeroy's Jurisprudence, § 879; 5 C. J. §§ 289, 389, 463. See also *Shibley v. Fort Smith & Van Buren Bridge Dist.*, 96 Ark. 424.

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

HARDY v. OUACHITA NATIONAL BANK OF MONROE.

Opinion delivered October 13, 1924.

1. BILLS AND NOTES—INDORSEMENT OF NOTE BEFORE DELIVERY.—One who indorses his name on a note before delivery and acceptance thereof by the maker is to be considered, so far as the holder of such note is concerned, as a joint maker of the note, and liable as such.
2. BILLS AND NOTES—INDORSEMENT PROCURED BY FRAUD.—Under the rule that, where one of two innocent persons must suffer the consequences of the fraud of a third person, he must bear the loss who put it in the power of the third person to perpetrate the fraud, one who is induced by the fraud of another to indorse a note of the latter, mistaking it for a piece of blank paper, is liable to a *bona fide* holder of the note.

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

Woodson Mosley, for appellant.

The signature of appellant was procured by fraud, and he is not therefore liable. 42 Ind. 227; 44 Ind. 70; 51 Mich. 553; 29 Wis. 194; 22 Mich. 479. Negotiability presupposes the existence of the instrument as having been made by the party whose name is subscribed thereto, and it is always competent to show that the instrument is not his. 53 N. E. 471. Appellant was not guilty of negligence in writing his name on the back of the note, under the circumstances of the case. 74 N. E. 1086.

Bridges & Wooldridge, for appellee.

Appellant was a general indorser before delivery, and his indorsement warranted that the note was genuine. C. & M. Digest, §§ 7831-32. By placing his name on same before delivery he incurs all the liability of an indorser. C. & M. Digest, § 7833; 116 Ark. 420; 146 Ark. 186. Appellee was the holder of the note for value. Section 7791, C. & M. Digest. He cannot assert fraud against an innocent holder. 118 Ark. 222; 94 Ark. 100; 3 R. C. L., § 320, p. 1105. The law would be the same if the contract was held to be a Louisiana contract. 128 La. 1008.

HART, J. The Ouachita National Bank of Monroe, Louisiana, sued J. B. Hardy for $2,298.10 alleged to be due on a promissory note.

The note was introduced in evidence, and was dated February 15, 1921. It was for $2,298.10, and was due December 15, 1921. The note was signed "Smith Motor Sales Co., by J. P. Smith, Mgr." No part of the note has ever been paid.

There was a judgment in favor of the bank against Hardy in the circuit court, and the case is here on appeal.

It is earnestly insisted by counsel for appellant that the circuit court erred in directing a verdict in favor of appellee.

The Smith Motor Sales Company was indebted to the Ouachita National Bank of Monroe, Louisiana, and the note sued on was given by it in renewal of an old note. According to the evidence of the president, vice president, and cashier of the bank, they agreed to take the note sued on in renewal of the old note which evidenced the amount of the indebtedness of the Smith Motor Sales Company to the bank. The bank declined to take the renewal note unless J. P. Smith would secure some one in good financial standing to indorse it. Smith offered to get J. B. Hardy to indorse the note, and, after the officers of the bank found that he was a man of good financial standing, they told Smith that they would accept Hardy's indorsement of the note and give him an extension of time on his indebtedness. They filled out a new note for the amount of the indebtedness, and gave it to Smith. Smith returned the note to the bank with the blank indorsement of J. P. Hardy on the back of it.

Under these circumstances Hardy was an original promisor of the note. This court has repeatedly held that when one, in order to give the maker of a note credit with the payee, writes his name on the back of the note before delivery and acceptance thereof by the payee, he is to be considered, so far as the holder of such note is concerned, as a joint maker of the note, and liable

as such. *Lake* v. *Little Rock Trust Co.*, 77 Ark. 53, and cases cited, and *Hodges* v. *Collison*, 116 Ark. 420.

But it is contended that Hardy is not liable as indorser on the note because his signature was obtained by fraud. On this point J. B. Hardy testified that J. P. Smith came to his place of business and asked him to sign a note for him; that he told Smith that he could not afford to do it; that finally Smith told him that he would like to get his name so that his father might address letters to him right; that Smith put a blank piece of paper on the table where he was writing, and that he wrote his name on it, and started to write his address; that Smith told him that he knew his address, and picked up the paper and walked away with it; that he never turned the paper over to see if there was any writing on the other side of it.

On this point all of the officers named above testified that Hardy admitted to them that the indorsement on the note bearing his signature was his genuine signature, and made the same explanation about signing the note as he had testified to. They all testified that the signature of Hardy on the back of the note was there before Smith delivered the note to them and before they accepted it in renewal of Smith's past indebtedness. They had nothing whatever to do with getting Hardy to indorse the note. They did not know him, and only made inquiries about his financial condition after Smith had offered him as an indorser on the note.

There is nothing in the record tending to show that any of the officers of the bank had anything whatever to do with procuring the indorsement of Hardy to the note. As far as the bank is concerned, Hardy signed the note as an indorser, and is liable on his indorsement, under the authorities cited above. He cannot be relieved from liability because of any fraud practiced by Smith in procuring his indorsement, unless such fraud was known to the bank before it accepted the note containing the indorsement, or the bank in some way participated in the fraud. Hardy, by carelessly indorsing the

note, put it in the power of Smith to deliver the note to the bank and thereby secure an extension of his existing indebtedness. The rule is that, where one of two innocent persons must suffer the consequences of the fraud of a third person, he must bear the loss who put it in the power of the third person to perpetrate the fraud.

The note was signed in Arkansas, but was payable in Louisiana. If it should be considered as a Louisiana contract, the law would be the same. *Hackley State Bank* v. *Magee,* 128 La. 1008.

It follows that the judgment must be affirmed.

LITTLE RIVER COUNTY *v.* BURON.

Opinion delivered October 13, 1924.

1. COUNTIES—CONTRACT FOR AUDIT OF COUNTY BOOKS.—Crawford & Moses' Dig., § 661, providing that the county judge "may, in his discretion, call on the State Auditorial Department for an audit of the books and accounts of the county," intended to give the county court the discretion of calling on the State Auditorial Department for auditors to make an audit of the county books, but not to take away the court's power to employ other auditors if deemed advisable.
2. APPEAL AND ERROR—CONCLUSIVENESS OF FINDING OF FACT.—A finding of fact of the circuit court sitting without a jury is as conclusive on appeal as the verdict of a jury.

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

June R. Morrell and *George R. Steel,* for appellant.

The claims are invalid for the reason that the county judge and the county court did not comply with the law, in not calling upon the Auditorial Department for the appointment of an auditor to make the audit. §§ 661, 662, 663 and 664, C. & M. Digest. The Legislature has absolute authority to provide the manner in which the county judge shall act, in case he exercises his authority, and to provide the manner in which he shall proceed. 119 Ark. 567; 92 Ark. 93; 89 Ark. 456; 99 Ark. 100; 85

Ark. 464. The question as to whether the enactment is wise or expedient is exclusively for the General Assembly to determine. 89 Ark. 456. In construing an act of the Legislature, the intention of the Legislature in the passage of the act must be taken into consideration. 25 R. C. L., § 216, p. 960. The statute is not merely directory, but mandatory. 77 Ark. 417; 25 R. C. L. 770; 106 Ark. 48; 22 How. 422; 24 N. E. 1009; 34 Ark. 394; 25 Ark. 101. The intention of the Legislature should prevail. 27 Ark. 420; 35 Ark. 56; 37 Ark. 491; 3 Ark. 285; 11 Ark. 44.

DuLaney & Steel, for appellee.

The claim was a valid claim against the county under article 7, § 28, of the Constitution. See also 122 Ark. 114; 175 Ill. App. 290; 114 Cal. 419; 46 Pac. 292. The Legislature, by the enactment of § 661, C. & M. Digest, simply gave the county court authority which it did not have before, that is, to call on the State Auditorial Department for an audit, if in its discretion it saw fit to do so. The word "may" in a statute is sometimes used in a mandatory, and sometimes in a directory, permissive, sense, but it is only where it is necessary to give effect to the clear policy and intention of the Legislature that it can be construed in a mandatory sense. 53 N. W. 256; 86 Iowa 352; 30 S. W. 1053; 88 Tex. 213; 26 U. S. 46; 7 L. ed. 47; 3 Neb. 224; 46 N. Y. 200; 59 Hun. 258; 12 N. Y. Supp. 890; 128 N. Y. 632; 29 N. E. 146; 75 N. Y. Supp. 976; 71 App. Div. 351; 69 Fed. 671; 8 Kan. 623; 60 Pac. 1092; 128 Cal. 444; 82 Mass. 166; 56 N. E. 953; 184 Ill. 597; 24 S. W. 638; 42 Mo. 171; 55 Cal. 599.

HART, J. V. E. Buron filed three claims in the county court of Little River County, Arkansas, for services in auditing the accounts of the various county officers, under a contract made with the county court. The three claims of Buron, amounting in the aggregate to $2,957.14, were allowed in the county court.

W. M. Gathright, a citizen and taxpayer of the county, filed his affidavit and bond for appeal, and the appeal was duly granted.

The circuit court, after hearing the evidence, found that the county judge of Little River County made a contract with V. E. Buron to audit the books and records of the various county officers of said county, and that the contract made by the county judge was ratified by the county court. The court further found that V. E. Buron and his assistants made an audit of the business, books and records of said county officers for a period of five years, in accordance with the contract, and that the services performed by Buron as such accountant were reasonable. It therefore affirmed the judgment of the county court making him an allowance in the sum named above. The case is here on appeal.

The first contention of appellant is that the county court had no power to make a contract with Buron to audit the accounts and records of the various county officers, except under the provisions of § 661 of Crawford & Moses' Digest. The section reads as follows: "The county judge of any county may, in his discretion, call on the State Auditorial Department for an audit of the books and accounts of the county and township officers of the county of which he is the county judge. In such event it shall be the duty of the State Comptroller to appoint one or more experienced auditors for the purpose of making such audits as called for by the county judge, and such auditor or auditors shall receive a salary of not less than $10 a day for each day, and actual traveling expenses while engaged in the work of such audit."

It is their contention that the word "may" means "must" or "shall," and that the county judge or county court had no discretion to cause an audit of the books and accounts of the county officers to be made, except by applying to the State Comptroller, as provided in the statute just quoted. They invoke the rule laid down in *Washington County* v. *Davis,* 162 Ark. 335. In that case it was held that the word "may" is always construed "must" or "shall" whenever it can be seen that the Legislature intended to impose a duty and not merely a privilege or discretionary power, and that the public or

third persons are interested and have a claim of right to have the power exercised.

We do not think that rule has any application under the language used in the section to be construed in the case at bar. That case and others recognize the rule to be that it is only where it is necessary to give effect to the clear policy and intent of the Legislature that the word "may" is to be construed in a mandatory sense, and, where there is nothing in the context or in the sense and policy of the section to require an unusual interpretation, its usual meaning is merely permissive or discretionary.

In the instant case we do not see that it is at all necessary that the word "may" should be construed in a mandatory sense in order to give effect to the clear policy and intention of the Legislature in passing the statute of which the section in question is a part. It does not seem to us that the legislative intent was to impose an imperative duty upon the county judge to call on the State Auditorial Department when an audit of the books and accounts of the various officers was deemed necessary; but it is rather made plain that it was the intention of the Legislature to give the county court the privilege or discretionary power of calling on the State Auditorial Department for experienced auditors if he deemed such a course to the best interest of the county.

Neither do we see that the public or third persons have a claim of right to demand an exercise of the power which is plainly given to the county judge in his discretion. Section 661 is a part of the act creating a State Auditorial Department. Primarily the duties of that department relate to the inspection and supervision of all books and accounts of departments of State and other State institutions named in the act. The act was passed by the Legislature of 1917. Prior to that time, in the case of *Leathem & Co.* v. *Jackson County*, 122 Ark. 114, this court held that the county court, being the general fiscal agent of the county, is possessed of supervisory

power over the collection and preservation of its funds, and that it had the implied power to employ an expert accountant to audit the books, accounts and public records of county officers.

There is nothing in § 661, or in any other section of the act creating the Auditorial Department, which shows that the Legislature intended to take away from the county court the power to employ accountants to audit the books of the county officers, as held in the case of *Leathem & Co.* v. *Jackson County, supra.* On the other hand, the very language used seems to indicate that it was the legislative intention to give the county court an added power, and that is, in its discretion, to apply to the Auditorial Department of State for experienced auditors to make the audit called for by him as county judge. In plain terms the section recognizes that the power is already vested in the county court to have made an audit of the books of the county officers and to employ expert accountants for that purpose, and § 661 merely gives the county judge the privilege, in his discretion, of applying to the State Auditorial Department for such experienced auditors or accountants.

But it is claimed that the section is mandatory because it fixes a minimum fee which the experienced auditors may receive, which is a salary of not less than $10 a day for each day while engaged in the work of audit, and actual traveling expenses. This might or might not be a cheaper way to make the audit. The county court might be able to employ accountants at much less than the salary fixed by this section of the statute. It is easy to see that in many instances an audit of the books might be made by local accountants at much less expense than to call on the Auditorial Department for experts employed by it. The evident purpose of the statute was to enable the county court to call on the Auditorial Department for accountants when, in its discretion, it was deemed best to do so.

The authority of making the audit is vested in the county court, and the rights of the public are only to

have a correct audit, and their rights are not in any manner affected by vesting in the county court the power to appoint expert accountants in the first place, or in giving it discretion to call upon the Auditorial Department for expert accountants to make the audit.

It is next insisted that the amount allowed by the county court for making the audit is too much. The proof on this branch of the case is in direct conflict, and no useful purpose could be served by setting it out in full. We deem it sufficient to say that an audit of the books and records of the various county officers for a period of five years was made. Buron was engaged eighty days in making the audit. He had two assistants most of the time. Other expert accountants testified that the services performed were worth the amount charged, and that the amount charged was no more than was customary to be paid by banks and other concerns for similar services.

It is true that the testimony as to the amount charged was contradicted by the witnesses for appellant; but the case was tried before the circuit court sitting without a jury. On this question of fact the circuit court sustained the finding of the county court, and, under the settled rules of this court, where circuit courts are required by law to pass upon questions of fact, the findings are as conclusive on appeal as the verdicts of juries. *Jones* v. *Glidewell,* 53 Ark. 161; *Matthews* v. *Clay County,* 125 Ark. 136; and *Cady* v. *Pack,* 135 Ark. 445.

It follows that the judgment will be affirmed.

FERREL v. STATE.

Opinion delivered October 13, 1924.

1. FORGERY—INTENT TO DEFRAUD.—In order to constitute the offense of uttering and publishing a forged writing, it is necessary that there be an intent to defraud, and that there be a knowledge of the falsity of the instrument on the part of the defendant.
2. FORGERY—INTENT TO DEFRAUD—SUFFICIENCY OF PROOF.—Proof that defendant indorsed another's name to a check payable to the latter, representing himself to be the payee, would not justify an inference that he did not have authority to sign the payee's name as indorser of the check.

Appeal from Jefferson Circuit Court; *T. G. Parham,* Judge; reversed.

H. Jordan Monk, for appellant.

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

HART, J. Frank Ferrel prosecutes this appeal to reverse a judgment of conviction against him for uttering a forged instrument, in violation of the provisions of § 2460 of Crawford & Moses' Digest.

The main reliance of the defendant for a reversal of the judgment is that the evidence is not legally sufficient to support the verdict.

According to the testimony of C. M. Leavitt, the defendant came into his store and purchased several articles of wearing apparel, and gave in payment thereof a check signed by J. K. Smith, payable to the order of Tom Newton, for the account of Walter Davis. The check was drawn on the Bank of Winchester, at Winchester, Arkansas. The defendant represented himself to be Tom Newton at the time he presented the check in payment, and he indorsed the check "Tom Newton."

It was also shown by the State that the defendant went to J. K. Smith, the drawer of the check, and represented himself to be Walter Davis, and to be living upon the farm of Tom Newton. He said that he was dissatisfied, and wanted to move. He stated further that he owed Tom Newton $47.80 for supplies. J. K. Smith gave him a check for that sum on the Bank of Winchester,

payable to the order of Tom Newton. Smith sent a servant with the defendant to Newton for the purpose of paying Newton and hauling back the defendant's things from there to Smith's farm. After they got near where the defendant said that Newton lived, the defendant left Smith's servant in the truck for the purpose of going to Newton's place by himself. Later the defendant came back, and said that Newton had told him that he would not get out of his chair and go anywhere to get the check. The check was then given to the defendant for the purpose of being delivered to Newton.

In order to constitute the offense of uttering and publishing a forged writing, it is necessary that there be an intent to defraud, and that there be a knowledge of the falsity of the instrument on the part of the defendant. *Elsey* v. *State,* 47 Ark. 572; *Maloney* v. *State,* 91 Ark. 485; and *Rickman* v. *State,* 135 Ark. 298.

Therefore one of the material averments of the indictment is that the defendant uttered and published the forged instrument with fraudulent intent. To establish this averment, it was essential for the State to prove that the defendant knew when he indorsed the check that he had no authority to do so. The only evidence which it can be claimed has any tendency to prove this fact is the circumstance that the defendant falsely represented that he was Tom Newton, the payee of the check. This was not sufficient. It may be that this circumstance would justify the suspicion that the defendant knew the character of the instrument, but it falls short of proving the fact that the defendant did not have the authority of Tom Newton to indorse the check and use it in payment of the goods purchased by him. The defendant did not testify in the case at all, and it did not devolve upon him to introduce evidence tending to disprove any fact material to the establishment of the crime charged against him.

On the other hand, the burden was on the State to prove every material fact charged in the indictment and involved in the commission of the crime, beyond a reason-

able doubt. The mere suspicion of the guilt of the defendant would not meet the requirements of the law. There must be some substantive evidence tending to show his guilt, and the mere fact that he represented himself to be Tom Newton would not justify the inference that he did not have authority to sign Tom Newton's name to the check as an indorser thereof. In short, his representations that he was Tom Newton did not justify the jury in finding that he signed Tom Newton's name as indorser of the check without his authority. Surmise, conjecture, or suspicion cannot take the place of proof.

It follows that the judgment must be reversed, and the cause will be remanded for a new trial.

CITIZENS' INVESTMENT & SECURITY COMPANY *v.* DANIEL.

Opinion delivered October 13, 1924.

BILLS AND NOTES—FAILURE OF CONSIDERATION—RENEWAL.—The giving of a renewal note without the knowledge at the time of the failure of the consideration for the original note, does not waive such defense, and the maker is not thereby estopped from pleading such failure in an action on the renewal note.

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

McConnell & Henderson, for appellant.

Defendant had no right to rescind the contract. To do so he must return or offer to return the stock. Fletcher, Cyc. on Corp., vol. 6, p. 6555, par. 3880: he cannot do so if guilty of laches, § 6557, nor if he has ratified the transaction by accepting a dividend or a renewal of a note. The offer to rescind comes too late. 35 Ark. 483; 38 Ark. 334. For other authorities on rescission, see 137 Ark. 574 and 7 R. C. L., § 211. Defendants cannot vary the written subscription agreement by parol. 126 Ark. 400; 92 Ark. 504; 125 Ark. 502; 111 Ark. 238; 106 Ark. 462. Appellees are estopped from setting up failure of consideration of the note. One who gives a note in renewal

for another note, with knowledge of a partial failure of consideration for the original note, cannot plead estoppel. 111 Ark. 353; 118 Ark. 465. They could not speculate on the success of the company, participate in its affairs, receive dividends, etc., and then plead failure of consideration. See 104 Ark. 517. Under the same state of facts this court held a subscriber liable to the same company on a similar contract. 160 Ark. 320.

R. W. Robins, for appellee.

The case (160 Ark. 320) relied on by appellant is not like the case at bar. There the subscriber was notified of the change in plans of the company, but here the appellees received no such notice or information. On the other hand, they were led to believe that the original plans were being carried out. There was therefore here a failure of consideration for which the note was given, and no liability can be imposed upon appellees. 48 Ark. 426.

SMITH, J. It is insisted, for the reversal of the judgment in this case, that the finding of facts upon which the judgment was based is unsupported by the testimony; and, further, that the case is similar to and is controlled by the case of *Harrington* v. *Citizens' Inv. & Sec. Co.,* 160 Ark. 320. This case, like the Harrington case, was one to enforce a stock subscription, the appellant here being the plaintiff in both cases.

As appears from the statement of facts in the Harrington case, it was alleged, and testimony was offered tending to show, that, while the plaintiff investment company solicited and received subscriptions upon the representation that it proposed to increase its capital stock from twenty-five thousand to one hundred thousand dollars and to reincorporate as a trust company, this plan was not consummated because sufficient subscriptions were not received for that purpose. In the Harrington case the fact is recited that Harrington was advised of this failure, and that his subscription as originally made had been applied to the increase of the capital stock of the investment company from twenty-five

thousand to seventy-five thousand dollars, and that, after the receipt of this notice, he executed a renewal of his original note. Upon this finding we applied the familiar rule that the giving of a renewal note with the knowledge, at the time, of the failure of the consideration for the original note, waives that defense, and the maker is thereby estopped from pleading such failure in an action on the renewal note.

It is conceded that the subscriptions were obtained upon the representation that a trust company was to be formed when subscriptions for one hundred thousand dollars were obtained, and that this subscription was not obtained.

It is contended by appellant that appellees had knowledge of this failure, and that the investment company had determined to treat the subscriptions which had been received as subscriptions to be applied to the increase of its capital stock from twenty-five thousand to seventy-five thousand dollars. If such were the facts, the case would be similar to and controlled by the Harrington case.

But here the facts are by no means undisputed. On the contrary, appellee, Mrs. Mary F. Daniel, the subscriber, testified that she was never advised that the plan to organize a trust company had been abandoned, and, while she admits renewing the note, she testified that she was assured at the time of each renewal that the plan would be finally consummated; that it was always understood that she was subscribing, not for a part of the increased capital stock of the investment company, but for stock in a trust company, and that the trust company was never organized, and the consideration for the note therefore failed.

The answer recited that the subscription had been obtained by fraud and misrepresentation; but upon these allegations the court made no finding. But the court did expressly find that the consideration for the note had failed; that the plaintiff investment company had contracted with the subscribers to perfect the organi-

zation of a trust company, which it failed to do, and that appellee was not advised of the abandonment of the plan when she renewed the note; and the testimony of appellee is legally sufficient to support that finding, which was made by the court sitting as a jury, and, this being true, we do not stop to inquire whether that finding was contrary to the preponderance of the evidence, and, if such was the fact, she was not estopped to plead failure of consideration.

Certain other questions are raised in the briefs, but the view we have expressed renders it unnecessary to discuss them in this opinion.

The judgment is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY v. SMITH & COMPANY.

Opinion delivered October 13, 1924.

1. CARRIERS—DAMAGES TO SHIPMENT—INSTRUCTION.—An instruction, in an action for damage to cotton caused by the carrier's negligence in exposing it to the weather, that it was the duty of the shipper immediately to recondition the cotton in order to minimize the damages, was properly modified by adding, "unless you find from the proof that a custom prevailed in Memphis [the destination] to do this as the cotton was sold;" the testimony tending to establish such custom, and there being no evidence that such custom did not meet the requirements of ordinary care.
2. CARRIERS—DAMAGES TO SHIPMENT—MARKET PRICE.—Where the cause of action against a carrier was for damage to a shipment of cotton by permitting it to become unnecessarily water-soaked, and not for failure to deliver the cotton in time for any particular market, it was not error to refuse an instruction which would have permitted the jury to take into account the fact that the market price of cotton on the day the cotton was delivered was higher than on the day when the cotton should have been delivered, had there been no negligent delay.

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

Thos. B. Pryor and *Daggett & Daggett*, for appellant.

Instruction No. 3 requested by appellant correctly states the law with reference to the duty of the consignee to receive the cotton when it was tendered, recondition it, and thereby minimize the damage. 4 R. C. L., Carriers, § 285; 101 Ark. 172; Ann. Cas. 1914A, note 66. The measure of damages, as declared in the instruction requested, is elementary. 74 Ark. 358; 90 Ark. 452. Of course, the failure to deliver in a reasonable time is a breach of the contract, but the consignee cannot refuse to accept the goods and sue for conversion, and the measure of damages is as stated. 90 Ark. 524; 99 Ark. 568. The liability of the carrier ceases on delivery of the goods, and damages accrued to that time is the full measure of liability. 124 Ark. 490. The claim for damages accrues on delivery of the goods in a damaged condition. Damages accrued at that time only are recoverable. 88 Ark. 594.

T. E. Lines, Killough, Killough & Killough, for appellee.

SMITH, J. W. M. Smith & Company sued the Missouri Pacific Railroad Company, alleging that on March 15, 1920, plaintiffs delivered to defendant at Parkin, Arkansas, 33 bales of cotton consigned to Memphis, Tenn.; that the cotton was delivered in Memphis on April 27, 1920; that defendant negligently permitted the cotton to get wet; and prayed for damages in the sum of $3,000. The jury returned a verdict for plaintiff in the sum of $2,108.55, with interest at 6 per cent. from April 26, 1920. From the judgment on the verdict defendant has appealed.

The theory on which appellee recovered judgment in the court below is reflected in an instruction numbered 3, requested by the appellant railroad company, the defendant below. This instruction was given, after modifying it by adding the clause, "unless you find from the proof that a custom prevailed in Memphis to do this as the cotton was sold." This clause is set out in the instruction as given, and is inclosed in parentheses, and, as thus modified, the instruction reads as follows:

"You are instructed that, even though you find that the cotton was damaged by exposure to the elements, such damage being occasioned by the negligence of the defendant in allowing the said cotton to remain on the platform at Parkin from the date bill of lading was issued until the date of shipment, and that said cotton was delivered to the consignee in Memphis in a damaged condition, you are further instructed that it was the duty of the plaintiff's agent to consignee to immediately (unless you find from the proof that a custom prevailed in Memphis to do this as the cotton was sold) recondition said cotton and thereby minimize the damage to that part of the cotton not damaged at the date of delivery. And in determining the amount of damage accruing to the plaintiff as of the date the cotton was delivered in Memphis, the measure of damages will be the difference in the value of the cotton as of the date delivery should have been made in Memphis by the defendant company and the value of the cotton as it would have been in its reconditioned form as of the date delivery was actually made."

Appellant excepted to the modification and the giving of the instruction as modified.

The testimony shows that the cotton was delivered to the appellant company at Parkin, Arkansas, a station on appellant's railroad, on March 15, 1920, for shipment to Memphis, Tennessee, thirty-three miles distant, but was not delivered in that city until April 27, 1920. During the larger part of this time the cotton stood on an uncovered platform, and frequent heavy rains fell on it, and it is conceded this testimony is sufficient to support the finding made by the jury, as reflected by the verdict returned, that the cotton was damaged by reason of a negligent delay of appellant company to transport the cotton within a reasonable time.

The testimony shows that the cotton was sold in various quantities by the consignee, a cotton factor, and that the last of it was not sold until about a year after its receipt. The testimony also shows that the cotton

was not "reconditioned" until it was sold, but each bale was reconditioned as it was sold. By reconditioning the cotton is meant the removal of the damaged cotton from the bale of which it was a part. It is the insistence of the railroad company that this should have been done immediately upon delivery of the cotton to the consignee, and the instruction numbered 3 as asked so advised the jury, but the instruction was modified as set out above; the effect of the modification being to tell the jury that it was not the consignee's duty to recondition the cotton immediately, unless a custom prevailed in Memphis to do this as the cotton was received. The correctness of this modification presents the principal question in the case.

It is the insistence of the appellant railroad company that, the cotton having gotten wet, the damage to the cotton on that account would continue to increase until the wet cotton was removed from the bale that is reconditioned, and that the consignee, in discharge of the duty to minimize the damage, should have reconditioned the cotton immediately upon its receipt, and that the carrier should not be held liable for any augmentation of the damage resulting from the failure to recondition immediately, and it is therefore insisted that the modification of instruction numbered 3 set out above was error calling for the reversal of the judgment rendered in appellee's favor.

The undisputed evidence shows that it was the custom of warehousemen handling and storing cotton in Memphis not to recondition damaged cotton until it was sold, but to do so at that time. When a bale was reconditioned, the undamaged cotton was weighed and reported to the factor for whom it was stored, and the damaged cotton, if salable at all, was sold for the account of the owner. The custom of handling damaged or wet cotton was to store it with the wet end up, the bale being placed where the air could strike it, and when this was done the cotton commenced to dry out, and, while this did not repair the existing damage, it arrested any increase of

the damage. The undisputed testimony shows that the cotton in question was so treated, and that the cotton was placed in a court where the air struck it, and the testimony is that, when this was done, the increased damage resulting from the failure to immediately recondition was negligible.

It will be observed that the part of the instruction dealing with the measure of damages took no account of the condition of the cotton at the time of the sale. On the contrary, it correctly told the jury that "in determining the amount of damage accruing to the plaintiff as of the date the cotton was delivered in Memphis, the measure of damages will be the difference in the value of the cotton as of the date delivery should have been made in Memphis by the defendant company and the value of the cotton as it would have been in its reconditioned form as of the date delivery was actually made." In other words, if the railroad company was liable, the measure of its liability was the value of the cotton which had been damaged or destroyed when the cotton reached Memphis, the extent of which damage would have been then shown, had the reconditioning occurred at that time. Now, if the railroad was liable for the damage then existing, it would not be released from this liability because the exact amount of the damage was not ascertained until the cotton was reconditioned, which was not done until the cotton was sold.

This was the damage for which the appellee sued and the theory upon which the recovery was had. This is shown by an instruction, also numbered 3, given at the request of appellee, in which the jury was told that "your first inquiry will be to ascertain the amount in pounds, as near as you can, of the amount of cotton that was damaged and destroyed, and then you will ascertain from the proof what the full market price of that cotton was in Memphis on the day it was delivered to the consignee, and the measure of the damage will be the market price of that cotton that was lost because of its damaged condition."

Having given this instruction, the court, upon modifying appellant's instruction numbered 3, said: "But this instruction as to the measure of damages is really exactly what I have already told you as to the measure of damages, which is to ascertain the amount in pounds of the injured cotton from the proof in the case, and the measure of damages would be the value of that damaged cotton in Memphis on the day the railroad company delivered it in Memphis to the consignee. The two instructions virtually tell you the same thing in different language."

It thus appears that the court definitely limited the recovery to a sum which would compensate the damages existing at the time the cotton was delivered to the consignee.

Moreover, there was no showing that the custom prevailing in Memphis to recondition cotton only upon sale did not meet the requirements of ordinary care; and this was the measure of the consignee's duty in the matter of minimizing the damages, and if this cotton was properly reconditioned, and the effect of the reconditioning was to separate the damaged from the undamaged cotton, and thus ascertain the extent of the damage, liability for having damaged the cotton could not be defeated because the extent of the damage had not been ascertained immediately upon the delivery of the cotton to the consignee.

We conclude therefore that no error was committed in modifying the instruction numbered 3.

An exception was saved to the refusal of the court to give an instruction numbered 4, reading as follows: "You are further instructed that, if you believe from the evidence that the value of the cotton on the Memphis market was greater on the 26th day of April, 1920, the date on which the cotton was actually delivered, than the value thereof on a date within which it could have been delivered in Memphis by the defendant company without unreasonable delay, then the damage suffered by the plaintiff will be limited to such damage as accrued to the

cotton by reason of the negligence of the defendant in allowing the cotton to remain exposed to the elements from the date of the issuance of the bill of lading until the date of delivery thereof in Memphis."

The insistence is that the testimony shows that the market price of the cotton was actually higher on the date of the delivery of the cotton than it was on any of the days when delivery would have been made, had there been no negligent delay in the delivery, and that the jury should have been permitted to take this fact into account.

It sufficiently answers this insistence to say that this is not a suit for failure to deliver in time for any particular market, but is a suit for the damage done to the cotton by permitting it to become unnecessarily water-soaked. Appellees had the right to hold the cotton and to sell it when they pleased, and they sue to recover only the damage which existed at the time the cotton was received in Memphis.

A large amount of testimony was introduced in regard to this damage to the various bales of cotton comprising this shipment, and no useful purpose would be served by setting it out and discussing it. The testimony shows the weight of the various bales on the date of their arrival in Memphis, which totaled 16,392 pounds, and the deductions from this admitted weight, and the number of pounds thrown out upon reconditioning the cotton, which amounted to 5,815 pounds, and if this amount of cotton was damaged upon the arrival of the shipment in Memphis, a verdict for a larger amount than the one returned might have been rendered.

No error appears, and the judgment is affirmed.

AVERITT v. DODD.

Opinion delivered October 13, 1924.

1. HIGHWAYS—DEVIATION OF ROAD PLANS FROM PRESCRIBED ROUTE.—Where the plans, specifications and contract for constructing a highway improvement adopted a different route from that specified and described in the act creating the district, the extent of the departure being 6,500 feet, the changes were material and unauthorized, rendering the contract for the construction of the road and sale of bonds void.
2. JUDGMENT—RES JUDICATA.—A judgment upholding the validity of a special act creating a road improvement district and the assessment and levy of benefits is not *res judicata* as to the question whether a contract let under the act is a compliance with the terms of the act.

Appeal from Polk Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

Pipkin & Frederick, for appellant.

McPhetrige & Martin, for appellee.

The change in route of the road made by the commissioners was unauthorized, and rendered all proceedings void. 148 Ark. 365. The record introduced by appellant in the Perry case on which his plea of *res judicata* is based, showed different parties and different issues from the case at bar, hence there is no ground of estoppel. 136 Ark. 115; 137 Ark. 134; 141 Ark. 453.

HUMPHREYS, J. This suit was brought against appellants by appellee in the chancery court of Polk County to restrain said appellants jointly and severally, as road commissioners of Road Improvement District No. 2 of Polk County, Arkansas, from performing any of the provisions of a contract entered into on the 9th day of December, 1922, between said commissioners and the Western Construction Company for the construction of a road and bridges in said district, and to restrain said commissioners, or either of them, in said capacity, from delivering to any purchaser bonds of said district executed by said commissioners on January 1, 1923.

Appellee was a property owner residing in the district, and sought the injunction upon several grounds,

only one of which we shall discuss, as it sustains the decree of the chancellor enjoining the appellants from proceeding with the improvements under contract with the Western Construction Company, and enjoining them from delivering the bonds to the Industrial Investment Company or any other person. The allegation, and testimony introduced in support thereof, which sustains the decree, is that the plans, specifications and contract provided for the construction of a highway along a different route than that specified and described in the act creating said district. The route provided for in the act creating the district was the public road known as the Mena and Womble road. The act described it as the public road leading from Mena to the Montgomery County line, leading to certain places and through certain townships. There were two public roads leading to Big Fork, one by Opal and the other by Bog Springs. The commissioners were authorized to follow either road at this particular point. Under the authority conferred upon the commissioners they had no power to materially deviate from the route in constructing the improvement. According to the undisputed evidence, the plans and specifications prepared by the engineer and adopted as a basis of the contract for the construction of the highway changed the route for nearly two miles and to a considerable distance from the public road.

A. E. Wear testified that he was familiar with the point at Big Fork where the commissioners changed the route from the public road; that they changed it from one side of the creek to the other for a distance of 3,000 feet.

Peter McWilliams, acting engineer for the district, testified that he had examined the plans, specifications and blue-prints for Road Improvement District No. 2, and that the survey as outlined and adopted by the commissioners departed from the route of the public road as it existed for a distance of 13,600 feet between Mena and the Montgomery County line; that the greatest departure was between Opal and Big Fork, the extent of the depart-

ure being 6,500 feet; that the greatest departure at any particular point was 2,900 feet.

We think the changes were material and unauthorized, rendering the contract for the construction of the road and sale of bonds void and of no effect.

In addition to denying all the material allegations in appellee's complaint, appellants interposed the further defense of *res judicata*. In support of this plea appellants interposed the pleadings and decree in a certain cause, No. 884, tried in the chancery court of Polk County, February 14, 1921, wherein J. R. Perry *et al.* were plaintiffs and the commissioners of Road Improvement District No. 2 of Polk County *et al.* were defendants. The complaint in said cause alleged that the plaintiffs were citizens and landowners in said district; that the district was wrongfully and illegally established, in violation of §§ 24 and 25 of article 5 of the Constitution of the State, and sets forth the particulars of said violation; that the assessment of benefits was excessive and was arbitrarily made; that the assessment for numerous reasons assigned was illegal and void. The plaintiffs prayed that the defendants be enjoined from levying a tax, that the collection of the tax be restrained, and to restrain the issuance of bonds by the commissioners.

The answer denied all material allegations of the complaint, and, upon a trial, the court found all issues in favor of the defendant. An appeal was prayed and granted, but the appeal was never perfected.

The issue of whether the commissioners had made a material change was not an issue in the Perry *et al.* case, as will be seen by reading the substance of the complaint given above. The only issues involved in that case were whether the act creating the improvement district was constitutional and whether the assessment and levy of benefits was arbitrary and confiscatory. The issues being entirely different, this action is not precluded by the adjudication in the Perry *et al.* case.

No error appearing, the decree is affirmed.

ROBERT WELCH STAVE & MERCANTILE COMPANY v. BURRIS.

Opinion delivered October 13, 1924.

1. TRIAL—INSTRUCTION—ASSUMPTION OF DISPUTED FACT.—Where, in an action against a foreign corporation, the sheriff's return to the summons stated that he had delivered a copy to J. R. W., manager of said company, an instruction that, in determining whether or not the defendant was doing business in the State, the jury might "take into consideration representations made by its managers, officers and employees, as well as any and all other facts and circumstances that throw any light on the facts," is not objectionable as assuming that J. R. W. was the manager of the defendant.
2. CORPORATIONS—FOREIGN CORPORATION DOING BUSINESS IN STATE.—Testimony *held* sufficient to sustain a finding that defendant, a foreign corporation, was doing business in the State.

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

A. D. DuLaney, for appellant.

The motion to quash service should have been sustained, as appellant is a foreign corporation, having no agent, office or place of business in this State. The service to be valid must have been made under authority of § 1152, C. & M. Digest, but none of the terms of said section apply to appellant. See 128 Ark. 321; 115 Ark. 272. Under the decision in 128 Ark. 321 appellant had the right to appear and move to quash service, and then to answer. See also 77 Ark. 412; 59 Ark. 593; 85 Ark. 236. It was error to give plaintiff's instruction No. 2.

Seth C. Reynolds and *A. P. Steel,* for appellee.

HUMPHREYS, J. Appellee instituted suit in the circuit court of Little River County against appellant to recover damages on account of a breach of an alleged contract whereby appellee was to haul, by water, 400 cords of stave bolts from Tilson's Landing on Red River to appellant's plant at Index, on said river. The sheriff's return on the summons is as follows:

"On the 6th day of June, 1921, I have duly served the within writ by delivering a copy and stating the substance thereof to the within named Robert Welch Stave & Mercantile Company, by delivering a copy to J. R.

Wiseman, manager of said company, as I am herein commanded. (Signed) J. R. Pierce, Sheriff."

Appellant appeared specially and moved to quash the service on the ground that it was a Missouri corporation, doing business solely in the State of Missouri, and that it had no place of business in Arkansas. After hearing testimony upon the issue tendered in the motion as to whether appellant was doing business at Index, Arkansas, the court overruled the motion, to which ruling exceptions were saved; and, without waiving any of its rights under said motion, appellant filed an answer denying all the material allegations in the complaint, and, by way of further defense, interposed the statute of frauds.

The cause was then submitted to a jury upon the pleadings, testimony and instructions of the court, which resulted in a judgment in favor of appellee for $200 and costs, from which is this appeal.

Only so much of the testimony has been abstracted by the respective parties as they deem necessary for a proper presentation on appeal of the two following questions:

First, whether the court erred in overruling the motion to quash service.

Second, whether the court erred in giving instruction No. 2 for appellee, over the special objection of appellant, which is as follows:

"2. The court instructs you that, in determining whether or not the defendant was doing business at Index at the time of this contract, you may take into consideration representations made by its managers, officers and employees, as well as any and all other facts and circumstances that throw any light on the facts."

The specific objections made to instruction No. 2 were that it assumed that J. R. Wiseman was manager and an officer of appellant, and that the instruction allowed the jury to take into consideration any statement made by any employee of the partnership that existed at Index by which it might bind appellant in the case. The instruction does not mention J. R. Wiseman and does not

assume that he was manager of appellant at Index. That was the issue in the case, and the meaning of the instruction is that the jury might consider the statements of the manager, officers and employees at the mill at Index along with all the other facts and circumstances in determining whether they represented appellant, and whether appellant was doing business at that point. The instruction did not tell the jury that agency might be established by the testimony of the agent alone. If the testimony of any of the witnesses was incompetent, the objection thereto should have been preserved and presented on appeal. The competency and relevancy of testimony cannot be reached on appeal in a law case by an objection to an instruction. The objection to the evidence itself must be made in a motion for a new trial, abstracted and presented as error to the appellate court.

As we understand it, the real contention of appellant is that no substantial evidence was introduced tending to show legal service on or liability against appellant. This must depend on whether there was any substantial evidence tending to show that appellant was conducting a business at Index. If so, service upon its manager at that point was sufficient to bring it into court and to sustain a judgment and verdict against it. Section 1152, C. & M. Digest.

J. W. Wiseman admitted that he was managing the business at Index, but denied that the business was owned or operated by appellant. He testified that the business was owned by Robert Welch himself and his brother, and was conducted by himself as manager under the partnership name of Welch Stave Company, and that it was an independent business. He testified that Robert Welch was president and his brother secretary of the Missouri corporation, and that the only connection the Missouri corporation had with the business at Index was to lend it money and take a part of its output. In his cross-examination, however, he made the following answers to questions propounded to him:

"Q. Your bank account is handled at Texarkana under the Welch Stave Company? A. Yes sir. Q. You

receive checks from the Robert Welch Stave & Mercantile Company to pay the labor at the mill, don't you? A. They are furnishing the money. Q. You admit that your payroll comes through the Robert Welch Stave & Mercantile Company of Saint Louis? A. Yes, some of it does. Q. I will ask you if, every time you issue a bill out there at Index, if you don't immediately send the bill to the office of the Robert Welch Stave & Mercantile Company? A. Yes sir. * * * Q. When the bank at Texarkana called on you for rating, did you not state to them that your company was a branch of the Robert Welch Stave & Mercantile Company, and, for the purpose of investigating the standing of the company, to make their inquiry of the Robert Welch Stave & Mercantile Company? A. I don't remember; I expect I did. I will tell you, the Robert Welch Stave & Mercantile Company is furnishing the money to us to run the mill at Index. Mr. Welch and my brother are interested in the business at Index. They are furnishing me the money to run the mill. * * * Q. Did T. H. Wiseman and Robert Welch own fifteen thousand dollars worth of machinery at Ogden in 1921? A. I guess possibly we owned more than that. Q. How many different names have you gone under at Index since you have been there? A. Two. Q. What were they? A. Welch Stave Company and Index Stave Company. Q. I will ask you this question: Didn't Mr. Robert Welch, or the Robert Welch Stave & Mercantile Company, in sending you money to pay off the payroll, make the checks payable to the Robert Welch Stave & Mercantile Company and send to you to be deposited in your bank here to pay your hands? A. After Mr. Welch got sick they did. Q. You get mail continually addressed to the Robert Welch Stave & Mercantile Company at Index, don't you? A. No sir. I don't know. Possibly I get circulars, but they get that, I suppose, from the Bradstreet Company."

It was also shown that most of the books relative to the business at Index were kept in the office of appellant in Saint Louis.

The appellee testified that he made the contract for hauling the staves with J. R. Wiseman, as manager of the Robert Welch Stave & Mercantile Company; that he had been familiar with appellant and its manager for two years, and had always understood appellant was a corporation.

It is true that the mere act of lending money to a concern and taking the output manufactured by it does not, of itself, show that the concern advancing the money and taking the output is the owner or interested as a party in the concern to whom it furnishes money, but this fact, when taken in connection with the manner of operation and control of the business by the advancing concern, may furnish a basis for a reasonable inference that the business was owned or operated by the concern which advanced the money. We think the facts and circumstances in the instant case were sufficient from which the court and the jury might well draw an inference that the business at Index was owned or operated by appellant.

No error appearing, the judgment is affirmed.

WISCONSIN & ARKANSAS LUMBER COMPANY *v.* MONTGOMERY.

Opinion delivered October 13, 1924.

1. NEGLIGENCE—MISTAKE OF JUDGMENT.—Where one is called upon suddenly in an emergency to do something for a person in a perilous position, a mere mistake of judgment does not constitute negligence as a matter of law.
2. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—A fellow-servant engaged in operating a machine for loading logs on cars was not guilty of negligence where, on hearing cry of distress from plaintiff, whom he could not see, he reversed the machine, instead of stopping it.

Appeal from Hot Spring Circuit Court; *Thomas E. Toler,* Judge; reversed.

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

Where one is placed in a position where he has to act in a certain emergency, he is not liable for a mistake of judgment. 25 N. Y. Supp. 91; 104 Va. 400; 51 S. E. 731; 37 L. R. A. (N. S.) 43. Especially so where the peril has been caused by the fault of another. 91 Ark. 388; 67 Ark. 209; 84 Ark. 241; 102 Ark. 499; 153 Pa. 117; 25 Atl. 994; 113 Ill. App. 312. There was no evidence to show any negligence on the part of the defendant. 105 Ark. 364.

H. B. Means, for appellee.

McCULLOCH, C. J. Appellee received personal injuries while working in the service of appellant, and he sues to recover damages, claiming that his injuries occurred by negligence of other servants of appellant.

Appellee and other servants of appellant performed services in connection with the operation of a machine used in the loading of logs on flat-cars, lifting the logs from the ground and placing them on the cars, to be hauled to the mill. The machine consisted of a cab inclosing an engine and hoisting apparatus, and the lifter, or "boom," as it is called, swung out of the front end of the cab. The logs on the ground were picked up with tongs attached to the end of the boom, and, as the cab with the boom attached to it swung around, the log was hoisted and carried to the car in front of the cab. The cab rested on a frame which rolled along the track running along the string of cars to be loaded. As a car was loaded, the loading machine would be moved back to the next car, and this process was continued until all the cars in the string were loaded. Appellant was engaged in hooking the tongs, that is, in attaching the tongs to the logs as they were loaded. There were four men employed in that work, and they worked in pairs on alternate days. The men would work one day and rest the next, with no duty to perform except to be present and assist in moving the loader from one car to another after the car had been completely loaded.

The day on which appellant was injured was a rest day for him and his co-worker, and, according to

the testimony, appellant had placed himself on the opposite side of the cab from the pile of logs on the ground which were being loaded on the car. He was waiting there to assist in moving the loader to the next car, and, with a cross-bar in his hand, he sat down on the axle of the car. Nichols was the foreman of the crew and had charge of the loading machine. He also operated the loader, his position being in the cab, which was inclosed on two sides.

Appellee, as before stated, had a cross-bar in his hand while he was sitting on the axle waiting for orders to transfer the loader, and he testified that he had the cross-bar for the purpose of pushing the wheels of the frame of the loader over to the next car and transferring it, and that, when he got up from his sitting position, he slipped and fell, and the corner of the cab, which was then swinging around with a log on the boom, caught him and drew him under the cab between it and the frame on which it rested. He testified that, as soon as he was caught, he hollered, and so did another operative, named Shinn, who was standing to one side. Nichols, who was operating the loader at that time, heard the distress call, and immediately reversed the loader, and appellee was mashed and his collar-bone broken.

The undisputed testimony is that Nichols could not see the position appellee was in at the time, nor did he know that appellee was in a position of danger until he heard the voices of appellee and Shinn.

It is not contended that there was any negligence on the part of appellant or any of its servants in moving the loader and causing it to strike appellee, nor is there any evidence that Nichols knew or had reason to believe that appellee would be injured by the moving of the loader in its ordinary operation. The sole contention is that Nichols was guilty of negligence in reversing the loader after he received notice of appellee's perilous position. In other words, the only theory upon which appellee seeks to sustain the recovery of damages is that his perilous position was discovered and that Nichols failed to

exercise ordinary care to protect him after receiving notice of the danger. On the other hand, it is earnestly insisted on the part of counsel for appellant that Nichols was not guilty of any negligence in reversing the loader after hearing the distress call of appellee from his position of peril.

The only testimony which tends in any degree to show negligence on the part of Nichols is that of appellee himself, who stated in his testimony that, after he was caught and drawn in under the loader and the loader was brought to a stop, he believed he could have been pulled out without serious injury, as he expressed it, except "a good tight mashing." He expressed this merely as his opinion, but explained that he had never been in such a situation before. Appellee stated the situation with respect to the injury as follows:

"Q. Now tell what happened after the foreman was notified that you were caught? A. Why, he turned and pulled the loader back. When he started turning back, I had this arm here, and when it turned back it pressed so tight that this elbow that the wheel was right over here, and this elbow hit the wheel, and it couldn't slip any way, so it just pulled all of this part of my back up here, and it broke the collar bone and pushed all this side of me up under my ear. Now I could have rolled out of there without their moving the machine."

We are of the opinion that it was purely a matter of speculation to say that the reversal of the loader was an act which contributed to appellee's injury. It is clear that the act of Nichols in thus reversing the loader was, to say the worst of it, only a mistake of judgment. He was acting suddenly and in an emergency, and he was called on to do something for a person who was in a perilous position, and a mere mistake of judgment does not necessarily constitute negligence. We have often said that a mistake of judgment does not, as a matter of law, constitute negligence. *St. L. I. M. & S. Ry. Co.* v. *Touhey,* 67 Ark. 209; *Woodson* v. *Prescott & N. W. Ry. Co.,* 91 Ark. 388; *Kansas City Southern Ry. Co.* v. *Wat-*

son, 102 Ark. 499. But we are convinced that the circumstances of the present case do not warrant the inference even that it was error in fact to reverse the loading machine, instead of stopping it and holding it in a stationary position, so as to let appellee crawl out from his position. The warning cry of appellee and his companion Shinn called for some action on the part of Nichols, who was operating the loader, and it called for action instantly. He could not see the injured man, and it was not unnatural for him to suppose that, as the injury had in some way been inflicted by the forward movement of the rear end of the cab, further injury would be averted by reversing the movement so as to enable the injured man to get out of his perilous position. If Nichols saw, or could have ascertained at the moment, what the particular situation of appellee was, then the inference of negligence might be drawn from his failure to adopt a proper course to enable appellee to be extricated from his position of peril, but the undisputed testimony is that Nichols could not see the injured man and had no means of knowing just what his position was; but he knew, from the warning given him by appellee and Shinn, that appellee was in a perilous position and that some quick movement of the machine was called for, either to stop it and keep it stationary or to move it backward. As before stated, it was a natural thing to suppose that the best way to avert further injury was to move the machine backward, as the injury had occurred by a forward movement.

Our conclusion therefore is that there was no negligence, and the court erred in submitting the question to the jury.

Reversed and remanded for new trial.

WILSON v. DANLEY.

Opinion delivered October 13, 1924.

1. ELECTIONS—PRIMARY ELECTION CONTEST—SUFFICIENCY OF AFFIDAVIT.—The fact that an affidavit to a complaint in a primary election contest, under Crawford & Moses' Digest, § 3772, does not recite that affiants are reputable citizens, is not fatal to its sufficiency, as the jurisdictional fact is that 10 reputable citizens have made the affidavit, not the mere recital of that fact.
2. ELECTIONS—PRIMARY ELECTION CONTEST—SUFFICIENCY OF AFFIDAVIT.—An affidavit in a primary election contest which alleges that affiants are citizens of the county is *prima facie* a sufficient compliance with Crawford & Moses' Dig., § 3772, requiring affidavits of 10 reputable citizens.
3. ELECTIONS—PRIMARY ELECTION CONTEST.—Persons qualified to vote at a primary election by reason of having the required residence were eligible to make affidavit in a contest of a nomination, though they were not entitled to vote because of failure to pay their poll taxes.
4. ELECTIONS—QUALIFIED ELECTOR.—One who paid his poll tax in an adjoining county but has resided in the county of the venue for six months is a qualified elector at a primary election.
5. ELECTIONS—SUFFICIENCY OF POLL-TAX RECEIPT.—A poll-tax receipt which gave the taxpayer's postoffice but did not otherwise state his residence, *held* sufficient to identify him.

Appeal from Pope Circuit Court; *J. T. Bullock,* Judge; reversed.

E. A. Williams, for appellant.

The supporting affidavit was in due form. It would not have added anything to the affidavit to have alleged that the affiants were "reputable citizens." That is a matter subject to proof. See 145 Ark. 585. It is unreasonable to hold that an elector shall be deprived of his right to vote, simply because the collector failed to make out his poll-tax receipt in the exact form required by § 3777, C. & M. Digest. See 159 Ark. 199, and 160 Ark. 269.

Ward & Caudle, and *Hays, Priddy & Hays,* for appellee.

The reference in the statute to a reputable citizen undoubtedly means citizens of honor and good repute, not merely electors. The case relied on by appellant in 145 Ark. 585 is not in point, as there only the meaning of the word "citizen" was discussed. The papers filed by

contestant must affirmatively show every fact necessary to give the court jurisdiction. 136 Ark. 217; 148 Ark. 83; 159 Ark. 199. The poll-tax receipts of Chambers, Austin and Bradford were void under § 3777, C. & M. Digest, and they were not entitled to sign the affidavit, not being reputable citizens within the meaning of the statute. They were not even entitled to vote.

SMITH, J. Appellant instituted this proceeding to contest the nomination of appellee as the Democratic candidate for county judge of Pope County. His complaint contained various allegations of fraud and illegal voting, of which appellee was the beneficiary and by means of which his nomination was effected. The complaint was verified by ten persons, and the verification reads as follows: "Come John Chambers, Emmitt Austin, W. F. Bradford, * * * (and seven other persons there named), and each for himself says that they are citizens of Pope County, Arkansas, and members of the Democratic party, and that the statements made in the foregoing complaint are true to the best of their information and belief, said statements being made under oath."

A demurrer was filed to the complaint upon the ground that it did not state a cause of action. Before passing upon the demurrer the court heard the following testimony:

John Chambers, one of the ten affiants, testified that he voted in the primary election on August 10 in Burnett Township, Pope County, in which he had resided since the preceding December. That he had previously lived in Conway County, where he had been assessed, and that he paid the taxes thus assessed against him two or three or four days after April 10, including his poll tax, the receipt for which he exhibited and which reads as follows:

"No. 2067. Receipt for Poll Tax of 1923. Color W

"Received this 10th day of Apr., 1924, of John Chambers, residence..... postoffice address Morrilton, R. F. D. No....., voting precinct No....., school district No. 34, the sum of one dollar in payment

of poll tax charged against said person in this county for the year 1923.

"(Signed) Jas. Guy Tucker, Auditor of State.

"(Signed) R. E. Bartlett, Sheriff & Collector, Conway County, Arkansas. By (signed) Mildred, D. C.

"If paid on or before Saturday next preceding the first Monday in July, 1924, will entitle the taxpayer, if otherwise qualified, to vote at any election held in this State prior to the first Monday in July, 1925."

The receipt was executed by the collector of Conway County on one of the official blanks prepared by the Auditor of State pursuant to that requirement of law.

The receipts of Austin and Bradford were also exhibited, and were substantially similar, except that they were executed by the collector of Pope County.

The receipt of Austin was executed in the name of E. Y. Austin, whereas he had signed the affidavit supporting the complaint as Emmitt Austin, but he testified that his name was Emmitt Young Austin, and that his custom was to sign his name as Emmitt Austin.

It is conceded that the names of Chambers, Austin and Bradford did not appear in the official list of voters of Pope County which the collector prepared and filed pursuant to law, and which was furnished to and used by the judges of election in holding the election, and that their receipts were not filed with the judges nor returned by the judges with the election returns, as required by § 3777, C. & M. Digest, as interpreted by this court in the case of *McLain* v. *Fish*, 159 Ark. 199.

The court below held that the complaint was not supported by the affidavits of ten reputable citizens as required by law, and dismissed the complaint on that account.

In the case of *Logan* v. *Russell*, 136 Ark. 217, it was held that the requirement of § 3772, C. & M. Digest, that the complaint in a proceeding to contest the certification of a primary nomination shall be supported by the affidavits of at least ten reputable citizens, was jurisdictional, and that if such affidavit was not filed, the proceeding would be dismissed.

It becomes necessary therefore in the instant case to determine whether the affidavit set out above meets the requirement of the statute.

It will be observed that the affidavit does not recite that the affiants are reputable citizens; but we do not think this omission fatal to the sufficiency of the affidavit. The recital that affiants, ten in number, were reputable citizens would not be conclusive of the truth of that recital. The thing which gives jurisdiction is that ten reputable citizens have signed, and not the mere recital of that fact.

In the case of *Ferguson* v. *Montgomery,* 148 Ark. 83, we held that it was essential that the affiants should be members of the party holding the contested election, but that it was not essential that the affidavit recite that fact.

In the case of *Simmons* v. *Terral,* 145 Ark. 585, we held that the word "citizen," as used in the statute, was synonymous with the word "elector," and, in reviewing that case in the *Ferguson* v. *Montgomery* case, we said: "Now the object of primary election statutes is to give the electors of recognized political parties the immediate control in the selection of their own candidates. Therefore only those who are entitled to participate in the primary were directly interested in the election and could be said to be reputable citizens or electors within the meaning of the statute."

Here the affiants each alleged that they are citizens of Pope County and members of the Democratic party, and we think this *prima facie* is sufficient compliance with the statute.

It is urged, upon the authority of the case of *McLain* v. *Fish, supra,* that affiants could not be interested persons, because their names did not appear in the published official list of qualified electors and that the evidence of their qualification, to-wit, a poll-tax receipt, was not returned by the election officers, as required by § 3777, C. & M. Digest. This requirement is that the elector whose name was omitted from the official list of voters should file the original, or a certified copy, of his tax receipt with the judges of the election, and the statute

also provided that, if they voted without complying with this statute, their ballots should not be counted.

But we are considering now the question whether the affiants were eligible to make the affidavits, and not whether their votes should be counted. They may not have sufficiently complied with the law to have their ballots counted, and yet have been entitled to vote, had they complied with the law by filing their receipts with the judges. Now, if these affiants were qualified to vote at this election, they did not forfeit their status as eligible affiants because their attempt to exercise the right to vote was abortive.

We proceed therefore to consider whether the affiants were entitled to vote. They were members of the Democratic party, and were residents of Pope County. Chambers had assessed and paid his poll tax in another county, but he had resided in Pope County for more than six months, and he had therefore resided long enough in that county to meet the requirement of the law in regard to residence. Section 1, article 3, Constitution. We think also that Emmitt Austin sufficiently identified himself as being E. Y. Austin. The affiants were therefore qualified electors if they have properly paid their poll tax.

It is earnestly insisted that affiants were not qualified electors because the receipts for the payment of their poll tax do not meet the requirements of § 3777, C. & M. Digest. It is provided in this section of the initiated act controlling contests of primary elections that "it shall be the duty of each elector at the time of the payment of his poll tax to state, and it shall be the duty of the collector to record and certify in his receipt evidencing the payment of such poll tax, the color, residence, postoffice address (rural route, town or street address), voting precinct, and school district, of such person at the time of the payment of such tax, and all poll-tax receipts not containing such requirements shall be void and shall not be recognized by the judges of election; provided, however, it shall not be necessary to state or have certified the street address of any such person in cities and towns

where the numbering of houses is not required by the ordinances thereof."

This section further provides that the Auditor of State shall have the poll-tax receipts which the law requires him to furnish to the collectors so printed as to conform to the requirements of this section.

The receipts exhibited by the affiants were executed on blanks furnished by the Auditor of State. The blank space showing residence was not filled out, but the post-office address is given. The rural route is not shown, and there may have been none. The voting precinct is not stated, but the number of the school district is given. The color of the taxpayer was not stated, but the letter "W" appears in that space, which was, no doubt, intended as an abbreviation for the word "white." The same omissions appear in all the receipts.

The evident purpose of this statute was to identify the taxpayer, so that he only, and not another, might use it as his authority for voting; and we think the collectors, in issuing these receipts, sufficiently complied with the requirements of the statute to make the receipts valid.

The word "residence" is defined in Webster's New International Dictionary as follows: "Act or fact of abiding or dwelling in a place for some time; act of making one's home in a place; as, the *residence* of an American in France or Italy for a year."

It is a matter of common knowledge that the great majority of the tax receipts are issued near the end of the time for paying taxes, and the collectors are pressed for time to serve the taxpayers, who have probably waited in line for the opportunity to pay, and the ordinary man would consider that he had sufficiently designated his residence when he had stated his post-office, and that he had sufficiently designated his voting precinct when he gave his postoffice address and the number of the school district in which he resides.

The possession of a poll-tax receipt by one liable therefor is made essential to the exercise of the duties

and rights of citizenship by Amendment No. 6 to the Constitution; and we do not think there was any intention to deprive a citizen of those rights, who had discharged the duty of paying his poll tax, because, in paying it, he had failed to have the collector fill out all blank spaces in the receipt, when they were sufficiently filled out to identify him, thereby meeting the evident purpose of the statute.

We are reenforced in this construction of the statute quoted from when we read it in connection with § 3741, C. & M. Digest, which provides: "* * * Any person liable to pay poll tax, and who has paid the same at any time within the dates named, shall, if possessed of the other qualifications required by law of an elector, be entitled to vote at any election held in this State at any time before the first Monday in July of the year succeeding that in which the payment is made."

We conclude therefore that the affiants were qualified electors and were entitled to make the supporting affidavit to appellant's complaint, and the court was therefore in error in dismissing the complaint for the want of a proper affidavit, and the judgment dismissing the cause will be reversed and the cause remanded, with directions to overrule the demurrer.

BELOATE v. NEW ENGLAND SECURITIES COMPANY.

Opinion delivered October 20, 1924.

1. MORTGAGES—REASSIGNMENT OF DEBT—ENFORCEMENT OF ACCELERATION CLAUSE.—Where default had been made in the payment of interest on a note secured by trust deed, the fact that the owner of the debt had assigned it and had not secured a reassignment before commencing a foreclosure suit did not prevent enforcement of the acceleration clause in the deed.
2. MORTGAGES—PARTIES TO FORECLOSURE.—The real owner of the debt secured by a deed of trust and the trustee therein are necessary parties to an action to foreclose such deed.
3. MORTGAGES—FORECLOSURE—DEFECT OF PARTIES.—Though a mortgage foreclosure suit will be dismissed if the owner of the debt

secured is not a party, such defect may be cured by subsequently joining him as a party.

4. MORTGAGES—RIGHT OF MORTGAGEE TO RECOVER TAXES PAID.—Where the owner of a debt secured by deed of trust assigned the debt and agreed to look after collections and report any tax delinquencies, in a subsequent suit by it after the debt had been reassigned to it, it could recover for taxes paid by it before reassignment, such payment not being voluntary.

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

E. H. Tharp, for appellant.

While the trustee in a mortgage is a necessary party, he cannot bring suit in his own name, but in his trust capacity. 44 Ark. 314. Suit must be brought by the owner of the indebtedness. 159 Ark. 231. A trustee cannot assume any right not given him by the grantor. 27 Ark. 122. The power of the trustee to act is limited by the deed itself. 31 Ark. 400. The reassignment after suit gave appellee no right either in the deed or note. 85 Ark. 246. The trustee could only bring action jointly with the owner of the note or foreclosed under the terms of the deed of trust, after being requested to do so by the holder of the note. 36 Ark. 17. Appellee was a volunteer in redeeming from the tax sale. One cannot make another his debtor without the latter's consent or request. 17 Wallace 166. The trustee could not recover judgment. 43 Ark. 521; 30 Ark. 600.

Ponder & Gibson, for appellee.

The suit was properly brought in the name of the trustee. The security company, although a proper party, was not a necessary party. C. & M. Dig., § 1092. See 30 Cyc. 85; 120 Wis. 405; 120 Ala. 449; 286 Ill. 606; 30 Ark. 249; 48 Ark. 355; 159 Ark. 231. Section 10100, C. & M. Digest, affords authority to appellee for the redemption of the land from tax sale. Redemption laws will be liberally construed. 39 Ark. 580; 113 Ark. 497. Almost any right, either at law or equity, perfect or inchoate, in possession or in action, or whether a charge or incumbrance, amounts to such ownership as will entitle the party holding to redeem. 39 Ark. 580; 42 Ark.

215. See also 74 Ark. 393. Any person may redeem lands from tax sale without authority, but such redemption inures to the benefit of the owner. 65 Miss. 516. Even if appellee were a volunteer, the reassignment by Mrs. Cady operated as a ratification of the redemption.

McCULLOCH, C. J. This is an action to foreclose a mortgage, or deed of trust, on real estate. The land in controversy was owned by T. J. Draper and his wife, Anna, and on January 1, 1919, they borrowed the sum of $2,100 from appellee, New England Securities Company, and executed a note for the same, due and payable five years after date, with interest coupons payable annually. They also executed a deed of trust to appellee, T. C. Alexander, conveying the land in controversy, as security for the debt. Prior to the commencement of this action the Drapers sold and conveyed the land to appellant, W. E. Beloate, the latter assuming, as a part of the consideration for the conveyance, to pay off the mortgage. The action was instituted by the New England Securities Company and T. C. Alexander, trustee, against Beloate and the Drapers.

It is alleged in the complaint that the New England Securities Company is the owner of the note with interest coupons, that default had been made in paying some of the coupons when due, and that the lands in controversy had been sold for taxes and that the same had been redeemed by the New England Securities Company, the sum of $357.02 being paid out in effecting the redemption. The notes and deed of trust contained an accelerating clause providing that all of the debt should be declared due on default in the payment of any interest coupon.

On January 24, 1919, the New England Securities Company assigned the debt to Mrs. Mary E. Wells Cady, by indorsement and by a separate written assignment, in which the assignor undertook to "look after the collection of the interest as it falls due, and the principal at maturity, and to remit same; to keep insurance in force for and on behalf of the holder thereof according to the provisions of the deed of trust securing the bond; to

make an annual examination of the taxbooks, and to report any delinquencies, and to advise the holder hereof of the status of the borrower and the condition of the security, whenever deemed necessary, hereby guaranteeing the deed of trust securing this bond to be a first and valid lien upon the premises described therein." Appellant Beloate filed an answer in which he denied that the New England Securities Company was the owner of the debt, and denied the right of the company to declare maturity of the same, or to pay the taxes on the land and assert a lien therefor, pleading that the New England Securities Company was a mere volunteer in the payment of the taxes. Thereafter, and before the trial of the cause, the New England Securities Company obtained a reassignment of the debt from Mrs. Cady. The instrument reassigning the debt was dated prior to the commencement of this action, but it was not acknowledged until a date subsequent to the commencement of the action. It appears that, in anticipation of the commencement of this suit, the reassignment was prepared by appellee New England Securities Company and forwarded to Mrs. Cady, and that the forfeiture was declared and this suit instituted before the assignment was actually executed by Mrs. Cady. The proof shows that the taxes were also paid by the New England Securities Company before the reassignment. In the final decree the court awarded a foreclosure for the full amount of the debt, as well as for the amount of taxes paid, and ordered a sale by the commissioner.

It is insisted, in the first place, that the suit was premature for the reason that a declaration of maturity of the debt was not made by the real holder; in other words, that the New England Securities Company was not the holder of the debt at the time it declared the maturity. It is sufficient answer to this contention to say that default had been made in the payment of interest which fell due prior to the commencement of the suit, and it was the right of the owner of the debt, whoever that might be, to declare maturity

under the acceleration clause and institute an action for the whole debt. The fact that the New England Securities Company had not secured a reassignment of the debt at the time it commenced this suit does not prevent an enforcement in this suit of the acceleration clause in the deed.

It is further insisted that the New England Securities Company was not the owner of the debt at the commencement of the suit, and could not be brought into the action after its commencement. The real owner of the debt, as well as the trustee in the mortgage, were necessary parties in the action to recover the debt and foreclose the mortgage. *Boyd* v. *Jones,* 44 Ark. 314; *Snider* v. *Dennis,* 159 Ark. 231. If the plea of appellant that the New England Securities Company was not the owner of the debt had been made good by proof, the suit should have been dismissed on account of defect of parties (*Boyd* v. *Jones, supra*), but the proof of the reassignment of the debt to the New England Securities Company subsequent to the commencement of the action was tantamount to an establishment of its rights to maintain this suit and to be brought in at that time as a necessary party-plaintiff, and, with that proof in the record, it would have been improper for the court to dismiss the action. Where one of the necessary parties has brought the action without joining the other party, the defect may be cured by bringing in the other party. *Snider* v. *Dennis, supra.* It is not like a case where there is an effort to substitute parties who have a right of action for other parties who instituted the action without right.

The same reasons stated herein for sustaining the decree with respect to the parties also sustain it as to the recovery of the taxes. In addition to those reasons, it may be said that the New England Securities Company was not a volunteer in paying the taxes, as it was under obligation to its assignee of the debt to protect the property from tax liens.

We think the decree was correct in all things, and it is affirmed.

PLUM BAYOU LEVEE DISTRICT *v.* POCKET CYPRESS DRAINAGE DISTRICT NO. 1.

Opinion delivered October 20, 1924.

1. DRAINS—TIME FOR APPEALING CASES.—A provision in a special act creating a drainage district that in cases "involving the validity of this district, or the assessment of benefits, and all suits to foreclose the lien of taxes * * * all appeals therefrom must be taken within thirty days," has no application where none of the above matters are involved, in which case the general statute of six months governs as to the time for appealing.
2. DRAINS—ENGINEER'S DISAPPROVAL OF PLANS.—Under Special Acts 1923, p. 1745, § 12, creating a drainage district, which provides that the drainage ditch may pass through a levee at a designated point, and that the engineer of the levee district shall approve the plans and specifications of the floodgates to be installed, *held* that, where the engineer disapproved such plans upon the ground that the place designated for passage of the ditch was inappropriate, his decision was erroneous, the statute being conclusive on that question.

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

Coleman & Gantt, for appellant.

The decision of the chief engineer is binding, and cannot be questioned except for fraud, or for such gross mistake as implies bad faith, or a failure to exercise an honest judgment. 83 Ark. 136. The fact that the court might differ with chief engineer in his conclusions will not warrant setting aside his findings. 17 How. 344. The burden was upon the plaintiff to show that the chief engineer's requirements were made in bad faith. 112 Ark. 83.

Gray & Morris, for appellee.

Where an arbitrator is selected by the Legislature, strong and satisfactory evidence only is required by the plaintiff. 43 L. R. A. 843. Where the plans and specifications have been approved by the chief engineer, his decision upon other matters is not material to the issue nor binding upon appellee. 88 Ark. 214.

McCULLOCH, C. J. Under authority of a special statute enacted by the General Assembly in the year

1905, Plum Bayou Levee District, created by that statute, constructed a levee along the east bank of the Arkansas River in Pulaski, Lonoke and Jefferson counties, to protect the adjacent lands from flood waters of the river. The levee begins at a point near Old River, in Pulaski County, and extends southeasterly along the bank of the river for a distance of about forty-three miles, ending at a point south of Rob Roy, and it protects an area of about 377,000 acres, the levee being maintained by the district.

The General Assembly of 1923 enacted a statute (Special Acts 1923, p. 1745) creating a drainage district known as Pocket Cypress Drainage District No. 1 of Pulaski and Jefferson counties, and it embraced an area of about 12,000 acres within the boundaries of the levee district for the purpose of draining that area. A section of the statute creating the drainage district reads as follows:

"Section 12. The commissioners are hereby granted the privilege to pass through Plum Bayou at a point near the mile-post between miles 18 and 19, in section three (3), township three (3) south, range ten (10) west, Jefferson County. However, all plans, specifications and installation of the necessary floodgates to be installed through said levee shall be approved by the chief engineer of the Plum Bayou Levee District."

Plans and surveys were made by the drainage district, at considerable cost, to carry out the work of constructing the drainage canal or ditch, and also plans and specifications were made by the engineer of the drainage district for passing the drainage canal through the levee at the point designated in the statute and for the installation of necessary floodgates. These plans were presented to the chief engineer of the levee district, who declined to approve them, and this action was instituted in the chancery court by the drainage district against the levee district to obtain a mandatory injunction compelling the levee district to permit the passage of the ditch through the levee, and to enjoin the levee district from interfering with the prosecution of that work. An answer

was filed by the levee district alleging that the plans and specifications for the passage of the drainage ditch through the levee and the installation of floodgates were inadequate to protect the levee, and that the engineer of the levee district had properly declined to approve them. The answer also attacked the validity of the statute creating the drainage district on the ground that it was an attempt to take property without compensation and without due process of law.

There was a trial before the chancery court on oral testimony of the respective engineers for the two districts, and other engineers, and also upon all of the maps showing the character of the area and the proposed plans and specifications for the work of passing the ditch through the levee and installing the floodgates. There were several sittings of the court and examinations and reexaminations of the engineers. In the beginning of the trial there were many points of difference between the opinions of the several engineers, but these differences were, to a considerable extent, eliminated as the trial progressed, and there was an exchange of views as to the plans for this work. The issues of fact finally settled down to the question as to the place for cutting through the levee and the proper safeguards to be adopted for temporarily protecting the levee while the work of constructing a floodgate and spillway was in progress. The main contention of the levee district and its engineer was that the point designated in the statute was not an appropriate one, for the reason that there was danger of the levee caving at that place on account of the encroachment of the river. The chancery court rendered a decree granting the relief prayed for by the drainage district.

The appeal to this court was not perfected for nearly six months after the rendition of the decree, and the appellee moved to dismiss on the ground that the statute creating the drainage district provides that, in all cases "involving the validity of this district, or the assessments of benefits, and all suits to foreclose the lien of taxes, *** all appeals therefrom must be taken and perfected within

thirty days." Appellant has abandoned the attack on the validity of the statute by failing to insist upon it here, and that strips the case of any of the characteristics which are embraced within the statute which shortens the time for appeal. The case, as it now stands, does not involve the validity of the district, or the assessments of benefits, and it is not a suit to foreclose the lien for taxes, hence the appeal may be prosecuted within the time specified by the general statute fixing six months as the time for appeal to this court. *Davis* v. *Cook,* 155 Ark. 613.

The contention of learned counsel for appellant is that, under a fair construction of § 12 of the statute creating the drainage district, the privilege of passing the ditch through the levee is conditional on the approval of the chief engineer of the levee district as to the selection of the place, as well as to the sufficiency and correctness of the plans and specifications. On the other hand, it is contended for the drainage district that the statute itself fixes the particular point for the passage of the drainage ditch through the levee, and that the requirement for securing the approval of the levee district relates only to the plans and specifications for the construction of the work at the place mentioned in the statute. We are of the opinion that the construction contended for by appellee is the correct one. In fact, the language of the statute admits of no other interpretation, for it plainly and definitely specifies in absolute terms that the drainage district shall have the privilege of passing the ditch through the levee at a designated point. Of course, the use of the word "near" gives a little latitude, but it clearly means that the point of passage shall be approximately at the mile-post between the designated sections. If there was nothing more in this controversy than the question as to the particular spot where the ditch should pass through the levee, there would be room for contention that there should be approval by the engineer of the levee district, but the contention of that engineer is that no point anywhere near the one designated is appropri-

ate, and, in order to carry out the views of the engineer, it would be necessary to make a radical change in the location. In fact, he contends that the levee should not be cut at all, but that the ditch should be run into Plum Bayou, and that that stream should be straightened so as to carry the water into the Arkansas River. This, according to the proof, would entail large expense, out of proportion to cost of drainage improvement; but, without discussing that feature of the testimony, we find it sufficient to say that the Legislature itself has granted the privilege of passing the ditch through the levee and has designated the place where it should be done. The evidence adduced in the case is not sufficient to show that the statute selecting the place is arbitrary or demonstrably erroneous. With this point in the controversy settled, it is clear that the refusal of the engineer of the levee district to approve the plans was arbitrarily based on what he conceived to be a proper selection of the place. It is true, as contended by counsel for appellant, that the engineer was, by the statute, constituted the arbiter concerning the approval of the plans, and that his decision is binding, except for fraud or gross mistake (*Carlile* v. *Corrigan,* 83 Ark. 136), but the fact that the engineer based his disapproval wholly on the selection of the place for passing the ditch through the levee—a matter not involved in his decision—his determination is based on an obvious error, and is not binding.

The question of the selection of the place having passed out of the case, the only objections relate to the matter of temporarily protecting the levee during the period of cutting the ditch through the levee and constructing the floodgate and spillway. On the final examination of the engineer he conceded that, if the work was to be done at that place, the plans and specifications met his approval, and were such as he would adopt himself. The temporary protection was afforded by the decree of the court in providing that the work should be done during the months of August, September and October, where there is no probability of high water interfering.

With this and other safeguards specified in the decree to be thrown around the time and method of the construction of the work, any objections to the construction of the work under those plans and specifications were captious. The real controversy in the case was, as before stated, in relation to the selection of the place. In the final analysis there has been no substantial controversy as to the plan nor as to the method and time for the work to be done.

The decree of the chancery court is therefore affirmed.

BOSTICK v. PERNOT.

Opinion delivered October 20, 1924.

1. MUNICIPAL CORPORATIONS—IMPROVEMENT DISTRICT—BOUNDARIES.—Where the original petition for creation of an inprovement district and the ordinance creating it correctly described the boundaries of the district, the ordinance was not invalidated by the fact that the published copy of the ordinance contained obvious clerical or typographical errors in the enacting clause in describing the boundaries of the district, where the published preamble correctly described such boundaries.
2. MUNICIPAL CORPORATIONS—INDEFINITENESS OF PLANS.—Plans for a paving district which stipulated that a concrete pavement should be laid, but left it to the discretion of the commissioners to select the type of concrete which, considerering its durability and cost, would conserve the best interests of the people of the district, *held* not too indefinite.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

George G. Stockard, for appellant.

The difference in the description of the petition and ordinance passed by the city council and that in the ordinance published, is fatal to the validity of the district. 104 Ark. 298; 67 Ark. 30. The failure of the commissioners to make definite plans renders all subsequent proceedings void. 134 Ark. 315.

C. M. Wofford, for appellee.

Patent clerical or typographical errors in the description of the boundaries of improvement districts will not invalidate their formation. 148 Ark. 634. In determining boundaries of a tract of land it is not permissible to disregard any of the calls if they can be applied and harmonized. 4 R. C. L. 110. The county court has jurisdiction in all matters concerning the internal improvement and local concerns of the county. 43 Ark. 324.

WOOD, J. This is an action by taxpayers in Paving District No. 4 of the city of Van Buren attacking the validity of an ordinance of the city council of Van Buren creating the district. The original petition for the creation of the district, signed by ten property owners of the district, and the ordinance creating the district, described the boundaries of the district as follows:

"Beginning at the southwest corner of block one (1) Knox Addition to the city of Van Buren, Arkansas, thence due east to the center of the main line of the St. Louis and San Francisco Railroad, thence in a northeasterly direction along the center of the said main line to a point 140 ft. due east of the east line of Cane Hill Street; thence due north on a line 140 feet due east of the east line of said Cane Hill Street, through Drennen Addition, to the south line of William Penn Street; thence west along the south line of William Penn Street to a point due south of the line between lots two and three of Boatright & Ayers' subdivision of Drennen Addition to the city of Van Buren, Arkansas; thence due north across William Penn Street and on the line between lots two and three of Boatright & Ayers' subdivision of Drennen Addition to the north line of Pennywitt Street; thence due west along the north line of Pennywitt Street to the southeast corner of block thirteen, Knox Addition to the city of Van Buren; thence west to a point due north of the northwest corner of block nine, Knox Addition to said city: thence due south along the east line of Washington Street to the southwest corner of block one, Knox

Addition to the city of Van Buren, the place of beginning, and being wholly within the corporate limits of the city of Van Buren, Arkansas."

The boundaries of the district as above set forth in the original petition and in the ordinance creating the district are correctly described in the preamble to the ordinance, which was published in the Van Buren Press-Argus as required by § 5650 of Crawford & Moses' Digest. But, in the enacting clause of the ordinance as thus published, the words "thence west along the south line of William Penn Street" are omitted, and after this omission the description is "to a point due south of the line between lots one and two, block 4," when, in order to conform to the description in the original petition and ordinance as passed by the council, the description should have been "to a point due south of the line between lots two and three" instead of lots one and two, and leaving out the words "block 4."

The omission of the words in the correct description as contained in the original petition and in the ordinance as passed and in the preamble to the ordinance as published, and the insertion of the improper description in the enacting clause of the ordinance as published, creates an impossible situation. It was an error in the description so glaring that any property owner seeking to discover the true boundaries of the district as created by the ordinance could not be misled by this description. A property owner, when he compared the description in the original petition and ordinance as enacted by the council and as contained in the preamble to the ordinance as published, would readily perceive that the words omitted from the description in the enacting clause of the published ordinance and the words inserted therein were the result of a mere clerical misprision. The property owner, in reading the preamble to the published ordinance, would know that it contained a correct description, and he would also know that it was the intention of the typographer to follow such description, and that, in attempting to do so, he had made an impossible and erroneous

description. Patent clerical or typographical errors in the published description of boundaries of improvement districts will not invalidate the ordinances creating them.

In R. C. L., vol. 4, p. 110 and 111, it is said: "In determining the boundaries of a tract of land it is not permissible to disregard any of the calls if they can be applied and harmonized in any reasonable manner; if there is an actual contradiction between calls in the description of land, the court may reject the one which is false or mistaken, and an unreconcilable call may be disregarded if it appears to have been inserted by mistake." See *Johnson* v. *Hamlen,* 148 Ark. 634; *Castle* v. *Sanders,* 160 Ark. 391.

This case is clearly differentiated from the cases of *Voss* v. *Reyburn,* 104 Ark. 298, and *McRaven* v. *Clancy,* 115 Ark. 163. In those cases the publication of the ordinance failed to include lands that were embraced in the petitions for and in the ordinances creating the districts. It is not so here.

2. The appellant contends that the plans filed by the commissioners and approved by the city council are too indefinite in that they do not definitely describe the kind and type of paving to be constructed. The board of improvement, in reporting their plans to the city council, submitted, as a part of their report, the plans for the improvement as prepared by the engineer of the district. The engineer reports that it was advisable to use some type of concrete pavement. The board of improvement, in its plans, reported as follows: "While the estimated cost is based upon the use of plain concrete, we will advertise for bids upon this kind of paving both with separate and integral curb and gutter and also vibrolithic concrete paving. If the prices bid permit the use of vibrolithic concrete paving with the funds available, this type of paving will be selected, as we believe it will be for the district's best interest."

The estimated cost of the above types of concrete was set forth in the engineer's report attached to and

made a part of the report of the board of improvement. It will be observed that the board definitely planned a concrete pavement, the type to be used depending upon the cost thereof and the funds available. Thus the plans for the improvement were not indefinite, and it was certainly within the discretion of the board of improvement to select the type of concrete which, considering its durability and cost, would conserve the best interests of the people of the district. *Conway* v. *Commissioners of Board of Improvement Dist. No. 20, ante,* p. 487, and cases cited.

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

BROWN v. BOARD OF COMMISSIONERS OF PAVING DISTRICT No. 3.

Opinion delivered October 20, 1924.

1. MUNICIPAL CORPORATIONS—SINGLENESS OF IMPROVEMENT.—Paving does not necessarily include curbing and guttering, as they are not convertible terms, and do not necessarily include each other, so as to constitute a "single improvement," under Crawford & Moses' Dig., § 5666, but distinct districts may be created for each, covering the same territory.
2. MUNICIPAL CORPORATIONS—CONCLUSIVENESS OF COUNCIL'S FINDING.—The determination of a city council as to the singleness and unity of an improvement project, as well as the selection of the property to be benefited thereby, is conclusive, except for fraud or demonstrable mistake.
3. MUNICIPAL CORPORATIONS—LIMIT OF COST OF IMPROVEMENT—INCLUSION OF COURTHOUSE.—In determining whether the cost of a proposed improvement exceeded the limit allowed by Crawford & Moses' Dig., § 5666, the commissioners of the district properly included the value of the county courthouse and grounds.

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

Starbird & Starbird, for appellants.

The plea of *res judicata* can only be available against one who was either a party or a privy to a party in the action pleaded. 96 Ark. 451; 105 Ark. 86. The organi-

zation of two districts to construct a single improvement is illegal and void, regardless of the cost of the improvement. 123 Ark. 467. The commissioners erred in including the value of the courthouse and grounds in their assessment. 88 Ark. 406; 141 Ark. 186; 123 Ark. 467. Public property, not being assessable, should be excluded in determining the value of the real property in an improvement district. 69 Ark. 69.

E. L. Matlock, for appellees.

When one or more of the taxpayers in a municipal improvement district, similarly situated, brings a suit attacking the legality of the formation of the district or its legal existence, or taxes and assessments levied by it, such suit is essentially a suit for all the property owners and taxpayers in the district. A judgment against a county or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. Freeman on Judgments, 3rd ed., § 178. Where a citizen and taxpayer brings an action in behalf of himself and other taxpayers against a municipality every citizen is regarded as a party to the proceedings, and bound by the judgment rendered. 15 R. C. L. § 510; 107 Pac. 163; 28 Kan. 289; 26 Kan. 658; 123 Ill. 122; 13 N. E. 161; 13 S. C. 290; 35 Conn. 526; 16 How. 303; 14 L. ed. 942; 13 Wash. 141; 42 Pac. 541; 34 W. Va. 730; 12 S. E. 859; 133 N. Y. 187; 30 N. E. 965; 31 N. E. 334; 60 Vt. 1; 12 Atl. 224; 57 Ohio St. 132; 48 N. E. 667. A former judgment is evidence of nothing in a suit between strangers to the record, except the rendition of the judgment. 96 Ark. 451; 105 Ark. 86. The findings of the city council that a majority in value signed the petition is final and conclusive. 131 Ark. 28; 132 Ark. 511; 131 Ark. 429.

HART, J. This appeal involves the correctness of a decree of the chancery court in which the complaint of certain landowners attacking the organization of municipal improvement districts and seeking to restrain the commissioners from constructing the improvements was dismissed for want of equity.

On the 31st day of May, 1923, appellants brought this suit in the chancery court against appellees to restrain them from proceeding further in the construction of two local improvements.

Appellants allege that they are owners of real property within the limits of each of the improvement districts, and that appellees are the commissioners of both districts.

The complaint alleges that two improvement districts were formed in the city of Van Buren having the same commissioners, assessors, and engineers; that one of said districts was organized for the purpose of building pavements upon and along certain streets in the city of Van Buren, and that the other district was organized for the purpose of building curbs and gutters along the same streets; that the districts have the same boundaries and were organized at the same time, and therefore constitute a single improvement.

The complaint also alleges that the cost of the improvement in one of the districts amounts to more than twenty per centum of the assessed value of the property therein.

It appears from the record that other owners of real property in the districts brought suit in the chancery court against the commissioners of the districts to enjoin them from proceeding further with the construction of the proposed improvements. One ground of attack was that the commissioners assessed and levied a tax of more than twenty per centum of the value of the real property of the districts according to the last county assessment. Another ground of attack was that the improvements constitute in fact a single improvement, the cost of which exceeds twenty per centum of the value of the real estate of the district. The chancery court dismissed these suits for want of equity, and an appeal was taken to this court. The decree was reversed because the cost of the improvement exceeded the twenty per cent. limit provided by statute, and the court also held that the assessments were void because they were not made upon a proper

basis. In that case, as well as in the instant case, it was contended that the fact that the districts were organized at the same time, and that one was for paving and the other for curbing and guttering the same streets, showed as a matter of law that but a single improvement was intended. The court, following the case of *Bottrell* v. *Hollipeter,* 135 Ark. 315, held that, while the power to pave may include the cost of curbing and guttering, yet they are not convertible terms, and do not necessarily include each other so as to constitute a single improvement. *Meyer* v. *Board of Improvement of Paving District No. 3,* 148 Ark. 623.

In *Cooper* v. *Hogan,* 163 Ark. 312, this court held that the determination of a city council in including property in an improvement district as to the singleness and unity of the improvement project, as well as the selection of the property to be benefited thereby, is conclusive except for fraud or demonstrable mistake.

Precisely the same issue on this point is raised in the present case as was raised in the cases just referred to, and these cases, being against the contention of counsel for appellants in the present case, necessarily preclude them from a recovery herein.

The other ground of attack upon the district is that the cost of one of the proposed improvements will be greater than the twenty per cent. limit of the assessed value of the property provided by statute.

The commissioners, in determining whether the cost of the improvement was greater than the limit prescribed by statute, included the value of the county courthouse and grounds as shown by the last county assessment. If the value of the courthouse as placed upon the assessment book by the county assessor should be included, the cost will not exceed the limit prescribed by statute. If the value of the courthouse as fixed by the assessor and placed upon the assessment book should not be included in making the estimate, the cost will exceed the limit prescribed by statute.

Section 5666 of Crawford & Moses' Digest provides, among other things, that no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment.

Section 9935 provides that the assessor, at the time of making the assessment of real property subject to taxation, shall enter in a separate list pertinent descriptions of all burying grounds, public schoolhouses, houses used exclusively for public worship, and institutions of purely public charity, and public buildings and property used exclusively for any public purpose, with the lot or tract of land on which said house or institution or public building is situated, and which are by law exempt from taxation, and the value thereof.

Thus it will be seen that the assessor is required to list all public buildings and to fix their value. There is no restriction in the Constitution as to the cost of the improvement, except that it shall not exceed the amount of the assessment of benefits. Therefore the Legislature had the power to provide that the cost of a single improvement should be twenty per centum of the value of the real property in the district as shown by the last county assessment. It also had the right to provide that the value of public buildings should be shown on the county assessment book. It follows that the value of the public buildings as shown by the last county assessment would be necessarily included in making the total value of the property shown by such assessment.

This rule was recognized in the *City of Malvern* v. *Nunn,* 127 Ark. 418. In this connection it may be stated that the Legislature of 1921 amended § 5666 of Crawford & Moses' Digest by taking away the twenty per centum limit as above set forth. General Acts of 1921, p. 416.

The improvement districts in the present case were organized before the passage of the act of 1921, just referred to, and the law as it stood before the passage of

the act must govern. Hence what we have said above disposes of the case; but, if it should be held that the act of 1921 applied, the result would be the same.

Therefore the decree will be affirmed.

ROGERS v. TRI-STATE MOTOR SALES COMPANY, INC.

Opinion delivered October 20, 1924.

ATTACHMENT—DELIVERY BOND—DISCHARGE OF SURETIES.—Where a delivery bond executed by defendant under Crawford & Moses' Dig., § 8731, was not conditioned as required by § 8649, that defendant should perform the judgment, but provided that the property should be "forthcoming and subject to the orders of the court," *held* that the sureties were discharged upon return of the property.

Appeal from Cross Circuit Court; *W. W. Bandy,* Judge; reversed.

S. W. Ogan, for appellant.

The attachment must have been sustained before any liability is incurred against the sureties upon the retaining bond. The condition of the retaining bond was fully performed. The liability of a surety on an attachment bond is created by and rests alone on the stipulations of the bond. Cyc. 4, vol. L. 840; 34 Ark. 542.

Giles Dearing, for appellee.

There was no attachment to sustain. Where personal property is sold and title retained, upon default, the vendor may bring replevin, or he may waive this right and elect to sue for the balance of the purchase price. 156 Ark. 319; 148 Ark. 151. Appellee's remedy is controlled by C. & M. Dig., § 8729, and it was not necessary to allege the ordinary grounds of attachment. 45 Ark. 136. The action instituted was not to enforce a lien, but to create one. 52 Ark. 450. The sureties on this bond are liable for the amount recovered in the action, without reference to whether the attachment was wrongfully

issued or not, and the attachment defendant is precluded from controverting the grounds of attachment. 39 Ark. 460; 48 Ark. 195.

SMITH, J. The Tri-State Motor Sales Company, hereinafter referred to as the company, sold an automobile to L. C. Rogers for the sum of $1,079, and, in payment therefor, Rogers executed two promissory notes, one for $359.72 and the other for $719.44. The title to the car was retained in the contract of sale and in the notes evidencing the debt.

Rogers failed to pay the notes when they fell due, and suit was filed to enforce payment, and it was there prayed: "That the sheriff of Cross County, Arkansas, attach and hold the said automobile herein described, and hold same subject to the orders of this court, and that a lien be by this court established upon said car, and that same be sold to satisfy the said debts."

The sheriff took possession of the car, whereupon Rogers executed the following bond: "We undertake and are bound unto the plaintiff, the Tri-State Motor Sales Company, Inc., and Commercial Acceptance Trust, in the sum of two thousand ($2,000) dollars, that the defendant, L. C. Rogers, shall perform the judgment of the court in this action, or that the undersigned will have the property attached in this action, or its value, one thousand and seventy-nine dollars, forthcoming and subject to the orders of this court, and for the satisfaction of such judgment." The sheriff approved this bond, and released the car to Rogers.

Upon the trial of this suit judgment was rendered in favor of the plaintiff for $1,018.86, and it was by the court adjudged that "a lien be and is hereby declared upon the said automobile, and that, if said debt be not paid, that said car be sold, * * *," and the proceeds of sale be applied to the payment of the judgment.

The car was sold under the judgment, and brought only $275. Thereafter the company sued Rogers and the sureties on his bond, set out above, and, upon the trial of this cause, judgment was rendered against the

sureties on the bond for the price of the car, less the proceeds from the sale, and the sureties have prosecuted this appeal.

Appellees rely on § 8731, C. & M. Digest, for the affirmance of this judgment. This section provides that the defendant in a suit of this character may give bond for the retention of the property as in cases of orders of delivery of personal property. The statute referred to, which prescribes the form of bond in cases of orders of delivery of personal property, is § 8649, C. & M. Digest, and this statute provides that the bond shall be "to the effect that the defendant shall perform the judgment of the court in the action."

It is only upon the execution of a bond with this condition that the defendant is entitled to have the property redelivered to him, and it will be observed that the bond here sued on was not so conditioned. The sureties did not undertake to perform the judgment except as an alternative if the automobile was not "forthcoming and subject to the orders of the court."

The auto was surrendered, and was sold under the orders of the court, and the condition of the bond was thus discharged. The company had the right to demand that the sheriff retain possession of the automobile until a bond was executed which conformed to the requirements of the statute; but the bond here sued on is, of course, the one which was executed, and not the bond which should have been required before the property was released.

The principle which controls here was announced in the case of *Fondren* v. *Norton,* 86 Ark. 410. That suit, like this, was one to enforce payment of a note given for the purchase price of the attached property. The property was found by the officer in the hands of a third party, who claimed to have purchased from the maker of the note. In lieu of a bond, the party in possession deposited with the officer a sum of money exceeding the value of the property. The trial court declared the law as follows: "1. The money in lieu of bond became such

bond as the statute required in such cases, and was an absolute and unqualified bond to perform the judgment of the court. 2. That, after the deposit and discharge of property, plaintiff relinquished all right to property, and could rely solely on the bond. 3. Plaintiff, having secured judgment against the original debtor, was entitled to the deposit of the money in satisfaction of his judgment." After rendering judgment in favor of the plaintiff for the amount of the note, the court directed that this judgment be satisfied out of the deposit in the hands of the officer. In reversing this judgment this court said: "The statute provides that, when the officer shall seize property in cases like this, the defendant may give bond for the retention as in cases of orders of delivery of personal property. Kirby's Digest, § 4968. 'Such a bond, in effect, as well as in terms, is absolute, to perform the judgment of the court.' *Mayfield* v. *Creamer,* 39 Ark. 460. The constable in this case was not authorized to receive money in lieu of such bond. He had no right to release the horse except upon the condition prescribed by the statute. The money being received without authority, it did not become a substitute for the bond prescribed by the statute."

The court further said that the owner of the money deposited with the officer obviously intended that the money should be held for the return of the horse (the property there attached) in the event it should be held liable for any judgment that should be recovered for the purchase money for which the note sued on was given, and that, in making the deposit, no consent was given that the money should be applied to the satisfaction of the debt if the horse was returned.

So here, the bond given was not conditioned as the statute required to secure the return of the property. The sureties obligated themselves to perform the judgment by paying the debt in the event only that the car was not returned, but, as the car was returned, the bond

was discharged, and the court was in error in rendering judgment against the sureties.

The judgment will therefore be reversed, and the suit against the sureties dismissed.

COSTON v. KEALY.

Opinion delivered October 20, 1924.

ATTORNEY AND CLIENT—LIABILITY FOR FEE.—Where an attorney representing certain contractors explained to one holding an order from the contractors that the claim of the latter against an improvement district was unliquidated and that his fee must be paid before anything should be paid on the order, and the holder of the order then filed it with the attorney for payment when the claim was collected, he will be held to have adopted the contract of employment of the attorney by the contractors, and the attorney's claim is entitled to priority.

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

James G. Coston, for appellant.

The relation of attorney and client existed between Coston and Kealy, and the latter is estopped to claim priority over the former's claim for services rendered. When Kealy was in Coston's office, he knew at that time that there would not be enough realized on the claim of Sifers & Hunt to pay both himself and Coston in full, and when Coston told him that his fee must be paid first, that was the time for Kealy to object, if he intended to object at all. 103 Ark. 513, 145 S. W. 245; 22 Ark. 173. The instrument given to Kealy by the contractors was not an assignment of any interest in the contract between them and the improvement district or in the funds due them, but merely a bill of exchange. C. & M. Digest, §§ 7892-7893. As to the status of Coston, it is settled that he not only has a lien on the securities in his hands, but also that he is virtually an assignee of a portion of the judgment, or of the *debt or claim* equal to his fee. 33

Ark. 234-235; 149 Ark. 11, 231 S. W. 195; 154 Ark. 302; 87 N. Y. 559-560.

Driver & Simpson, for appellee.

There is no evidence that the relation of attorney and client existed between appellant and Kealy, and there is nothing to base a common-law lien upon, save a mere contract between the contractors and the district. Appellant was notified that the contractors had sold the debt to appellee long before the certificates were issued, and that they had no interest in the certificates when issued. Cases relied on by appellant are not in line with appellant's contention and do not support his theory.

HUMPHREYS, J. This suit was brought on July 2, 1923, by Sifers & Hunt, contractors, through their attorney, J. T. Coston, against the commissioners of the Osceola Grading & Oiling District No. 1, and its collector, to enjoin them from making additional payments to a part of the creditors to the exclusion of plaintiff's claim, alleging insolvency of the district. It seems that the commissioners and collector were paying all of the first collections from the assessments to some of the creditors whom they favored, instead of pro-rating the amount amongst all the creditors. The indebtedness of the district amounted to $15,000 and the aggregate assessment of benefits amounted to only $8,202.50, which represented the entire assets of the district with which to pay its liabilities.

On the 28th of July, 1923, Kealy filed an intervention, alleging that, on the 17th of February, 1923, the contractors made an assignment to him of their interest in the funds due the contractors from the district to the extent of $5,789.70. He further alleged the insolvency of the district, and that the commissioners were paying some of the creditors, with a prayer for a distribution of the funds of the district *pro rata* among the creditors.

On the 18th of September, 1923, Coston filed an intervention in the action, alleging his employment, the service rendered by him in adjusting the differences between the contractors and the district, the placing of

the contract and certificates in his possession by his client, and that they were still in his possession, concluding with a prayer that his lien for services be protected.

The cause was heard upon the pleadings and testimony, which resulted in a decree enjoining the commissioners from making any additional payments to the favored creditors of the district until all other creditors were paid an equal percentage of their claim. There was no appeal from the decree on this branch of the case. The court, however, denied the petition of J. T. Coston for priority of his claim over that of Philip J. Kealy and other creditors of Sifers & Hunt, and ordered the sum due said contractors to be distributed as follows:

Ben H. Green	$ 268.50	
Chester Danehower	72.00	
Mrs. Electra Buck	50.00	
Philip J. Kealy	5,789.70	then to
J. T. Coston	1,500.00	

From the order denying his intervention J. T. Coston has prosecuted an appeal to this court. Kealy did not appeal from or attack the order of the court allowing the other creditors of the contractors to share and share alike with him.

Counsel for appellant has made a succinct statement of the facts in this case responsive to the issue of priority of claims presented by the intervention, so we adopt it, in the main, as a statement of the case by the court. It is as follows:

"An improvement district was organized for the purpose of doing certain work on the streets of Osceola. The contract for the work was let to plaintiffs, Sifers & Hunt, and the work was done before the assessments were made. The total liabilities of the district aggregated about $15,000 and the total assessment of benefits was only $8,202.50. A dispute arose between Sifers & Hunt, contractors, and the improvement district as to the amount due them. Thereupon the contractors employed appellant, Coston, an attorney-at-law, to represent them in making an adjustment of the differences

between the contractors and the district, agreeing to pay him $1,500 for his services, and turned over to him the contract between the district and the contractors. Coston finally brought about an adjustment of the differences between the district and the contractors, and the district issued and delivered to Coston, as attorney for the contractors, fourteen certificates of indebtedness, aggregating the sum of $6,987.72. The original contract between the district and the contractors and the certificates issued by the district to the contractor in making the adjustment of their differences are still in Coston's possession.

February 17, 1923, the contractors gave to Philip J. Kealy an order on Coston "for the sum of $5,789.70, or on the drawer of this order, out of the amount now due and payable for work performed." Two days later the contractors issued the following order:

"February 19, 1923.

"Judge J. T. Coston,
"Osceola, Arkansas.

"Dear sir: You are hereby authorized to pay to Col. Philip J. Kealy or order, the sum of $5,789.70 of the funds now due and payable to the Arkansas Good Roads Company for work performed for the city of Osceola, Arkansas. Yours very truly,

"THE ARKANSAS GOOD ROADS COMPANY,
"By E. I. Sifers."

When the above order was received by Coston, he wrote Kealy as follows:

"Mr. Philip J. Kealy, "March 12, 1923.
"221 Dwight Building,
"Kansas City, Mo.

"Dear sir: I beg to acknowledge receipt of your favor, inclosing letter from the Arkansas Good Roads Company for work done in Osceola.

"This is to advise you that I have placed the claim among my files, and when these funds are collected, or as fast as they are collected, I will be glad to remit, first paying claims that are entitled to priority, of course.

"Yours very truly,
"J. T. COSTON."

A few days later Kealy made a visit to Coston, who explained to him the status of the claim of the contractors against the district, and also explained to Kealy that his fee for services must be paid first. Thereupon Kealy replied, "Of course, you will have to be paid."

A little later Coston discovered that the commissioners of the improvement district were collecting the assessments and paying some of the creditors in full and nothing to others. Accordingly, on July 2, 1923, he commenced this action in behalf of the contractors against the commissioners, alleging the insolvency of the district and that the commissioners were paying the funds of the district to certain creditors and had announced their intention of paying all other indebtedness in full before paying the contractors anything, concluding with a prayer for an injunction, and that the funds of the district be paid out according to law and with due regard to the rights of the contractors and other creditors.

Appellant contends that he was entitled to deduct the amount of his fee from the sum due appellee on his order from Sifers & Hunt before paying any amount to appellee on said order. This contention is based upon the ground that the relationship of attorney and client existed between appellant and appellee. Appellee contends that no such relationship existed between him and appellant. We think the preponderance of the testimony establishes this relationship between them. When appellee presented his order to appellant, there was no money in the hands of appellant to pay it. All that appellant had in his possession was a contract between Sifers & Hunt and the commissioners of the district, which Sifers & Hunt had performed before any benefits had been assessed against the property in the district. The claim was unliquidated, and had not at that time been adjusted. The collection thereof depended largely on the ability and influence of appellant to induce the commissioners to make an equitable settlement with Sifers & Hunt. Appellant explained the nature and character of the claim to appellee, and informed him that his fee

of $1,500 must be paid before he could pay anything on the order. With a full understanding of the situation, appellee filed his claim with appellant for payment when the claim was collected. Appellee permitted appellant to proceed with the adjustment and to receive certificates of indebtedness for the claim, and raised no objection until after this suit was brought to enforce a *pro rata* collection on said certificates. Appellee adopted the contract of employment between the contractors and appellant by knowingly accepting the benefit of his legal services and by permitting him to continue these services after being advised of the nature and character of the claim and the amount agreed upon as a fee for adjusting same.

The court erred in denying the petition of appellant for priority over Kealy and the other creditors of Sifers & Hunt.

On account of this error the decree is reversed, and the cause remanded with directions to the court to allow appellant's claim as a prior and paramount claim out of the sum due Sifers & Hunt to the claims of appellee and the other creditors of said contractors.

LAVOICE v. DELONEY.

Opinion delivered October 20, 1924.

1. LANDLORD AND TENANT—DISPOSITION OF CROP BY LANDLORD—INSTRUCTION.—Where a landlord, holding a mortgage on his tenant's crops, agreed to hold the cotton crop until the market recovered, or until both parties should decide it best to sell, in an action by the landlord to foreclose the mortgage, in which the tenant filed a cross-bill claiming damages by reason of the landlord's failure to sell the cotton at a good price when requested to do so, an instruction ignoring the contract as to disposition of the cotton and permitting the jury to find the value of the crop in its own way was erroneous.
2. MORTGAGES—DUTY OF MORTGAGEE TO SELL AT HIGHEST PRICE.—Where a landlord, holding a mortgage on the tenant's crops, agreed to hold the tenant's cotton until the market price recovered,

or until both parties should decide to sell, such agreement did not obligate the landlord to sell at the highest price offered, irrepective of whether the offer would bring enough to pay his debt.

Appeal from Little River Circuit Court; *Ben E. Isbell,* Judge; reversed.

Otis Gilleylen, for appellant.

It is conceded that appellant was lawfully in possession of the cotton. If therefore he was guilty of conversion, the measure of damages was the market price of the cotton at the time of sale, less the amount of the mortgage debt, and also less the amount of rents due appellant. 126 Ark. 554; 51 Ark. 19; 144 Ark. 547; 128 Ark. 232.

HUMPHREYS, J. This is an appeal from a judgment in favor of appellees against appellant in the circuit court of Little River County growing out of a rental contract. Appellant was the landlord and appellees the tenants. The latter part of 1920 appellant leased a plantation in said county to appellees for the years 1921, 1922 and 1923, at a yearly rental of $3,300. Early in the year 1921 he furnished them corn to the value of $600, and took an interest-bearing note for same, payable in the fall. On April 1, 1921, he advanced them $800 in cash and took an interest-bearing note for same, due November 15, 1921. For the purpose of securing this note and all other indebtedness which was then due or might become due, appellees executed a chattel mortgage to appellant, covering the crops to be raised on the plantation and ten mules which appellees owned and were using in cultivating the place. A little later on appellant advanced appellees another $100, for which he took two interest-bearing notes in the sum of $50 each, payable in the fall. Appellant also advanced a small amount to appellees to pay cotton pickers. On November 29, 1921, the three-years' lease was canceled, appellant agreeing, in consideration of the termination of the lease, to reduce the rent to $2,500 for the year 1921, to buy at least 1,600 bushels of corn from appellee, with an option to buy more, at fifty-five cents per bushel, for

enough to pay the $600 note, and sixty cents per bushel for the balance, and to hold the cotton which had not been sold until the market recovered, or until both parties should decide it best to sell, but in no event to hold same longer than January 1, 1922.

Appellees introduced testimony tending to show that, after the contract of cancellation had been executed, the market price of cotton recovered, and that they were offered twenty-three cents per pound for the whole lot of cotton; that they requested appellant to accept the offer, but he declined to do so, and, in December, sold it at a much lower price, without their knowledge or consent, and to their damage in a large sum.

Appellant introduced testimony tending to show that no such offer was made and refused, and that he sold the cotton for the best price obtainable in the market.

After selling the cotton and applying the proceeds thereof and accounting for the value of 2,000 bushels of corn at the price specified in the cancellation contract, appellant brought this suit to foreclose the chattel mortgage against the mules, to pay the $800 note and other indebtedness which he claimed appellees owed him.

Appellees filed an answer pleading payment, and a cross-bill claiming that appellant had received 2,800 bushels of corn instead of 2,000 bushels, and had damaged them in a large sum by refusing to sell the cotton at twenty-three cents per pound when requested to do so.

Appellant filed an answer denying the material allegations of the cross-bill.

The cause was submitted upon the pleadings, the testimony introduced by the parties and the instructions given by the court, which resulted in a verdict and judgment in favor of appellees for $510.45.

The first contention of appellant for a reversal of the judgment is that, under the most favorable interpretation which can be given the testimony, under any conceivable theory of the case, appellees would not have been entitled to a judgment of more than $251.09. We deem it unnecessary to outline and analyze the testi-

mony, as the judgment must be reversed on account of erroneous instructions given by the court.

Appellant next contends that the court erred in giving instruction No. 3 requested by appellees, which is as follows:

"The court further instructs the jury that, if they find from a preponderance of the evidence that the defendants turned over to plaintiff the cotton raised by them on plaintiff's place during the year 1921, it would devolve upon the plaintiff to account to the defendants for the value of said crop."

This instruction wholly ignored the contract entered into between the parties for the disposition of the cotton, and permitted the jury to ascertain and determine the value of the crop in its own way.

Appellant next contends that the court erred in giving instruction No. 4, requested by appellees, which is as follows: "The court instructs the jury that, if they find from a preponderance of the evidence that the plaintiff, having taken possession of said cotton, refused to let defendants sell the same for the highest price, if you find defendants were offered the highest price, and afterwards, without defendant's consent, sold the said cotton for a price less than the highest price, then the plaintiff would be liable to defendant for the loss sustained by reason of plaintiff's selling same for less than the highest price."

The contract for the sale of the property did not impose upon appellant a duty to sell the cotton at the highest price which might prevail between November 29, 1921, and January 1, 1922. It only imposed a duty upon appellant to hold the cotton until the market improved or until both parties should decide it was best to sell same. Of course, if appellees received an offer which would be sufficient to pay their entire indebtedness to appellant, then it would have been appellant's duty to sell it, irrespective of the contract, because he could have no interest in the cotton, either under the contract or under his chattel mortgage, beyond an amount sufficient

to pay what appellees owed him. If the instruction had contained such a proviso, then it would have declared the law applicable to the case, but, as written, it imposed an absolute duty upon appellant to sell the cotton at twenty-three cents per pound if such an offer was received and such a request was made upon him to sell same, irrespective of whether it would bring enough to pay his debt. If it would not have brought enough to pay the entire indebtedness then due him, he would have been entitled, under the contract, to hold same for a higher price.

Appellant's last contention is that the court erred in giving instruction No. 5, requested by appellee, which is as follows: "The jury are instructed that, if they find from a preponderance of the evidence that plaintiff has received in money or property, or because of the loss in selling cotton for less than the highest price, as herein defined, and the money or property and loss amounts to more than the notes and interest sued on herein, you will find for defendants for such excess, if you find there is an excess."

This instruction would have been correct if the highest price of the cotton mentioned therein had been properly defined in instruction No. 4. As said in discussing instruction No. 4, appellant was not required, under the contract, to hold and sell the cotton at the highest price obtainable, unless it would have sold for enough at such price to pay his entire indebtedness.

On account of the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

MISSOURI STATE LIFE INSURANCE COMPANY v. WITT.

Opinion delivered October 20, 1924.

INSURANCE—FOREIGN CORPORATION—VENUE OF ACTION.—Under Crawford & Moses' Dig., § 1829, foreign corporations, including life insurance companies, may be sued in any county of the State, regardless of the residence or place of death of the insured.

Appeal from Ouachita Circuit Court; *L. S. Britt,* Judge; affirmed.

C. E. Pettit and *W. A. Leach,* for appellant.

The venue in this case is determined by C. & M. Digest, § 6151. The suit should have been brought in Monroe County. It is clear that, prior to the passage of the act of March 18, 1899, the act of April 4, 1887, had no application whatever to foreign insurance corporations, and that process could not be served on such corporations in any manner other than that pointed out by the statute relative to such insurance companies. 69 Ark. 396; 59 Ark. 593; 139 U. S. 233; 60 Ark. 578. The act of March 18, 1899, was an amendment of the statute relative to corporations generally; and foreign insurance companies not being mentioned therein, and the act amended not having any application to foreign insurance companies, the law relative to service of process upon such companies was not in any manner affected by that act. Attention is called to the fact that in the revision of 1904, that portion of the act of March 18, 1899, prescribing the manner of service, which was carried forward as § 839 of Kirby's Digest (now § 1829 of C. & M. Digest), viz., "service of summons and other process upon the agent designated under the provisions of § 825" (C. & M. Dig., § 1826), was not contained in the act as originally enacted, and was not incorporated therein by any subsequent legislative enactment.

T. J. Gaughan and *Bogle & Sharp,* for appellee.

The motion to quash the service was properly overruled. The statute relied upon by appellant, C. & M. Dig., § 6151, was the act of February 27, 1897, but a later act was passed, that of May 13, 1907, an act regulating

foreign corporations in the State, and brought forward in Crawford & Moses' Digest as § 1826, which specifically includes foreign fire and life insurance companies, and requires of each that it shall designate its general office or place of business in this State, and shall name an agent upon whom process may be served. See also the act of 1909, § 1174, C. & M. Digest, regulating the service on foreign corporations, and the act of May 13, 1917, C. & M. Dig., § 1827. The foregoing acts unquestionably, we think, gave the court jurisdiction in this case; also that the question has been settled by this court in the case of *Mutual Aid Insurance Company* v. *Blacknall,* 123 Ark. 379. See also 140 Ark. 137; 150 Ark. 635; 156 Ark. 211.

HUMPHREYS, J. Appellee recovered judgment in the circuit court of Ouachita County upon a life insurance policy for $5,000, interest, the statutory penalty, and an attorney's fee against appellant, which policy was issued by it upon the life of Charles A. Witt, naming appellee as the beneficiary therein.

An appeal has been duly prosecuted from the judgment to this court, and appellant seeks a reversal thereof upon three grounds, namely: (1). That the trial court was without jurisdiction. (2). That the answers made by the insured in his application for the policy were false, and rendered the policy void. (3). That the trial court erroneously instructed the jury.

(1). The insured resided in Monroe County, Arkansas, when he procured the policy, and continued to reside there until his death. This suit was brought in Ouachita County, and service was obtained upon appellant, a foreign corporation, in Pulaski County, by delivering a copy of the summons to its designated agent, Bruce T. Bullion, Insurance Commissioner. The appellant appeared specially and moved to quash the summons upon the ground that it was issued out of a court that had no jurisdiction over the cause of action. The trial court overruled the motion to quash the service, and the contention of appellant is that the court com-

mitted reversible error in doing so. Appellant insists that the venue of the cause of action was fixed by § 6150 of Crawford & Moses' Digest, which requires actions on life insurance policies to be brought in the county of the residence of the insured, or in the county where the death of the insured occurred. In other words, appellant contends that the suit should have been brought in Monroe County, where the insured resided and died. Section 6150 of Crawford & Moses' Digest became a law by enactment of the Legislature of 1897. The suit was brought under § 1829 of Crawford & Moses' Digest, which is as follows:

"Service of summons and other process upon the agent designated under the provisions of § 1826 at any place in this State shall be sufficient service to give jurisdiction over such corporation to any of the courts of this State, whether the service was had upon said agent within the county where the suit is brought or is pending, or not."

This section of the Digest was passed by the Legislature in 1899, two years later than § 6150, *supra.* Section 1826 of Crawford & Moses' Digest, referred to in said § 1829, expressly embraces foreign life insurance companies. By carefully reading § 1829 we have concluded that it is a venue statute, and that its purpose is to give jurisdiction over suits against foreign corporations, including foreign life insurance companies, to any of the courts of this State. This was the effect of the ruling of this court in the case of the *American Hardwood Lumber Co.* v. *Ellis,* 115 Ark. 524. In that case the contention was made that a transitory action must be brought against a foreign corporation in the county where its designated agent resided. This court rejected the contention upon the ground that § 1829, *supra,* meant to add something to the law as it then existed, "in saying that the service should be sufficient to give jurisdiction to any of the courts of this State, whether had in the county where the suit is brought or is pending, or not." In construing the statute in question this court said: "We

conceive it to be our duty to give effect to the language used by the lawmakers, and, when this is done, it means that, under the statute now in force, service on the designated agent, even outside of the county where the suit is brought, is sufficient. We have nothing to do with the harshness of the statute nor the inconvenience which is likely to follow from it. That is a matter which addresses itself entirely to the lawmakers."

It is true that the court had under review a transitory action, but the statute in question makes no distinction between transitory and local actions. It relates to both kinds of actions, so, if the statute changed the venue with reference to transitory actions, it had the effect of changing the venue of any action brought against a foreign corporation which had designated an agent in this State for the purpose of service. Moreover, a suit upon an insurance policy against a foreign insurance company is in its nature a transitory action. We think § 1829 had the effect of changing the venue in suits against foreign insurance corporations from the county of the insured's residence, or the county where his death occurred, to any county in the State.

The court did not therefore commit error in overruling the motion to quash the service.

(2-3). The two other questions presented on this appeal, and relied upon for reversal of the judgment by appellant, were involved in a companion case between the same parties reported in volume 161 of the Arkansas Reports, at page 148. There is no material difference between the facts in the two cases or in the theory upon which they were submitted, so the instant case is ruled by the case of *Mo. State Life Ins. Co.* v. *Witt,* 161 Ark. 148.

No error appearing, the judgment is affirmed.

McCULLOCH, C. J., (dissenting). The statutes of this State localize actions on insurance policies by providing that actions on life insurance policies shall be maintained "in the county of the residence of the party whose life was insured, or in the county where the death of such

party occurred." Crawford & Moses' Digest, § 6150. Such action is thus made local and not a transitory one.

I am quite unable to understand what the majority mean by saying that "a suit upon an insurance policy against a foreign insurance company is in its nature a transitory action." The character of an action—whether transitory or local—is determined altogether by the statute which authorizes its maintenance. Nothing in the Constitution fixes the venue in civil actions, and that is fixed by statute. The power of the Legislature in fixing venue in civil actions is unrestricted. That power has been exercised in the statute referred to above (§ 6150), and the question presented in this case is whether it has been repealed or amended by § 1829 so as to make an action against a foreign corporation on a policy of insurance a transitory one. I do not think such is the effect of the later statute, which does not deal with the matter of venue in civil actions, but merely with place of service of process. The words in the statute, "give jurisdiction over such corporation to any of the courts of this State," relate to jurisdiction to persons and not to subject-matter.

The case of *American Hardwood Lbr. Co.* v. *Ellis & Co.*, 115 Ark. 524, does not, I think, support the views of the majority, for it involved a purely transitory action and was confined to the question of effect of the later statute on transitory actions against foreign corporations.

The effect of the present decision holding that § 1829 is a venue statute in actions against foreign corporations leads to the result that all venue statutes as to such corporations are repealed by the later statute and that such a corporation may be sued in Ashley County to recover possession of land in Washington County, or that the chancery court of Lafayette County may appoint a receiver to wind up such a corporation doing business and having property situated exclusively in Clay County. I cannot believe that such was the intention of the lawmakers as expressed in the language used.

WESTERN UNION TELEGRAPH COMPANY v. FLEMING.

Opinion delivered October 27, 1924.

1. TELEGRAPHS AND TELEPHONES—REQUIREMENTS AS TO FILING CLAIM. —A requirement in a contract for delivery of a telegram that the addressee should present his claim of damages to the telegraph company is complied with where he dictated his claim to the agent of the company.
2. TELEGRAPHS AND TELEPHONES—DAMAGES FOR DELAY IN DELIVERY OF MESSAGE.—Where a telegram offering to buy apples stipulated no price, and there was no contractual relation between the sender and the addressee, damages for delay in delivery were too remote and conjectural to form the basis of a right to recover.

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

Francis R. Stark, Grant & Neal, and *H. C. Mechem,* for appellant.

The telegram did not constitute a contract between the sender and sendee. 58 Ark. 29; 133 Ark. 184; 92 Miss. 849; 47 So. 412. It was merely an initial step looking to the negotiations of a contract. 136 Ark. 63; 65 Ark. 537.

Profits cannot be recovered, unless they are such as grow out of a contract perfected. 47 So. 412.

The plaintiff erred in not presenting his claim in writing within sixty days after the message was filed for transmission. 80 Ark. 562. Where an agent varies from the authority given him, the acts will not bind the principal. 8 Ark. 227; 92 Ark. 315; 94 Ark. 301; 100 Ark. 360.

A person dealing with an agent is bound to ascertain the nature and extent of his authority. 92 Ark. 315; 94 Ark. 301; 155 Ark. 224; 140 Ark. 306; 132 Ark. 155.

McCULLOCH, C. J. Appellee instituted this action against appellant to recover damages laid in the sum of $108.70, and alleged to have been sustained by reason of the negligent failure to deliver a telegraphic message. Appellant filed an answer denying the allegations of the complaint, and also pleading failure of appellee to present his claim for damages within the time specified by the contract. There was a trial of the issues before a jury, which resulted in a verdict in appellee's favor for the amount of damages claimed.

Appellee is a farmer and apple-grower near Springdale, in Washington County. In addition to marketing his own apple crop, he is engaged in the business of buying and selling apples, and, previous to the sending of the telegram which forms the basis of this controversy, appellee had had dealings with J. R. Sturdy, who lived at the town of Beebe, in White County. On October 31, 1922, Sturdy delivered to appellant a telegraphic message, addressed to appellee at Springdale, in words as follows: "Send me car of apples to Beebe, a few winesaps, quick. Answer. Wire. Will mail draft today." The message was transmitted to and received at appellant's office in Springdale, but was not delivered for four days, but the proof shows it could have been delivered, for appellee resided only a short distance from town, and had a telephone in his home.

According to the testimony, appellee did not have on hand any apples from his own orchard, but he had made an arrangement with another dealer, McClinton by name, to take from the latter a carload of apples at the prevailing price of $1.40 per bushel. If the telegram had been promptly delivered, appellee would have, according to his own testimony, sold to Sturdy the carload of apples he had engaged from McClinton, but, on account of the delay, McClinton sold the car of apples to another person, and apples advanced from $1.40 to $1.75 per bushel from the day on which the telegram was received at Springdale to the time of its delivery, four days later. When the message was delivered to appellee, he went into the market and purchased a carload of apples at the prevailing price of $1.75 per bushel, and sold them to Sturdy, but the evidence does not show what price he received for them. Appellee testified that he incurred an additional expense of $24 in handling the carload of apples.

It is first contended that the evidence does not establish appellee's right to recover, for the reason that he did not file his claim with the company's agent in accordance with the terms of the contract. Appellee testified that, as soon as he received the message and

discovered the delay in delivery, he went to McClinton to get the carload of apples which he engaged, but, finding that McClinton had sold the apples to another, he went to appellant's office in Springdale and there presented his claim for damages. He testified that he informed the agent of the details, and, not having his reading-glasses with him, he dictated the claim to the agent, who wrote it down. This was, we think, a substantial compliance with the terms of the contract, and appellee's right to recover is not defeated on account of the irregularity in failing to make out the claim himself.

It is next contended that the evidence is not sufficient to show any damages resulting from the negligent failure to deliver the message, and we think that this contention of counsel for appellant is sound. The delayed telegram did not, of itself, constitute a contract between the sender and sendee, but it was merely the initial step in negotiations for a contract of sale. The message stipulated no price, nor is there any proof that there was any contractual relation between appellee and Sturdy for a sale of apples. As a mere proposal to purchase, the damages for loss were too remote and conjectural to form the basis of a right to recover. *Western Union Tel. Co.* v. *Caldwell,* 133 Ark. 184. There being no proof of a contract for the sale at any given price, the parties may or may not have been able to agree on terms. The fact that they did subsequently agree upon terms and consummate a sale, presumably at a profit to appellee, does not form a basis for the recovery of damages. If appellee had been deprived, by the non-delivery of the telegram, of the opportunity to purchase the apples from McClinton so as to take advantage of the advance in the market, or if it had been shown that he had been deprived of the opportunity to consummate a sale with Sturdy, then he would be entitled to recover damages (*Western Union Tel. Co.* v. *Love Banks Co.,* 73 Ark. 205), but no such state of facts appears in the proof. Our conclusion therefore is that the evidence fails to establish the right to recover.

Reversed and remanded for a new trial.

APPENDIX

OPINIONS NOT REPORTED.

Brown *v.* State; appeal from Union Circuit Court; L. S. Britt, Judge; affirmed June 16, 1924; *per* McCulloch, C. J.

Burrows *v.* State; appeal from Woodruff Circuit Court, Northern District; E. D. Robertson, Judge; affirmed June 23, 1924; *per* Wood, J.

Daniell *v.* State; appeal from Nevada Circuit Court; James H. McCollum, Judge; affirmed October 20, 1924; *per* Wood, J.

Diffie *v.* State; appeal from Hot Spring Circuit Court; Thomas E. Toler, Judge; affirmed September 29, 1924; *per* McCulloch, C. J.

Erwin *v.* Stith; appeal from Prairie Circuit Court, Northern District; George W. Clark, Judge; affirmed June 16, 1924; *per* Smith, J.

Golden *v.* Strickland; appeal from Pope Circuit Court; J. T. Bullock, Judge; affirmed May 19, 1924; *per* Humphreys, J.

Griffin *v.* State; appeal from Craighead Circuit Court; G. E. Keck, Judge; affirmed September 29, 1924; *per* Hart, J.

Hagins *v.* Lincoln County Bank; appeal from Lincoln Chancery Court; John M. Elliott, Chancellor; affirmed June 2, 1924; *per* McCulloch, C. J.

Higgs *v.* State; appeal from Crittenden Circuit Court; G. E. Keck, Judge; affirmed July 7, 1924; *per* Wood, J.

Hill *v.* State; appeal from Pulaski Circuit Court, First Division; John W. Wade, Judge; affirmed April 28, 1924; *per* Hart, J.

Kelsey & Fletcher *v.* Brown & Hackney, Inc.; appeal from Pulaski Circuit Court, Third Division; Marvin Harris, Judge; *per* Humphreys, J.

King *v.* State; appeal from Grant Circuit Court; Thomas E. Toler, Judge; affirmed June 2, 1924; *per* Humphreys, J.

King *v.* Stewart; appeal from Clark Circuit Court; James H. McCollum, Judge; reversed October 6, 1924; *per* Hart, J.

McCulloch *v.* Polk; appeal from Clay Circuit Court, Western District; Archer Wheatley, Chancellor; affirmed June 16, 1924; *per* Humphreys, J.

Mallett *v.* State; appeal from Conway Circuit Court; J. T. Bullock, Judge; affirmed June 30, 1924; *per* McCulloch, C. J.

Marks *v.* Morgan; appeal from Cleveland Chancery Court; John M. Elliott, Chancellor; affirmed July 14, 1924; *per* Smith, J.

Matthews *v.* State; appeal from Mississippi Circuit Court, Osceola District; G. E. Keck, Judge; affirmed July 14, 1924; *per* Wood, J.

Moncrief *v.* Bank of Lake; appeal from Pulaski Chancery Court; John E. Martineau, Chancellor; affirmed June 23, 1924; *per* Humphreys, J.

Moore *v.* State; appeal from Greene Circuit Court, Second Division; G. E. Keck, Judge; affirmed October 6, 1924; *per* Humphreys, J.

Morgan *v.* Lide; appeal from Ouachita Chancery Court, Second Division; George M. LeCroy, Chancellor; affirmed June 23, 1924; *per* Wood, J.

Oberste *v.* Pegues; appeal from Sebastian Circuit Court, Ft. Smith District; John E. Tatum, Judge; affirmed July 7, 1924; *per* Smith, J.

Poindexter *v.* State; appeal from Woodruff Circuit Court, Northern District; E. D. Robertson, Judge; affirmed June 23, 1924; *per* Hart, JJ.

Reed *v.* State; appeal from Clay Circuit Court, Eastern District; G. E. Keck, Judge; affirmed May 19, 1924; *per* Wood, J.

Richardson *v.* State; appeal from Logan Circuit Court; James Cochran, Judge; reversed September 29, 1924; *per* Wood, J.

Robertson *v.* State; appeal from Woodruff Circuit Court, Southern District; E. D. Robertson, Judge; affirmed June 30, 1924; *per* Humphreys, J.

Sellers *v.* Decker; appeal from Randolph Chancery Court; Lyman F. Reeder, Chancellor; reversed June 16, 1924; *per* Humphreys, J.

Skinner *v.* B. C. Land Co.; appeal from Mississippi Chancery Court, Chickasawba District; Archer Wheatley, Chancellor; affirmed June 2, 1924; *per* Wood, J.

Stacy *v.* State; appeal from Hot Spring Circuit Court; Thomas E. Toler, Judge; affirmed September 29, 1924; *per* Humphreys, J.

Walker *v.* McCameron; appeal from Fulton Circuit Court; John C. Ashley, Judge; affirmed May 26, 1924; *per* Humphreys, J.

White *v.* McGehee; appeal from Pulaski Circuit Court, Third Division; Marvin Harris, Judge; reversed May 19, 1924; *per* Wood, J.

Williams *v.* State; appeal from Columbia Circuit Court; L. S. Britt, Judge; affirmed May 28, 1924; *per* Humphreys, J.

INDEX

ACCOMPLICE: See BURGLARY; CRIMINAL LAW.

ACCORD AND SATISFACTION:

whether check was tendered in full settlement a jury question when. *Collier Com. Co.* v. *Wright*, 338.

acceptance of check tendered in full payment is satisfaction. *Id.*

ADVERSE POSSESSION:

character of possession required. *Young* v. *Knox*, 129.

evidence *held* to sustain decree quieting title by adverse possession. *Id.*

plaintiff must prove his adverse possession. *France* v. *Butcher*, 312.

payment of taxes by grantor not available to grantee when. *Id.*

ANIMALS:

annexation of contiguous territory to stock-law district not authorized when. *Wright* v. *Raymer*, 146.

APPEAL AND ERROR:

review of verdict directed for plaintiff viewed in light most favorable to defendant. *Miller County Bank & Trust Co.* v. *Beasley*, 44.

exclusion of competent evidence *held* prejudicial. *Beauchamp* v. *Hayes Store Co.*, 126.

conclusiveness of chancellor's finding of fact. *Young* v. *Knox*, 129.

no reversal for harmless error. *Coburn* v. *Gilbert*, 155.

practice on appeal from directed verdict. *Thompson* v. *Kirk*, 218.

error as to damages cured by remittitur. *Wakin* v. *Morgan*, 234.

conclusiveness of verdict. *Missouri Pac. R. Co.* v. *Wood*, 240.

no reversal for erroneous reasoning when. *Murphy* v. *Murphy*, 246.

bill of exceptions filed out of time not considered. *Petroleum Producers Assoc.* v. *First Nat. Bank*, 267.

presumption from absence of bill of exceptions. *Id.*

judgment for excessive amount reduced when. *Collier Com. Co.* v. *Wright*, 338.

conclusiveness of circuit court's finding of facts. *Little River County* v. *Buron*, 535.

ARBITRATION AND AWARD:

conclusiveness of statutory arbitration and award *Hill* v. *Ralph*, 524.

ASSAULT AND BATTERY:
evidence *held* to sustain conviction of aggravated assault. *Norman* v. *State*, 142.

ATTACHMENT:
sureties on forthcoming bond discharged upon return of property. *Rogers* v. *Tri-State Motor Sales Co., Inc.*, 590.

ATTORNEY AND CLIENT:
third person liable for attorney's fee under implied contract when. *Coston* v. *Kealy*, 594.

BANKS AND BANKING:
bank charged with notice of landlord's lien on proceeds of crop. *Miller County Bank & Trust Co.* v. *Beasley*, 44.
bank charged with notice of facts known or which should have been known to its president. *Id.*
authority of bank to execute guaranty contract *held* for jury. *Bank of Morrilton* v. *Skipper, Tucker & Co.*, 49.
sufficiency of indictment for receiving deposits while insolvent. *Dover* v. *State*, 496.
liability of director therefor though absent. *Id.*
power of Legislature to define insolvency. *Id.*

BILLS AND NOTES:
effect of indorsing note before delivery. *Hardy* v. *Ouachita Nat. Bank*, 532.
liability in case of indorsement procured by fraud. *Id.*

BRIBERY:
insufficiency of evidence to sustain charge. *Payne* v. *State*, 229.

BRIDGES: See HIGHWAYS.
approval of contract to construct bridges *held* sufficient. *Woodruff County* v. *Road Imp. Dist. No. 1*, 101.
contract between county judge and improvement district *held* established. *Id.*

BROKERS:
broker becoming purchaser not entitled to commission. *Greer* v. *Craig*, 209.
right of principal to rescind in such case. *Id.*
liability for actual price received. *Id.*
duty of broker to exercise good faith. *Id.*

BURGLARY:
liability of accomplice watching outside while burglary committed. *Knight* v. *State*, 226.

CARRIERS:

instruction as to duty of consignee to "recondition" damaged cotton properly modified when. *Missouri Pac. Rd. Co.* v. *Smith & Co.*, 546.

instruction as to market price disapproved. *Id.*

CERTIORARI:

lies to review acts of State Election Board. *Warren* v. *McRae*, 436.

COMMERCE:

local statutes inapplicable in action under Federal Employers' Liability Act. *St. Louis S. W. Ry. Co.* v. *Martin*, 30.

CONFIRMATION OF TITLE: See QUIETING TITLE.

CONSTITUTIONAL LAW:

statute disposing of school lands *held* not impairment of contract with United States. *Brooks* v. *Wilson*, 477.

CONTINUANCES:

discretion of trial court in criminal cases. *Eddy* v. *State*, 289.

burden of proving abuse of discretion. *Id.*

CONTRACTS:

when executed. *Republic Power & Service Co.* v. *Gus Blass Co.*, 163.

CORPORATIONS:

extent of power of State over foreign corporations. *Republic Power & Service Co.* v. *Gus Blass Co.*, 163.

right of foreign corporation to enforce contracts. *Id.*

contract of foreign corporation not executed when. *Id.*

effect of assignment by foreign corporation of unlawful contract. *Id.*

effect of subsequent compliance by foreign corporation with State law. *Id.*

liability of officers for failure to file annual report. *Interstate Jobbing Co.* v. *Velvin*, 263.

extent of such liability. *Id.*

finding that foreign corporation was doing business in State sustained when. *Robert Welch Stave & Merc. Co.* v. *Burris*, 556.

COUNTIES:

sufficiency of verification of claim against county. *Woodruff County* v. *Road Imp. Dist. No. 14*, 101.

COUNTIES—Continued:

duty of county to furnish courthouse and offices. *Penix* v. *Shaddox*, 152.
authority of county court to assign offices. *Id.*
assignment of offices reviewed how. *Id.*
claim against county demurrable when. *Buron* v. *Little River County*, 482.
county not liable for audit of books of improvement district. *Id.*
authority of county court to contract for audit of county books. *Little River County* v. *Buron*, 535.

COSTS:

assessed against appellant through judgment modified when. *Greer* v. *Craig*, 209.
tender *held* to stop costs. *Walker* v. *Whitmore*, 276.

COUNTY COURT: See COUNTIES; EQUITY.

COMPROMISE AND SETTLEMENT: See ACCORD AND SATISFACTION.

CRIMINAL LAW: See ASSAULT AND BATTERY; HOMICIDE; BURGLARY; BRIBERY; INTOXICATING LIQUORS; RAPE.

discretion as to permitting withdrawal of plea of guilty. *McClain* v. *State*, 48.
presumption as to exercise of such discretion. *Id.*
motion for new trial filed at term subsequent to that at which verdict was rendered when. *Collatt* v. *State*, 136.
sentence may be rendered at subsequent term when. *Id.*
opinion of witness admissible when. *Norman* v. *State*, 142.
admissibility of proof of theft of things not alleged. *Wilson* v. *State*, 148.
expression of opinion of prosecuting attorney cured when. *Id.*
expression of opinion that reform school would benefit accused *held* proper. *Id.*
admissibility of statement of co-conspirator. *Payne* v. *State*, 229.
such statement *held* inadmissible when. *Id.*
instruction *held* not objectionable as on weight of evidence. *Jones* v. *State*, 250.
not necessary to multiply instructions. *Id.*
improper argument of prosecuting attorney cured when. *Kindle* v. *State*, 284.
improper argument must be objected to at the time. *Id.*
purchaser of liquor not accomplice of seller. *Eddy* v. *State*, 289.
admissibility of test in murder case. *Houston* v. *State*, 294.

CRIMINAL LAW—Continued:

not reversible error to make argument based on misunderstanding of testimony. *Adams* v. *State*, 308.
prejudice in argument removed when. *Id.*
ground for new trial that testimony "was incompetent, irrelevant and immaterial" *held* indefinite. *Lomax* v. *State*, 386.
no conviction of two offenses on appeal from conviction of one. *Fly* v. *Fort Smith*, 392.
information in municipal court unnecessary when. *Id.*
effect of failure to introduce city ordinance in evidence. *Id.*
admission of improper evidence invited when. *McDonald* v. *State*, 411.
conviction of assault and battery instead of simple assault harmless when. *Crank* v. *State*, 417.
burden of proving witness' incompetency. *McFarland* v. *State*, 431.
failure to submit question to jury not error when. *Id.*
exclusion of evidence harmless when. *Id.*
prostitution and running disorderly house are separate offenses. *Woodson* v. *Ft. Smith*, 443.
former acquittal of one no defense to charge of the other. *Id.*
weight of testimony *held* for jury. *Melton* v. *State*, 448.
instruction as to effect of testimony approved. *Id.*
evidence of another crime admissible when. *Morris* v. *State*, 452.
such evidence inadmissible when. *Id.*
rule limiting right to change of venue *held* invalid. *Clarkson* v. *State*, 459.
error in not sustaining demurrer to indictment waived when. *Dover* v. *State*, 496.
sufficiency of indictment on motion in arrest. *Id.*
accused may not complain of State's introduction of rebutting testimony when. *Jordan* v. *State*, 502.
discretion as to order of introduction of testimony. *Id.*

CROPS:

deeds *held* to convey crops. *Haffke* v. *Hempstead County Bank & Trust Co.*, 158.

DAMAGES:

measure of damages for building destroyed by fire. *Missouri Pac. Rd. Co.* v. *Wood*, 240.
duty of servant wrongfully discharged to minimize damages. *Hale Hdw. Co.* v. *Ragland*, 258.
damages reduced by securing other employment. *Id.*

DIVORCE:

defendant's guilt of adultery established when. *Johnson* v. *Johnson*, 195.
amount of alimony determined how. *Id.*
allowance of alimony reduced when. *Id.*

DEEDS: See CROPS.

DRAINS:

sufficiency of notice of application to change from special to general district. *Britt* v. *Laconia Circle Special Drainage District*, 92.
power of drainage district to borrow money. *Id.*
repeal of act by inconsistent statute. *Id.*
sufficiency of description of boundaries of district. *Id.*
authority of drainage district to construct a levee. *Id.*
jurisdiction of circuit court where drainage district lies in more than one county. *Bayou Meto Drainage Dist.* v. *Ingram*, 318.
extension of boundaries of district authorized when. *Id.*
time for appealing cases involving drainage matters. *Plum Bayou Levee Dist.* v. *Pocket Cypress Drainage Dist. No. 1*, 576.
effect of engineer's disapproval of plans. *Id.*

ELECTIONS:

complaint in primary election contest *held* insufficient. *Hill* v. *Williams*, 421.
right of absentee voter to cast ballot. *Jones* v. *Smith*, 425.
construction of absentee voters statute. *Id.*
when voters unavoidably absent. *Id.*
county election commissioners are public officers. *Warren* v. *McRae*, 436.
such officers not removable. *Id.*
acts of State Election Board reviewable on certiorari. *Id.*
right to contest primary election. *Storey* v. *Looney*, 455.
sufficiency of affidavit in primary election contest. *Wilson* v. *Danley*, 565.
who are qualified to make such affidavit. *Id.*
who are qualified electors. *Id.*
sufficiency of poll-tax receipt. *Id.*

EQUITY:

court of chancery has no jurisdiction to correct errors of county court. *Penix* v. *Shaddox*, 152.
sheriff not restrained from disobeying county court. *Id.*
jurisdiction to foreclose mortgage of decedent. *Haffke* v. *Hempstead County Bank & Trust Co.*, 158.

EQUITY—Continued:
doctrine of laches applied when. *Dickinson* v. *Norman*, 186.
bill uniting two separate causes of action *held* multifarious. *Washum* v. *Wilson Merc. Co.*, 464.

ESTOPPEL: See HUSBAND AND WIFE.

EVIDENCE:
judicial notice taken of Governor's proclamation. *Sims* v. *Weldon*, 13.
judicial notice taken of legislative records. *Id.*
bank presumed to have notice of statute giving landlord a lien. *Miller County Bank & Trust Co.* v. *Beasley*, 44.
parol evidence admissible to explain written contract when. *Garner Mfg. Co.* v. *Cornelius Lbr. Co.*, 119.
evidence of prior transaction *held* relevant when. *Coburn* v. *Gilbert*, 155.
parol evidence admissible to explain written contract when. *Clear Creek Oil & Gas Co.* v. *Bushmaier*, 303.
statement of donor after gift completed incompetent against donee. *McKee* v. *Hendricks*, 369.
sufficiency of proof of conspiracy between donor and donee to render donor's statements competent. *Id.*
evidence of plaintiff's transaction with third person inadmissible when. *Davison* v. *Harris*, 518.

EXCEPTIONS, BILL OF:
time for filing computed how. *Petroleum Producers Assoc.* v. *First Nat. Bank*, 267.
signing and filing within time allowed *held* necessary. *Id.*

EXECUTION:
title acquired by purchaser at execution sale. *Cain* v. *Lane*, 205.

FORCIBLE ENTRY AND UNLAWFUL DETAINER. See LANDLORD AND TENANT.

FORGERY:
to utter a forged writing one must intend to defraud and know that instrument is false. *Ferrel* v. *State*, 541.
proof of intent to defraud *held* insufficient. *Id.*

FRAUDULENT CONVEYANCES:
return of *nulla bona* as evidence of insolvency. *Tidwell* v. *J. H. Askew & Co.*, 57.
voluntary conveyances presumptively fraudulent. *Id.*
remedy of creditors depends on debtor's insolvency. *Cain* v. *Lane*, 205.

FRAUDULENT CONVEYANCES—Continued:

validity *inter partes*. *Murphy* v. *Murphy*, 246.

who may sue to cancel fraudulent conveyance of deceased grantor. *Id.*

right of grantor's heirs and creditors to set aside. *McKee* v. *Hendricks*, 369.

evidence *held* to show intent to hinder and delay creditors. *Id.*

GAS:

natural gas company *held* to be public utility. *Arkansas Natural Gas Co.* v. *Norton Company*, 173.

such company not considered as private company as to certain customers. *Id.*

distinction between consumers in matter of charges. *Id.*

power of Corporation Commission to fix rates. *Id.*

power of gas company to enforce rate-fixing contracts. *Id.*

construction of statute relative to such contracts. *Id.*

payment by consumer *held* not voluntary. *Id.*

public service company not required to operate all wells at full capacity at all times. *Clear Creek Oil & Gas Co.* v. *Bushmaier*, 303.

liability of such company for market price of gas at well.

GIFTS:

delivery without intent to pass title insufficient. *McKee* v. *Hendricks*, 369.

GUARANTY:

construction according to language used. *Bank of Morrilton* v. *Skipper, Tucker & Co.*, 49.

guaranty contract *held* to be absolute. *Id.*

contract of guaranty *held* not to be continuing. *Id.*

fraud in procuring contract of guaranty not waived when. *Id.*

authority of bank to execute guaranty contract *held* for jury. *Id.*

HABEAS CORPUS:

parent securing custody of child by abuse of writ *held* to have obeyed order to restore. *Scott* v. *Brown*, 270.

HIGHWAYS:

act construed to authorize improvements only within district. *Board of Com'rs of Road Imp. Dist. No. 9* v. *Furlow*, 60.

act *held* not to invade jurisdiction of county court to lay out roads. *Id.*

authority of commissioners to select route upheld. *Id.*

no negligence in driving car with defective brake when. *Guile* v. *Snyder*, 221.

HIGHWAYS—Continued:

duty of driver of automobile in passing a team. *Hardy* v. *Cloe*, 253.

care in passing a team is jury question when. *Id.*

instruction as to contributory negligence properly refused when. *Id.*

sufficiency of description of boundaries of highway district. *Hiter* v. *Harahan Viaduct Imp. Dist.*, 351.

act not invalid in authorizing change in route when. *Id.*

bridge district may take over old viaduct with its unpaid indebtedness. *Id.*

conditional authority to incumber lands of district. *Id.*

right of district to incur preliminary expenses. *Id.*

act creating district *held* to contemplate but one assessment. *Id.*

authority of district to issue bonds.

plans for improvement held not too indefinite. *Conway* v. *Com'rs of Board of Imp. Dist. No. 20*, 487.

deviation of road plans from route prescribed by statute *held* material. *Averitt* v. *Dodd*, 553.

HOMICIDE:

instruction as to burden of proof *held* harmless. *Norman* v. *State*, 142.

instruction as to self-defense *held* abstract and prejudicial. *Jones* v. *State*, 250.

sufficiency of evidence of murder in second degree. *Houston* v. *State*, 294.

admissibility of evidence to contradict defendant's theory of accidental killing. *Id.*

relevancy of proof of bullet-holes in deceased's home. *Id.*

evidence *held* to sustain conviction of murder in second degree. *Adams* v. *State*, 308.

instruction as to burden of proving self-defense not open to general objection. *Lomax* v. *State*, 386.

abstract instruction properly refused. *Id.*

instructions as to self-defense approved. *Id.*

refusal to instruct as to right to defend habitation not error when. *McFarland* v. *State*, 431.

HUSBAND AND WIFE:

wife estopped to deny husband's right to mortgage her crop. *Haffke* v. *Hempstead County Bank & Trust Co.*, 158.

INDICTMENT AND INFORMATION:

burglary and grand larceny may be joined in one indictment. *Wilson* v. *State*, 148.

under indictment for assault to commit rape no conviction of assault and battery when. *Crank* v. *State*, 417.

INJUNCTION:

equity may not restrain sheriff from disobeying county court. *Penix* v. *Shaddox*, 152.

INSURANCE:

compromise of claim on policy not established. *Mosaic Templars of America* v. *Woolfolk*, 273.
method of proof of insured's death. *Ætna Life Ins. Co.* v. *Duncan*, 395.
sufficiency of such proof. *Id.*
such proof waived when. *Id.*
policy reinstated when. *Id.*
provisions of policy may be waived when. *Id.*
effect of death of insured before delivery of premium note. *Id.*
venue of action against foreign life insurance corporation. *Missouri State Life Ins. Co.* v. *Witt*, 604.

INTOXICATING LIQUORS:

sufficiency of evidence of unlawful sale. *Eddy* v. *State*, 289.
instructions as to time of sale held not conflicting. *Id.*
evidence of illegal transportation *held* sufficient. *Fly* v. *Fort Smith*, 392.
evidence of sale by accused's wife and son competent when. *Melton* v. *State*, 448.
evidence of subsequent possession of whiskey competent when. *Id.*

JUDGMENT:

judgment between third persons not binding as *res judicata*. *White* v. *Hudson*, 287.
objection to judgment in failing to show whether plaintiff is a partnership or a corporation is waived when. *Hawkins* v. *Simmons*, 461.
effect of judgment in favor of G. G. S. & Company. *Id.*
judgment upholding validity of act creating road improvement district not *res judicata* as to whether contract let under the act complies therewith. *Averitt* v. *Dodd*, 553.

JUSTICE OF THE PEACE:

jurisdiction to render personal judgment on notes. *Reed* v. *Webb*, 282.

LACHES: See QUIETING TITLE.

LANDLORD AND TENANT:

construction of lease prepared by lessor. *Whittaker* v. *Holmes*, 1.
occupancy of building as sole consideration for paying rent. *Id.*
liability of lessee for rent on destruction of building. *Id.*

LANDLORD AND TENANT—Continued:
landlord *held* not to have waived rents when. *Haglin* v. *Oakley*, 192.
landlord entitled to possession on tenant's default when. *Thompson* v. *Kirk*, 218.
landlord entitled to judgment on retaining bond when. *Id.*
lessee may abandon lease how. *Mizell* v. *Mercer*, 224.
failure to plant crop as abandonment. *Id.*
damages recoverable for unlawful eviction. *Wakin* v. *Morgan*, 234.
judgment of restitution proper. *Id.*
instruction as to landlord's liability for tenant's crop disposed of by former disapproved. *Lavoice* v. *Deloney*, 599.

LARCENY:
sufficiency of evidence of having stolen cattle. *McDonald* v. *State*, 411.
effect of recent possession of stolen property. *Id.*
instruction *held* not objectionable as upon weight of evidence. *Id.*

LIMITATION OF ACTIONS. See ADVERSE POSSESSION; TAXATION.
permanency of levee as obstruction of flow of water *held* for jury. *Burel* v. *Hutson*, 111.
statute *held* to run in favor of and against religious societies. *Young* v. *Knox*, 129.
statute runs against remainderman or reversioner when. *Champion* v. *Williams*, 328.
when statute runs in favor of bailee. *Lee County Nat. Bank* v. *Hughes*, 493.

MASTER AND SERVANT:
local statutes not applicable to action under Federal Employers' Liability Act. *St. Louis S. W. Ry. Co.* v. *Martin*, 30.
rule as to switching cars in railroad yard construed to be general. *Id.*
whether rule habitually disregarded and abrogated *held* for jury. *Id.*
assumed risk a jury question when. *Id.*
risk of extraordinary danger assumed when. *Id.*
extraordinary risks not assumed when. *Id.*
habitual violation as abrogation of rule discussed. *Id.*
finding of negligence in shunting cars sustained. *Id.*
employee wrongfully discharged not bound to seek employment of different character. *Hale Hdw. Co.* v. *Ragland*, 258.
right of master to discharge servant. *Id.*
servant may not injure master's business. *Id.*
reduction of damages by employment elsewhere. *Id.*

MASTER AND SERVANT—Continued:
fellow-servant not negligent when. *Wisconsin & Ark. Lbr. Co.* v. *Montgomery,* 560.
effect of mere mistake of judgment on fellow-servant's part. *Id.*

MINES AND MINERALS:
oil and gas syndicate *held* to be partnership. *Haskell* v. *Patterson,* 65.
syndicate not estopped to enforce trust in oil and gas leases. *Id.*

MORTGAGES:
mortgage *held* not to secure collateral note when. *First Nat. Bank* v. *Tisdial,* 40.
mortgage *held* not to secure indebtedness of mortgagor's transferee. *Walker* v. *Whitmore,* 276.
mortgage *held* not to include after-acquired property when. *Hachmeister* v. *Power Mfg. Co.,* 469.
right to enforce acceleration clause on reassignment of debt. *Beloate* v. *New England Securities Co.,* 571.
parties necessary to foreclose suit. *Id.*
defect of parties cured how. *Id.*
right of mortgagee to recover taxes paid. *Id.*
duty of mortgagee as to selling mortgagor's crop at highest market price. *Lavoice* v. *Deloney,* 599.
delivery of verified statement of account waived when. *Haffke* v. *Hempstead County Bank & Trust Co.,* 158.
jurisdiction of equity to foreclose mortgage of decedent. *Id.*

MUNICIPAL CORPORATIONS:
improvement district has no proprietary interest in improved street. *Williams* v. *Fort Smith,* 215.
powers of district cease upon completion of improvement. *Id.*
rights of property owners to materials formerly used in paving street. *Id.*
city entitled to use such discarded materials. *Id.*
conclusiveness of action of city council in establishing boundaries of improvement district. *Hill* v. *Walthour,* 243.
exclusion of territory from district *held* not arbitrary. *Id.*
plans for improvement of streets held not too indefinite. *Conway* v. *Com'rs of Board of Imp. Dist. No. 20,* 487.
sufficiency of description of boundaries of improvement district. *Bostick* v. *Pernot,* 581.
plans for pavement held not too indefinite. *Id.*
paving held separate from curbing and guttering. *Brown* v. *Board of Com'rs of Pav. Dist. No. 3,* 585.
conclusiveness of council's finding as to singleness of improvement. *Id.*
courthouse included in determining limit of cost of improvement. *Id.*

NEGLIGENCE:

no negligence shown in driving defective car when. *Guile* v. *Snyder*, 221.
instruction as to contributory negligence properly refused when. *Hardy* v. *Cloe*, 253.
mere mistake of judgment is not negligence or matter of law. *Wisconsin & Ark. Lbr. Co.* v. *Montgomery*, 560.

OFFICERS:

county election commissioners are public officers. *Warren* v. *McRae*, 436.
such officers not removable. *Id.*

OIL AND GAS: See GAS.

PANDERING: See PROSTITUTION.

PARENT AND CHILD:

parent procuring custody of child by abuse of process *held* to have complied with order to restore such custody. *Scott* v. *Brown*, 270.

PARTIES: See MORTGAGES.

right to sue for another's benefit. *Collier Com. Co.* v. *Wright*, 338.

PARTNERSHIP:

syndicate for dealing in oil and gas leases *held* to be a partnership. *Haskell* v. *Patterson*, 65.

PLEADING:

motion to make complaint more specific properly denied when. *Ætna Life Ins. Co.* v. *Duncan*, 395.

POISONS:

indictment for possessing narcotics upheld. *Starr* v. *State*, 511.
mere possession of narcotics unlawful with exceptions mentioned in statute. *Id.*
admission of evidence of possessing other narcotics than charged *held* error when. *Id.*
under charge of having morphine no conviction of having cocaine. *Id.*
instruction as to having morphine *held* conflicting. *Id.*

PROSTITUTION:

evidence held not to sustain conviction of detaining female upon pretense of marriage. *Almond* v. *State*, 419.

QUIETING TITLE: See ADVERSE POSSESSION.
plaintiff estopped by his grantor's laches when. *Dickinson* v. *Norman*, 186.
doctrine of laches applied when. *Id.*
evidence held to establish plaintiff's title. *Cain* v. *Lane*, 205.
plaintiff must recover on his own title. *France* v. *Butcher*, 312.
plaintiff must prove his adverse possession. *Id.*
conclusiveness of decree confirming title to land. *Chapman* v. *Williams*, 328.
no bond required in confirmation proceeding. *Id.*

RAILROADS:
evidence held to sustain finding that locomotive set fire to building. *Missouri Pac. Rd. Co.* v. *Wood*, 240.

RAPE:
conviction of assault with intent to rape sustained when. *Kindle* v. *State*, 284.
instruction as to presumption of consent properly refused when. *Id.*
instruction as to resistance of prosecutrix properly refused. *Id.*
exclusion of testimony as to conduct of prosecutrix not error when. *Jordan* v. *State*, 502.

RELIGIOUS SOCIETIES:
statute of limitation *held* operative for or against. *Young* v. *Knox*, 129.
proper parties to sue for. *Id.*

SALES:
right of parties to alter written contract by subsequent verbal one. *Garner Mfg. Co.* v. *Cornelius Lumber Co.*, 119.
effect of delivery of non-negotiable bill of lading. *Id.*
effect of seller reserving title. *Id.*
invoice not evidence of title. *Id.*
in action of account for goods sold evidence *held* admissible to show that a third person was the purchaser. *Beauchamp* v. *Hayes Stores Co.*, 126.
retained title waived when. *Reed v. Webb*, 282.
right of seller to waive such title and sue out specific attachment. *Id.*
measure of damages on purchaser's breach of contract. *Collier Com. Co.* v. *Wright*, 338.
tender by seller waived by purchaser when. *Id.*
instruction as to necessity of inspection of purchaser's agent approved. *Id.*
effect of reserving title in vendor. *Hachmeister* v. *Power Mfg. Co.*, 469.

SALES—Continued:

vendee could not divert vendor's title to machinery so sold by affixing it to real estate. *Id.*

reservation of title waived when. *Id.*

SCHOOLS AND SCHOOL DISTRICTS:

title of State to school lands held absolute. *Brooks* v. *Wilson*, 477.

validity of provisions for sale of such lands. *Id.*

statute for locating high school in center of district construed. *Hill* v. *Ralph*, 524.

STATUTES:

validity of statute passed during extra session. *Sims* v. *Weldon*, 13.

validity of such statute a judicial question. *Id.*

extent of legislative power to enact laws at such session. *Id.*

effect of Governor's call to confine legislation to particular subjects. *Id.*

scope of Governor's call. *Id.*

judicial notice taken of supplemental proclamation of Governor. *Id.*

power of Governor to issue supplemental proclamation. *Id.*

effect of enacting at extra session statute not within Governor's call. *Id.*

construction to render statute valid. *Board of Com'rs of Road Imp. Dist. No. 9* v. *Furlow*, 60.

Special Drainage Dist., 92.

rule of *ejusdem generis* inapplicable when. *Jones* v. *Smith*, 425.

effect of partial invalidity of statute. *Brooks* v. *Wilson*, 477.

court will not take notice of proof of publication attached to legislative bill. *Wacaster* v. *Hot Springs*, 521.

passage of special act conclusive that due notice was given when. *Id.*

statute viewed as a whole. *Hill* v. *Ralph*, 524.

STATUTES CITED:

CRAWFORD & MOSES' DIGEST:

§ 70 ..... 248, 372, 384
321 147
330 147
661 ..... 537, 538
697 498
717 501
1092 350
1653-6 179
1715 ..... 264, 266

C. & M. DIGEST—Continued:

1726 266
1825-1832 167
1826, 1829 606
2029, 2030 110
2104 155
2272 155
2279 153
2490 ..... 411, 415
2703 419

STATUTES CITED—Continued:

C. & M. DIGEST—Continued:

3016 150
3076 49
3224 497
3607 322
3607-3654 ..... 94, 98, 99
3614 323
3625, 3628 324
3629 323
3630 ..... 325, 327
3670 327
3708 12
3711 ..... 440, 441
3714 441
3740 456
3741 571
3772 ..... 422, 457, 485
3777 ..... 567, 568
3810 427
4121 524
4847 220
4854 ..... 220, 239
5650 583
5666 589
6150 ..... 606, 608
6165 394
6261 338
6892, 6894 46
6942 333
6943 ..... 141, 316
6947 333
7403 ..... 159, 160
7428 255
8363 337
8369 337
8370 338
8638 136
8649 592
8720, 8730 284
8731 592
9104-9112 479
9108 480

C. & M. DIGEST—Continued:

9110 481
9285 481
9935 589
10054 336

CONSTITUTION OF 1874:

Art. 2, § 10 460
3, 1 428
3, 3 429
5, 26 ..... 522, 523
6, 8 25
16, 5 12
Amendment 6 571
Amendment 8 17

ACTS:

1869, Feb. 19 334
1899, Act March 18 316
1907, No. 359 ..... 95, 99
1909, No. 279 101
1911, No. 134, § 12 255
1913, No. 177 101
1920, No. 377 61
1921, p. 177 179
1921, p. 388 322
1921, Gen. Acts, p. 416 589
1921, p. 429 180
1921, p. 490 485
1921 p. 671 141
1921, p. 866 146
1923, p. 177 513
1923, No. 143, Sp. Acts 525
1923, No. 345 27
1923, Sp. Acts No. 668 ..... 95, 99
1923, Sp. Acts. p. 1168 522
1923, Sp. Acts p. 1243 354
1923, Sp. Acts p. 1574 489
1923, Sp. Acts, p. 1745 577

ACTS OF CONGRESS:

Employers' Liability Act 33

TAXATION:

purchase of public cemetery at tax sale *held* void. *Winn* v. *Little Rock*, 11.
affidavit of tender of taxes not required in such case. *Id.*

TAXATION—Continued:

tax sale on wrong day held void. *Champion* v. *Williams*, 328.
two-years' statute of limitation applies to possession under void tax deed. *Id.*
entry under void tax sale is trespass. *Id.*
no forfeiture of life tenant's estate by failure to redeem from void tax sale. *Id.*
conclusiveness of decree confirming tax title. *Id.*

TELEGRAPHS AND TELEPHONES:

requirement as to filing claim with telegraph company complied with when. *Western Union Tel. Co.*, v. *Fleming*, 609.
damages for delay in delivery held too remote when. *Id.*

TENDER: See COSTS.

TRIAL:

argument of counsel held improper. *Missouri Pac. Rd. Co.* v. *Brooks*, 466.
refusal of abstract instruction not error. *Lee County Nat. Bank* v. *Hughes*, 493.
instruction held not to assume disputed fact. *Robt. Welch Stave & Mfg. Co.* v. *Burris*, 556.

TRUSTS:

holder of oil and gas leases *held* to be trustee for syndicate. *Haskell v. Patterson*, 65.
when constructive trust arises. *Id.*
agreement to purchase oil and gas leases construed. *Id.*
duty of trustee toward syndicate in purchasing oil and gas leases. *Id.*
resulting trust created how. *Reeves* v. *Reeves*, 505.

VENUE:

of action against foreign life insurance corporation. *Missouri State Life Ins. Co.* v. *Witt*, 604.

WATER AND WATERCOURSES:

right to recover damages for flooding by levee *held* a jury question. *Burel* v. *Hutson*, 111.

WITNESSES:

youthful witness may be asked leading questions when. *Crank* v. *State*, 417.
accused on cross-examination may be asked whether he had committed a similar offense or been convicted of it. *Jordan* v. *State*, 502.

WORDS AND PHRASES:

as near as practicable. *Board of Commissioners* v. *Furlow*, 63.
center, centrally. *Hill* v. *Ralph*, 529.
completed. *Bayou Meto Drainage Dist.* v. *Ingram*, 318.
executed contract. *Republic Power & Service Co.* v. *Gus Blass Co.*, 169.
grantor. *Walker* v. *Whitmore*, 280.
income tax. *Sims* v. *Weldon*, 13.
may. *Little River County* v. *Buron*, 537.
near. *Plum Bayou Levee Dist.* v. *Pocket Cypress Drainage Dist.*, 579.
or other person. *Jones* v. *Smith*, 430.
pandering. *Almond* v. *State*, 419.
pretense. *Almond* v. *State*, 419.
prostitute. *Woodson* v. *Ft. Smith*, 447.
residence. *Wilson* v. *Danley*, 570.
sales tax. *Sims* v. *Weldon*, 13.
single improvement. *Brown* v. *Board of Improvement*, 585.
those under whom he claims. *France* v. *Butcher*, 318.
unavoidably absent. *Jones v. Smith*, 431.

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2/4/53